FREEDOM OF THE PRESS IN WARTIME

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The Press Clause of the First Amendment should be understood to require the government to permit coverage of war. Up to now, the Supreme Court has ascribed little independent significance to the Press Clause. It has protected the press under the Speech Clause when possible, and denied press claims that would require reading the Press Clause as creating rights not guaranteed to all speakers. Logistical and security concerns, however, make it impossible to give all speakers the access necessary to cover war. In all wars, the military tries to suppress news coverage that might undermine public support for the war. For instance, there was virtually no on-scene coverage of the invasion of Afghanistan in 2002. During the invasion of Iraq in 2003 the embedding journalists with military units gave the press many mole's-eye views of combat but provided little information about the overall conduct and progress of the war. The Press Clause should be read as imposing limits on the government's ability to manipulate public opinion by restricting war coverage. This would not mean that every individual claiming to be press has a constitutional right of access to war zones, but it would mean that restrictions that make it impossible for the press to fulfill its institutional role, such as complete exclusion from the theater of operations, would be unconstitutional.

INTRODUCTION

The tendency of the military to suppress information that might erode public support in wartime is long-standing. General Pershing barred reporters from the front lines in World War I.[1] At the end of World War II, the first American reporter to arrive in Nagasaki after the explosion of the atomic bomb filed dispatches reporting the horrors he saw, but General MacArthur censored them because he believed they

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1. *See* William Hammond, *The News Media and the Military*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN MILITARY 2094, 2095 (John E. Jessup & Louise B. Katz eds., 1994).

would tarnish the public image of the U.S. victory, and they remained unpublished for sixty years.[2] In the first Gulf War in 1991, the Pentagon denied the press first-hand access to virtually all military operations, giving General Norman Schwarzkopf and Defense Secretary Dick Cheney a near monopoly on information about the war.[3] The practice of embedding journalists with military units during the invasion of Iraq in 2003 had the effect, whether calculated or fortuitous, of providing mole's eye views of the war that were overwhelmingly favorable to the military without enhancing coverage of the overall progress of the war.[4] There is little doubt that the military views press coverage as a tool that can be used to shape public opinion.

Preventing the government from controlling the flow of information to the public is widely thought to be among the principal purposes of the First Amendment.[5] Yet only once has the Supreme Court invoked the First Amendment to protect the press's right to report on military matters. That was in 1971, when the Court held that the government could not enjoin publication of the Pentagon Papers.[6] The scope of that case was limited. The information at issue was historical; a different result might be reached if it were strategic or tactical.[7] The decision left open the possibility that the press might be punished after the fact for publishing information the government believed might compromise national security,[8] and might even be enjoined from publishing if Congress author-

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2. *See* Kenji Hall, *Japan Paper Runs Censored A-Bomb Stories*, ABC NEWS, June 19, 2005, http://abcnews.go.com/International/wireStory?id=862677&page=1.

3. *See infra* Part I.A.

4. *See infra* text accompanying notes 32–35.

5. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439, 448–49 (1991):

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

(quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

6. New York Times Co. v. United States, 403 U.S. 713 (1971). The *New York Times* and the *Washington Post* had begun publishing reports about a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The Nixon administration sought to enjoin the publication on the ground that it endangered national security. The Court held 6–3 that enjoining the newspapers would violate the First Amendment.

7. Or possibly not. None of the justices attached great significance to the fact that the material was historical, and none disputed the government's claim that disclosure would harm national security.

8. The view that the decision would not preclude criminal punishment of the newspapers for publishing the Pentagon Papers was specifically mentioned in *New York Times Co. v. United States* by Justices Stewart, 403 U.S. at 730; White, *id.* at 737; Burger, *id.* at 752; and Blackmun, *id.* at 759.

ized such injunctions,[9] or if the government persuaded the courts that the threat to national security was strong enough.[10]

Despite its limits, the Pentagon Papers case has proved to be a powerful precedent, perhaps because the decision repudiated an all-out effort by the Nixon administration,[11] at the height of its power and at a time when it was thought to have a friendly Court,[12] to suppress information that at least some of the justices believed genuinely threatened national security. Only once since then has the government attempted to enjoin a publication on national security grounds.[13] A possible measure of the power of the Pentagon Papers case is the fact that the current administration made no attempt to enjoin broadcast or publication of the images of the prisoner abuse at Abu Ghraib during the Iraq War.[14]

But the Pentagon Papers case only deprived the government of the most heavy-handed instrument for controlling information about war: the prior restraint on publication. It did not diminish the government's ability to control the information to which the press, and hence the public, has access. In the decades since the decision, control of press access to information has become the principal means by which the government manipulates public opinion about war—not only military operations, casualties, prisoners, occupation, peacekeeping, and rebuilding, but also domestic surveillance, immigration practices, courts martial, and other war-related or terrorism-related legal proceedings.[15]

This article explores the possibility that the First Amendment might have something to say about press rights to cover the events and consequences of war. If it does, the Press Clause seems to be the likely source

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9. Three members of the majority that voted to strike down the injunctions—Justices Stewart, White, and Marshall—indicated that absence of a statute authorizing injunctions of the sort sought affected their votes. *Id.* at 731, 747. And of course the three dissenters—Chief Justice Burger and Justices Blackmun and Harlan—were prepared to uphold the injunctions even without Congressional authorization. *Id.* at 758–59.

10. The Court's holding was only that the government had failed to overcome the heavy presumption of unconstitutionality that attaches to prior restraints. *Id.* at 714 (per curiam).

11. The importance that the Nixon administration attached to suppression of the Pentagon Papers is extensively documented in SANFORD J. UNGAR, THE PAPERS AND *THE PAPERS*: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS (1972).

12. By the time this case was decided, Nixon had appointed Chief Justice Burger and Justice Blackmun to the Court, ending the era of the Warren Court.

13. United States v. The Progressive, 467 F. Supp. 990 (W.D. Wis. 1979), *vacated as moot*, 610 F.2d 819 (7th Cir. 1979).

14. Gen. Richard Myers, Chairman of the Joint Chiefs of Staff, attempted to persuade CBS not to air the broadcast, and succeeded in getting the broadcast delayed for two weeks, but no legal action was instigated. *See* Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, THE NEW YORKER, May 17, 2004, at 39–40.

15. *See infra* Part I.A.

of those rights.[16] On the other hand, if that clause does not prevent even the most obvious and unjustifiable restrictions on the ability of the press to provide independent information about war, it will be hard to resist the conclusion that it is a constitutional nullity.

Thus, the larger subject of this article is the meaning of the Press Clause. I argue that it guarantees rights that are not protected by the Speech Clause; that it should be interpreted not to confer individual rights on particular journalists, but to protect the institutional role of the press; and that this role includes the ability of the press to give the public independent coverage of war, difficult as it is to apply such a right to the exigencies of war. Courts often evade such questions by invoking doctrines like mootness and nonjusticiability. I argue that although the specific claims in individual cases may be transitory, the underlying issues are recurring and should be addressed. I offer these specific arguments because that seems to be the best way to stimulate consideration of a clause of the Constitution that has been the subject of much rhetoric but surprisingly little real attention. This is a preliminary exploration of the meaning of the Press Clause. The suggestions I advance here are tentative, and I reserve the right to reconsider them.[17]

I intend to conduct this discussion of the rights of "the press" without precisely defining that term. As will become clear, part of my argument is that the courts should work out the contours of the constitutional concept of "press" gradually, on a case-by-case basis, just as they do with other constitutional concepts such as "speech" and "religion." For the most part, my argument does not require a precise definition of press. For present purposes, it is enough to say that "the press" is whatever institutional entity might plausibly be thought to be referred to by the Press Clause. When I use the term media, I mean to cast a wider net, to include not only the press but also media entities that do not have plausible claims to Press Clause protection.

Part I describes the nature of the restrictions imposed on war coverage in recent military operations and the courts' responses when those restrictions have been challenged. Part II discusses the Supreme Court's use and nonuse of the Press Clause—since the Court has never explicitly considered the Press Clause in connection with war coverage, this discussion deals with interpretation of the Press Clause in contexts other than war. Part III considers how a First Amendment right to cover war

16. The possibility that press rights of access to war might be recognized under the Speech Clause, without resort to the Press Clause, is considered in Part II.B *infra*.

17. As Baron Bramwell did when he said, "The matter does not appear to me now as it appears to have appeared to me then." Andrews v. Styrap, (Ex. 1872) 26 L.T. (n.s.) 704, 706.

might be framed and suggests some principles that might provide a starting point for such a right.

I. WAR, THE PRESS, AND THE COURTS

A. Restrictions on War Coverage

Vietnam was the last time the press had relatively unrestricted access to war.[18] In that war, the government made little effort to control reporters' movements;[19] on the contrary, it facilitated on-scene coverage by arranging ground and air transportation to battlefields and setting up teletype circuits for use by the press.[20] In 1983, when the United States launched a controversial military operation in Grenada, the press was excluded and no first-hand news reports were available for two and a half days, by which time the operation was essentially over.[21] No journalists were present when the assault on the west side of the island went awry, resulting in many American casualties.[22] When reporters were eventually admitted, they were taken places that seemed to have been selected to show the involvement of the Soviets in Grenada, rather than what happened in the invasion.[23] Press outcry over that exclusion led to a new Pentagon policy designed to assure that a press pool—a small contingent of selected journalists who pledge to share their reports with their colleagues—would be allowed to be present from the early stages of future military operations.[24] But in the 1989 invasion of Panama, the new policy failed to make any difference, apparently because of then-Secretary of Defense Dick Cheney's insistence on secrecy.[25] Independent journalists were detained at an Air Force base to protect the franchise of the designated press pool, and the pool was taken to locations away from the

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18. *See* JOHN R. MACARTHUR, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR 112–13 (2d ed. 2004).

19. *See* A. TREVOR THRALL, WAR IN THE MEDIA AGE 14 (2000).

20. For example, the military provided daily flights for press from Saigon to eight other areas of the country. *See id.* at 23. There was no censorship of press dispatches. *See id.* at 14.

21. *See* PASCALE COMBELLES-SIEGEL, THE TROUBLED PATH TO THE PENTAGON'S RULES ON MEDIA ACCESS TO THE BATTLEFIELD: GRENADA TO TODAY (1996), *available at* http://www.carlisle.army.mil/ssi/pubs/1996/medaacss/medaacss.pdf.

22. MACARTHUR, *supra* note 18, at 214.

23. COMBELLES-SIEGEL, *supra* note 21.

24. *See* Winant Sidle, *Report of the CJCS Media-Military Relations Panel (Sidle Panel)*, Aug. 23, 1984, *reprinted in* PETER BRAESTRUP, BATTLE LINES: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE MILITARY AND THE MEDIA app. at 161, 166 (1985).

25. *See* Fred S. Hoffman, *Review of Panama Pool Deployment: December 1989*, Mar. 9, 1990, *reprinted in* JACQUELINE E. SHARKEY, UNDER FIRE: U.S. MILITARY RESTRICTIONS ON THE MEDIA FROM GRENADA TO THE PERSIAN GULF app. C at 7–8 (1991). Hoffman was the Pentagon official appointed to review the failure of the pool system in Panama.

fighting, apparently chosen to show the perfidy of the target of the operation, General Noriega.[26] The only briefings given were by U.S. embassy personnel who had no up-to-date information about military operations.[27]

In the 1991 Gulf War, the Pentagon perfected the technique of controlling coverage.[28] It permitted *only* pool coverage of combat operations,[29] determined where the pools would be taken,[30] and retained the right to censor their copy.[31] Perhaps most important, it required them to be escorted by military personnel at all times,[32] which virtually assured that reporters would hear nothing from military personnel who questioned official versions of events. Only ten percent of the journalists who applied for the pools ever reached the front lines, and those that did were sent where the military wanted them to go rather than to places of their own choosing.[33] Journalists who attempted to reach battle zones on their own were subject to detention.[34] Military censors altered dispatches for reasons clearly not related to security—for example, removing curse words from quotations, deleting television footage showing a soldier reading the swimsuit issue of Sports Illustrated, and suppressing a report that pilots watched pornographic videos.[35]

Military officials denied interviews to some reporters whose coverage they regarded as unfavorable, and censors sometimes delayed transmission of news dispatches that had already been cleared by officers in the field.[36] The bases from which B-52 bombing missions were

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26. COMBELLES-SIEGEL, *supra* note 21.

27. *Id.*

28. How the military accomplished this is described extensively, with documentation, in John E. Smith, Note, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM. J.L. & SOC. PROBS. 291 (1993).

29. *See Guidelines for News Media*, Jan. 14, 1991, *in* Pete Williams, *Ground Rules and Guidelines for Correspondents in the Event of Hostilities in the Persian Gulf*, Jan. 15, 1991, *reprinted in* SHARKEY, *supra* note 25, at app. D, exh. 6 (stating that "[n]ews media personnel who are not members of official . . . pools will not be permitted into forward areas" and that commanders "will exclude from the area of operation all unauthorized individuals").

30. *See* COMBELLES-SIEGEL, *supra* note 21.

31. Several versions of the regulations, as they evolved from week to week, are appended to the opinion in *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991).

32. Gen. Schwarzkopf's chief public relations officer was especially emphatic about this. He wrote in a memo that laid out ground rules: "News media representatives will be escorted at all times. Repeat, at all times." MACARTHUR, *supra* note 18, at 7.

33. *See* COMBELLES-SIEGEL, *supra* note 21.

34. *See* Jason DeParle, *Keeping the News in Step: Are the Pentagon's Gulf War Rules Here to Stay?*, N.Y. TIMES, May 6, 1991, at A9.

35. *See* Robert Fisk, *Out of the Pool*, MOTHER JONES, May–June 1991, at 56, 58, *quoted in* Smith, *supra* note 28, at 312 n.98.

