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Of Foreign Fevers, Shot, and Shell: Constitutional Rights of Media Access to the Battlefield after *Flynt v. Rumsfeld*

Thomas C. Terry, Ph.D.*

“And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”

– Associate Justice Hugo Black¹

ABSTRACT

Cresting the dune, the camouflaged Humvee crashed through the bracken-covered sandy top and plunged down the opposite side in a spray of sand and small stones and to the groan of suspension and the rattle of jerry cans. The sound of explosions echoed in the distance. The reporter in the “suicide seat” gripped the sweat-slickened handhold tighter against the careening of the vehicle. Her head joggled, and she snugged her satphone as the Humvee clawed for traction. The reporter undoubtedly felt she had a constitutional right to be there, slashing towards Baghdad. If called upon to justify her presence, she would have argued so. But did she? American media and military have sparred for decades over access to the battlefield since the Pentagon, feeling burned by the unrestricted access of the Vietnam War, experimented with pools and embedding. While reporters and news organizations frequently bridled at the restrictions, they sought no legal recourse until Hustler

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¹ N.Y. Times, Co. v. United States, 403 U.S. 713, 717 (1971).

*publisher Larry Flynt filed suit against the Department of Defense several times, eventually claiming a constitutional right of access to the scenes of American combat operations. This study examines the relevant case law and historical circumstances leading up to the Supreme Court's denial of certiorari of Flynt v. Rumsfeld in October 2004 and suggests whether any constitutional rights of access arguments remain.*²

"To every army and almost every general a newspaper reporter goes along . . . inciting jealousy and discontent, and doing infinite mischief."

– General William Tecumseh Sherman³

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² Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (Oct. 12, 2004) ("Rumsfeld III"). Since Larry Flynt is a principal in two cases before five courts discussed in this study, to avoid confusion they will be referred to by the other party's name with a Roman numeral to differentiate them: Flynt v. Rumsfeld, 180 F. Supp. 2d 174 (D.D.C. 2002) ("Rumsfeld I"); Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004) ("Rumsfeld II"); Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (Oct. 12, 2004) ("Rumsfeld III"); Flynt v. Weinberger, 588 F. Supp.2d 57 (D.D.C. 1984) ("Weinberger I") *vacated*, 762 F.2d 134 (D.C. Cir. 1985) ("Weinberger II").

³ PHILLIP KNIGHTLEY, THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND PROPAGANDIST FROM THE CRIMEA TO KOSOVO 28 (Prion Books Ltd., 2d ed. 2000).

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I. INTRODUCTION

After September 11, 2001 and with the prospect of warfare looming, *Hustler* publisher Larry Flynt struck preemptively against the Department of Defense. He first filed suit in the District of Columbia federal court in November 2001, claiming *historic* media access to the battlefield.⁴ He further contended the battlefield was a public fora and demanded that a *Hustler* reporter be embedded with troops in Afghanistan.⁵ He also charged that Directive 5122.5 (Enclosure 3), the Department of Defense document governing media access to combat operations, was an unconstitutional form of licensing.⁶ The federal District Court for the District of Columbia denied Flynt's motion for a preliminary injunction, claiming he had not presented sufficient rationale to justify injunctive relief, according to Judge Paul Friedman, writing the opinion of the court.⁷

Flynt would not be dissuaded. He filed an amended complaint with the District Court, adding a claim of a *constitutional* right of access. The District Court again rebuffed Flynt. Flynt appealed to the U.S. Court of Appeals for the D.C. Circuit, which in 2004 affirmed the lower court's ruling.⁸ Judge David Sentelle, writing the unanimous opinion, unequivocally rejected Flynt's constitutional demand to have a *Hustler* reporter embedded. "[W]e hold that there is no constitutionally based right for the media to embed with U.S. military forces in combat . . .," Judge Sentelle stated.⁹ Flynt subsequently appealed to the Supreme Court, which denied certiorari on October 12, 2004 in a terse one-line release, along with dozens of others.¹⁰ Judge Sentelle had been hostile to press access rights before, writing the unanimous decision in *Center for National Security Studies v. Department of Justice*.¹¹ That 2003 D.C. Circuit decision approved the constitutionality of the federal Freedom of

⁴ Rumsfeld I, 180 F. Supp. 2d 174.

