PRESS ACCESS TO MILITARY OPERATIONS: GRENADA AND THE NEED FOR A NEW ANALYTICAL FRAMEWORK

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In the predawn hours of October 25, 1983, several hundred United States Navy Seals, Marines, and Army Rangers landed on the island of Grenada,1 spearheading an assault force that included contingents from seven Caribbean nations.2 The commander of the invasion task force, backed by the Reagan Administration, excluded the news media from the island for the first two days of the operation.3 Administration officials asserted that the exclusion was necessary to achieve military surprise, to permit the invasion force to concentrate on its objectives without the distraction and obstruction that a press presence would cause, and to avoid devoting troops to the task of protecting the safety of reporters.4 Press groups and others, however, swiftly denounced the exclusion as a violation of the norms of freedom of the press.5

The question of whether the press may constitutionally be excluded from the battlefield pits the guarantee of freedom of the press against the obligation of the government to protect national security during crises and involves a situation that neither Congress nor the courts have addressed.6 While apprehension on the part of the news

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1 See Magnuson, D-Day in Grenada, TIME, Nov. 7, 1983, at 22.
6 In Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984), aff'd but vacated on other grounds, 762 F.2d 134 (D.C. Cir. 1985) (per curiam), a publisher challenged the Grenadian press exclusion, seeking injunctive and declaratory relief against the Government on the grounds, inter alia, that the exclusion was unconstitutional. The district court, while dismissing the case as moot, engaged in some discussion of the merits of the controversy, stating that even if the “press ban had violated plaintiffs’ constitutional rights, which the Court doubts,” the court “would exercise its equitable discretion and decline to enter an injunction restraining the government from restricting press access to future United States military operations.” 588 F. Supp. at 60. The Court of Appeals
media may have subsided somewhat since a special Defense Department panel issued a report on the subject of press coverage of military operations, the truce between the Pentagon and the press remains uneasy. If another access denial in the Grenadian mold is imposed in a future military deployment, an aggrieved press may attempt to litigate its way into the combat zone.

for the D.C. Circuit, while affirming the mootness holding, found the district court's pronouncements on the merits to be improper and vacated the lower court's opinion. The case was ordered dismissed without prejudice. See 762 F.2d at 135-36.

On August 23, 1984, the Defense Department released a report prepared by a special Media-Military Relations Panel composed of Defense Department public affairs officials, retired media personnel, and journalism professors. The Panel recommended that the Pentagon take several measures, including: conducting concurrent public affairs and operational planning; using press pools in appropriate circumstances; considering whether a correspondent accreditation system should be developed; and encouraging voluntary media compliance with Pentagon security guidelines. See Chairman of the Joint Chiefs of Staff Media-Military Relations Panel, Sidle Report, reprinted in Office of Assistant Secretary of Defense (Public Affairs) News Release No. 450-84 (Aug. 23, 1984) [hereinafter SIDLE REPORT]. While the report's recommendations constitute a significant step toward ensuring the greatest possible press access to military operations, they leave many questions unanswered. When pressed by reporters at a news briefing as to what effect the report would have had in Grenada had the recommendations been in place at the time of the invasion, the Assistant Secretary of Defense for Public Affairs stated in a noncommittal fashion that particular decisions must be made "on a case by case basis." Transcript of news briefing accompanying SIDLE REPORT, at 4-5 (on file with the University of Pennsylvania Law Review). More recently, when American journalists were kept away from clashes between a United States naval fleet and Libyan forces in the Mediterranean in March, 1986, the Defense Department spokesman stated that the report "doesn't commit us to doing anything" and that "[w]e have to take each case as it comes." N.Y. Times, Mar. 28, 1986, at A12, col. 4. Moreover, as one member of the panel has pointed out, there is "no guarantee . . . that a future administration or Pentagon will not set aside the Sidle guidelines." Zorthian, Now, How Will Unfettered Media Cover Combat?, N.Y. Times, Sept. 12, 1984, at A31, col. 6. And General Sidle, the panel chairman, stated in an introductory letter accompanying the panel's report that "the matter of so-called First Amendment rights" was a "gray area" that the panel had decided to set aside as "a matter for the legal profession and the courts." Introductory letter accompanying SIDLE REPORT from Major General Winant Sidle, USA, (Ret.) to General John W. Vessey, Jr., Chairman, Joint Chiefs of Staff (Aug. 23, 1984) (on file with the University of Pennsylvania Law Review).

Attempts to foster dialogue between reporters and military personnel pursuant to recommendations of the Sidle Report have met with little success, according to one account. See N.Y. Times, Jan. 29, 1986, at A20, col. 3.

One senior Administration official, when questioned about the access denial in Grenada, stated that he would adopt the same policy in a similar situation. See Middleton, Barring Reporters from the Battlefield, N.Y. Times, Feb. 5, 1984, §6 (Magazine), at 35, 69 (statement of James A. Baker 3d, then White House Chief of Staff). Another senior official stated similarly that "it was possible that reporters would be banned from other military actions in the future." Wash. Post, Dec. 16, 1983, at A10, col. 1 (statement of Secretary of State George P. Shultz).

The time constraints facing a newspaper or press group seeking an injunction against a battlefield access denial would be formidable, but not insuperable, as demonstrated by New York Times Co. v. United States, 403 U.S. 713 (1971). In the lower court proceedings in that case, the District Court for the District of Columbia issued its
The government's exclusion of the press from an ongoing news event such as a military conflict should be viewed as a prior restraint on publication, because a press exclusion, like a suppression on publication, prevents the press from reporting the news to the public. The Supreme Court, however, has applied prior restraint analysis only to government attempts to suppress the dissemination of information already gathered by a would-be publisher or speaker and has declined to characterize access denials as prior restraints in cases denying a right of media access to prisons and granting a right of public access to criminal trials. Nevertheless, the impact of an access denial on first amendment values is the same as that of an ordinary prior restraint. Accordingly, a Grenada-style press exclusion could be analyzed by a court in terms of the national security exception to the prior restraint doctrine. Dictum in the Supreme Court's opinion in Near v. Minnesota remains governing law in this area. The government may issue a prior restraint to "prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

This Comment argues that applying the Near standard to a governmental exclusion of the press from a military operation would be a decision on the day of the hearing, June 21, 1971. The District Court for the Southern District of New York issued its decision on June 19, 1971, the day after it heard arguments. Both cases were heard on appeal on June 22, with the appellate decisions issued the following day. See id. at 713, 755 (Harlan, J., dissenting). The Supreme Court heard argument on June 26 and issued its decision on June 30. The federal courts would have even greater reason to act with dispatch in a battlefield exclusion case which, in contrast to New York Times Co., would involve an ongoing news event from which reporters were being irrevocably excluded.

10 See infra cases cited in note 22.
11 See Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that the news media had no guaranteed right of access to a county jail for broadcast purposes under the first amendment); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (upholding a Federal Bureau of Prisons ban on press interviews with inmates, because this practice was consistent with the restrictions applied to the general public); Pell v. Procunier, 417 U.S. 817 (1974) (denying that journalists' first and fourteenth amendment rights had been infringed by a California Dept. of Corrections policy prohibiting media interviews with specific individual inmates).
12 See Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (striking down a Massachusetts statute that required the exclusion of the general public from trials of certain sexual offenses involving minors because it violated first amendment right of access to criminal trials); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that a trial court abridged the right to attend criminal trials implicit in the first amendment when it granted a motion to close a criminal trial).
13 283 U.S. 697 (1931).
15 Near, 238 U.S. at 716.
mistake. The Near standard is obsolete and potentially dangerous in today's world. Because the test was announced during a simple era in United States foreign and defense policy, Near's hypothesized threat to national security was tidy and of limited scope.\(^{16}\) In contrast, the contemporary national security environment is characterized by global American commitments and the constant possibility of nuclear war.\(^ {17}\) That a majority of the Court did not find the Near standard valid in New York Times Co. v. United States,\(^ {18}\) and that one district court has questioned the Near exception\(^ {19}\) underscore the obsolescence of the standard.

If a battlefield access case reaches the Supreme Court, a propitious occasion would arise for the Court to depart from Near and adopt a more flexible framework that is better suited to modern demands.\(^ {20}\) The Court's right of access decisions offer a two track approach that meets the need for flexibility. Under this approach, a battlefield press exclusion would be subject to either of two well-tested first amendment standards: the "strict scrutiny" test or the "time, place and manner" test. The nature of the government purpose behind the access denial would determine the level of scrutiny to be applied.\(^ {21}\)

Part I of this Comment argues that excluding the press from the battlefield imposes a prior restraint, notwithstanding the Supreme Court's avoidance of prior restraint analysis in its access denial decisions. Part II describes and analyzes the unravelling of Near's version of the national security exception to the prior restraint doctrine. Part III advocates the replacement of the Near standard in the access denial area by the two track right of access approach and then applies the two track framework and the Near test to the facts of the press exclusion in Grenada, contrasting the outcomes reached under each approach.