36. *See* Richard L. Berke, *Pentagon Defends Coverage Rules While Admitting to Some Delays*, N.Y. TIMES, Feb. 21, 1991, at A14.

launched were off-limits to press, in part because "the United States feared that coverage of the B-52 would bring back memories of Vietnam."[37]

Much of the coverage of the first Gulf war actually came from daily briefings by General Norman Schwartzkopf and other high-ranking officials in Riyadh and Washington.[38] The briefings were memorable chiefly for their videos, taken from the attacking aircraft, of "smart" bombs seeking out and destroying inanimate objects with great precision.[39] The military refused to release videos showing human targets or audio tapes of pilots during combat.[40] Only after the war did it become known that 90 percent of the bombs dropped were "dumb" bombs, some of which struck civilian targets.[41] After the war, an editor of the *New York Times* said "They managed us completely. If it were an athletic contest [between the Pentagon and the press], the score would be 100 to 1."[42]

The press was outraged by the policies employed in the first Gulf War. The Washington bureau chiefs of fifteen major news organizations, including the major networks, the Associated Press, and major newspapers, sent Secretary of Defense Cheney a letter protesting "the virtual total control that your Department exercised over the American press."[43] They commissioned a report which concluded that "the combination of security review and the use of the pool system as a form of censorship made the Gulf War the most undercovered major conflict in modern American history."[44] Cheney agreed to negotiate with the group, and those negotiations produced a new policy that was supposed to be more media-friendly.[45] The Pentagon agreed to new combat coverage principles, which would allow independent journalists access to units and operations; provide transport and communication facilities (for pool journalists only); allow independent journalists to use their own communications equipment and ride on military vehicles; and pledged

37. COMBELLES-SIEGEL, *supra* note 21, at 43 n.53. Protecting Spain and Saudi Arabia, where two of the five bases were located, from domestic criticism for allowing the missions was offered as another reason for the exclusion of press.

38. *See* DeParle, *supra* note 34, at A9.

39. *Id.*

40. *Id.*

41. *Id.*

42. MACARTHUR, *supra* note 18, at 35 (quoting Howell Raines).

43. COMBELLES-SIEGEL, *supra* note 21, at 19.

44. *Id.*

45. *Id.* at 20–21.

that public affairs officers would not interfere with reporting.[46] The Pentagon refused to give up the right to censor dispatches and photos.[47]

The first test of the new policies came when American troops landed in Somalia in 1992. A pool of about twenty reporters was aboard the invading vessels, the military fully briefed the media in advance, and television cameras were on the beach to capture scenes of the troops wading ashore.[48] Press representatives were happy with the expanded access, [49] although some suspected it had been permitted only because the Marine Corps was eager to showcase its capabilities at a time when Congress was considering post-Cold War cuts in the military budget.[50]

The new stance was short-lived. By the time the U.S. joined NATO in a bombing campaign in Kosovo in 1999, the reluctance to provide information had returned. The military refused to provide access to U.S. commanders and withheld information about the targets attacked, the results, the types of aircraft and weapons used, and number of missions flown—information that had been provided in earlier wars.[51] When the U.S. invaded Afghanistan in 2002, the Pentagon ignored its 1992 policy and excluded the press entirely from combat operations for the first six weeks of the war.[52] For the next month, only pool representatives were permitted.[53] When journalists were admitted, their coverage was subject to severe restrictions, including a prohibition against identifying soldiers

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46. *Id.*

47. *Id.* at 21.

48. *See* COMBELLES-SIEGEL, *supra* note 21. *See also* Art Pine, *TV's Bright Lights Turn Off Pentagon Chiefs*, L.A. TIMES, Dec. 10, 1992, at A13 (explaining that some military officials expressed anger over the media presence and use of bright lights on Somalia's beachfront during the Marine invasion). But reporters said "not only did the Pentagon fail to alert them to keep their lights off but that publicity-hungry military officials had invited them to be there, even telling them the time and place in advance". *Id.*

49. *See* Smith, *supra* note 28, at 305 (cautioning that Somalia may not have been a real test of the policies because it was a rescue mission rather than a war).

50. *See, e.g.*, Jonathan Alter, *Did the Press Push Us Into Somalia?*, NEWSWEEK, Dec. 21, 1992, at 33 (asserting that the Marine Corps wanted to advertise its capabilities as a naval landing force because it feared that it was about to lose its role to Army helicopter operations). *See also* John Lancaster, *For Marine Corps, Somalia Operation Offers New Esprit; Mission Could Generate 'Good News' as Service Confronts Shrinking Budgets*, WASH. POST, Dec. 6, 1992, at A34 (quoting Colin Powell, Chairman of the Joint Chiefs of Staff, as saying the operation represented a type of "paid political advertisement" for the military).

51. *See* Robert Salladay, *Editors Decry Information Lack in Kosovo*, AUSTIN AMERICAN-STATESMAN, Apr. 18, 1999, at A11 (reporting complaints contained in letter to Secretary of Defense William Cohen from editors of the *Washington Post*, *New York Times*, *NBC*, *Associated Press*, *Wall Street Journal*, and *CNN*).

52. *See* Neil Hickey, *Access Denied: Pentagon's War Reporting Rules Are Toughest Ever*, COLUM. JOURNALISM REV., Jan.–Feb. 2002, at 26.

53. *Id.*

by name and hometown.[54] In one incident, U.S. Marines confined American journalists in a warehouse to keep them from covering American troops killed or injured by a stray U.S. bomb.[55] Reporters contended that the restrictions were even tighter than those of the first Gulf War, and one of the reasons was alleged to be concern that images of Afghan civilian bomb casualties would erode support for the war at home and abroad.[56]

For the invasion of Iraq in 2002, the Pentagon adopted a new policy that was much more popular with the press. Instead of the pool-only coverage of the first Gulf War or the no-access practices of the invasion of Afghanistan, the military agreed to allow journalists to be "embedded" with military units.[57] One reason for the new policy was that the military determined that the absence of credible on-scene reporting in Afghanistan left the U.S. vulnerable to adverse propaganda about such matters as civilian casualties.[58]

Reporters and photographers who signed up to embed were assigned to units selected by the military.[59] More than 700 U.S. and foreign journalists covered the invasion in this fashion.[60] Embedded reporters and photographers provided a great deal of human interest coverage and occasional dramatic first-hand reports of combat.[61] This coverage was popular with the public and with much of the press, but two weaknesses quickly became apparent. One was loss of objectivity. It was widely observed, by the journalists themselves as well as by outsiders, that the embedded journalists identified with the soldiers they were covering and came to view matters from their perspective.[62] This gave the reporting a patriotic flavor. The military denied that this had been the objective of the program, but they clearly viewed the embed

54. *See* Andrew Bushell & Brent Cunningham, *Being There*, COLUM. JOURNALISM REV., Mar.–Apr. 2003, at 18.

55. *See* Hickey, *supra* note 52, at 27. The Pentagon eventually apologized for that act, but a few days later three photojournalists were detained by Afghan forces at the request of U.S. forces, and their photos of American troops were confiscated. *Id.*

56. *Id.*

57. The entire embed project, from conception and advance planning through 2004, is detailed in JUDITH SYLVESTER & SUZANNE HUFFMAN, REPORTING FROM THE FRONT: THE MEDIA AND THE MILITARY (2005).

58. *See* Hickey, *supra* note 52, at 26.

59. *See* SYLVESTER & HUFFMAN, *supra* note 57, at 51–52 (detailing the way assignments were made according to the officer who put together the embed program).

60. *Id.* at 54.

61. For a compilation of short essays from members of the media some of which contain human interest stories and/or first hand accounts of combat see *id.* at 63–184.

62. *See id.* at 212–13 (stating that "the majority of the embeds said that they could not maintain objectivity," and that they tended to view the soldiers as comrades rather than as subjects of their news stories).

practice a success from their point of view.[63] Second, the policy produced fragmented coverage, because each embedded journalist was able to report only about the activities of his or her unit and was unable to get much information about the larger picture. Journalists who had also covered the first Gulf War said access to military officers directing the campaign was much worse in 2003.[64] Ranking military officials in Iraq were generally not made available regularly to answer questions, and were often unable or unwilling to even confirm news that had already been reported by the AP, Reuters, or the networks.[65] In fact, most information about the conduct of the war came from officials in the Pentagon, including Defense Secretary Donald Rumsfeld, who tightened his control of information by warning that other Pentagon officers who disclosed information about ongoing operations would be breaking the law.[66]

In sum, the Pentagon avoided the media outrage provoked by its press policies in the first Gulf War and Afghanistan, and the embedding practice produced vivid but fragmentary coverage. One of the journalists who had been involved with the Pentagon in planning the press policies for the invasion of Iraq said, "The ground level coverage was interesting and riveting, in some respects . . . . I think fewer people got a good sense of how the military was progressing, overall, because too much time was spent on small details and few people were doing the larger, overall story."[67]

In retrospect, the most grievous restriction on war coverage was the denial of access to detention facilities[68] in Afghanistan, Iraq, and Cuba. There was no meaningful press access to the Abu Ghraib prison in Iraq until after the abuses there were exposed in April of 2004 by the broadcast on CBS's "60 Minutes II" of photos taken by the guards them-

63. *See id.* at 41–43 (reporting discussions among the responsible military planners as to who should get credit for devising the program).

64. *See id.* at 38 (quoting Richard Pyle of the Associated Press: "[A]ccess at HQ was much, much worse, because it was used primarily to provide the party line and spin. So while we got great snapshots, the media were unable to get the broader picture that would have enabled us to better understand what we were seeing.").

65. *See id.* at 231.

66. *See* Hickey, *supra* note 52, at 27 (reporting that Sec. of Defense Rumsfeld's warning came after *The Washington Post* broke the news that the ground war in Afghanistan had begun and a Pentagon briefer showed the press night-vision videos of commandos parachuting into Afghanistan).

67. SYLVESTER & HUFFMAN, *supra* note 57, at 231 (quoting Steve Geimann of Bloomberg News, who had been among the Washington bureau chiefs invited to advise the Pentagon in the devising of the policy).

68. I use terms like "detention centers," "detainees," and "abuse" reluctantly. Those are government-issued euphemisms for prisons, prisoners, and atrocities, but the press has adopted them so thoroughly that to describe them non-euphemistically has come to sound tendentious.

selves.[69] The military did not voluntarily reveal the abuses, even though Secretary Rumsfeld was aware of the allegations three months earlier[70] and an official report had been filed six weeks earlier concluding that "numerous instances of sadistic, blatant, and wanton criminal abuses," intentionally inflicted by military personnel, had occurred at Abu Ghraib, and that there were graphic photographs that confirmed this and identified some of the perpetrators.[71]

The military and the administration initially portrayed those abuses as isolated and aberrational acts by a few rogue soldiers at Abu Ghraib, but that was false.[72] By the time the Abu Ghraib scandal broke, the detainee abuse had been occurring for nearly two years at several facilities, and the government had extensive evidence of it. In December of 2002, military coroners had ruled that deaths of two prisoners in the Bagram detention center in Afghanistan were criminal homicides caused by beatings administered by American guards.[73] Senior military intelligence officers in Afghanistan failed to file reports on the incidents, military spokesmen claimed both men died of natural causes, and the American commander in Afghanistan denied that abuse by soldiers contributed to the deaths.[74] Nevertheless, by August 2003, ranking Army officials

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69. *See* Hersh, *supra* note 14 (reporting that photos were given to a military policeman, who was disturbed by what they depicted and turned them over to the Army's Criminal Investigations Division). Also, the C.I.D. commissioned a report by Major General Antonio M. Taguba of the atrocities depicted in the photos. *See* MARK DANNER, TORTURE AND TRUTH app. II at 215 (2004) (stating that the photos were apparently leaked to "*60 Minutes II*" by someone who has not been publicly identified).

70. *See* Hersh, *supra* note 14 (reporting that Rumsfeld said he learned of the allegations three days after the photos were given to the C.I.D. on Jan. 13, 2004).

71. *See* MAJOR GENERAL ANTONIO M. TAGUBA, THE TAGUBA REPORT, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 405, 416 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS]. Taguba's full report was officially filed on March 9. *Id.* at 414. His executive summary, containing the conclusion that the abuses had occurred and were documented in photos, was filed Feb. 29, *id.*, and the Chairman of the Joint Chiefs of Staff later testified that by then people inside the Pentagon had discussed the photos. *See* Hersh, *supra* note 14. There was no public disclosure until the CBS broadcast on April 28. *See* DANNER, *supra* note 69, at 215.

72. *See* JAMES R. SCHLESINGER, THE SCHLESINGER REPORT, *reprinted in* TORTURE PAPERS, *supra* note 71, at 908, 909 (reporting how the panel, appointed by Secretary of Defense Donald Rumsfeld, identified 66 substantiated cases of prisoner abuse by mid-August 2004). *See also* DANNER, *supra* note 69, app. II at 215 (illustrating the level of individual depravity by citing an account attributed to Specialist Charles A. Graner Jr., a prison guard in civilian life, who was one of the perpetrators at Abu Ghraib stating: "The Christian in me says it's wrong, but the corrections officer in me says, 'I love to make a grown man piss himself.'").

73. *See* Douglas Jehl, *Army Details Scale of Abuse in Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1.

74. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

knew enough about the matter to take the inquiry away from agents in Afghanistan and transfer it to headquarters in the U.S.[75] No criminal charges were filed in the deaths until almost two years later, after the abuses at Abu Ghraib became known.[76] Meanwhile, the unit responsible for the interrogation operations at Bagram and the captain who led it were sent to Iraq where they helped establish the interrogation center at Abu Ghraib in July 2003.[77] The International Red Cross had complained to U.S. officials about detainee abuse many months before the Abu Ghraib photos were broadcast.[78] The military later determined that eighteen detainee deaths in Afghanistan and Iraq were confirmed instances of criminal homicide by U.S. forces.[79]

Even after disclosure of the events at Abu Ghraib, officials insisted that detainees at the Guantanamo Bay facility were not mistreated,[80] but that too proved false. Approved interrogation methods there included continuous interrogation for up to twenty hours, isolation for up to thirty days, forcing prisoners into "stress positions" for up to four hours, sleep deprivation, and use of dogs to terrorize prisoners.[81] The military reported thirty-two suicide attempts by prisoners as of September 2003,[82] and fifty-three detainees required mental health treatment within a few months after the center opened.[83] Interrogators reported that military physicians advised them on ways of increasing psychological distress on detainees and gave them information from individual medical files to help them exploit the prisoners' vulnerabilities.[84] At least eleven sol-

75. Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

76. *See* Golden, *supra* note 74 (reporting that in October 2004 the Army's Criminal Investigation Command found probable cause to prosecute 27 officers and enlisted personnel in the two deaths).

77. *Id.*

78. *See* Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241, 242 (2005).

79. *See* Douglas Jehl & Eric Schmidt, *U.S. Military Says 26 Inmate Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, at A1 (stating that, in addition to the eighteen confirmed detainee homicides, eight other suspected homicides were still under investigation).

80. *See, e.g.*, Shadi Rahimi, *Amid Concerns, Cheney Defends Guantánamo*, N.Y. TIMES, June 13, 2005, http://www.nytimes.com/2005/06/13/politics/13cnd-cheney.html?ex=1276315200&en=1ae876d320e72009&ei=5088&partner=rssnyt&emc=rss (reporting that Vice President Cheney said in a speech that detainees at Guantanamo have been treated humanely).