⁵ *Id.*

⁶ *Id.*; Rudy DeLeon, Dep. Sec'y. of Def., U.S. Dep't. of Def. Directive 5122.5 (Enclosure 3), Sept. 27, 2000.

⁷ Rumsfeld I, F. Supp. 2d at 176.

⁸ Rumsfeld II, 355 F.3d at 706.

⁹ *Id.*

¹⁰ Rumsfeld III, 255 F.3d 697.

¹¹ See 331 F.3d 918 (D.C. Cir. 2003).

Information Act exemption that allowed withholding the names of suspects detained after September 11, 2001.

Though military operations have ceased in Iraq and are dramatically winding down in Afghanistan, American soldiers are still engaged in military operations in those countries. Additionally, several hundred advisers have been deployed back into Iraq to face the ISIS threat. Al Qaeda may be weakened after multiple assassinations of top leaders, but it is still potent. Concerns over nuclear proliferation in Iran and North Korea remain. A pugnacious Russia is flexing its geopolitical muscles in Eastern Europe and Central Asia. Syria is disintegrating, while Bahrain and Saudi Arabia may well be tinderboxes. ISIS is posing an increasing and perplexing challenge as well. The world remains a dangerous, dubious, and complicated arena, and the opportunity for further American military action is very real; in fact, inevitable. And taking Justice Black at his word in the opening quotation of this study, the need for independent observation of military operations by the media is as vital as ever. But over the past two decades, media access to United States combat forces has been erratic as the Pentagon toggled between delayed media access in Grenada, pool access in the first Gulf War, and embedding in the Iraq War. Will embedding, praised by many journalists, continue? If battlefield reverses occur or further behavior such as Abu Ghraib recurs, will access be suddenly withdrawn by an embarrassed, chastened, furious, or secretive government and military? American citizens, buffeted by revelations over widespread NSA email and cell phone intercepts, insurgency in post-war Iraq, and alleged torture at Guantanamo, turn to the media for explanation. These troublesome scenarios at first blush argue for an unambiguous Supreme Court decision resolving whether there is a constitutional right of the media to report from the sites of American combat.

II. A TRIO OF CASES

General William Tecumseh Sherman observed, "It's impossible to carry on a war with a free press."¹² Though it may be obvious what he *meant* by that comment, paradoxically, it can also be read two different ways—one involving a *military* battlefield and the other a *political* and *constitutional* battlefield. If Sherman were at the Pentagon today, he would have to coexist with the modern media.

There is a trio of crucial cases at various federal court levels that has sought establishment of a constitutional right of access to the battlefield:

¹² Peter Andrews, *The Media and the Military*, AMERICAN HERITAGE, July-Aug. 1991, at 80.

Flynt v. Weinberger at the District and Appellate Court levels,¹³ *Flynt v. Rumsfeld* at the District, Appellate,¹⁴ and Supreme Court levels, and *Nation Magazine v. United States Department of Defense*.¹⁵

Flynt v. Weinberger (“*Weinberger I*”) was filed by *Hustler* magazine publisher Larry Flynt during the United States invasion of Grenada in 1983, but dismissed the next year in a *per curiam* opinion by the Federal District Court for the District of Columbia.¹⁶ The federal district court in *Weinberger I* decided wars, such as the invasion of Grenada, were short in duration and unlikely to be repeated, despite substantial historical evidence to the contrary over the preceding half century.¹⁷ Flynt appealed to the Court of Appeals for the D.C. Circuit, which held the issue was moot because combat had ceased.¹⁸

Frustrated by their treatment during the 1983 Grenada campaign when they were kept offshore for two days, journalists lobbied for more access.¹⁹ In response, the Reagan administration set up a commission and adopted its recommendation to create press pools.²⁰ When the military had the chance to implement the pool system during the invasion of Panama in 1989, it was not activated until after the invasion had been underway for 24 hours.²¹ And when pool reporters did arrive in Panama, they were sequestered on a base, rather than given access to events as they unfolded.²²

Pool coverage was continued during the first Gulf War in 1991. *Nation* magazine, along with several others, notably *Harper’s* magazine and the *Village Voice*, were excluded from this pool system and brought suit during the military build-up phase of the first Gulf War but before the actual attack against Iraq began.²³ By the time the case was decided, the war was over, and it was dismissed because the legal issue was moot, regulations had been lifted, and a well-focused controversy was absent, according to the federal court for the Southern District of New York.²⁴

¹³ See *Weinberger I*, 588 F.Supp. 57 (D.D.C. 1984) *vacated by* *Weinberger II*, 762 F.2d 134 (D.C. Cir. 1985).