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\(^ {16}\) See infra notes 31-32 and accompanying text.
\(^ {17}\) For decisions taking judicial notice of the contemporary national security environment, see infra text accompanying notes 80 & 96.
\(^ {18}\) 403 U.S. 713 (1971).
\(^ {19}\) See United States v. Progressive, Inc. 467 F. Supp. 990, 992 (W.D. Wis.) (granting the United States government a preliminary injunction against the publisher of an article allegedly threatening to national security, despite the court's acknowledgement that it would result in a prior restraint), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).
\(^ {20}\) While Near's weaknesses also exist in contexts other than that of access denial, this Comment focuses on battlefield exclusions because of the absence of any Supreme Court decisions in that area. The Court could most easily depart from Near in a particular fact situation where Near has not been applied.
\(^ {21}\) Cf. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 607 n.17 (1982) (asserting that if the state's purpose is "to inhibit the disclosure of sensitive information" it must undergo the "strict scrutiny" test, but if the intent is to impose reasonable ""time, place and manner" restrictions on protected speech" it would be subjected to a lesser amount of scrutiny).
I. The Battlefield Press Exclusion as Prior Restraint

Prior restraints—government restrictions imposed in advance upon expression protected by the first amendment—are generally regarded as more restrictive of first amendment rights than subsequent punishments, which impose sanctions on the speaker after prohibited statements are made.\(^2\) Though the punishment for violation of a judicially imposed prior restraint occurs subsequent to the speech in a contempt citation, the distinction between prior and subsequent measures remains a cornerstone of first amendment analysis in the Supreme Court. The Court's prior restraint doctrine bars all prior restraints, with certain narrow exceptions, including one that has become known as the national security exception.

A. Genesis of the National Security Exception: Near v. Minnesota

Because excluding the press from an ongoing news event on grounds of national security could be viewed as a means of restraining the press from reporting the news event, the Supreme Court might draw upon precedent describing the national security exception to the prior restraint doctrine if it were to hear a case involving the exclusion of the press from a military operation. In fact, an access denial may be viewed as even more restrictive than censorship because it prevents the press from witnessing the military operation first-hand.\(^3\)

\(^2\) According to one commentator, the reasons for considering a system of prior restraint to be more inhibiting than a system of subsequent punishment are:

- It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

T. Emerson, The System of Freedom of Expression 506 (1970); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (stating that "[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand"); Freedman v. Maryland, 380 U.S. 51, 57-58 (1965) (holding invalid as a prior restraint a Maryland statute requiring that motion pictures be submitted to the State Board of Censors prior to release); Near v. Minnesota, 283 U.S. 697, 713-15 (1931) (discussing the long-standing acknowledgement that systems of prior restraint are antithetical to first amendment freedoms). But see Murphy, The Prior Restraint Doctrine in the Supreme Court: A Reevaluation, 51 Notre Dame L. Rev. 898 (1976) (criticizing the prior-subsequent distinction).

The Court established the national security exception to the prior restraint doctrine in Near v. Minnesota. Near involved a Minnesota statute that authorized abatement as a public nuisance of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Pursuant to the statute, a local prosecutor sought to enjoin the publication of The Saturday Press, which had published articles charging in substance "that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." The statute provided that an injunction suppressing further publication would be granted unless the publisher of the newspaper could prove the material printed to be "true and . . . published with good motives and for justifiable ends." Publishing the newspaper subsequent to the injunction would be punished as contempt of court unless the subsequent publication was "in harmony with the public welfare."

The Court struck down the statute, as applied to The Press, as the type of "previous restraint upon publication" that the guarantee of freedom of the press was chiefly designed to prevent. The Court added, however, that:

the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. This dictum is the origin of the national security exception to the prior restraint doctrine.

Near's formulation of the national security exception is notable for the limited and tidy scope of its hypothesized threat to national security. It focuses on obstructions to the raising of troops and on the safety of sailors and soldiers during wartime—classic national security concerns that persist to this day as priorities for any defense planner. Such a focus, however, does not capture the range and complexity of concerns encompassed by contemporary conceptions of national security.

24 283 U.S. 697 (1931).
25 Id. at 701-02.
26 Id. at 703-04.
27 Id. at 713.
28 Id. at 712.
29 See id. at 722-23.
30 See id. at 713-15.
31 Id. at 716.
Near's author, Chief Justice Hughes, writing in 1931, was operating in an era in which nuclear weapons did not exist and American isolationism, a tradition dating to President Washington's remonstrations against alliances with foreign powers, was the basis of United States foreign policy. Accordingly, the Near exception refers to disclosure of information about a discrete event that endangers participants in that event. It does not encompass a government need for secrecy based on non-wartime or extra-battlefield concerns. Nor does it address the issue of information regarding activity in one part of the globe that, if disclosed, could have swift and severe repercussions elsewhere in a national security environment characterized by interlocking commitments, widespread tensions, and enormous dangers.

B. Right of Access and the Supreme Court: Prisons, Jails, and Criminal Trials

One might argue that Near's national security exception to the prior restraint doctrine does not apply to a Grenada-style press exclusion for the simple reason that the Supreme Court has never considered an access denial to be a prior restraint. The discussion below examines some of the leading Supreme Court decisions on the access denial issue, noting that the Court has failed to employ prior restraint analysis in any case. An argument is then made that due to the special nature of the governmental decision to enter into armed conflict, Near's view of national security must be confronted in the battlefield exclusion context despite the absence of prior restraint analysis in previous access denial decisions.

The Supreme Court has held on three occasions that the news media have no constitutional right of access to prisons or jails over and above the access right possessed by the public at large. The Court did not utilize prior restraint analysis in any of these decisions, possibly implying that the concept of the prior restraint is to be confined to government prohibitions on the dissemination of information already gathered.

Houchins v. KQED, Inc. involved a sheriff's refusal to allow television reporters to televise events at a county jail, interview inmates, or enter a section of the jail where a prisoner had committed suicide.

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34 438 U.S. 1 (1978) (plurality opinion).
35 See id. at 3-5.
The Court reversed the court of appeals' affirmance of a preliminary injunction against the access restrictions, holding: "[t]he public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes." The Court stressed that the information in question was within the government's control. While conceding the existence of "an undoubted right to gather news 'from any source by means within the law,'" the Court found "no basis for the claim that the first amendment compels others—private persons or governments—to supply information." Similarly, in Saxbe v. Washington Post Co. and Pell v. Procunier, the Court sustained prison regulations that barred media interviews with inmates, holding that reporters do not have a constitutional right of access to prisons or their inmates greater than that afforded the general public. In none of these cases did the Court analyze the press exclusion in question as a prior restraint.

In Richmond Newspapers Inc. v. Virginia and Globe Newspaper Co. v. Superior Court, the Supreme Court invalidated exclusions of the public from criminal trials. While identifying a presumptive right of access in each case, the Court again failed to employ prior restraint analysis.

In the Richmond decision, the Court struck down a trial judge's order barring the public, including the media, from attending a murder trial. In his plurality opinion, Chief Justice Burger traced the his-

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56 Id. at 9. Chief Justice Burger, writing for the Court, was joined by two other justices. One member of the Court concurred in the judgment, three dissented, and two took no part in the consideration or decision of the case.
37 See id. at 9, 14-15.
38 Id. at 11 (quoting Branzburg v. Hayes, 408 U.S. 665, 681-82 (1972)).
39 Id. at 11. The Court cited Branzburg, 408 U.S. at 681-82, which involved a reporter's asserted right to withhold from a grand jury information he had obtained from confidential sources. The reporter argued that disclosure would impair his ability to maintain the confidential relationships that were essential to an effective right to gather news. The Supreme Court rejected this argument, noting that "the first amendment does not guarantee the press a constitutional right of special access to information not available to the public generally," id. at 684, and that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." Id. at 684-85. Branzburg, like the Court's access denial decisions, does not employ prior restraint analysis.
43 See Saxbe, 417 U.S. at 850; Pell, 417 U.S. at 834.
44 448 U.S. 555 (1980).
46 See Globe, 457 U.S. at 605; Richmond, 448 U.S. at 564-70.
47 See Richmond, 448 U.S. at 581.
48 The Chief Justice's opinion was joined by two other members of the court.
tory of the criminal trial as conducted in Britain and the United States, noting that the criminal trial had always been open to the public, 48 that "public trials had significant community therapeutic value," 49 and that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 50 The presence of the public in the courtroom, the Chief Justice added, was "thought to enhance the integrity and quality of what takes place" there. Chief Justice Burger stressed that centuries of tradition had made the courtroom "a public place where the people generally—and representatives of the media—have a right to be present," 51 subject to certain exceptions. 52 The Richmond decision thus addresses the right of the public at large to attend criminal trials and does not grant a special right of access to the press in particular. The Chief Justice's reliance on freedom of assembly along with the freedoms of speech and the press 53 also illustrates that the right of access to criminal trials belongs to the public at large.

In Globe, the Court struck down a Massachusetts statute that required trial judges at trials involving sexual assaults on minors to exclude the general public from the courtroom during the victim's testimony. Justice Brennan, writing for the five member majority, stressed that "a major purpose of [the first] Amendment was to protect the free discussion of governmental affairs." 54 Echoing Richmond, Justice Brennan focused on two features of the criminal justice system that "explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment." 55 These two features were that "the criminal trial historically has been open to the press and general public" 56 and that the right of access to criminal trials enhances the quality of the proceedings and thus "plays a particularly significant role in the functioning of the judicial process and the government as a whole." 57 Justice Brennan then articulated a test that the government would have to satisfy in order to rebut the presumption

Four justices concurred in the judgment.

48 See Richmond, 448 U.S. at 564-70.
49 Id. at 570.
50 Id. at 575.
51 Id. at 578.
52 Id.
53 See id. at 578, 581-82 n.18. These exceptions are discussed in depth in Part III (B).
54 Id. at 577-78.
56 Id. at 605.
57 Id.
58 Id. at 606.
that a criminal trial is open to the public: “[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” This standard appears to be substantially more flexible than the near-absolute protection of first amendment activity that prior restraint analysis provides.

C. The Battlefield Exclusion Contrasted to the Prison and Courtroom Exclusions

One might read the Houchins, Saxbe, Pell, Richmond, and Globe decisions as precluding the use of prior restraint analysis in any access denial case. Under this interpretation, in a Grenada-style battlefield access denial, Near’s national security exception to the prior restraint doctrine would not be an issue. The battlefield exclusion, however, differs from the prison and criminal trial cases because of the government purposes involved. In the prison context, the government claims a right to exclude reporters in order to protect inmate privacy and preserve general order in the prison. In the courtroom context, the government may exclude the public in order to protect the defendant’s sixth amendment right to a fair trial by keeping jurors separate from members of the public who might convey prejudicial information to them. Furthermore, the courtroom exclusion may protect the anonymity of an innocent victim of a criminal act.