81. *See* List Issued to Reporters by Bush Aides on June 22, 2004, *GTMO Interrogation Techniques*, *reprinted in* THE TORTURE PAPERS, *supra* note 71, app. A at 1239.

82. DAVID ROSE, GUANTANAMO: THE WAR ON HUMAN RIGHTS 64 (2004).

83. *Id.* at 66.

84. *See* M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantanamo Bay*, 353 NEW ENG. J. MED. 6 (2005).

diers were punished for abusing detainees at Guantanamo.[85] Two years after the fact, documents came to light showing that senior military lawyers had warned that extreme interrogation techniques approved by the administration for use at Guantanamo were illegal and put the interrogators at risk of criminal prosecution under domestic, military, and international law.[86]

While the press was not completely excluded from the detention facilities at Guantanamo, severe restrictions on access precluded first-hand reporting on the prisoners and the interrogation methods. As a result, information about the identities or treatment of the prisoners has come not from independent press reporting, but from official reports, lawyers for the few prisoners who were represented by counsel, and statements of prisoners after their release. Reporters were never allowed to speak with prisoners, and those who tried to do so were expelled.[87] When the first detainees arrived in January of 2002, a few journalists were already at the base but they were kept far away from the prisoners.[88] The military took photographs of the first contingent of prisoners and released them to the press, but the images generated anxiety among human rights organizations,[89] and Secretary of Defense Donald Rumsfeld decided that the release of such information was a mistake.[90] Eventually, several hundred reporters visited Guantanamo,[91] but they were subject to severe restrictions. They were not allowed to hear interrogations or question military personnel about security measures, interrogation techniques, or information gained from interrogation.[92] They were required to agree in advance

85. *See* Richard A. Serrano, *Report Details Discipline for Guantanamo Abuses*, L.A. TIMES, May 7, 2005, at A13 (describing a State Department report prepared for the United Nations Committee Against Torture).

86. *See* Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, July 28, 2005, at A21 (quoting memoranda sent in early 2003 by senior lawyers in each of the military services to the administration task force that developed interrogation policies for Guantanamo).

87. *See* ROSE, *supra* note 82, at 4.

88. *Id.* at 3.

89. *See id.* at 8. The photos showed detainees kneeling in the dust, shackled hand and foot, dressed in orange jumpsuits, still wearing the black-lensed goggles, surgical masks, headphones, and taped-on-gloves that they had been forced to don at the start of their twenty-seven-hour flight.

90. *See id.* at 2.

91. Rose says more than 250 had been there by the time he visited in the autumn of 2003. *Id.* at 7.

92. The press was also forbidden to take photos that showed detainees' faces, to reveal identities or even nationalities of detainees, or to report on the movement of prisoners. *See* JTF-GTMO MEDIA POLICY AT NAVAL STATION GUANTANAMO BAY, CUBA 3 (2005), http://www.jtfgtmo.southcom.mil/content/JTF-GTMO%20Media%20Ground%20Rules.pdf

to comply with all the restrictions, submit all photos and videos to censors, and abide by the censors' decisions.[93]

Press access to the detention facilities might not have prevented all the deaths, injuries, and abuses, but it surely would have made it harder for the military to dissemble. The scandals that eventually emerged from the detention facilities demonstrate that war and its accoutrements deserve at least as much scrutiny as the peacetime activities of government. The current state of the law does little to facilitate such scrutiny; instead, the press gets what access it is able to persuade the government to grant.

To be sure, the lack of legally guaranteed access is not the only obstacle to fuller coverage. The press has shown little zeal to provide greater coverage of events in Afghanistan, Iraq, and Guantanamo Bay. As Michael Massing has shown, press questioning of the premises, conduct, and success of the war almost all occurred after the fact; very little occurred before or during the invasion of Iraq.[94] None of the major national news outlets filed suit against the military restrictions on coverage of these operations. They are reported to have turned down invitations to join, or support as amici curiae, a suit filed by smaller media in the first Gulf War, [95] possibly because they feared challenging the government would be unpopular with readers.[96] None of the national media challenged the administration's decision to conduct in secret the immigration hearings of hundreds of aliens rounded up after 9/11.[97]

After the Supreme Court ordered the government to give hearings to the detainees at Guantanamo, over 500 such hearings were conducted, and the testimony shed a great deal of light on the prisoners, the reasons for their detention, conditions at the detention facility, and the interroga-

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93. *Id.* at 3–4.

94. *See* MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ (2004).

95. The case *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991), described *infra* at note 108 and accompanying text, was brought by *The Nation*, *Harper's*, the *Village Voice*, and others. John R. MacArthur, who was publisher of *Harper's Magazine* at the time, reports that the big three television networks, the *Washington Post*, the *New York Times*, and *Newsday* all declined to join the suit or file amicus briefs. *See* MACARTHUR, *supra*, note 18, at 34.

96. *See* MACARTHUR, *supra*, note 18, at 21 ("[N]ewspapers all over the country, including the *New York Times*, the *Los Angeles Times*, and all the others, are terribly concerned about losing touch with their readers and losing the support of their readers. . . . You have to keep in mind that this was a terribly popular war by all of the polls I've seen . . . .").

97. Suits challenging the secrecy were brought by the corporate owner of the *New Jersey Law Journal* and the *Herald News* and by the *Detroit Free Press*, *Detroit News*, and *Metro Times*. *See* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

tion practices employed there.[98] These tribunals were at least theoretically open to press coverage, but the press actually covered very few of them; the testimony remained largely unknown until the Department of Defense released transcripts in response to a Freedom of Information Act request.[99] Media eagerly signed up to embed staffers for the initial invasion of Iraq, but once President Bush pronounced the "mission accomplished" in May of 2003, two months after the ground war began, most of the embedded journalists went home.[100] By September of 2003, fewer than thirty remained.[101] Thus, during the most controversial part of the war—and the deadliest part in terms of U.S. casualties—news coverage was left mostly to "unilaterals," as journalists not part of the embed program came to be called.[102]

The lack of more aggressive coverage may be attributable to budgetary constraints and public distaste for unpleasant war news, but those are not the only reasons. Restrictions on coverage affect the cost-benefit calculations of media deciding whether to cover.[103] The administration was quick to publicly criticize the media when they questioned the progress of the war,[104] and the criticism seemed designed to encourage public hostility to detached war reporting.[105]

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98. *See* Paisley Dodds, Associated Press, *Records Reveal Guantanamo Stories,* May 23, 2005, *available at* http://abcnews.go.com/International/wireStory?id=781536 (last visited Nov. 2, 2005).

99. The Associated Press filed the request and filed the story about what the transcripts revealed from its London bureau. *See id.*

100. *See* SYLVESTER & HUFFMAN, *supra* note 57, at 59.

101. *Id.* at 60.

102. *See id.* at 211–13 (describing tensions between "embeds" and "unilaterals" and indicating that the military was less enthusiastic about coverage by "unilaterals").

103. The Associated Press did not say explicitly why it and other news organizations had not covered the Guantanamo hearings, but said "[b]ecause of Guantanamo's remoteness, it was difficult for reporters to stay for extended periods." *See* Dodds, *supra* note 98.

104. *See* Pauline Jelinek, Associated Press, *Rumsfeld criticizes media 'mood swings,'* MILWAUKEE JOURNAL SENTINEL, Mar. 28, 2003, at 11A (reporting on Defense Secretary's complaints about the press raising questions about the progress of the war); Mark Jurkowitz, *White House, Media on Tenser Footing,* BOSTON GLOBE, March 29, 2003 at A22 (reporting the White House press secretary's criticism of media questions about when the war would end).

105. *See* Orville Schell, *Preface* to MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ, at vi (2004) ("[O]ne of the main factors that prevented . . . dissenting views from entering the bloodstream of the national discussion was insinuations by key U.S. leaders that critics were lacking in patriotism."). One of the most infamous of these insinuations was White House Press Secretary Ari Fleischer's comment, directed at the press that "[p]eople had better watch what they say." *Id. See also* Jurkowitz, *supra* note 104, at A22 (quoting journalism critic Marvin Kalb as saying most journalists were not eager to seem confrontational toward the White House); Editorial, *Media Openness Needed in Iraq, Despite Bad News,* VIRGINIAN-PILOT & LEDGER STAR, Oct. 25, 2003, at B10 (alleging that the administration criticism was aimed at manipulating press coverage).

The military is not always opposed to press coverage. As the Somalia episode illustrates,[106] officials welcome press coverage when it advances their goals. Sometimes the military decides that disallowing coverage produces worse consequences than permitting it.[107] But coverage when it suits the military is not free and independent coverage.

Governmental impediments to independent press coverage of war and its incidents are numerous and often deliberate. The judicial response when these are challenged is the subject of the next section.

B. The Courts' Response

All constitutional challenges to these restrictions on war coverage have been dismissed, and none has reached the Supreme Court. In two cases, district courts indicated that the First Amendment might impose some limits on the power of the military to limit coverage,[108] but the District of Columbia Circuit—the only court of appeals to address the question—has vehemently rejected that proposition twice. In the first case that court rejected a challenge to a new Pentagon policy, adopted on the eve of Operation Desert Storm,[109] to discontinue public ceremonies at Dover Air Force Base honoring soldiers killed abroad.[110] The plaintiffs alleged that this was a viewpoint-based restriction aimed at suppressing the implicit anti-war message conveyed by photos of flag-draped coffins being unloaded from cargo planes at a military mortuary. The court said even if this amounted to viewpoint discrimination, *Pell* and *Saxbe* implicitly approved it, because the plaintiffs in those cases also could have claimed that denying access to specified prisoners was discrimination against reporters seeking to discover protest and complaint, as opposed to those who were content to describe the prison as the

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106. *See supra* text accompanying note 50.

107. For example, the Pentagon concluded that barring coverage in Afghanistan had left the military vulnerable to adverse propaganda. *See supra* text accompanying note 58.

108. *See* Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) ("[T]here is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation."); Flynt v. Rumsfeld (*Flynt I*), 180 F. Supp. 2d 174, 175 (D.D.C. 2003), *rev'd* 355 F.3d 697 (D.C. Cir. 2004) ("[I]n an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil . . . .").

109. The policy is alleged to have been adopted because the first Bush administration was embarrassed when television networks broadcast split-screen images showing a presidential speech lauding the Panama invasion on one side and coffins of soldiers killed there on the other. *See* MACARTHUR, *supra* note 18, at 254.

110. *See* JB Pictures, Inc. v. U.S. Dep't of Def., 86 F.3d 236 (D.C. Cir. 1996).

authorities sought to have it presented. Because the press could still have access (if the family consented) when the coffins were unloaded at the soldier's home base, the court said the limitation on newsgathering was not complete and was justified by the government's interests in sparing families the emotional trauma of a major ceremony and the hardship of traveling to Dover.

In the second case decided by the D.C. Circuit, *Hustler* magazine publisher Larry Flynt challenged a Pentagon directive that barred correspondents, including one from his magazine, from accompanying U.S. troops in the invasion of Afghanistan in 2002.[111] The district court had listed a number of technical objections—lack of ripeness, standing, or a concrete controversy—and invoked its discretion to refuse declaratory relief, but believed there might be some merit in Flynt's substantive theory.[112] The court of appeals brushed aside the technical objections, decided the case on the merits, and rejected the First Amendment argument enthusiastically: "There is nothing we have found in the Constitution, American history, or our case law to support this claim."[113] The court said, "The Directive appellants challenge is incredibly supportive of media access to the military with only a few limitations," and the district court was "more than correct" in declining to give declaratory relief.[114] The Supreme Court denied certiorari.[115]

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111. *See* Flynt v. Rumsfeld (*Flynt II*), 355 F.3d 697, 703 (D.C. Cir. 2004).

112. *See Flynt I*, 245 F. Supp. 2d at 108, *aff'd*, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313 (2004) ("[T]he Court agrees that there may be a limited or qualified right of media access to the battlefield.").

113. *Flynt II*, 355 F.3d at 703.

114. *Id.* at 705. What Flynt sought was to have his correspondent "embedded" with troops, the practice that the Pentagon adopted the very next year as the principal method for coverage of the war in Iraq. That of course does not mean the court should have granted the relief Flynt wanted. Ordering the Pentagon to adopt the practice as a matter of constitutional law is a very different thing from the military's voluntary adoption of it, and units to which Flynt sought access in Afghanistan were mostly special operations units rather than the regular Army and Marine units with which journalists were embedded in Iraq.

Nevertheless, Flynt's claim did not deserve to be treated as cavalierly as it was. The court held the courtroom access cases irrelevant on the ground that war coverage lacked the tradition of openness that characterized trials; the only support offered for this was the observation that war reporting in the American Revolution was primarily by means of soldiers' letters home and official reports published in the newspapers, and that professional war correspondents did not exist until at least the Civil War. *See infra*, note 112. But that ignores the fact that in World War I, the Spanish civil war, World War II, and Vietnam, a venerable and distinguished tradition of on-the-scene war coverage developed. *See, e.g.*, THE LIBRARY OF AMERICA, REPORTING ON WORLD WAR II: AMERICAN JOURNALISM 1938–1944 (1995); THE LIBRARY OF AMERICA, 1 REPORTING ON VIETNAM: AMERICAN JOURNALISM 1959–1969 (1998); THE LIBRARY OF AMERICA, 2 REPORTING ON VIETNAM: AMERICAN JOURNALISM 1969–1975 (1998). But the court said "even if we were to attempt a *Richmond Newspapers* analysis and consider the historical foundations of a right of access to combat units, appellants' claim would fail miserably." *Flynt II*, 355 F.3d at 705.

So far as existing case law is concerned, there appears to be nothing to prevent the Pentagon from eliminating on-scene coverage of military operations, detention facilities, military hospitals, and other auxiliaries of war. In the absence of either a constitutional or statutory right of access, the press has no clear legal ground to challenge no-access policies. Whether the Press Clause provides such a ground is the next question.

II. THE PRESS CLAUSE

The Press Clause today is no more than an invisible force in constitutional law: it influences interpretation of the Speech Clause but has no independent effect.[116] That has not always been so. In the early years of First Amendment jurisprudence, the Supreme Court often relied explicitly on the Press Clause as the source of press rights. But for the past thirty or forty years, the Court has refused to give the Press Clause any significance different from that of the Speech Clause. When faced with claims based on freedom of the press, the Court usually interprets the Speech Clause broadly enough to protect the claimed right,[117] and when that is not possible—when rights are claimed that cannot be made available to all speakers—the court denies them.[118]

Continuing to ignore the Press Clause is the easiest alternative. That course does not require any constitutional innovation or invite any unexpected consequences, and so far it seems not to have seriously diminished the freedom of the press. Rights shared with the public at large are just as useful as press-specific rights would be, and they deflect the resentments that the latter might generate. Well-financed media litigants

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And in any event, the courtroom access cases have been extended to proceedings that were not historically open, on the theory that utilitarian advantages of openness may require access even when there is no history of access. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (holding that a pre-trial probable cause hearing could not be constitutionally closed); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding unconstitutional a statute requiring closure of courtroom during testimony of minor victims of sex offenses even though such proceedings had often been closed historically). Whether the challenged policy was "incredibly supportive of media access," *Flynt II*, 355 F.3d at 705, would depend on the effectiveness of the Pentagon's directive that "open and independent reporting" was to be the principal means of coverage, *id.* at 700, that public affairs officers were to "act as liaisons but not interfere with reporting," *id.* at 705, and that journalists were to be permitted "to ride on military vehicles and aircraft when possible." *Id.* at 700.

115. Petition for Writ of Certiorari to the United States Supreme Court, Flynt v. Rumsfeld (No. 04-33), *cert. denied,* 125 S. Ct. 313 (2004).

116. This is true as a matter of law. It probably does influence some governmental decisions, to the extent that officials believe they are constitutionally bound despite the absence of case law.

117. *See infra* Part II.A.

118. *See infra* note 147.

pursuing their own interests win free speech rights for others who might lack the interest or resources to win them on their own. The Supreme Court's determination to interpret the Speech Clause broadly enough to protect the institutional needs of the press probably results in a larger aggregate amount of freedom of expression than reliance on the Press Clause would produce. In the few instances in which the Court has been unable or unwilling to vindicate the claim under the Speech Clause, the press has often been able to secure passage of legislation that gives them similar protection.[119] But this course means that insofar as press freedom cannot be protected by the Speech Clause, it must be left to the mercy of the political branches, and the potential hazards of that course suggest that it might be wise to explore the possibility of giving meaning to the Press Clause. The Court has not foreclosed the possibility that the Press Clause might have independent force, and the question will become unavoidable when the Court faces a free-press issue the Speech Clause cannot resolve. A challenge to restrictions on the press's ability to cover war might well be the controversy that forces the issue.[120]

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119. For example, in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court held that the First Amendment posed no obstacle to law enforcement searches of newsrooms. The press's objections to such searches deserved more solicitude than the Court gave them, but the Court's insensitivity proved to be inconsequential; the problem has all but disappeared because Congress and many state legislatures promptly passed statutes severely restricting newsroom searches. *See, e.g.*, 42 U.S.C. § 2000aa (2000); CAL. PENAL CODE § 1524G (West 2000 & Supp. 2005); CONN. GEN. STAT. ANN. § 54-33j (West 2001); 725 ILL. COMP. STAT. 5/108-3(b) (West 1992 & Supp. 2005); NEB. REV. STAT. §29-813(2) (Reissue 1995); N.J. STAT. ANN. § 2A:84A-21.9 (1994); OR. REV. STAT. § 44.520(2) (2003); TEX. CODE CRIM. PROC. ANN. art. 18.01(e) (Vernon 2005); WASH. REV. CODE ANN. § 10.79.015(3) (West 2002 & Supp. 2005); WISC. STAT. ANN. § 968.13(1)(d) (West 2000).

After the Court declined, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), to recognize a reporter's First Amendment privilege to protect identities of confidential sources, seventeen state legislatures passed statutes creating such a privilege, joining fourteen other states that already had shield statutes. The thirty-one state statutes are reproduced in 2 ROBERT D. SACK, SACK ON DEFAMATION, app. 3 (3d ed. 1999).

With respect to government records and meetings, the absence of any constitutional right of press access has had little practical effect because of the press's success in pressuring legislators to mandate access. The Freedom of Information Act, 5 U.S.C. § 552 (2000), for all its shortcomings, is a powerful engine for openness, even during administrations that are determined to resist it, and every state has open records and open meetings statutes. *See* MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, CASES AND MATERIALS ON MASS MEDIA LAW 625, 631 (7th ed. 2005).

120. Other controversies also could force the Court to interpret the Press Clause. One is whether the government, having imposed heightened levels of official secrecy in the interest of combating terror, may reinforce that secrecy by compelling journalists to disclose sources of leaks. *Cf. In Re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005). Another is whether government may promote its views through clandestine payments to journalists or by furnishing videos that are broadcast as news but are in fact government propaganda. *See, e.g.*, Robert Pear, *Buying of News by Bush's Aides Is Ruled Illegal*, N.Y. TIMES, Oct. 1, 2005, at A1 (reporting that government auditors concluded

Giving the Press Clause independent force necessarily translates into some degree of "preferential treatment" of the press, and the difficulties with that are enormous, politically as well as legally. Perhaps never have times been less propitious for such an enterprise. For most of the public, "the press" today evokes not the journalistic heroes of history—Elijah Lovejoy, Thomas Nast, Colonel McCormick, Ernie Pyle, Edward R. Murrow, Woodward and Bernstein, Walter Cronkite—but the international conglomerates that now control most news outlets. Public distrust of the press is massive, bipartisan, and politicized: the distrust comes from all parts of the political spectrum, and it is often based on suspicions of political bias.[121] Deciding who would qualify for preferential treatment under the Press Clause would be fiercely contested, and is probably more legitimately contestable now than ever before, not only because of the multiplication of media forms, but also because of the blurring of lines between news and entertainment, politics and comedy, and journalism and business.

An independently meaningful Press Clause would present novel, and perhaps unwelcome, constitutional issues. If it is seen as a source of personal rights for those who qualify as press, that might subvert existing statutory and informal press preferences. Those perquisites—press passes, press rooms, news conferences, favorable postal rates, tax exemptions, shield statutes, exemptions from securities and campaign finance regulations, and many more—have much to do with the free press as we know it. That vast universe of nonconstitutional press preferences is subject to many legitimate criticisms, but replacing it with a scheme of constitutional rights for anyone who can claim the label "press" might be much worse.

A better alternative is to interpret the Press Clause as protecting the press as an institution,[122] not the individual rights of persons or entities

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the administration had violated anti-propaganda laws by paying journalists to promulgate government views and by furnishing prepackaged videos which television stations ran as their own news reports). A third is whether the First Amendment exempts media corporations from campaign finance regulations that limit the ability of corporations generally to influence elections. *Cf.* McConnell v. FEC, 540 U.S. 93 (2003).

121. *See* Patrick D. Healy, *Believe It: The Media's Credibility Headache Gets Worse*, N.Y. TIMES, May 22, 2005, (Week in Review), at 4 (reporting that the percentage of Americans who believe little or nothing of what they read in daily newspapers increased from 16 percent two decades ago to 45 percent now; the percentage expressing great confidence in the media fell from 25–30 in the 1970s to 12 percent in 2005, and the percentage who consider news reports slanted rose from 53 percent in 1985 to 66 percent in 2003).

122. The most persistent advocate of an institutional interpretation of the First Amendment is Fred Schauer, whose most recent article on this theme is *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (arguing that the press is among the institutions to which the First Amendment should be seen as having relevance different from its application

claiming to be press. Under such an interpretation, the government would violate the Press Clause only when it interfered with the overall ability of the press to fulfill whatever role that clause is thought to safeguard. A finding of such a violation would not necessarily translate into an individual right for a particular member of the press. Such an interpretation has no close parallel elsewhere in constitutional law, and would bear little resemblance to Speech Clause jurisprudence, in which freedom of speech is protected almost exclusively through the creation and protection of rights of individual speakers. It would require innovative answers to such questions as who has standing to assert the institutional interests of the press, and what relief is to be granted when a violation is found. These issues are addressed in Part III.D.

A. The Press Clause in the Early Years

"Early" is a relative term here, since the Supreme Court did not begin to interpret the First Amendment until well into the twentieth century.[123] In the first twenty or thirty years of that development, the Court seemed to take the Press Clause seriously. Many of the great press victories were based explicitly on the Press Clause. The Court said it was the constitutional guarantee of freedom of the press that protected newspapers from prior restraints on publication,[124] prevented discriminatory taxation of newspapers,[125] allowed pamphleteers to distribute their writings without a permit,[126] and protected editors' freedom to editorialize about elections.[127]

In retrospect, these early cases seem both natural and naïve. The claimants asserting First Amendment rights were clearly press by any definition, so why shouldn't their claims be addressed under the Press Clause? The Framers envisioned that clause, not the Speech Clause, as the source of protection for press rights.[128] In the naïveté of early First

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to individuals). Also, in *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998), Schauer makes the institutional argument in a different context, but makes many points that are nonetheless applicable to treatment of the press as a protected institution.

123. The Court decided no important First Amendment case until *Schenck v. United States*, 249 U.S. 47 (1919), and did not actually invalidate a state restriction on speech until *Near v. Minnesota*, 283 U.S. 697 (1931).

124. *See Near*, 283 U.S. at 723.

125. Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

126. Lovell v. City of Griffin, 303 U.S. 444 (1938).

127. Mills v. Alabama, 384 U.S. 214 (1966).

128. Discussions of freedom of expression in the revolutionary legislatures, the state ratifying conventions, and the framing of the First Amendment all centered around the value of a free press. *See* David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 538–40 (1983). Freedom of speech developed as an offshoot of freedom of the press and free-

Amendment jurisprudence, it would have seemed unnatural to treat press claims as Speech Clause claims. At the same time, it appears that the potential problem of deciding who qualifies as press never troubled the Court in those cases. The opinions simply assumed that the litigants were press and did not consider how that identification might be made if it were not obvious.[129]

Gradually that reliance on the Press Clause gave way to less specific attributions, such as "freedom of speech and press" or "freedom of expression." In some instances this may have occurred because press claims and those of non-press speakers were being decided in the same case. In *Bridges v. California*,[130] for example, the Court struck down contempt citations against the *Los Angeles Times* and the labor leader Harry Bridges in the same opinion; *New York Times Co. v. Sullivan*[131] reversed libel judgments against not only the *Times*, but also four individual defendants. In these cases, relying on the generic "freedom of expression" obviated the need to engage in separate analyses for the press and non-press parties. Eventually, however, the Court came to eschew reliance on the Press Clause even when the claim involved only the press.[132]

This abandonment of the Press Clause as a specific source of constitutional authority had no immediate consequences, because the Court gave the press whatever rights it recognized under the Speech Clause and the press asked no more. But in the 1970s, the press began asserting claims that could be accepted only if the First Amendment gave the press rights that it did not give all speakers. These included claims that journalists had First Amendment rights to interview prisoners[133] and to resist subpoenas[134] and search warrants.[135] Whether the Press Clause created

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dom of religion. *See* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 5–6 (1960).

129. One exception is *Lovell*, 303 U.S. at 452, in which the Court made the extravagant assertion that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." It was only necessary in that case to say, as the Court did, that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets." *Id.*

130. 314 U.S. 252 (1941).

131. 376 U.S. 254 (1964).

132. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967) (analyzing judgment against magazine as abridgement of the rights of free speech and press); Craig v. Harney, 331 U.S. 367 (1947) (analyzing punishment of a newspaper for its editorials as abridgement of the rights of free speech and press); Pennekamp v. Florida, 328 U.S. 331 (1946) (same).

133. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974).

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

135. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

rights different from those based on the Speech Clause became, for the first time, an issue that had to be decided.

Justice Stewart embraced the idea of distinctive press rights emanating from the Press Clause in 1972 in a dissenting opinion in *Branzburg v. Hayes*.[136] The issue in that case was whether the First Amendment gave journalists a right to refuse to disclose confidential sources—or, as the majority put it, "require[d] a privileged position for them."[137] Although Stewart discussed at length the constitutionally-protected role of the press, he did not explicitly ascribe independent significance to the Press Clause. Indeed, he seemed at pains to ground his argument in more diffuse notions of the First Amendment:

> As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.[138]

Nonetheless, it was clear he believed that the First Amendment gave the press rights different from those of other speakers: his proposed solution to the confidential source problem was to create a qualified testimonial privilege available to persons he described as "reporters" or "newsmen."[139]

Two years later, Stewart explicitly embraced the Press Clause as a source of special protection for the press. In an off-the-bench speech[140] that attracted a great deal of attention, he argued that "the Free Press Clause" extends to "the publishing business" an institutional protection different from the Speech Clause and other Bill of Rights guarantees.[141] He argued that the Founders distinguished between freedom of speech and freedom of the press and intended "the constitutional guarantee of a free press . . . to create a fourth institution outside government as an additional check on the three official branches."[142]

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136. 408 U.S. 665, 726–37 (1972) (Stewart, J., dissenting).

137. *Id.* at 682.

138. *Id.* at 726 n.2.

139. *Id.* at 743.

140. Potter Stewart, Associate Justice, United States Supreme Court, Or of the Press, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L. J. 631 (1975).

141. *Id.* at 633.

142. *Id.* at 634.

The Court seemed to take that view, at least in dicta, in a decision issued a few months before Stewart spoke. The case was *Miami Herald Publishing Co. v. Tornillo*;[143] the issue was whether a state could constitutionally require a newspaper to give a right of reply to a political candidate it had attacked. The Court's answer was no; the costs to the newspaper of providing the space and composing time to print the reply would penalize it for having attacked the candidate, which would tend to deter editors from publishing material that might trigger the right-of-reply.[144] Such a content-based penalty would be contrary to general First Amendment principles. That rationale required no extra protection for the press; imposing a similar burden on anyone would violate the Speech Clause. But the Court added another paragraph:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.[145]

This explicit resort to the guarantee of a free press, and more importantly, the suggestion that the First Amendment protects editorial control and judgment from governmental intrusion into the function of editors, seemed to support Stewart's view. The proposition that the Press Clause protects editorial judgment has become a central tenet for some who claim a distinct role for the Press Clause.[146]

143. 418 U.S. 241 (1974).
144. *Id.* at 256–57.
145. *Id.* at 258 (footnote omitted).
146. *See, e.g.*, Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754 (1999).

B. Avoiding the Press Clause

The era of *Tornillo* and Stewart's speech turned out to be the apogee of the independent life of the Press Clause.[147] Since then the Court has not developed an independent Press Clause jurisprudence. Indeed, it has gone out of its way to avoid doing so. The Court has responded to constitutional claims by the press in one of two ways. In many cases the Court has interpreted the Speech Clause broadly enough to sustain the press claim,[148] thereby obviating the need to rely on the Press Clause. When that has not been possible, the Court has rejected the claim.[149] After showing how the Court treats press claims as speech claims, I will suggest two other theories by which the Court might avoid relying on the Press Clause.