Exclusions of the press from the battlefield, however, are likely to evince a different sort of government purpose. If the need for military success is the dominant aim of an access denial, the government is excluding the press in order to advance the government’s own policy interests. Such a purpose triggers the same policy concerns as censorship, the classic prior restraint. Censorship is regarded as suspect because of its historical roots in the old English licensing system, which was perpetuated by the government in order to protect its political interests. Because an access denial in the battlefield context raises similar policy

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59 Id. at 607.
60 Id. at 607. The right of access to the criminal trial was extended to the voir dire examination of prospective jurors in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). The right of access decisions are reassessed below in the context of the battlefield exclusion. See infra text accompanying notes 145-75.
61 See Houchins, 438 U.S. at 5; Saxbe, 417 U.S. at 848-49; Pell, 417 U.S. at 826-27, 830-32. The Pell Court also noted that “this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press’ investigation and reporting of those conditions.” Id. at 830.
62 See Richmond, 448 U.S. at 559-60, 560 n.2.
64 See, e.g., Near v. Minnesota, 283 U.S. 697, 713-14 (1931); T. Emerson, supra note 22, at 504.
concerns, it also should be subject to prior restraint analysis. If one accepts this distinction between the battlefield exclusion on the one hand, and the prison and courtroom cases on the other, Near's national security exception to the prior restraint doctrine is relevant to the battlefield exclusion analysis, and thus the shortcomings of the exception must be confronted.

Even if the Supreme Court's access denial precedents do exempt a battlefield press exclusion from prior restraint analysis, the language of Near's national security exception can be incorporated into access denial analysis. Because the Court's access denial decisions allow the exclusion where the government interests are sufficiently strong, one might find it convenient to draw on Near in order to gain an understanding of what the government interests are in the first amendment-national security context. Thus, the deficiencies of the Near formulation could impair access denial analysis in the same way that it impairs prior restraint analysis. Accordingly, an examination of the battlefield exclusion issue calls for the reassessment of the Near test whether or not one views battlefield exclusions as prior restraints.

II. THE DISINTEGRATION OF THE NEAR TEST

A. The Pentagon Papers Case and Nebraska Press Association

Thirty-two years passed before the Supreme Court reconsidered the Near national security exception to prior restraints. In New York Times Co. v. United States (the Pentagon Papers Case), the Court was unable to form a consensus on what the national security exception should be, and the deficiencies in Near became apparent as only one Justice cited Near's formulation of the exception. In the Pentagon Papers Case, the Court considered a request by the United States to enjoin the New York Times and the Washington Post from publishing the contents of a classified Defense Department

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65 One might contend that the government attempts to advance its own political interests in the prison and courtroom scenarios as well, because the maintenance of an orderly and dignified criminal justice system is the underlying objective in these situations. But, because the link between a discrete governmental political interest and the press exclusion is so much more direct and clear in the battlefield exclusion case than in the prison and courtroom cases, the kinds of purposes involved are clearly distinguishable.

66 See Globe, 457 U.S. at 607.


68 403 U.S. 713 (1971).

69 See id. at 726 (Brennan, J., concurring).
study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." Although the newspapers had begun publishing the documents on an installment basis, the government contended that an injunction was justified because further publication would present a "grave and immediate danger" to the security of the United States. The Court denied the motion, holding that the requested injunction would be an unconstitutional prior restraint.

In its brief per curiam opinion, the Court cited Near v. Minnesota for the proposition that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" and concluded that the government had not met its "heavy burden of showing justification for the imposition of such a restraint." Near's "sailing dates of transports" dictum was not cited by the court, and an examination of the separate opinions written by each Justice confirms that Near's formulation of the national security exception did not command a Court majority.

The opinions of Justices Black and Douglas, in which each Justice reciprocally concurred, denounced prior restraints in absolute terms. Justice Black did not mention Near at all, while Justice Douglas cited Near for its general condemnation of prior restraints without mentioning its national security exception. By holding that prior restraints are always impermissible, each Justice effectively repudiated the Near exception.

Justice Brennan was the only member of the Court to cite Near's formulation of the national security exception, describing the exception as encompassing "a single, extremely narrow class of cases." In tacit recognition of the Near test's antiquity, Justice Brennan applied it by analogy rather than literally, formulating the following standard: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."

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70 See 403 U.S. at 714.
72 See Pentagon Papers Case, 403 U.S. at 714.
73 283 U.S. 697 (1931).
74 Id. (also citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).
75 Id. (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
76 See id. at 714-19 (Black, J., concurring), 720 (Douglas, J., concurring).
77 See id. at 723-24 (Douglas, J., concurring).
78 See id. at 726 (Brennan, J., concurring).
79 Id. at 726-27 (emphasis added). Justice Brennan's attempt to modernize the Near standard is also reflected in his willingness to assume arguendo that "the present
Justice Brennan's conversion of the Near formulation to a metaphor might be viewed as a creative and successful invigoration of a doctrine that had apparently become obsolete. But even this diluted version of the Near exception is troublesome. If one recognizes (as Justice Brennan did arguendo) that the current national security environment is fraught with great perils and complexities, it becomes clear that Near's "transport at sea" language constitutes an unrealistically narrow conception of national security, even if one applies it by analogy or considers it merely illustrative. It is difficult to accept a line of analysis that maintains that if the publication of certain information could lead to nuclear war, a prior restraint would be permissible because nuclear war is "kindred to imperiling the safety of a transport at sea." The two risks differ so greatly in magnitude and scope that one cannot draw a meaningful analogy between them. Moreover, a metaphorical application of dictum from a case more than a half century old is not the forthright kind of analysis that first amendment doctrine merits.

Justice Stewart, in a concurrence joined by Justice White, was sympathetic to executive discretion in the area of foreign affairs, stating that "the Executive is endowed with enormous power in the two related areas of national defense and international relations," power that is "largely unchecked by the Legislative and Judicial branches" and that has been "pressed to the very hilt since the advent of the nuclear missile age." Nevertheless, Justice Stewart's formulation of the national security exception to the prior restraint doctrine was narrow: a prior restraint was justified only if the disclosure of the information at issue would "surely result in direct, immediate, and irreparable damage to our Nation or its people." Justice Stewart's complete avoidance of the Near dictum and the broad, sweeping terms of his test suggest a more flexible standard than that of Justice Brennan. A threat to "our Nation or its people" is likely to apply to a large variety and number of menaces, not simply to events that could be considered "kindred to imperiling the safety of a transport at sea."

The "world situation" was "tantamount to a time of war" and that "the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust . . . ." Id. at 726.

Justice Brennan's arguendo description of "the present world situation" as "tantamount to a time of war" may implicitly recognize the global nature of United States commitments and the attendant degree of tensions.

Id. at 727 (Stewart, J., concurring) (footnotes omitted).

Id. at 730.

From another perspective, however, Justice Stewart's version of the national security exception is actually narrower than Justice Brennan's. While Justice Brennan assumed arguendo that information could be suppressed if its disclosure would "set in motion a nuclear holocaust," id. at 726 (Brennan, J., concurring), Justice Stewart's
The *Pentagon Papers Case* demonstrates the lack of a coherent approach by the Supreme Court to the national security exception to the prior restraint doctrine. No consensus was formed for the *Near* standard or for any other formulation. The two most widely cited opinions, those of Justices Brennan and Stewart, appear to be unsatisfactory. When the Brennan and Stewart standards were combined in Justice Brennan's concurring opinion in *Nebraska Press Association v. Stuart*\(^8^4\) the confusion was compounded. In *Nebraska Press Association*, the Court struck down a state trial judge's order barring publication or broadcast of certain information implicating the accused in a homicide trial. Justice Brennan's concurrence, joined by Justices Stewart and Marshall, restated the language of the Brennan and the Stewart *Pentagon Papers* standards,\(^8^8\) effectively equating the two formulations despite the discrepancies between the full Brennan and Stewart opinions in the *Pentagon Papers Case* itself.

B. The *Near* Formulation Under Attack: The Progressive Decision

The federal government has met its "heavy burden of showing justification" for the imposition of a prior restraint on national security grounds only once, in the case of *United States v. Progressive, Inc.*\(^8^6\) The district court in *Progressive* granted the government's request for a preliminary injunction barring the publication of a magazine article on hydrogen bomb design. Though purporting to apply both Justice Stewart's standard in the *Pentagon Papers Case* and *Near's* national security exception, the *Progressive* decision is difficult to reconcile with either of these formulations and is more accurately characterized as a harsh critique of both.

The *Progressive* court found that the magazine article in question "could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon"\(^8^7\) and granted the requested injunction on two alternate grounds. First, it found that the government had met its burden of proof under section 2274 of the Atomic Energy Act of 1954,\(^8^8\) which "prohibits anyone from communi-
cating, transmitting, or disclosing any 'restricted data' to any person 'with reason to believe that such data will be utilized to injure the United States or to secure an advantage to any foreign nation.' The presence of this statute, wrote the court, was a "most vital difference" between the instant case and the Pentagon Papers Case. This "vital difference," however, proved unnecessary to the alternative ground given by the court for its holding: that the government had met the Stewart test of "direct, immediate and irreparable injury to our nation and its people." Thus, a preliminary injunction "would be warranted even in the absence of statutory authorization."