1. Treating Press Claims as Speech Claims

The determination to base protections on the Speech Clause whenever possible had many salutary effects. In defamation cases, by basing the constitutional protections on the Speech Clause rather than the Press Clause, the Court made them available to speakers generally, not just the press. Although the argument that the Court made in *New York Times Co. v. Sullivan* relied primarily on the historical use of libel law to sup-

147. The last case to hold a state action unconstitutional squarely on the basis of the Press Clause was *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Although in places the opinion refers generically to "the First and Fourteenth Amendments" or "freedom of expression," the concluding sentence says: "Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability." *Id.* at 496–97. The rationale is based on the effect that liability would have on freedom of the press.

148. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that the First Amendment protects a radio station's right to broadcast an illegally intercepted telephone conversation); Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that civil liability based on a statute forbidding news media from publishing names of rape victims "violates the First Amendment"); Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (holding that a claim for intentional infliction of emotional distress arising from a magazine caricature could not be affirmed "consistently with the First Amendment"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (recognizing a "public" right under the First Amendment to attend criminal trials).

149. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (denying press claim that it could not be forbidden from disclosing information obtained through discovery in civil litigation); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (denying press contention that newsroom search was unconstitutional); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (denying press challenge to restrictions on access to prison); Pell v. Procunier, 417 U.S. 817 (1974) (same); Branzburg v. Hayes, 408 U.S. 665 (1972) (denying press claim of privilege to resist subpoenas). *But see* Houchins v. KQED, Inc., 438 U.S. 1 (1978), discussed *infra* notes 201–02 (seemingly recognizing limited special press rights of access to prison).

press the press,[150] the Court's decision was not limited to the Times, but applied equally to four individuals sued separately for having signed the ad over which the Times was sued. In subsequent libel decisions the Court occasionally employed rhetoric suggesting that non-press speakers might be less fully protected,[151] but in fact it has never failed to give them the same treatment as media defendants.[152] The result is that the constitutional law of defamation gives media no advantage over other participants in public discussion.

In a few cases, the Court protects the press disproportionately, though not exclusively, by giving special protection to speech on "matters of public concern." When it was asked to adopt a media/non-media distinction in defamation cases, confining the constitutional limitations on liability to media cases, the Court declined. Instead, it embraced the "public concern" concept, holding that at least some of those limitations apply only to defamation that occurs in speech about matters of public concern.[153] A similar construct allows the press to publish or broadcast illegally intercepted telephone conversations. State and federal wiretap statutes make it a crime to "use" such material if the user knows it was illegally obtained.[154] The Court held that the "use" prohibitions in the statutes are unconstitutional insofar as they forbid publicizing matters of public concern.[155] These protections are available to all who engage in

150. 376 U.S. 254, 274–76 (1964) (recounting the debates over freedom of the press that accompanied the framing of the First Amendment).

151. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

152. *See, e.g.*, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).

153. *See Dun & Bradstreet*, 472 U.S. at 749. The issue was whether a private plaintiff could recover presumed and punitive damages without showing actual malice as required by *Gertz*, 418 U.S. at 323. The Vermont Supreme Court held that it could, on the ground that the *Gertz* limitations on such damages did not apply to nonmedia defendants. The United States Supreme Court noted that there was disagreement among the lower courts on that point, see *Dun & Bradstreet*, 472 U.S. at 753 n.1, but did not address the question. It affirmed the judgment "for reasons different from those relied on by the Vermont Supreme Court," *id.* at 753, namely that *Gertz* applied only to matters of public concern.

154. *See* 18 U.S.C. § 2511(1)(d) (2000); 18 PA. CONS. STAT. § 5725(a) (2000).

155. *See* Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding such use constitutionally protected as long as the user had committed no illegal act other than the knowing use of illegally intercepted material). The majority opinion said this conclusion flowed from the general proposition that the First Amendment protects publication of truthful information about matters of public concern. Two members of the 6–3 majority filed a concurring opinion that seemed to narrow the holding to matters of "unusual public concern." Justice Breyer, joined by Justice O'Connor, believed that the speakers' legitimate privacy expectations in the intercepted conversation were "unusually low" and the public interest in disclosing their conversation was "unusually high" because they seemed to be making threats that posed a public dan-

discussions about matters of public concern,[156] but they especially benefit the press because almost by definition, press speech is about matters of public concern.

Sometimes, however, the Court's determination to rest protections on the Speech Clause rather than the Press Clause forced it to adopt unconvincing fictions. When faced with press claims for a constitutional right of access to judicial proceedings, the Court responded by recognizing a *public* right of access instead.[157] The public was not seeking access to courtrooms, of course, and could not be widely accommodated if it did. The Court recognized this,[158] and even advised that it would be permissible to exclude members of the public in order to make room for the press,[159] but insisted nonetheless that the right it was recognizing was that of the public rather than the press.

In the courtroom-access context, the impulse to avoid preferential treatment for the press produced only a harmless and transparent fiction. In others, however, it can produce analytical confusion. The Court's cases on differential taxation of media illustrate this. Initially these cases clearly relied on the Press Clause. In 1936, the Court held that a tax that applied to the thirteen largest newspapers in Louisiana (all but one of which opposed Senator Huey Long) while exempting smaller newspapers (most of which supported Long)[160] was unconstitutional "because it abridges the freedom of the press."[161] The Court reviewed at length the use of taxation throughout history to suppress the press or segments thereof, and concluded that the tax in question had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[162]

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ger. They said the decision therefore applies only to "publication of intercepted information of a special kind." *Id.* at 540 (Breyer, J., concurring).

I argue that this case could have been decided more straightforwardly by holding that a free press right was at stake. *See* discussion *infra* Part II.B.1

156. In *Bartnicki*, the Court noted that its decision applied not only to the radio station that broadcast the intercepted tape, but also to the individual who received it anonymously and passed it on to the radio station. *See* 532 U.S. at 525 n.8. The Court also employs the "public concern" distinction in contexts that do not involve the press at all. *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (protecting public employees from dismissal for speech about matters of public concern). My point is that the protection of the "public concern" distinction applies to almost all press speech but only a small subset of non-press speech.

157. *See infra* Part III.A.

158. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980).

159. *See id.*

160. Indeed, Long's own literature called it "a tax on lying, 2 cents per lie." WILLIAM IVY HAIR, THE KINGFISH AND HIS REALM: THE LIFE AND TIMES OF HUEY P. LONG 279 (1991).

161. Grosjean v. Am. Press Co., 297 U.S. 233, 251 (1936).

162. *Id.*

The theory that the history of the Press Clause required special scrutiny of differential taxation of media was elaborated more fully in a series of cases fifty years later. Beginning with *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[163] the Court held that a tax that singled out the press for special treatment, or targeted a small group of newspapers, was presumptively unconstitutional even without evidence that its purpose was punitive. The Court recounted the history of the Press Clause and found "substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment."[164] The Court subsequently invalidated a state sales tax that applied only to a few magazines.[165] Again, the Court viewed the problem as differential taxation of the press.[166]

For reasons that are not clear, the Court eventually backed away from the straightforward notion that it was the Press Clause that precluded discriminatory taxation of the press. In *Leathers v. Medlock*,[167] the Court reinterpreted the press taxation cases in terms of discrimination against *speakers*. The Court said the previous taxation cases "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."[168]

"Differential taxation of speakers" is a difficult concept to understand. All taxpayers are speakers; to say they cannot be differentially taxed is to say that taxes must apply uniformly to everyone. But the Court has repeatedly rejected that proposition and did so again in *Leathers*, opining that, "[i]nherent in the power to tax is the power to discriminate in taxation."[169] So the phrase must refer to taxation of speakers *qua* speakers. But that is a problematical concept too. Unless one posits an omnipresent tax collector—one who can collect the tax whenever someone speaks—a "tax on speech" could not be administered. As a practical matter, the only way the legislature could differentially tax speakers would be by categorizing them according to tangible indicia that enable the tax collector to determine who owes the tax and who does not. The only obvious tangible means of classification is the medium by which the speech is communicated. A tax on speech about specified subjects, or on

163. 460 U.S. 575 (1983).

164. *Id.* at 583.

165. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

166. *See id.* at 223 ("The question presented in this case is whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's guarantee of freedom of the press.").

167. 499 U.S. 439 (1991).

168. *Id.* at 447.

169. *Id.* at 451.

speech expressing specified views, would be subject to the same administrative difficulty, and would be subject to the further objection that the government may not penalize speech on the basis of its content or viewpoint.[170] Despite these difficulties, the Court abandoned the clear reliance on the Press Clause in the earlier cases and attempted to explain those results in Speech Clause terms,[171] even though they are not readily explainable as Speech Clause cases. Here is an instance where the Court's zeal to avoid reliance on the Press Clause led it into an untenable, if not incoherent, rationale.

Another case in which the analysis could have been more straightforward had the Court been willing to use the Press Clause is *Bartnicki v. Vopper*.[172] The question was whether a radio station could be held liable for broadcasting a private cellular phone conversation that it knew had been recorded in violation of state and federal wiretap laws.[173] The relevant statutes forbade not only the illegal recording but also intentional disclosure thereof, [174] and contained no exception for disclosures by news media. The defendants were clearly liable unless the First Amendment protected them. They argued that the press has a right to publish even stolen information if it concerns a matter of public importance, but the Court refused to consider any special right for the press.[175] Instead, it adopted a rationale that required it to perform contortions, both analytical and factual.

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170. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (holding that a statute that imposed a financial penalty on speakers because of the content of their speech was presumptively inconsistent with the First Amendment).

171. If the Court had been unwilling in *Leathers* to treat the complaining taxpayers as press, we might infer that its reason for resorting to the Speech Clause was not to retreat from the previous reliance on the Press Clause, but to expand the constitutional limitations on differential taxation to non-press media—i.e., to hold that in addition to the anti-discrimination principles that apply to the press because of the Press Clause, the Speech Clause limits tax discrimination among other media. But that explanation is not convincing, for two reasons. First, the Court did not hold that the press cases were inapplicable to cable; on the contrary, it said cable television "is, in much of its operation, part of the 'press.'" *Leathers*, 499 U.S. at 444. It treated the press tax cases as relevant precedents, although it expanded the analysis to also include similar First Amendment claims by non-press organizations. Second, it did not hold the discrimination against cable television unconstitutional. It upheld the tax discrimination, not only as to inter-media discrimination between cable and print media, but also as to intra-media discrimination between cable and satellite services. Although it might have been necessary to create a new Speech Clause-based principle to *invalidate* the tax discrimination against cable, it obviously was not necessary to do so to *uphold* it. If the Court believed the previous cases did not create a principle broad enough to cover cable, that belief by itself would have been a sufficient basis for the decision.

172. 532 U.S. 514 (2001).

173. *Id.* at 517.

174. *See* 18 U.S.C. § 2511(1)(d) (2000); 18 PA. CONS. STAT. § 5725(a) (2000).

175. *Bartnicki*, 532 U.S. at 525–26.

Although it conceded that the wiretap statutes were content-neutral, the Court subjected them to the strict scrutiny normally reserved for content-based regulations. It held that the statutes could not be applied to the defendants absent a "need of the highest order"—the test that was developed in *Daily Mail*,[176] *Landmark Communications*,[177] and *Florida Star*[178] for statutes that punished speech because of its content. It then held that neither the government's interest in discouraging third parties' use of illegally taped conversations nor its interest in protecting the privacy of telephone conversations was sufficient to justify application of the wiretap statutes to disclosures about matters of public concern by defendants who had nothing to do with the illegal interception.[179] That formulation of the controlling principle then forced the Court to embrace a dubious factual proposition: that a private telephone conversation was "debate about matter[s] of public concern."[180] Unpersuasive as this reasoning may be, it enabled the Court to protect the media defendants in that case (and perhaps also the New York Times in another similar case pending at the time *Bartnicki* was decided),[181] without creating a specific rule for the press.[182]

The courtroom access cases, the taxation cases, and *Bartnicki* illustrate various techniques the Court has employed to treat press cases as Speech Clause cases. They also show that the consequences of those maneuvers range from salutary to harmless to pernicious. I turn now to other possible ways of avoiding the Press Clause.

2. Treating Press as a Favored Subset of Speakers

Conceivably, the press could be given preferential constitutional treatment without reliance on the Press Clause. As noted above, the Court has managed to give the press de facto special treatment under the Speech Clause, and it could do so de jure as well. It could treat the press as a favored speaker under the Speech Clause, and tilt the balance on account of that factor to make the result come out differently than it does in cases involving non-press speakers. For example, in taxation cases, the fact that the taxpayer is press might entitle it to enhanced Speech Clause protection on the theory that such a taxpayer's speech interests are more

176. Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).
177. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).
178. Florida Star v. B.J.F., 491 U.S. 524 (1989).
179. *See Bartnicki*, 532 U.S. at 529–34.
180. *Id.* at 535.
181. *See* McDermott v. Boehner, 532 U.S. 1050 (2001).
182. *Bartnicki*, 532 U.S. 514.

important to society (or more vulnerable to suppression through taxation) than those of other taxpayers.

It is hard to see what this circumlocution achieves. It still results in favored treatment of the press. It leaves the outcome dependent on *how much* the press speaker is favored—a risky criterion to employ in controversies that will always be fraught with political consequences and suspicions of political motive. Most important, it does not avoid the definitional difficulties that arise from reliance on the Press Clause; it merely changes the inquiry from "Who is press?" to "Who is a favored speaker?" Answering that question is even less attractive than deciding who is press. The Court has generally shunned the notion that freedom of speech depends on the identity of the speaker.[183] The presumption that all speakers are equal, even if their speech is not, is a laudable one. Deviating from that principle under the Speech Clause would have no inherent limitation; if the press is a speaker more equal than others, why aren't candidates for public office, or even officeholders? Interpreting the Press Clause to give special rights to the press also deviates from the equality-of-speakers principle, of course, but at least it limits the extent of the deviation to those who can come within the definition of press instead of exposing all speakers to the possibility of differential treatment.

To the textualist, the favored-speaker dodge is objectionable for another reason. The First Amendment expressly protects freedom of the press. Denying that the Press Clause means anything, while specially protecting the press under the Speech Clause, ignores the textual basis that the framers provided for specially protecting the press.

3. Protecting a Right to Receive Information

Another way of protecting freedom of the press without relying specifically on the Press Clause would be by recognizing a "right to receive information." The Court could hold that limitations on the government's power to interfere with the activities of the press stem from the public's right to receive the information that is thereby suppressed, rather than from any rights of the press itself. In a number of cases the Court has posited the existence of such a right [184] and in a few it has actually em-

183. As Professor Schauer observes, "First Amendment doctrine has been hesitant to draw lines between or among speakers or between or among communicative institutions, preferring overwhelmingly to demarcate the First Amendment along lines representing different types of speech." Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1263 (2005).

184. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive . . . .'" Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting Martin v. City of Struth-

braced the theory, to the extent of allowing would-be recipients of information to challenge restrictions that were not challenged by those whose speech was restricted.[185]

This theory is more tenable as an *explanation* for the Press Clause than as an independent source of rights, however. It is undeniable that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom,"[186] and that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[187] It has long been clear that protecting freedom of the press is not an end in itself, but only a means to the end of informing the public.[188] As I shall argue later, informing the public should be the central precept in interpreting the Press Clause. But the reason for a right does not necessarily define the right. A First Amendment right to receive in-

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ers, 319 U.S. 141, 143 (1943)). The most frequently cited language is in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), where the Court asserted that "[i]t is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here." But the issue in that case was whether the First Amendment allowed regulation of broadcasting. The First Amendment claimant was a speaker not a listener, and the Court's conclusion was only that the public has a right to have broadcasting "function consistently with the ends and purposes of the First Amendment," not that they actually had First Amendment rights independent of those of speakers. *Id. Cf.* Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) ("[T]he First Amendment protects not only the dissemination but also the receipt of information and ideas."); Saxbe v. Washington Post Co., 417 U.S. 843, 862–863 (1974) (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression."); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (quoting *Martin*, 319 U.S. at 143) (noting that "[i]n a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'" but then not actually enforcing such a right).

185. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (holding that consumers had standing to challenge restrictions on prescription drug advertising even though no pharmacist had done so); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (holding that citizens had a First Amendment right to receive political publications sent from abroad). *Cf.* Procunier v. Martinez, 416 U.S. 396 (1974) (holding that censorship of prison inmates' incoming mail violated the First Amendment rights of the recipients as well as those of the senders).

186. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion of Brennan, J.).

187. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

188. One of the earliest articulations of press freedom on American soil was the "Address to the Inhabitants of Quebec" adopted by the Continental Congress in 1774. It asserted that the importance of freedom of the press

> consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

1 BERNARD SCHWARTZ, THE BILL OF RIGHTS 223 (1971).

formation would be hard to cabin. Would it support a recipient's right to assert his or her First Amendment rights against those of an unwilling speaker? Would it require the government to act affirmatively to provide information that no speaker is providing?[189] Such questions have discouraged lower courts from employing the right-to-receive theory[190] and have evoked debate within the Court over the appropriate scope of the theory.[191] The cases in which the Court actually relied on the right to receive information involved government interference with communications from willing non-governmental speakers to willing recipients,[192] and therefore do not suggest that the government must make information available to the public, through the press or otherwise.

The First Amendment could have been written to guarantee a right to receive information, but it was not. It could be interpreted as guaranteeing such a right, but that would produce a jurisprudence quite different from the First Amendment law we know.[193] That law relies on the self-interest of speakers and the press to vindicate the interests of the public. The surrogacy is often imperfect. The public interest may fail to find an advocate, and perhaps in some of those instances a right to receive information should be recognized to permit the assertion of information interests that no speaker is advancing. Some of the claims that speakers do advance offer little benefit to the public or may even be harmful to some portion of it, and those circumstances ought to influence the resolution of the claim. But the First Amendment jurisprudence we have is predominantly a marketplace model, one that relies on speakers and the press,

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189. "[T]he 'right to receive information and ideas' . . . does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government." *Pico*, 457 U.S. at 888 (Burger, J., dissenting) (quoting *Stanley*, 394 U.S. at 564).

190. *See* Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (holding that viewers had no First Amendment right to compel public television stations to carry a program they had decided to cancel); Frissel v. Rizzo, 597 F.2d 840 (3d Cir. 1979) (rejecting a taxpayer's challenge to a mayor's decision to withdraw city advertising from a newspaper on the ground that the taxpayer had no standing unless he could show some reason why the newspaper could not sue).

191. Justice Rehnquist, dissenting in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, argued that the theory should only be available when the information in question otherwise would not be reasonably available, and asserted that all the previous right-to-receive cases had met that test. 425 U.S. 748, 782 (1976). The majority stated: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is." *Id.* at 757 n.15. *Cf.* Kleindienst v. Mandel, 408 U.S. 753, 765 (1972), in which the Court argued in dicta that a listener's alternative means of access may be a relevant factor in balancing First Amendment rights against governmental regulatory interests.

192. *See* cases cited *supra* notes 184–185.

193. As Professor Baker says, "The listener's right to hear, read, or see when there is no willing speaker or when the speaker has no legal right to speak is, at best, weakly protected." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 302 n.42 (1989).

rather than the government or the courts, to ascertain and serve the information needs of the public.[194] There may well be pockets of need that cannot be met by the marketplace model, for which the right-to-receive theory should be available. But however desirable that might be in situations in which the marketplace model fails, it makes little sense to abandon the conventional model in situations in which the press is eager to serve the public's right to receive information, the principal obstacle is a restriction on the press's ability to do so, and the claim is one that would clearly fall within the ambit of the Press Clause if that clause has any ambit.

The press-as-favored-speaker strategy and the right-to-receive-information theory are possible ways to avoid relying on the Press Clause, but neither has been much used and both are problematic. As we have seen, the principal strategy the Court has actually used has been to treat press claims as speech claims. That is not a realistic option in the context of war coverage. For obvious reasons, access to battlefields, commanders, prisoners, and military hospitals cannot be extended to the public at large. Recognition of a constitutional right to cover war therefore seems to depend squarely on the role of the Press Clause.

III. APPLYING THE PRESS CLAUSE TO WAR COVERAGE

Positing a right under the Press Clause to cover war is a challenging enterprise. As we shall see in this section, the Supreme Court has been reluctant to recognize constitutional rights of access in any context. In recent history, press complaints about tight military control of war coverage have received little sympathy from the courts. Genuine difficulties in accommodating the imperatives of war and the interests of the press counsel against attempting any comprehensive manifesto of press rights. I shall try, however, to suggest a few modest steps that might assure some independent coverage of war.

A. Press Rights of Access

The most conspicuous freedoms extended to the press and not to other speakers are those relating to access. From the White House, the galleries of Congress, and the corridors of the Pentagon to the local city hall and police station, representatives of the press get special privileges

194. *See id.* at 67 (observing that under existing case law, under the marketplace model of the First Amendment, and under the liberty model that Professor Baker prefers, listeners' rights are generally protected only to the extent that a speaker's right is protected).

that allow them to ask questions, observe events, and cultivate sources—opportunities that are denied to the rest of us.[195] These are valuable benefits. In the past, accommodations for the press—press rooms, dedicated telegraph and phone lines, seats on the press bus or plane—were often provided free of charge. Now the press usually pays something, but rarely full value; market economics do not yet set the price the press pays for space in the White House or access to the floor of a political convention. Far more significant is the cost of the time and attention that government officials devote to the needs and desires of the press. So even if it now pays something, the press still enjoys its special benefits primarily at public expense.

These press perquisites do not flow from the Press Clause, however, at least not directly. In a few instances they may derive from statutes or regulations,[196] but primarily they exist through the largesse of the executive and legislative branches. Nothing compels the President to accommodate the White House press corps. Congress has no legal obligation to provide press galleries, and the police generally are not required by law to give the press access to disaster sites or crime scenes.[197] The desire to maintain good relations with the press, or at least to avoid the hostility that might flow from a decision to take away perquisites that the press has come to expect, apparently is powerful enough to protect the tradition of preferential press access most of the time. With respect to war coverage, however, if that tradition ever existed, little is left of it.

When the press has claimed a constitutional right of access it has usually been unsuccessful. The Court's position on access generally has been that the Constitution does not "require government to accord the press special access to information not shared by members of the public generally."[198] This proposition emerged from press challenges of prison policies banning interviews with individually chosen inmates.[199] The Court's opinions in those cases emphasized that the prisons in question provided many other means by which members of the press and public

195. I have discussed these press perquisites in detail elsewhere. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

196. The Freedom of Information Act restricts the cost of fees and requires that fee schedules be established to determine when fees may be waived. 5 U.S.C. §§ 552(a)(4)(A)(i)–(vii) (2000). Press representatives in Texas generally have free access to disaster or emergency scenes, 37 TEX. ADMIN. CODE §1.55 (2005), and executions, 37 TEX. ADMIN. CODE § 152.51(c)(6) (2005).

197. *See* Kinsey v. City of Opp, Ala., 50 F. Supp. 2d 1232 (M.D. Ala. 1999) (news photographer had no constitutional right to take photos of fatal auto accident); City of Oak Creek v. Ah King, 436 N.W.2d 285 (Wis. 1989) (rejecting First Amendment defense of cameraman arrested for entering site of airliner crash).

198. Pell v. Procunier, 417 U.S. 817, 834 (1974).

199. *See id.*; Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

could observe prison conditions, and noted that the restrictions did not appear to be part of an effort to conceal information[200]—qualifications that may distinguish the restrictions on coverage at Abu Ghraib and Guantanamo. The closest the Court has ever come to holding that the First Amendment requires special access for the press was in *Houchins v. KQED, Inc.*,[201] which produced a peculiar 4–3 endorsement of the proposition that press had to be allowed a reasonable opportunity to visit a prison and had to be allowed to use recorders and cameras.[202]

The only places to which the press has a well-established constitutional right of access are courtrooms, and that right is not, nominally at least, a special press right. The Court has held that the *public* has a con-

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200. *Pell*, 417 U.S. at 830; *Saxbe*, 417 U.S. at 848.

201. 438 U.S. 1 (1978).

202. The *Houchins* Court again rejected the argument that the First Amendment gives the press special rights of access, but a fragile four-member majority held that some accommodations had to be made to meet the information-gathering needs of the press. A sheriff in charge of a local jail had entirely excluded the press and public from a portion of the jail called Little Greystone, in which the trial judge described conditions as "truly deplorable." KQED, Inc. v. Houchins, 546 F.2d 284, 285 n.1 (9th Cir. 1976). The sheriff permitted access to the rest of the facility only by means of monthly public tours, which were limited to twenty-five persons and were booked months in advance. *See id.*

Three justices saw no constitutional problem. They said it was enough that the press had the same freedom as the public to learn about jail conditions by receiving letters from inmates and by interviewing third parties such as prison workers and inmates' lawyers and visitors. *Houchins*, 438 U.S. at 8–11. Three dissenters agreed that the press had no greater right of access than the public, but they believed the sheriff's restriction violated the public's First Amendment right to be informed about conditions in the jail. *Id.* at 24–25. They would have affirmed the trial judge's order requiring the sheriff to give "responsible representatives of the news media" access to all parts of the jail at reasonable times, with the rationale that:

> relief tailored to the needs of the press may properly be awarded to a representative of the press which is successful in proving that it has been harmed by a constitutional violation and need not await the grant of relief to members of the general public who may also have been injured by petitioner's unconstitutional access policy but have not yet sought to vindicate their rights.

Id.

With two justices not participating, Justice Stewart cast the decisive fourth vote. He said the sheriff could not be ordered to admit the press to the section of the jail excluded from the public tours and could not be ordered to permit press interviews with randomly encountered inmates, because those steps would enlarge the scope of what the sheriff had opened to public view and would therefore violate the principle of the earlier cases that the press had no greater right of access than the public. *Id.* at 18. But in a perplexing circumlocution, Stewart said the Constitution required that the press be allowed to use cameras and recorders and be allowed access "on a more flexible and frequent basis than scheduled monthly tours." *Id.* His explanation was that the Constitution "requires sensitivity to . . . the special needs of the press," and that "simply allowing reporters to sign up for tours on the same terms as the public" could not fulfill this obligation. *Id.* at 17–18. The question was whether to affirm the order requiring the sheriff to give the press reasonable access to the entire jail, so Stewart's vote was to reverse, and made a majority of four for that result. But he concurred only in the judgment, so his opinion, together with the dissent, also made a fragile majority for his position regarding "more flexible" press access.

stitutional right to attend criminal trials and some other judicial proceedings.[203] This right was established in response to claims brought by the press, the beneficiaries of the decisions were the press, and the Court acknowledged that implementing the public's right may require "preferential seating for media representatives."[204] But the Court conspicuously refused to treat these as Press Clause cases, grounding the decisions not on the role of the press in covering courts[205] but on the long tradition of *public* attendance at trials. This refusal to find the right in the Press Clause even when the press was the claimant and principal beneficiary reveals the vehemence of the Court's unwillingness to recognize special press rights.

The prison- and courtroom-access cases establish the constitutional backdrop against which claims of a right to cover wars presumably are to be viewed: the press cannot be treated worse than the public, and may be entitled in practice to some marginal preferential treatment, but has no general constitutional right of access to places from which the public is excluded.[206]

B. Obstacles to Recognizing a Constitutional Right to Cover War

Finding a way to protect press freedom to cover the modern varieties of war is a daunting task, in part because of the nature of modern

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203. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

204. *Richmond Newspapers*, 448 U.S. at 581 n.18. Two concurring justices observed that "the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens and funnels information about trials to a large number of individuals." *Id.* at 586 n.2. (Brennan, J., and Marshall, J., concurring).