The court's application of the Stewart standard becomes dubious when one sets the language of the standard—"disclosure . . . will surely result in direct, immediate and irreparable" damage—next to the court's crucial finding that the magazine article "could possibly" pose a threat of nuclear proliferation. The court was clearly emphasizing the "irreparable" aspect of the Stewart test and disregarding the "surely result in direct, immediate" language. The decision's misapplication of the Stewart standard can best be understood by considering the Progressive court's view of Near.

The court quoted Near's national security exception in full and characterized it as describing "an extremely narrow area . . . in which interference with first amendment rights might be tolerated and a prior restraint on publication might be appropriate." Then, in language unusually bold for a district court's discussion of governing Supreme Court precedent, the Progressive court stated:

In the Near case, the Supreme Court recognized that publication of troop movements in time of war would threaten national security and could therefore be restrained. Times have changed significantly since 1931 when Near was decided. Now war by foot soldiers has been replaced by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war

89 Progressive, 467 F. Supp. at 994 (quoting 42 U.S.C. § 2274 (1982)). "Restricted data" under the Act included all data concerning "the use of special nuclear material in the production of energy." Id. (quoting 42 U.S.C. § 2014(y) (1982)).
90 Id.
91 Id. at 1000 (citations omitted). Elsewhere in the opinion, the court described the Stewart test as requiring a showing of "grave, direct, immediate and irreparable harm to the United States." Id. at 996.
92 Id. at 1000.
93 Pentagon Papers Case, 403 U.S. at 730 (Stewart, J., concurring) (emphasis added).
94 See Progressive, 467 F. Supp. at 992.
95 Id.
could be commenced. It is not surprising that the Progressive court, having taken judicial notice of the nuclear era, should focus on the "irreparable damage" aspect of the Stewart test and find that a prior restraint was justified to prevent the publication of material that "could possibly" increase the chances of nuclear war.

Despite its tacit acknowledgment of the Near test's obsolescence, the Progressive court followed Justice Brennan's example and applied the Near exception by way of analogy,97 despite the logical and doctrinal flaws in such an approach.98 The Near exception has never been overruled and was recently cited by the Supreme Court in a defamation decision.99

When Chief Justice Hughes formulated a national security exception to the prior restraint doctrine in Near, he broke important new ground: even the odious prior restraint could be justified in one class of cases. That class of cases was necessarily a very narrow one, because the definition of national security in the isolated, secure America of 1931 was very narrow. The contemporary, broader meaning of national security should accordingly yield a broader, more flexible national security exception. In departing from the Near exception, the Supreme Court would be faithful to the principle of constitutional interpretation that guided Chief Justice Hughes in 1931—the principle that constitutional tests should be informed by contemporary understandings. A departure from the Near exception, rather than a mechanical or metaphorical application of it, would remain true to the jurisprudence underlying the Near decision.

III. A Two-Track Right of Access Framework: Applying Strict Scrutiny and Time, Place, and Manner Analysis

The Near v. Minnesota100 formulation of the national security exception is obsolete, and Near's shortcomings must be confronted in the battlefield exclusion situation whether or not one considers such access

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96 Id. at 996.
97 The court concluded that "publication of the technical information on the hydrogen bomb contained in the article is analagous to publication of troop movements or locations in time of war . . . ." Id.
98 See supra text accompanying note 80.
99 See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2945 n.5 (1985) (holding that proof of actual malice was not required in defamation action against credit agency for issuing false credit report and citing Near for proposition that "certain kinds of speech are less central to the interests of the First Amendment than others").
100 283 U.S. 697 (1931).
denials to be prior restraints. The remainder of this Comment is devoted to extracting from the case law an alternative framework that is better suited to the battlefield access issue and applying this framework to the Grenada exclusion. A fact-intensive, two-track analysis applying strict scrutiny to access denials designed to prevent the disclosure of sensitive information and applying time, place, and manner analysis to press exclusions based on content-neutral logistical concerns would provide a principled and flexible framework for resolving disputes arising out of such exclusions. This alternative approach may be viewed as a new version of the national security exception or as an extension of "right of access" case law to exclusions of the news media from military operations.

A. The Existence of a Right of Access to Information Under Government Control: Whose Information Is This, Anyway?

As the discussion in Part I points out, the Supreme Court has recognized a public right of access to criminal trials, but not to prisons or jails. In *Houchins v. KQED, Inc.*, Chief Justice Burger viewed the press's asserted right of access to a county jail as a "claim that the First Amendment compels others [—including the government—] to supply information" and held that no right to "government information" existed. Such reasoning, which apparently considers information about activity in government institutions to be under exclusive government control, is difficult to reconcile with the right of access to criminal trials that the Supreme Court established in *Richmond Newspapers, Inc. v. Virginia* and *Globe Newspaper Co. v. Superior Court*. The courthouse would seem to be as much of a government institution as the jailhouse. Moreover, denying a right of press access on the grounds that the information in question belongs exclusively to the government begs the question, because a right of access claim is essentially equivalent to a contention that the government does not have an exclusive right to certain information. If the Court is to reject such a claim while providing principles that will be applied prospectively, it must reveal why it finds a particular access request barred by the gov-

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101 Chief Justice Burger in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), also denied the existence of a public right of access to other public facilities such as hospitals and mental institutions. See id. at 14.


103 Id. at 11-14; see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (The Constitution does not impose "upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.").

104 *448 U.S. 555* (1980).

The Court provided such a principled analysis in establishing a right of access in the Richmond and Globe cases. Each decision stressed two significant features of the criminal trial that triggered a presumption that the trial was open to the public: the history of open trials and the salutary civic role played by the public in witnessing the events taking place in the courtroom. Special emphasis should be placed on the latter of these two factors, because the historical presence of the public at criminal trials probably flows from the recognition of the public's ability to "enhance the integrity and quality of what takes place" there. The prison and jail cases can be characterized as situations wherein the civic role of the press is not sufficiently salutary to trigger a right of access.

Thus, when examining a battlefield press exclusion to determine whether a right of access exists, the Richmond-Globe approach could be applied by asking whether, in the light of historical experience, the press has an important civic role to play in covering military operations first-hand. Before beginning this inquiry, it will be useful to delineate the limitations to the right of access.

B. Sources and Substance of the Two-Track Approach

Justice Brennan, writing for the majority in Globe, noted, "Although the right of access to criminal trials is of constitutional stature, it is not absolute." The state could bar the press and public from a criminal trial in "limited" circumstances. Using familiar first amendment terminology, Justice Brennan then set out a standard of "strict scrutiny" by which one class of access denials would be assessed:

[T]he State's justification in denying access must be a weighty one. Where, as in the present case, the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Justice Brennan made clear that this exacting level of scrutiny was not

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106 See supra text accompanying notes 46-58.
107 Richmond, 448 U.S. at 578; accord Globe, 457 U.S. at 605-606.
108 Globe, 457 U.S. at 606 (citations omitted).
109 Id.
110 Id. at 607 n.17.
111 Id. at 606-07 (emphasis added).
to be applied to all access denials: "Of course, limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech would not be subjected to such strict scrutiny."¹¹²

Justice Brennan thus set out a two-track framework for the analysis of access denials: strict scrutiny for exclusions designed to inhibit the disclosure of sensitive information, and less exacting scrutiny for exclusions that are kindred to time, place, and manner restrictions.¹¹³ Professor Laurence Tribe, speaking generally of governmental abridgments of free speech, has described these two tracks as separating "government actions aimed at communicative impact" from "government actions aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity."¹¹⁴ The flexibility of such a framework, which posits two alternative fact-intensive standards, is apparent upon consideration of some of the leading decisions applying each track.¹¹⁵

Justice Brennan's application of strict scrutiny to the statute at issue in Globe illustrates the fact-intensive nature of this track of analysis in the access denial context. The statute in Globe required judges presiding over trials involving sexual assaults on minors to exclude the public from the courtroom during the victim's testimony. Although the court struck down the statute, Justice Brennan conceded that the state had a compelling interest in safeguarding the physical and psychological well-being of the minor against the trauma of testifying publicly.¹¹⁶ Such an interest, however, did not justify a mandatory closure rule, because it was "clear that the circumstances of the particular case may affect the significance of the interest."¹¹⁷ The state's goal could have been achieved by a more narrowly tailored means such as granting the trial judge the discretion to determine the necessity of closure on a case-by-case basis, considering such factors as "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."¹¹⁸

¹¹² Id. at 607 n.17 (citations omitted).
¹¹³ See also Richmond, 448 U.S. at 578, 581-82 n.18 (1980)(limitations on public access to a trial evaluated as time, place and manner restriction) (dicta).
¹¹⁵ Three commentators who have assessed the access denial in Grenada have described the Supreme Court's right of access approach only in terms of its strict scrutiny component, disregarding the alternative time, place and manner track. See Note, supra note 23, at 397-402; Comment, The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press a Right of Access to Wartime News?, 58 TEMP. L.Q. 873, 886-87, 890 (1985); Note, supra note 67, at 232-35.
¹¹⁶ See Globe, 457 U.S. at 607.
¹¹⁷ Id. at 608.
¹¹⁸ Id. Justice Brennan, however, expressly declined to consider the constitutionality of state statutes that granted such discretion to trial judges. See id. at 608 n.22.
Justice Brennan also found it "doubtful" that the other interest claimed by the state—the encouragement of minor victims of sex crimes to come forward and testify—was compelling, because such an interest could be used to support an array of mandatory closures designed to encourage various classes of crime victims to come forward.\textsuperscript{119} Moreover, the statute in question was not narrowly tailored to effect this interest. The state offered no empirical support for the claim that automatic closure would increase the number of minor victims coming forward to testify, and, given that the press was not denied access to the transcript, court personnel, or other sources of the victim's testimony, the statute was not effective in preventing the press from publicizing the victim's testimony or identity.\textsuperscript{120}

The right of access to criminal trials was extended to the \textit{voir dire} examination of prospective jurors in \textit{Press-Enterprise Co. v. Superior Court}.\textsuperscript{121} After tracking the \textit{Richmond-Globe} analysis and finding that \textit{voir dire} proceedings were presumptively open to the public,\textsuperscript{122} Chief Justice Burger, writing for the majority, applied strict scrutiny to the closure of the proceedings and found that the state had not successfully rebutted the presumption of openness.\textsuperscript{123} The Chief Justice's opinion rephrased the \textit{Globe} formulation of strict scrutiny in the following way:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.\textsuperscript{124}

The Chief Justice added that a successful rebuttal of the presumption also required the trial court "to consider whether alternatives were available" to protect the interests at stake.\textsuperscript{125} This consideration of alternatives contrasts with the more rigorous scrutiny that Justice Marshall deemed appropriate in his opinion concurring in the judgment: "[P]rior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests."\textsuperscript{126} Because the ma-

\begin{footnotes}
\textsuperscript{119} See id. at 609-10.
\textsuperscript{120} See id.
\textsuperscript{122} See id. at 505-10.
\textsuperscript{123} See id. at 510-11.
\textsuperscript{124} Id. at 510.
\textsuperscript{125} Id. at 511.
\textsuperscript{126} Id. at 520 (Marshall, J., concurring in judgment).
\end{footnotes}
iority was satisfied with mere "consideration of alternatives," one may infer that a trial court's choice of closure following consideration of several less restrictive alternatives would satisfy the Press-Enterprise test if closure was the most effective means of advancing state interests.