205. A role the Court had previously recognized in a different context. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

206. The intersection of the prison-access and courtroom-access cases was explored in *California First Amendment Coal. v. Woodford*, 299 F.3d 868 (9th Cir. 2002). The court held that press representatives invited by the state to witness executions had a First Amendment right to see the full process of executing a prisoner by lethal injection from beginning to end, not just the motionless body at the moment the chemicals were injected from a concealed location. The Ninth Circuit interpreted *Pell* and *Saxbe* as creating "at least qualified rights of access to gather information from prison inmates and to observe some prison operations," and thought executions were sufficiently related to the criminal justice process to be subject to the Supreme Court decisions mandating access to judicial proceedings. *Id.* at 874. The court accepted the proposition that the press had no greater right of access than the public, however, and did not address what rights the press might have if the state had not already made the decision to admit them to executions. *Id.*

warfare.[207] Covering wars that can be launched from virtually anywhere in the world, and conducted by a few hundred commandos helicoptered in from afar, is very different from covering wars conducted with thousands of troops and elaborate on-site support facilities, well-defined theaters of action, battle lines, field command headquarters, and established logistical routes. When wars last for years, there is time to work out accommodations as the scenario unfolds. Wars that are over in a matter of days or weeks can be covered only in accordance with advance planning, which is always difficult. Planning for the war usually takes place on an accelerated timetable, one in which many other decisions take precedence over decisions about press coverage. After the war is over, the issue loses its urgency.[208] Even when the press and the military focus on the issue in peacetime and draw up plans for future war coverage, those tend to get pushed aside when the next war starts, in part because circumstances usually seem different from those for which the plan was devised.[209]

The logistics of facilitating press coverage are genuinely difficult. The press can no longer be accommodated merely by allowing a journalist with a pad and pencil to accompany the troops and file stories over a military telegraph.[210] Television journalism, in particular, seems to require its own quasi-military logistical support, although that has eased somewhat with improvements in satellite communications and the miniaturization of cameras.[211] The embedding of journalists during the Iraq

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207. The definitive work on the larger dimensions of modern warfare is PHILIP BOBBITT, THE SHIELD OF ACHILLES (2002), especially chapter 26. For a perceptive view tied more specifically to news coverage of modern warfare, see Ben H. Babdikian's Foreword to MACARTHUR, *supra* note 18.

208. MacArthur attributes the military's success in controlling coverage of the first Gulf War to the failure of the press to follow through on its complaints about restrictions on coverage of military operations in Grenada and Panama once those invasions were over. *See* MACARTHUR, *supra* note 18.

209. *See* COMBELLES-SIEGEL, *supra* note 21 (describing in detail how military policy regarding press coverage evolved through the 1983 invasion of Grenada, the 1987 attack on Iranian frigates in the Persian Gulf, the 1989 invasion of Panama, Operation Desert Shield in 1991, and the first Gulf War, and how each new version was ignored or proved unsatisfactory under changed circumstances).

210. The military's failure to provide for prompt transmission of media stories and photos was a major complaint during the first Gulf War. By the Pentagon's own account, only twenty-one percent of the press reports and photos sent from the field reached Dhahran in less than twelve hours, and thirty-one percent arrived more than two days late. *See* DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 746 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf.

211. *See* COMBELLES-SIEGEL, *supra* note 21 ("[W]ith the growing sophistication and miniaturization of satellite communications devices, the media increasingly have the technical ability to transmit on their own."). While this relieves some of the logistical burden of ac-

War required a considerable dedication of resources by the Pentagon and extensive planning and cooperation by the military and the media.[212]

Finding a way to protect press freedom to cover wars is also difficult conceptually. Freedom of the press, like most other constitutional provisions, is easiest to implement when it can be enforced negatively—by forbidding government from interfering with it. But noninterference with independent efforts of the press to cover war may not be enough; the affirmative help of the government may be required. In *Flynt v. Rumsfeld*, the court of appeals noted that Flynt was seeking something more than a right to cover war:

> The Government has no rule—at least so far as Flynt has made known to us—that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there.[213]

The inadequacy of that response is obvious. Without guidance from the military, the "media outlet" wouldn't know what action to expect or where to go to cover it—to say nothing of the safety issues that would be raised by journalists roaming a battle zone on their own. The Pentagon itself has acknowledged that it must play an affirmative role in facilitating news coverage: it agreed after the first Gulf War that in future engagements the military would be responsible for providing transport and communication facilities for journalists and would provide press access to all units.[214]

For these reasons, the military, Congress, and the judiciary have all been reluctant to establish legal protections for press coverage of war. Congress is reluctant to interfere with the executive's power to conduct war, and the courts are doubly reluctant when neither the legislative nor executive branches have acted. Sometimes the courts defer to the executive too enthusiastically even when Congress has acted. For example, although the Freedom of Information Act is obviously intended to subject executive secrecy decisions to judicial scrutiny, a court of appeals

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commodating television, the author notes that it creates a new problem for the military, by making it harder to censor the transmissions.

212. *See id.*

213. 355 F.3d 697, 702 (D.C. Cir. 2004).

214. *See* U.S. Dep't of Def. Directive No. 5122.5, Enclosure 3, at E3.1.5 (Sept. 27, 2000) (stating that journalists are to be provided access to all major military units); *id.* at E3.1.7 (stating that journalists should be permitted to ride on military vehicles and aircraft when possible); *id.* at E3.1.8 (directing officers to make transmission facilities available and not to ban communications systems operated be news organizations).

held that the courts could not examine the basis for the government's refusal to disclose the names of any of the more than 1,000 foreigners detained in the United States after September 11.[215]

Even if the courts were inclined to act, it is hard to say in the abstract what the law should do to protect war coverage. In the reality of a specific war, issues and potential solutions may become clear, but then other issues take priority: Congress is preoccupied with approval and funding of the war itself, and the military with the planning and conduct of military operations. Because legislative action and litigation have a long time frame and modern warfare (or at least particular phases of it) a short one, the press coverage issues of the specific war are often moot by the time Congress or the courts are ready to act. The military considers winning the war to be its overriding responsibility, and since Vietnam it has tended to view press coverage as generally antithetical to that goal.

It is not easy to see what the Press Clause might contribute to such an intractable problem, but the indefensibility of concluding that it is irrelevant can be appreciated by imagining that a President decided to wage a secret war—no on-site coverage, no briefings from the Pentagon or military commanders, no announcements from the White House. Conscientious judges could hardly say that scenario raised no constitutional issue, and if waging secret war would be unconstitutional, that conclusion presumably would have to be based at least in part on the First Amendment.

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215. *See* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003). The executive had previously enjoyed such broad deference only when it invoked the Freedom of Information Act ("FOIA") exemptions for national security and intelligence sources and methods under 5 U.S.C. §§ 552(b)(1), (b)(3) (2000). In this case, the government did not rely on those exemptions, but claimed the names were within the FOIA exemption for law enforcement records whose disclosure "could reasonably be expected to interfere with enforcement proceedings." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 922 (quoting 5 U.S.C. § 552(b)(7)(A) (2000)). The court said the same deference the executive receives under the national security and intelligence exemptions is due under the law enforcement exemption (§ 552(b)(7)(A) and in any FOIA case in which "the government's declarations raise legitimate concerns that disclosure would impair national security." *Id.* at 928.

The district court held that the government had not even shown that the detainees had any connection to or knowledge of terrorist activity. Ctr. for Nat'l Sec. Studies v. U.S. Dept. of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002). But the court of appeals held that courts were required to accept the government's predictions that knowing the names of detainees might help terrorists map the course of the government's investigation. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928–29. Judge Tatel, dissenting, argued that the court should at least require government to explain why it refused to disclose even the names of detainees it had determined were innocent and why the attorney general had felt free to announce the arrest (and names) of some of the detainees. "By asking these questions, the court would not, as it warns, be 'second-guessing' the government's judgments about matters of national security. It would, rather, be doing the job Congress assigned the judiciary . . . ." *Id.* at 945.

Some might say the First Amendment violation lies in depriving the public of information about such a critical matter, rather than in the restriction of press rights, but it would be difficult, or at least perverse, to say that the Press Clause had nothing to do with that conclusion, because only the press can provide a consistent and comprehensive flow of information to the public. As we have seen in the Iraq War, email and digital photography now make it possible for non-press personnel in the war zone to report some timely and important news. A civilian employee of a military contractor took photos of flag-draped coffins lined up in the hold of a cargo plane and emailed them to a friend; the friend gave them to a newspaper and the resulting widespread publication of the photos gave the public the images of casualties that the Pentagon had been trying to avoid.[216] The biggest scandal of the war, the prisoner abuse at Abu Ghraib, was exposed not by journalistic investigation but by photos taken by the guards themselves.[217] But the military tries hard to prevent these unauthorized disclosures,[218] and acquiring information by these means is haphazard and unreliable. If the public has a First Amendment right to be informed about war, that requires a more consistent and comprehensive stream of news than can be provided by scattered reports from soldiers and civilians who may be punished as a result of their communications.[219] Such a right can only be vindicated by enabling the press to do its job.

Possibly the largest obstacle to a successful challenge of restrictions on war coverage is the nature of constitutional adjudication itself. Our system assumes that constitutional rights will be vindicated by individual litigants complaining of the specific restrictions that affect them. It allows courts to remedy only those specific violations, and denies them power to prescribe remedies that will not solve the specific litigant's

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216. *See* Bill Carter, *Pentagon Ban on Pictures of Dead Troops Is Broken*, N.Y. TIMES, Apr. 23, 2004, at A14; Sheryl Gay Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES, June 22, 2004, at A17.

217. *See* Hersh, *supra* note 14.

218. Personnel are forbidden from photographing detention facilities at Guantanamo. Also, film processed at the base exchange is screened and questionable photos seized, and personnel are prohibited from saying anything about detention operations in emails or phone calls. *See* Jessi Stone, *Security a High Priority at GTMO*, THE WIRE [official base publication], Apr. 1, 2005, at 4, *available at* http://www.jtfgtmo.southcom.mil/content/wire/issue40.pdf. Interrogators there are forbidden from discussing camp operations. *See* Neil A. Lewis, *Documents Say Detainees Cited Abuse of Koran*, N.Y. TIMES, May 26, 2005, at A1. When photos taken of Saddam Hussein in his cell appeared in newspapers in London and New York, the White House launched an investigation of the source. *See* David E. Sanger & Alan Cowell, *Hussein Photos in Tabloids Prompt U.S. Call to Investigate*, N.Y. TIMES, May 21, 2005, at A3.

219. The employee who took the photos of coffins was fired from her job, as was her husband, and some of the soldiers who took the photos at Abu Ghraib were prosecuted for their part in the abuse. *See* Carter, *supra* note 216.

problem. This system is ill-suited to the resolution of constitutional problems that arise from many different restrictions on many different entities, and that is precisely the nature of the problem with war coverage. Although some of the individual restrictions may be unconstitutional standing alone, the real problem is with the total package of restrictions. War coverage is subject to myriad restrictions, many of which do not by themselves prevent the press from doing its job, but which in the aggregate give the military a great deal of control over the way the public perceives the war.

It seems clear that this is to some extent a calculated policy, or at least has been in the past. In the lead-up to the first Gulf War, then-President Bush and his advisers are said to have vowed "to manage the information flow in a way that supported [their] political goals."[220] Then-Defense Secretary Cheney was put in charge of implementing the policy.[221] When the ground war began, Cheney ordered a complete news blackout, which he lifted only after his own staff told him it was ill-advised.[222] Colin Powell, then-Chairman of the Joint Chiefs of Staff, is quoted as saying the code name "Desert Storm" was chosen in part because of the "cute angle" it formed with "Stormin' Norman," the nickname of General Norman Schwarzkopf, who became the star of the official briefings through which most information about the war was channeled.[223] Midway through the war, mounting press complaints about the restrictions led some White House aides to fear that a "credibility gap" was emerging, but a "Saturday Night Live" skit, depicting the press corps at the Riyadh briefings as buffoons who appeared eager to reveal military secrets, convinced senior White House officials that the public supported the press restrictions.[224] Each day's briefing was preceded by a rehearsal at which military public affairs aides gave the briefing officer extensive lists of potential questions and the officer tried out various answers.[225]

The extent and coordination of the administration's efforts to shape public opinion during the first Gulf War were not known publicly until after the war when the New York Times conducted a lengthy investigation of the matter.[226] Whether a similar concerted effort was made to control information about the current war in Iraq is not known, though

220. *See* MACARTHUR, *supra* note 18, at 7.
221. *See* DeParle, *supra* note 34.
222. *Id.*
223. *Id.*
224. *See* MACARTHUR, *supra* note 18, at 151.
225. *See* DeParle, *supra* note 34.
226. *See id.* (reporting on interviews and documents examined in a six-week review of the policies governing coverage of the 1991 Gulf War).

we do know that there are important differences, such as the policy of replacing exclusive pool coverage with coverage by embedded journalists. In order to raise the full scope of the constitutional issue, press litigants would have to be able to prove that the specific restrictions of which they complain are part of an unconstitutional campaign to prevent the press from functioning freely and independently, and they would have to be able to prove it during the war, while it is still possible for the courts to do something about it. That would require a more sophisticated and coordinated litigation strategy than any the press has mounted so far; it might require courts to apply their rules about mootness and standing more thoughtfully, and it might prove impossible. But litigants often have to use creative means to show courts what lies beyond their self-imposed blinders, and this is an instance where it is important to resist the narrow focus that our litigation practice seems to demand.

C. Some Tentative Proposals

A constitutional right to press coverage of war would be a difficult right to define and administer, but if there are circumstances under which some such right should be recognized, courts should not refuse to consider it because of those obstacles. At the very least, courts should leave open the possibility. Implementation of the right may have to be left largely to the military, but the military needs some prodding. For the reasons described above, the pressures of conducting war and the natural instinct to prefer not having to deal with the press tend to deter the military from providing for adequate press coverage. The Secretary of Defense, the Joint Chiefs of Staff, and line officers need to be under some countervailing pressure to do so—the kind of pressure that comes from an assumption that the press has some constitutional right to cover war, however inchoate and undefined it may be. The Constitution often works through means other than judicial enforcement. An announcement that there is no constitutional right to cover war would unnecessarily deny the benefits of that nonjudicial influence.

Eventually, of course, such an assumption will lose its power if it becomes obvious that the constitutional obligation to facilitate press coverage of war has no teeth. Describing what the obligation entails probably cannot be done in detail, certainly not in the abstract and in advance of any concrete issue. It is possible, however, to envision some general principles.

One might be that complete denial of access—from a war zone, from detention facilities, from the personnel actually conducting the war, from the leaders directing it—is presumptively unconstitutional. There

may be many good reasons for denying the press access to certain areas at specific times. It may be logistically impossible to accommodate a press presence in specific phases of an operation. But rarely will there be good reason for more than partial and temporary exclusion. The *Houchins* case strongly implies that authorities are under a constitutional obligation to provide *some* means by which the public can learn about conditions or activities in a domestic prison.[227] The case for such an obligation with respect to war is at least as strong.

A second principle might be that if on-scene press coverage cannot be allowed, the military has to facilitate the next best thing. If reporters and photographers cannot accompany aircraft on bombing missions, they should be allowed to interview the crews when they return from their missions. If it is impossible to provide access to the person who commanded a military operation, the press should have access to the officer to whom that commander reported. If journalists cannot accompany troops in battle, they should be able to interview them when the battle is over. If there are good reasons for denying the press access to interrogation and detention facilities, they should be allowed to question the personnel who staff them and at least a sampling of the detainees.