Chief Justice Burger's application of strict scrutiny proved fatal to the trial closure in Press-Enterprise. The Chief Justice conceded that protecting the sixth amendment right of an accused to a fair jury selection process constituted a compelling state interest, and that the privacy interests of a prospective juror might also, in some circumstances, be compelling. The lower court, however, had made no findings that showed how an open proceeding threatened those interests and had failed to consider alternatives to closure. The Chief Justice spelled out in considerable detail the alternative measures that could have been taken to protect any privacy interests at stake.

The Supreme Court's application of the strict scrutiny track of access denial analysis, while exacting, is highly fact-intensive, providing the flexible framework that national security issues demand but that the Near exception fails to provide. Even more flexible is the time, place and manner standard that Globe held applicable to government access denials aimed at something other than communicative impact. While the Supreme Court has never confronted a press exclusion that was kindred to a time, place and manner regulation, a brief examination of several leading decisions in non-press contexts illustrates the highly fact-intensive nature of this track.

Chief Justice Hughes's opinion for the Court in Cox v. New Hampshire laid the foundation for the time, place and manner track of first amendment analysis. In upholding a state statute that prohibited a "parade or procession" on a public street without a special license, as applied to a Jehovah's Witnesses group, the Chief Justice noted, "Civil liberties ... imply the existence of an organized society maintaining public order without which liberty itself would be lost in

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127 Id. at 511.
128 See id. at 510.
129 See id. at 511.
130 See id. at 510-11.
131 See id. at 512-13.
132 For other examples of the strict scrutiny track, see Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) (restricting candidates' access to the voters requires a compelling state interest); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-03 (1979) (finding that the state can punish publication of lawfully obtained information only if necessary "to further a state interest of the highest order"); NAACP v. Button, 371 U.S. 415, 438 (1963) (stating that "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms").
133 312 U.S. 569 (1941).
the excesses of unrestrained abuses.\textsuperscript{134} Management of the use of streets for parades and processions was the type of "time, place and manner"\textsuperscript{135} regulation traditionally exercised by local government to "conserve the public convenience."\textsuperscript{136} Such authority did not violate first amendment rights provided that it was exercised "without unfair discrimination"\textsuperscript{137}—that is, provided that the regulation in question was not aimed at the communicative impact of the marchers' procession.

In \textit{Cox v. Louisiana},\textsuperscript{138} which involved a demonstration that took place outside a courthouse, the Court held invalid the conviction of the demonstration's leader under statutes that prohibited the obstruction of public passages and breach of the peace. The Court applied time, place and manner analysis to the public passages conviction, finding the statute in question invalid because of a course of discriminatory application by the local authorities, who had acted with "completely uncontrolled discretion" in their administration of the statute over time.\textsuperscript{139} Thus, the Court found that the limits on government authority described in the time, place and manner analysis of \textit{Cox v. New Hampshire} had been transcended.

In \textit{Grayned v. Rockford},\textsuperscript{140} Justice Marshall's opinion for the majority offered a different formulation of time, place and manner analysis from that articulated in \textit{Cox v. New Hampshire} and \textit{Cox v. Louisiana}. Sustaining an ordinance that barred demonstrations near schools, Justice Marshall found the crucial inquiry to be "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."\textsuperscript{141} The Court held that regulations affecting conduct that involved communication "must be narrowly tailored to effect the state's legitimate interest."\textsuperscript{142} Despite these linguistic variations, the \textit{Grayned} standard is not substantively different from that of \textit{Cox v. New Hampshire} and \textit{Cox v. Louisiana}. Justice Marshall's requirement that the statute be narrowly tailored to its purpose is an apparent clarification of the earlier cases' prohibitions against unfairly discriminatory regulations; an overly broad statute invites discriminatory application.

\textsuperscript{134} Id. at 574.
\textsuperscript{135} Id. at 575.
\textsuperscript{136} Id. at 576.
\textsuperscript{137} Id.
\textsuperscript{138} 379 U.S. 536 (1965).
\textsuperscript{139} Id. at 555-57.
\textsuperscript{140} 408 U.S. 104 (1972).
\textsuperscript{141} Id. at 116-17.
\textsuperscript{142} Id.
The most recent formulation of the time, place and manner standard was articulated in *Schad v. Mount Ephraim*. In *Schad*, the Supreme Court held that a municipal zoning ordinance that prohibited the exhibition of topless dancing was not a valid time, place and manner restriction. Justice White, writing for the majority, stated, "To be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication."

C. *Does the Press Have a Right of Access to the Battlefield?*

In assessing the constitutional validity of the press exclusion in Grenada, one must begin by asking if the first amendment provides any right of press access to the battlefield. It has already been submitted that the *Richmond* and *Globe* decisions offer a specific way to pose this question: In light of historical experience, does the press have an important civic role to play in covering military operations first-hand? Applying *Richmond* and *Globe* in this fashion, however, raises a problem. Each of these decisions involved exclusion of the general public from the courtroom. In neither case did the Supreme Court intimate that the news media possessed any special right of access distinct from the rights possessed by the public at large. In fact, the Court on several occasions has rejected an interpretation of the first amendment that would grant the press such a special status. Because no serious argument can be made that the general public has a right to attend military operations, can *Richmond* and *Globe* be applied to grant a special right of battlefield access to the news media alone?

A negative answer to this question would impose severe limitations on first amendment freedoms in the area of foreign affairs. The discus-

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144 Id. at 75-76; see also Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 535 (1980) (recognizing “the validity of reasonable time, place or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication”).
145 See, e.g., *Houchins*, 438 U.S. at 11 (holding that the news media have no constitutional right of access to the county jail over and above that of other persons); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 797-802 (1977) (Burger, C.J., concurring) (concluding that there is no difference between the first amendment rights of the press and the first amendment rights of every other citizen); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834 (1974) (both holding that the press has no constitutional right of access to prisons or inmates beyond that available to the general public); Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (noting that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally”).
146 For a negative answer to this question, see Note, *supra* note 67, at 228.
sion of foreign affairs, a subject of vital public concern, is an example of the type of speech that the first amendment values most highly.\textsuperscript{147} Because the Executive Branch, acting to protect national security, has extensive authority to regulate the ability of United States citizens to travel abroad,\textsuperscript{148} a general rule placing the news media and the general public on the same footing in all right of access cases would substantially erode the ability of the public to obtain information needed for the informed discussion of foreign affairs.\textsuperscript{149} Accordingly, before mechanically limiting the \textit{Richmond-Globe} "civic role" test to cases where an asserted right of general public access is at stake, one should draw a practical contrast between the courtroom situation, where opening the forum to the public is generally as feasible as opening the forum to the press, and the battlefield setting, where opening the forum to the public is never feasible but opening it to the press often is. Consideration of these practicalities and the first amendment values at issue justifies applying the "civic role" test to determine whether a special right of press access to the battlefield exists based on historical experience.

The historical record of the press in covering military operations is extensive and well documented.\textsuperscript{150} The general trend has been for the government to permit access to the battlefield whilesubjecting news dispatches to some form of censorship. The press has been present in every protracted United States military operation in the last century, providing first-hand coverage of battlefront action in the Civil War, Spanish-American War, World War I, World War II, Korea, Viet-

\textsuperscript{147} See New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (On public questions, there should be "uninhibited, robust, and wide-open" debate.).


\textsuperscript{149} The public's right to receive information and ideas would therefore be implicated. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 (1980); First Nat'l Bank of Boston, 435 U.S. at 783 (both asserting that the first amendment is meant, in part, to afford the public access to discussion, debate, and the dissemination of information and ideas); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (finding that the first amendment entitles the user of prescription drugs to receive information from pharmacists concerning the prices of such drugs); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (defending the public right of access to social, political, aesthetic, moral, and other ideas and experiences); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that "[i]t is now well established that the Constitution protects the right to receive information and ideas"); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating that the first amendment encompasses the rights to utter, to print, to distribute, and to receive as well as the freedoms of inquiry and thought).

Press Access to Military Operations

During World War II, reporters even landed with Allied troops on D-Day, an operation dependent on surprise.151 On occasion, however, the press has been excluded from the battlefield. During the Civil War, in early 1862, General Henry W. Halleck excluded the press from his zone of command, and General William T. Sherman also barred the press from certain areas. General Sherman based his decision on security considerations, viewing Northern newspapers as rich intelligence sources for the Confederate government.152 General John J. Pershing persuaded the War Department to exclude the press from his pacification campaign on Mindoro Island in the Philippines in 1901 and 1902.153 In more recent times, military operations that can be described as "commando raids"—quick, surprise attacks designed to achieve limited, discrete objectives—have routinely been conducted without the presence of reporters. In situations such as the attempted rescue of American hostages in Iran in 1980154 or the October 1985 interception of the Egyptair plane carrying the suspected planner and perpetrators of the Achille Lauro seajacking,155 logistical considerations prevented the press from accompanying the troops. In the Iranian rescue mission, for example, soldiers and equipment occupied all the available space in the transport helicopters.156 In addition to logistical factors, the essential role of secrecy and surprise in such missions probably plays a large part in the decision to exclude the media. As the degree of secrecy becomes greater and the operation approaches "covert" status (which, by definition, entails total press exclusion), the importance of surprise increases. The absence of reporters from the theoretically covert (but in reality overt) Bay of Pigs operation157 demonstrates the great exclusionary powers attendant upon such operations.

While media access to military operations has been the general rule, battlefield dispatches have frequently been censored both by commanders at the front and their superiors in Washington.158 At times, such censorship has placed a heavier burden on the press than a short-

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151 See Note, supra note 23, at 380-82 & n.90.
152 See Gottschalk, supra note 150, at 43.
153 See id. at 37.
154 See Middleton, supra note 8, at 36.
157 See Note, supra note 23, at 402.
159 See Note, supra note 23, at 372-80; Middleton, supra note 8, at 61. See generally Gottschalk, supra note 150 (recounting the historical role of censorship in the relationship between the military and the press in the United States).
term access denial would. During World War II, General Dwight D. Eisenhower imposed a six-week political censorship on reporting from the North African front in order to facilitate negotiations between rival French generals Charles DeGaulle and Henri Giraud.\(^{160}\) And in the Pacific theater, General Douglas A. MacArthur's restrictive news media policy operated in tandem with the Navy's policy of delaying bad news and then releasing it in conjunction with stories of combat success.\(^{161}\) Included among such incidents of media manipulation was a two-month delay of news of the American naval defeat off Savo Island.\(^{162}\) While such examples of censorship are not identical to access denials, they constitute important elements of the historical record by which the press's civic role on the battlefield is to be assessed for first amendment purposes.

Does historical experience indicate that the press performs a salutary civic function in covering military operations, "enhanc[ing] the integrity and quality of what takes place"\(^{163}\) there, thus making the battlefield presumptively open to the media? Three alternative conceptions of the press's role in the military context emerge from the historical record. First, there is the view of the press as harmful adversary. This view casts the press as a distinct social group with values opposed to those of the military and policy views entailing consistent opposition to the deployment of United States military forces abroad. General Sherman's complaints about Civil War correspondents "picking up dropped expressions, inciting jealousy and discontent and doing infinite mischief"\(^{164}\) may have manifested such an outlook. The view of the press as harmful adversary is expressed by many of today's generals and admirals, who were the majors and commanders in Vietnam. These officers believe that biased and inaccurate media coverage was responsible for the public's growing hostility toward the war; the press's mischaracterization of the Tet Offensive as a victory for the Viet Cong is cited as the most vivid example of such reporting.\(^{165}\) The view of the

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\(^{160}\) See Gottschalk, \textit{supra} note 150 at 42-43.

\(^{161}\) See id. at 40.

\(^{162}\) See id. Censorship was milder in the Vietnam war; to obtain credentials from United States military authorities, reporters had to sign a pledge not to disclose in advance troop movements, exact casualty totals, and certain aspects of military operations. See \textit{N.Y. Times}, Oct. 27, 1983, at A23, col. 4.

\(^{163}\) \textit{Richmond}, 448 U.S. at 578.

\(^{164}\) Middleton, \textit{supra} note 8, at 37.

\(^{165}\) See id. at 37, 61, 69. President Reagan has lent his support to this view, stating that in Vietnam, the press was not on "our side, militarily." \textit{Id.} at 37. A similar outlook is reflected in Secretary of State George Shultz's comparison of reporters of the World War II era, who "on the whole were on our side," with today's reporters, who seemingly "are always against us and so they're always seeking to report something that's going to screw things up." Wash. Post, Dec. 16, 1983, at A10, col. 1. Secretary
press as harmful adversary finds support in sociological observations as well: one commentator has contended that in the 1960's, journalism began to attract "the young and the college graduate who had learned their radicalism at the knees of the great radicals of the decade," leading to "the appearance of journalists shaped by the very same adversary culture they set out to cover."\(^{166}\) This view of the press's historical role in covering military operations portrays the media's presence on the battlefield as unhealthy and thus would not deem the battlefield presumptively open to reporters.

The second conception of the media's historical role in covering military operations may be labelled "the press as mythmaker." This reading of the record stands in direct opposition to the view of the press as harmful adversary. It holds that military correspondents have, either consciously or unwittingly, frequently served as the tool of particular military figures or as a government policy instrument. Examples of the press acting as mythmaker include Lieutenant Colonel Theodore Roosevelt's use of reporters to project an image of himself as hero of the Spanish-American War\(^{167}\) and General MacArthur's exploitation of reporters for similar "image building" in World War II.\(^{168}\) The benign reporting of a press that is said to have been "on our side" during World War II also supports the view of the press as mythmaker.\(^{169}\) A permutation of the mythmaker view has been advanced by one student of government and the news media, who has commented that government efforts to control the press by means of censorship and regulation have been replaced by a more subtle phenomenon called "news management."\(^{170}\) Reporters, he contends, "often fall prey to the more insidious temptations of becoming insiders, of having influence. The routines and conventions of their work incline them to accept the words of officials without probing beneath them on their own."\(^{171}\)

Shultz hastened to add that he believed that a free press was vital to our society. See id. Comment, The Burger Court and Freedom of the Press: The Abuse of Liberty by the Press, 7 OHIO N.U.L. REV. 1005, 1023-24 (1980). The Twentieth Century Fund, a research foundation in New York, has concluded that the military and the media each tend "to attract different personality types and to foster different sets of values." While "military people are schooled to respect tradition, authority and leadership," journalists tend to be "more freewheeling, irreverent and skeptical of authority" because their profession occasionally demands that they challenge "official wisdom." N.Y. Times, Jan. 29, 1986, at A20, col. 3.

\(^{166}\) See Middleton, supra note 8, at 37, 61.


\(^{168}\) See id. at 304-33.


\(^{170}\) Id. at 195; see also Wash. Post, Oct. 4, 1986, at A1, col. 1; N.Y. Times, Oct. 3, 1986, at A1, col. 1 (all discussing the Reagan Administration's alleged attempt to
role or some variation thereof is the one that military correspondents have historically played, no presumptive right of access emerges; rather, the press's battlefield presence exists at the pleasure of the military leaders and government whose ends the reporters serve.

The third conception of the media's presence at military operations is that of the press as watchdog, serving as the eyes and ears of the public and thereby performing a vital function in a democratic society. One exponent of this view contends that the press's presence on the battlefield

improves the performance of the military itself and facilitates a more responsive and democratic civilian government. Faced with the watchful eye of the public, the leaders of military operations would be directly accountable to the public for the quality of their decisions. The public, in turn, would be better able to make their own judgments about the actions of their leaders . . . .172

This model casts the press as the voice of healthy skepticism, wary of government efforts to deceive, but not purveyors of a particular political agenda, antiwar or otherwise. Media coverage of the Vietnam war, according to this view, enabled an informed public to demand that its leaders withdraw United States troops.173 While many a commander would be likely to express serious doubt about the press's ability to enhance the quality of his troops' combat performance,174 the media's function as the link between soldiers and citizens may enable the public to decide whether the means and ends of a military operation are compatible with American values. In this broad sense, one might argue, the press does enhance the integrity and quality of what takes place on the battlefield, and thus is entitled to a presumptive right of access.

Each of these three conceptions of the media's role in covering military operations finds support in the historical record, and choosing any one of them as the most accurate portrait would constitute an oversimplification based on a selective reading of history. Probably the clearest conclusion that can be reached is this: The baldest version of the conception of the press as mythmaker, serving as the tool of commanders

undermine the regime of Libyan leader Mohamar Qaddafi by planting false information in the American press); L.A. Times, Oct. 3, 1986, § 1, at 6, col. 2.

172 Note, supra note 23, at 399.


and politicians, is no longer valid, but the more subtle notion of "news management" still gives pause. Some elements of the press undoubtedly do pursue political agendas, with antimilitary values frequently motivating antiwar slants in coverage. But many military correspondents—including some of those who fall prey to news management and those whose reporting is biased—provide the public with vital information that serves as the raw material that a free society uses to build opinions and ideologies. The notion of the press as watchdog is best viewed as a model, an aspirational norm that good journalists sometimes achieve. It is submitted here that such success is achieved often enough for the battlefield to be deemed presumptively open to the media. For all its flaws, the press's military coverage remains the only nongovernmental source of information about armed conflict involving United States troops. To acknowledge that the press sometimes fails in its mission as watchdog does not erase the vital role it performs when it succeeds. Without lionizing the press, and without operating with a historical record as pure as that surrounding the press's presence at criminal trials, the observer of the military correspondent still finds that the press performs a salutary civic function, triggering a presumptive right of press access to the battlefield.