Justifications for restrictions on news coverage should have to be specific. The need to maintain secrecy with regard to military operations and concern for the safety of journalists are powerful reasons to restrict coverage of combat operations, but they do not apply equally to all aspects of war. The existence of prisons at Abu Ghraib and Guantanamo was never a military secret, and the safety risks to journalists visiting them presumably would not have been great.[228] Exclusion of the press from those facilities may have been justified for other reasons,[229] but courts should demand relevant justifications instead of generalities. Restrictions whose purpose appears to be to prevent disclosure of embar-

227. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978). Although *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), are sometimes cited for the proposition that the press has no constitutional right of access to places from which the public is excluded, in both of those cases the press in fact had access not allowed to the public.

228. *Cf.* Getty Images News Servs. Corp. v. U.S. Dep't of Def., 193 F. Supp. 2d 112 (D.D.C. 2002) ("[T]he situation at Guantanamo Bay does not seem to present the same set of challenges that more temporary and mercurial military operations might.").

229. There has been no litigation that required the government to articulate its reasons for restricting press coverage of detention facilities. In other contexts, however, the government has maintained that it was necessary to keep secret the identities of detainees to prevent terrorist organizations from understanding the scope and direction of the government's investigation of terrorist activities. *See, e.g.*, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (upholding exclusion of press from immigration hearings involving persons suspected of terrorist activities or ties).

rassing information are entitled to no judicial respect.[230] When officials themselves ignore restrictions that they insist must be enforced against the press,[231] courts should react with the skepticism they usually employ when stated justifications for restrictions on speech are inconsistent with the facts.[232]

Principles that protect press rights to cover war, however limited those rights must be, require that there be a judicial enforcement procedure. All too often, the courts have been unavailable because they are unable to act before the rush of events makes the particular controversy moot. One solution is to expedite the decision process. In the Pentagon Papers case,[233] the entire litigation (two cases) moved from filing of the complaints to a decision by the Supreme Court in less than three weeks. That level of haste is unusual if not unique, and may be unwise.[234] But it demonstrates that in matters of real urgency, courts can act rapidly. Most claims relating to war coverage will not be that urgent, but some (such as those arising from complete exclusion) should be accorded at least as much solicitude as the publication of a classified study of the history of the Vietnam War.

With respect to less urgent war coverage claims, the courts should be less eager to hold that they are moot. Elsewhere in First Amendment law, courts lower the mootness barrier when the question is one "capable of repetition, yet evading review."[235] They refuse to dismiss as moot controversies that raise important First Amendment questions but by

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230. *See, e.g.*, Neil A. Lewis, *Interrogators Cite Doctors' Aid at Guantanamo*, N.Y. TIMES, June 24, 2005, at A1 (reporting that the military refused to allow the Times to interview medical personnel at Guantanamo about reports that they aided interrogators in conducting coercive questioning of detainees).

231. For example, although the administration has generally refused to identify detainees or reveal interrogation methods on grounds that might help terrorists, when faced with a need to defend interrogation practices at Guantanamo, the Pentagon confirmed a report that named a "high-value" detainee and detailed the techniques used to make him talk. *See* Rahimi, *supra* note 80.

232. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (holding that existence of content-neutral alternatives casts "considerable doubt on the government's protestations" that its regulation of hate-speech was racially neutral); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (holding that statute's failure to include income from non-speech activities in its scheme to give "fruits of crime" to victims belied state's claim that its purpose was to compensate victims rather than punish speech).

233. *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

234. In dissent, Justice Harlan said "the Court has been almost irresponsibly feverish in dealing with these cases," with the result that matters that should have been taken into account were not. *Id.* at 753 (Harlan, J., dissenting). Justice Burger, also dissenting, argued that the "precipitate action of this Court . . . is not the kind of judicial conduct that ought to attend the disposition of a great issue." *Id.* at 749 (Burger, J., dissenting).

235. Roe v. Wade, 410 U.S. 113, 113 (1973).

their nature dissipate before the judicial process can run its course.[236] This exception to the mootness rule has not been embraced in war coverage cases, but it should be. There is a pattern in these cases: with each war, the military imposes policies different from those of the previous war. At the beginning of the war the press attempts to operate under the new policies, or tries to persuade the Pentagon to change them. Eventually someone in the press gives up on those approaches and files a challenge. After a few months the court dismisses the challenge, sometimes directly on the ground of mootness,[237] but more often on other grounds yet under the influence of similar considerations—the policy attacked has been modified[238] or the war situation has changed such that the relief sought by the complainant is no longer possible.[239]

Even if it is not obvious that the individual claims are "capable of repetition yet evading review," the cases taken together show that similar claims arise in every war, yet the First Amendment issues they raise rarely get addressed. The sense one gets from the opinions is that judges recognize that war coverage claims raise serious First Amendment issues, but they are reluctant to interfere with military decisions, or it is not clear what relief might be appropriate, so they grasp at reasons not to reach the merits. Reluctance to issue advisory opinions is a generally healthy impulse, but experience has amply demonstrated that this is an area in which the healthy generalization should yield to the reality that important questions about war coverage never get answered under the usual self-imposed judicial constraints.

Over the past generation, the Department of Defense has edged closer to the view that permitting war coverage is an act of grace, or at least that it is a strategic concern to be permitted or forbidden according to its likelihood of advancing the public relations goals of the military.[240]

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236. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982) (agreeing to decide the press's claim that it was unconstitutionally denied access to a hearing long after the hearing had concluded); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546–47 (1976) (holding that mootness did not preclude deciding the constitutionality of prior restraint even though the restraint had long since expired).

237. *E.g.*, Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985) (upholding dismissal for mootness of publisher's exclusion of press from U.S. military invasion of Grenada).

238. *See, e.g.*, Getty Images News Servs., Corp. v. U.S. Dep't of Def., 193 F. Supp. 2d 112 (D.D.C. 2002) (dismissing press complaint about lack of access to detention center at Guantanamo Bay Naval Base on the ground that while the litigation was pending the Department of Defense had relaxed its exclusion policy).

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

240. "[T]he operative assumption at the Pentagon is, we will talk to you if it fits our specific narrow purpose and not if it doesn't." Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb.–Mar. 2005, at 26, 30 (quoting David Wood, a national security correspondent since 1981).

Congress has shown no interest in changing this. Negotiations between the press and the Pentagon have produced some agreements, but the Pentagon feels free to modify or ignore them when a new war starts on the ground that conditions are different from those contemplated by the agreement. The constitutional responses suggested here would create very limited press rights, but they would preserve some judicial influence in matters of war coverage, which is far better than leaving public information about war at the sufferance of the government.[241]

D. Enforcing Institutional Rights

A constitutional right to cover war would be impossible to administer if it gave every person who could plausibly claim to be a journalist a right to accompany troops, question commanders, or interview prisoners. The difficulty of deciding who is a journalist can be exaggerated, as the current administration did when it argued that the courts cannot be trusted to deny members of Al Qaeda rights as journalists.[242] But it is obvious that the military cannot be required to accommodate everyone who comes within even the narrowest definition of "press," let alone everyone who might come within a definition broadened to include bloggers and others who perform some of the same functions as the traditional press. That should not preclude recognition of a First Amendment right to cover war, however. The Press Clause should be seen primarily as a protector of the institutional role of the press, and only secondarily as a source of individual rights. In this view, the purpose of the Press Clause

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241. Might such rights be created as a matter of federal common law rather than as constitutional rights? The Court apparently does not doubt its power to create common law rules relating to military matters. It has created common law rules barring military personnel from suing the government for injuries "incident to military service." Feres v. United States, 340 U.S. 135, 144 (1950) (holding government immune from suits on behalf of soldiers for injuries that "arise out of or are in the course of activity incident to service").

The Court has also created common law rules limiting liabilities of military contractors. *See* Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (holding military contractor immune from tort liability for design defect in helicopter furnished in accordance with military specifications). But those are not rules restricting the military or requiring the military to do something it might prefer not to do. On the contrary, they are rules designed to protect the autonomy of the military. They reflect a resolve *not* to allow judicial processes to interfere with military decisions. As the war coverage cases show, it is hard enough to persuade courts to restrict military decision-making in response to arguments that the Constitution requires them to do so. Expecting them to do it in the exercise of common law powers seems unrealistic.

242. The Justice Department opposed federal legislation to protect journalists' confidential sources on the ground that it would cover "criminal or terrorist organizations that also have media operations . . . such as al Qaeda." Patricia Wilson, *Bush Administration Opposes Shield for Journalists*, REUTERS, July 20, 2005, *available at* http://today.reuters.com/business/newsarticle.aspx?type=tnBusinessNews&storyID=nN20221665 (last visited Nov. 3, 2005).

is not to confer individual rights on everyone who can claim the label "press." To paraphrase Justice Stewart, its purpose is to protect the full flow of information to the public, and the individual rights of particular press claimants are subsumed under that broad societal interest.[243]

An interpretation that treats Press Clause rights as individual rights would be undesirable for another reason. The press receives a great deal of favorable treatment by law, and is defined legislatively for many different purposes, ranging from access to Congress, to tax exemption, to protection from searches and subpoenas.[244] As I have argued elsewhere,[245] an interpretation of the Press Clause that prevents discrimination among individual press representatives as a matter of constitutional law would inevitably interfere, possibly fatally, with the existing universe of nonconstitutional press preferences. Anyone denied such a benefit could mount a constitutional challenge merely by claiming to be a member of the class encompassed by the Press Clause, and the prospect of litigating those claims would tend to discourage governmental entities from offering nonconstitutional preferences.

The argument that the press can be protected under the Press Clause without giving the same rights to everyone who might qualify as press requires an unfamiliar style of constitutional interpretation. It is difficult to accept because it differs so dramatically from Speech Clause jurisprudence, where nondiscrimination among speakers is an article of faith. The marketplace model of free speech is so deeply entrenched that it is unpopular, if not unthinkable, to suggest that free speech interests could be served without giving everyone the same right to speak.[246] But a sensible interpretation of the Press Clause begins with an understanding that a law violates the Press Clause only when it compromises the institutional role of the press, not when it merely denies a right to an individual member of the press. A litigant advancing a Press Clause claim should not be able to succeed merely by showing that he or she has been denied a right given to another member of the press; success should require a showing that the challenged restriction threatens the ability of the press to perform its role.

That is a hard distinction to maintain, of course. Only the law's effects on particular components of the press can compromise its ability to

243. *See* Branzburg v. Hayes, 408 U.S. 665, 726 n.2 (1972) (Stewart, J., dissenting).

244. I described these sources of preferential treatment in some detail in *Freedom of the Press*, *supra* note 195, at 485–92.

245. *Id.* at 510–12.

246. Such heresies do occasionally get articulated. "What is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 26 (1948), *quoted in* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973).

carry out its institutional role, and only the press entities or individuals who are affected can bring litigation to protect the institutional role of the press. Requiring them to assert and show not merely an interference with their own ability to function as press, but also a threat to the press as an institution, gives them an unfamiliar burden.

Under the institutional interpretation, the question in each case would not be whether the litigant was deprived of a right to which he or she was entitled by virtue of being a member of the press, but whether the challenged restriction deprived "the press" of the freedom the Constitution guarantees. This is the apparent implication of Justice Stewart's view of the Press Clause: "Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution."[247] Defining the protected institution is a daunting task, of course, but that is not a valid reason for refusing to give the Press Clause meaning. The Court did not begin its Speech Clause jurisprudence by asking, "How shall we define speech?" Defining "religion" for purposes of the Establishment and Free Exercise Clauses is no easy matter either. The meanings of "speech" and "religion"—and many other constitutional concepts—have evolved (and are still evolving) incrementally. Defining "the press" should be left to the same case-by-case processes.

Enforcing the rights of an institution in a system designed for the vindication of individual rights poses some challenges. The concept of standing requires adjustments to accommodate the reality that institutional rights can only be asserted by specific litigants. Decisions regarding standing to enforce the Establishment Clause may provide a suitable starting point, if only to demonstrate that standing can be a malleable concept.[248]

Deciding what relief to grant when a violation of the institutional right is found would also be challenging. If the right is only institutional, a successful litigant would not necessarily be entitled to personal relief. To make institutional rights enforceable in a system that relies on self-interested litigants, courts would have to tailor relief not only to the theory of the right, but also to the practicalities of enforcement through litigation. This might require special rules to reward successful litigants

247. Stewart, *supra* note 140, at 633.

248. *Compare* Flast v. Cohen, 392 U.S. 83 (1968) (holding that taxpayers had standing to challenge expenditures alleged to be in violation of the Establishment Clause), *with* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (holding that taxpayers lacked standing to make such a challenge).

without conferring the same benefits on all others similarly situated. Again, inability to answer all these questions *ex ante* need not preclude giving meaning to the Press Clause; the answers should be worked out gradually.

CONCLUSION

In other contexts, it has been relatively easy for the Supreme Court to avoid giving the press special protection under the Press Clause, because the executive and legislative branches generally have protected press freedom adequately. But those branches do not protect coverage of war and its ancillary activities, and it seems unlikely that Congress or the military will change that. It is only a slight exaggeration to say that the press currently is able to provide only what coverage the military chooses to permit. Since Vietnam, the military generally has opted for less coverage rather than more. The courts have failed to recognize any constitutional right to cover war for many reasons: the judicial process moves too slowly to provide timely relief, judges are reluctant to interfere with the military decisions of the executive, and implementing a constitutional right to cover war with specific constitutional requirements or limitations is a daunting task.

These are valid concerns. But if, as a general proposition, it is important that the public know what its government is doing, that is doubly true of the conduct of war, the consequences of which are more serious than most other exercises of governmental power. A judicial response that leaves news about the conduct of war at the sufferance of the military is an abdication of constitutional responsibility. I have suggested restrained judicial responses that would prevent total news blackouts and assure at least a minimal flow of information from the places and people involved in the war. More importantly, recognizing a constitutional right to cover war gives the press some leverage in its perpetual struggle with the military. Denying that any such right exists leaves the press with no weapon other than an appeal to public opinion, and the patriotic impulses of wartime invariably disadvantage the press in that public relations battle.

What is needed is a Press Clause that provides a threat, usually latent, but credible enough to prod the executive and legislative branches to protect the press's ability to cover war. The Press Clause cannot be expected to provide a solution to every claim by a journalist who wants to be accommodated as a war correspondent, and every claim that arises need not be resolved by a constitutional rule. Freedom of the press requires a careful, and adjustable, mix of constitutional and nonconstitu-

tional influences. But the nonconstitutional sources of law have failed to maintain the conditions necessary for free and independent press coverage of war. The influence of the Press Clause is needed.