D. The Access Denial in Grenada: Was the Presumption Rebutted?

How does the press exclusion in Grenada fare under the right of access approach? To determine whether the reasons given by the government to justify the access denial would successfully rebut the presumption of an open battlefield in court, the first question to be asked is whether the exclusion was aimed at communicative impact, which would trigger strict scrutiny, or noncommunicative impact, which would trigger the time, place and manner standard. The President and top Defense Department officials set forth three government interests in their efforts to justify the two-day exclusion: the need to achieve military surprise; the need to permit the invasion force to concentrate on military objectives without the distraction or physical obstruction that would be caused by a press presence; and the need to assure that troops not be occupied with protecting the safety of reporters. The decision

175 See supra note 173.
176 See N.Y. Times, Oct. 27, 1983, at A1, col. 6, A23, col. 4; N.Y. Times, Oct. 26, 1983, at A23, col. 1. Other formulations of the asserted governmental interests can be gleaned from press accounts. For example, Deputy Secretary of State Kenneth Dam stated that reporters were excluded "for the safety of the people on the island, the Americans on the island, and of the military forces." N.Y. Times, Oct. 31, 1983, at
was said to have been made by the invasion task force commander, with the White House and the Secretary of Defense declining to overrule him.  

The three government interests asserted indicate that the access denial in Grenada was aimed at both the communicative and noncommunicative impact that battlefield coverage was perceived as threatening. The fear that first-hand coverage would compromise the operation's need for surprise evinces a purpose "to inhibit the disclosure of sensitive information," triggering strict scrutiny. By contrast, the logistical concerns about a press presence distracting and obstructing United States troops and the additional logistical concern about the safety of reporters focus on problems purportedly posed by the physical presence of journalists, not on what the journalists would report. These purposes trigger a time, place, and manner analysis. Each level of scrutiny must accordingly be applied to each class of government interests advanced.

1. Military Surprise: Strict Scrutiny

The Supreme Court has stated that "no governmental interest is more compelling than the security of the Nation."  

A12, col. 1. One knowledgeable observer found that "[c]onstraints of time and the need for tactical surprise made press participation in the initial launch unwieldy and unwise." Catto, Dateline Grenada: The Media and the Military Go at It, Wash. Post, Oct. 30, 1983, at C7, col. 3. One senior Defense Department official is reported to have quipped that the invasion was a commando-type operation that did not lend itself to "the tender loving care and feeding of the press." N.Y. Times, Oct. 27, 1983, at A1, col. 6, A23, col. 4. These comments are essentially restatements of the three governmental interests already described.

About seven weeks after the invasion, Secretary of State George Shultz was interviewed on the subject of the press exclusion and created some controversy when he stated that the press is "always seeking to report something that's going to screw things up" and that "when you're trying to conduct a military operation you don't need that." Wash. Post, Dec. 16, 1983, at A10, col. 1. The White House disavowed Shultz's statement, see id., and thus it is not treated here as evincing one of the governmental interests officially asserted by the Administration.


178 Globe, 457 U.S. at 606.

179 Haig v. Agee, 453 U.S. 280, 307 (1981); see also Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) ("That Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable," although Congress may not exercise such power in a way that unduly infringes other constitutionally protected freedoms.). Compare decisions recognizing the military's "special constitutional function": Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) (overruling a district court's injunctive intervention in a court-martial proceeding on due process grounds and noting that "[t]he military is 'a specialized society separate from civilian society' with 'laws and traditions of its own [developed] during its long history'") (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)); Schlesinger v. Ballard, 419 U.S. 498, 508
judicial deference granted the Executive Branch on matters of foreign and defense policy. Accordingly, if secrecy and surprise were essential to the Grenada invasion, they too attain the level of a compelling interest. The first step in the strict scrutiny inquiry therefore is to ascertain the importance that secrecy and surprise played in the planning and execution of the invasion.

Extremely tight secrecy surrounded the October 25 landing on the island, indicating that surprise played a critical role in the operation's planning. On the afternoon of October 24, CBS White House correspondent Bill Plante approached the White House Press Office with a rumor that an invasion was to take place the next morning. White House Press Officer Larry Speakes told Plante that this was "preposterous." In the final hours preceding the invasion, Pentagon officials released misleading and contradictory information about the disposition of some of the Navy ships carrying the Marine landing team. One reporter asked a Pentagon spokesman about the whereabouts of a Marine task force that was destined for Lebanon but had already been diverted toward Grenada. "They are afloat in the Atlantic and headed for the Mediterranean," the spokesman replied. These same marines

(1975) (upholding military rule subjecting male and female naval line officers to differing treatment); Parker v. Levy, 417 U.S. 733, 758 (1974) (rejecting constitutional challenge to the Uniform Code of Military Justice on first and fifth amendment grounds and noting that the "fundamental necessity for obedience [in the military] . . . may render permissible within the military that which would be constitutionally impermissible outside it").

See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 669-74 (1981) (upholding the President's power, via executive order and regulation, to nullify attachment and liens on Iranian assets in the United States); Haig, 453 U.S. at 289, n.17 (dictum) (referring to presidential power in the field of international relations as "delicate, plenary and exclusive," yet a power which "must be exercised in subordination to the applicable provisions of the Constitution") (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936)); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (noting "the exclusive competence" of the executive branch in the field of foreign affairs); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (stating that the "President [is] the sole organ of the federal government in the field of international relations").

Thus, no factual inquiry should be made as to whether the invasion's most frequently asserted purposes— securing the safety of Americans on the island and helping the Organization of Eastern Caribbean States restore law and order and responsive governmental institutions to Grenada, see N.Y. Times, Oct. 28, 1983, at A10, col. 5; N.Y. Times, Oct. 26, 1983, at A1, col. 6, at A18, col. 1—were the actual purposes or whether they were compelling.


landed in Grenada just hours later. Not until 9 p.m. on October 25, more than fifteen hours after the landing, did the Pentagon issue its first combat communique, which stated, among other things, that "[c]onsideration for the operational security of the mission prevents release of detailed plans, objectives and the total for U.S. personnel ashore."186

The three opening landings themselves stressed surprise. The first United States forces to enter Grenada were a small group of Navy Seals, an elite force trained in special surprise seaborne operations. The Seals slipped ashore under cover of darkness and, after a brief firefight, seized control of the Governor-General's mansion in St. George's, Grenada's capital.186 Next came the two main strikes in the assault, consisting of Marines and Army Rangers, also units specially trained for surprise raids.187 The Marines arrived at 5:36 a.m. aboard troop helicopters and landed at Pearls Airport in the northeastern section of the island. The Rangers landed thirty-six minutes later at the airport under construction at Point Salines located on the island's southern tip.188 Some of the Rangers parachuted in, making the first combat jump by United States airborne troops since the Vietnam War, when such jumps were a sparingly used tactic.189 The Marines declared Pearls Airport secure within two hours; the Rangers, after overcoming heavy anti-aircraft fire, secured the Point Salines airstrip by 7:15 a.m.190 At least one senior Defense Department official reportedly described these landings as constituting a "commando-type operation,"191 and one commentator compared the assault to the rescue mission conducted by Israel in its famous raid on Entebbe.192

Given the role that secrecy and surprise played in planning and executing the landings, the achievement of military surprise on day one of the invasion must be deemed a compelling governmental interest.193 More troublesome, however, are the issues of whether the access denial was narrowly tailored to advance this interest, whether the government

188 See Magnuson, supra note 186, at 22.
190 See Magnuson, supra note 186, at 23.
192 See Catto, supra note 176.
193 The decisions mandating great judicial deference in the area of foreign affairs, see supra note 180, would bar any judicial inquiry into whether the invasion could have been conducted just as successfully without surprise. Whether surprise could have been attained without the access denial, however, is a separate issue directly implicating first amendment rights, and thus a subject for judicial scrutiny.
had considered alternative measures, and whether the interest in surprise remained compelling when the access denial was extended to a second day.

One might argue that the exclusion of reporters from Grenada did not effectively advance the government's interest in surprise for the simple reason that signs of an impending invasion were actually available to the Grenadian and Cuban forces on the days preceding the landing. On October 23, government radio broadcasts in Grenada took note of threatening movements by neighboring Caribbean states, warned that "[a]n invasion of our country is expected tonight," and called for all militia units to report for immediate duty. On the next day, when approximately fifty Marines arrived in Barbados in a naval transport plane, a spokesperson at the United States Embassy there responded to inquiries by stating that the Marines "could be used as part of one of the options to effect the departure of Americans waiting on Grenada and to insure their safety." Admiral Wesley L. McDonald, commander of United States forces in the Atlantic region, said, on October 28, that the Cuban forces in Grenada had known that "U.S. intervention was likely" and had prepared for it.

Despite such warnings of and preparations for attack, the access denial was an effective means of achieving military surprise. The Grenadian radio's prediction that an invasion would occur on the night of October 23, one and one-half days before the actual strike, illustrates the imperfect character of the information available to them. Because many American officials had denied any plans to invade, the Grenadian government was confronted with contradictory and confusing information about what was to take place. While intervention may have been considered likely, the nature, scope, and timing of that intervention was probably not known. Moreover, when the landing occurred, the Cuban and Grenadian forces could not have been certain of such important details as the size and composition of the landing forces and of the

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201 One might add that groundless announcements of impending invasions accompanied by calls for mobilization are made regularly by nervous rulers in Nicaragua. See L.A. Times, July 5, 1985, § I, at 14, col. 1. Thus, the Grenadian broadcast may not have been based on any hard evidence or on a sincere fear of imminent attack.
202 In the parlance of defense planning, the Grenadian government was confronted with the difficult task of discerning "signals" of an impending United States attack against a background of "noise," i.e., useless information that camouflages relevant data. See R. Wohlstetter, PEARL HARBOR: WARNING AND DECISION 3 (1962); see also R. Betts, SURPRISE ATTACK: LESSONS FOR DEFENSE PLANNING 92-95 (1982) (discussing the difficulties in intercepting and interpreting information for purposes of detecting attacks).
reinforcements waiting offshore.

Had reporters accompanied the Marines and Rangers in the hours preceding the invasion and landed in Grenada with them, a risk would have existed that valuable information that had been unavailable to the Grenadian government would have become available to them in some manner, either via a message sent to a reporter's home office or by contact between reporters and the defending troops. Such a result emerges most plausibly when one considers the contemporary role of television and radio as instruments of instant news dissemination. Because the Grenadian government had expelled virtually all Western reporters from the island one week before the invasion, the United States decision to exclude the press was a highly effective way of barring coverage of the operation.

Once it is determined that the press exclusion effectively advanced the government's interest in secrecy and surprise, the remaining question is whether alternative measures of achieving that interest were considered. Unfortunately, there is no public record of the contents of the deliberations that preceded the exclusion decision at either the military or political levels. At this juncture, however, it should be recalled that the Supreme Court's opinion in Press-Enterprise Co. v. Superior Court mandates mere consideration of alternative measures, not that the choice made constitute the least restrictive alternative available. Given the time constraints facing national security planners in an atmosphere such as that preceding the Grenada operation, it would not be reasonable to expect that the time devoted to the consideration of alternatives be extensive. Thus, the government would probably have little difficulty in fulfilling the requirement of consideration of alternatives.

One alternative to the access denial that might have been considered would have entailed permitting reporters to land with the troops while censoring and/or delaying their dispatches. Howard Simons, former Managing Editor of the Washington Post, has stated his willingness to accept such a measure. But policing such an arrangement in the fast-paced atmosphere of a military operation's early stages could prove problematic; the unscrupulous correspondent might still find a

199 See Note, supra note 67, at 232.
202 See id. at 511.
203 See Catto, supra note 176; Weinberger, Grenada Invasion Was a Military, Political Success, N.Y. Times, Sept. 30, 1986, at A34, col. 4 (letter to editor asserting that two and one-half days were available for planning the operation).
means of communicating with the home office or with defending forces. Another alternative envisions an arrangement whereby the Defense Department sequesters a pool of reporters in a military compound in the days preceding an operation, informs them of what is to happen, and assures them that they will go in with the first wave.\textsuperscript{205} While this system, which was supported by the Sidle Panel,\textsuperscript{206} would undoubtedly be useful in many situations, an operation that stresses surprise could still be imperiled once resourceful journalists are roaming free on the battlefront. Editors of major news organizations, including the Associated Press and the \textit{Washington Post}, have conceded that they could not promise in advance not to publish what their reporters learn about military plans and that they would forego publication only if they were convinced that self-censorship was vital to national security.\textsuperscript{207} If the government could show that alternatives such as these had been considered and rejected prior to the decision to exclude, the access denial on day one of the invasion would survive strict scrutiny.

At a certain point, however, the Grenada invasion was transformed from a commando operation to a conventional military engagement, with the initial importance of surprise disappearing. While a precise dividing line is difficult to draw, it appears that the continuation of the access denial to day two of the operation was not justified by the government's interest in secrecy and surprise. Indeed, the military apparently abandoned the surprise rationale on the second day of the operation, relying instead on logistical concerns to justify the continued exclusion.\textsuperscript{208}

2. Logistical Concerns: Time, Place, and Manner Analysis

The two central logistical concerns advanced by the government to justify the access denial were the need to permit the invasion force to concentrate on military objectives without the distraction or physical obstruction arising from a press presence and the impracticability of

\begin{itemize}
\item \textsuperscript{205} See Middleton, \textit{supra} note 8, at 69, 92; N.Y. Times, Jan. 29, 1984, at E20, col. 3.
\item \textsuperscript{206} See \textit{SIDLE REPORT, supra} note 7, at 5, 12.
\item \textsuperscript{207} See N.Y. Times, Jan. 29, 1984, at E20, col. 3; see also N.Y. Times, Feb. 19, 1983, at A5 col. 2 (reporting on ABC News' rejection of a White House request to delay for 24 hours a report on the deployment of AWAC surveillance planes and the carrier Nimitz in the eastern Mediterranean to counter what were regarded as aggressive moves by Libya).
\item \textsuperscript{208} See Catto, \textit{supra} note 176 (stating that the ostensible reason for continued exclusion was that "[r]eporters wandering loose would be a nuisance and a danger to those engaged in mopping up operations, and they might be taken hostage by desperate Cubans").
\end{itemize}
using any troops to protect reporters from personal danger. The argument about reporter safety is a weak one. Prior to Grenada, military conflicts were never considered too dangerous for the press to cover first-hand; members of the media have taken their chances on the battlefield numerous times\(^{209}\) and were prepared to do so again in Grenada without guarantees of government protection.\(^{210}\) A governmental interest in avoiding devoting troops to the protection of correspondents has never been asserted to justify excluding reporters from the battlefield; the acceptance of such an interest now would run counter to the historical record. Thus, the governmental interest here is not significant, or even legitimate.

More serious was the government's interest in avoiding any distraction or obstruction that a press presence on the battlefield might have caused. Critical to the evaluation of this interest is the characterization of the Grenada invasion as a commando raid. The Seals' seizure of the Governor-General's mansion with the Governor-General trapped inside amounted to a delicate rescue mission. In the subsequent assaults, the Rangers and Marines landed (some of the Rangers by parachute) under cover of darkness at two points on the island. The Rangers landed in the face of antiaircraft fire at Point Salines in the South, encountering armed Cuban "construction workers" at the airport being built there. The Marines landed in the northeastern area of the island, seizing Pearls Airport. The next targets secured were the True Blue campus of the St. George's University School of Medicine, with its American students, the power station, and the broadcasting station.\(^{211}\) The delicate nature of such quick seizures of discrete targets (one of which constituted a rescue operation) indicates that the government did have a significant interest in enabling the Rangers and Marines to fight without the physical inconveniences of a news media presence. The access denial was an effective measure for avoiding such problems, and the exclusion applied even-handedly to all members of the press. Alternative ways of covering the invasion existed by way of second-hand reporting from Barbados and Washington.\(^{212}\) Thus, the distraction and obstruction concern enables the day one access denial to survive time, place and manner scrutiny.

Like the government's interest in surprise, however, the logistical

\(^{209}\) See supra text accompanying notes 150-52.

\(^{210}\) Reporters covering the Vietnam War were required to sign waivers that released the government from any responsibility for their safety. See N.Y. Times, Oct. 28, 1983, at A26, col. 1 (editorial).


concern above is largely tied to the fluid, sensitive nature of a commando operation and does not persist when that operation becomes more orderly and conventional. While drawing a dividing line again is difficult, it appears that the government’s significant logistical interest did not, as a general matter, persist on day two of the invasion, because most major objectives were secured on day one. It is true that there were particular operations on day two from which the government’s exclusion of the press remained justified. In the early morning, the Marines fought their way to the Governor-General’s mansion and joined up with the Seals inside, and at 4 p.m. airborne units assaulted the troops surrounding the second, Grand Anse campus of the medical school. But the significant logistical concern that justified access denials from these rescue operations do not explain the exclusion of the press from the entire island on day two. The result reached after applying time, place and manner analysis to the government’s logistical concerns thus mirrors the outcome of applying strict scrutiny to the military surprise issue: the access denial was constitutional on day one of the invasion, but its continuation on day two impermissibly encroached on first amendment rights.

E. Near in Grenada

How would the government’s arguments for excluding the press from Grenada fare under the Near “troop movements” exception? The simplicity of the Near exception yields results quickly here. The military surprise rationale fits squarely within the four corners of Near’s tolerance of prior restraints designed to prevent the publication of the number and location of troops. It should be noted, however, that the Near exception apparently would always permit prior restraints that are designed to advance a governmental interest in military surprise—even if the military operation in question was not a commando-type action relying heavily on secrecy and surprise. A government could invoke the surprise argument in even the most conventional military operation to justify a prior restraint and be protected by Near. In contrast, the more fact-intensive strict scrutiny approach requires a showing that surprise is actually necessary to an operation, achieving the status of a compelling interest, before an access denial or censorship measure will be deemed constitutionally permissible.

The government’s interest in shielding troops from the distractions and obstructions of reporters and the purported interest regarding re-

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213 See Magnuson, supra note 186, at 25.
porter safety are simply not contemplated by the language of the Near exception. The Near Court's concerns were directed solely at prior restraints on the publication of material already gathered by reporters; the Court's silence on the distraction and obstruction issue and the safety issue is thus understandable. Time, place and manner analysis, as applied above, fills this void.

CONCLUSION

The Grenadian press exclusion gave rise to more rancor between government and the news media than any event since the Pentagon Papers controversy. Despite the recommendations of the Sidle Report, tensions persist, and future conflicts and recriminations may be inevitable. No judicial standard can serve as a panacea, but a court presented with a dispute as to the validity of a battlefield access denial should be able to set forth guidelines that will reduce the frequency and severity of such disputes. Such guidelines should be sensitive both to the press's important truth-seeking role and to contemporary national security realities.

Some may view a presumptive right of press access to battlefields as a startling notion. Military conflict, they may argue, presents a situation of crisis and chaos that is not paralleled in such presumptively open forums as the courtroom. The historical record of reporters in the battlezone, however, indicates that a limited analogy with the criminal trial is sound. Others may choose to accept this analogy and contend, in the spirit of Near, that the presumption of an open battlefield can be rebutted only by government interests in protecting the secrecy of information about the troops involved in the particular battle at issue. These analysts should confront the validity of their assumptions about the meaning of national security.

The Sidle Report characterized the "so-called First Amendment rights" implicated by battlefield press exclusions as a "gray area."214 The two track approach advanced here does not replace the gray with bright lines, but it does establish a right of access and define the scope of that right in familiar terms of first amendment analysis. The proposed framework would thus substantially reduce the uncertainty that currently prevails on the subject of press access to military operations.

214 SIDLE REPORT, supra note 7, at 1.