¹⁴ See *Rumsfeld I*, 180 F. Supp. 2d 174 (D.D.C. 2002); see also *Rumsfeld II*, 355 F.3d 697; *Rumsfeld III*, 355 F.3d 697, *cert denied*, 543 U.S. 925.

¹⁵ See 762 F.Supp. 1558 (S.D.N.Y. 1991).

¹⁶ *Weinberger I*, 588 F. Supp. 57.

¹⁷ *Id.* at 59.

¹⁸ *Weinberger II*, 762 F.2d 134, 136 (D.C. Cir. 1985).

¹⁹ Kevin A. Smith, *The Media at the Point of the Spear*, 102 MICH. L. REV. 1329, 1334 (2004).

²⁰ *Id.* at 1334

²¹ *Id.* at 1336.

²² *Id.*

²³ *Nation*, 762 F.Supp. at 1561.

²⁴ *Id.* at 1575.

However, most importantly, the federal district court in *Nation* pronounced that battlefields were a limited public fora and as such the media were entitled to a *conditional* right of access.²⁵

In preparation for war in Afghanistan and Iraq, the Pentagon adopted still another method for media coverage of U.S. military operations, abandoning press pools in favor of embedding as recommended by yet another advisory commission. Flynt initially asked to have a *Hustler* reporter accompany Special Forces in Afghanistan, but his request was rejected. While repulsing Flynt, Assistant Secretary of Defense Victoria Clarke restated the military's adherence to Department of Defense Directive 5122.5 (Enclosure 3) mandating "[o]pen and independent reporting [as] the principal means of coverage of U.S. military operations."²⁶ Despite that commitment, Clarke equivocated, noting pools might be a temporary expedient and that access to Special Forces operations could be restricted.²⁷ Rather than waiting to see whether a *Hustler* reporter would be embedded, Flynt filed suit in late 2001. *Rumsfeld III* worked its way unsuccessfully from the federal district court for the District of Columbia to the Court of Appeals for the D.C. Circuit, and then to the Supreme Court, which denied certiorari.²⁸

III. WHAT REMAINS

A. Courtroom Analogy

Flynt argued that access to the courtroom in *Richmond Newspapers* established the precedent that provided the media first with a historic and then a constitutional right to attend the battlefield to observe and report.²⁹ The possibility exists that the Supreme Court could find a pattern of historic access to the battlefield based on the precedent of First Amendment cases supporting the assertion of these rights. Non-combatants have been present at battlefields by accident, certainly, but also by choice on numerous occasions, often taking picnic lunches and making a battle into an outing, such as at Culloden in 1746 and First Bull Run in 1861. French cab drivers rushed troops to the front to blunt the German onslaught against Paris in 1914. Civilians ferried British,

²⁵ *Id.* at 1574 (citing *Heffron v. Int'l. Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981)).

²⁶ Appellants' Brief, *supra* note 4, at 4.

²⁷ *Rumsfeld I*, 180 F. Supp. 2d 174 (D.D.C. 2002).

²⁸ *Rumsfeld III*, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (Oct. 12, 2004).

²⁹ *Rumsfeld II*, 355 F.3d at 703-04 (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 556 (1980)).

French, and Belgian troops across the English Channel from Dunkirk in 1940.

In *Rumsfeld II*, Flynt further argued the value of the media in the proper functioning of American democracy, citing another Supreme Court case, *Mills v. Alabama*.³⁰ Justice Hugo Black, in the majority opinion in *Mills*, wrote that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials”³¹ Justice Black added that “suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”³² Moreover, writing in the Pentagon Papers case, Justice Black believed the “essential purpose and history of the First Amendment” argued for an unfettered media.³³ “The Government’s power to censor the press was abolished so the press would remain forever free to censure the Government,” Justice Black continued.³⁴ “The press was protected so it could bare the secrets of government and inform the people.”³⁵ Presumably, some means to acquire information is constitutionally implicit through the language of the First Amendment. Relying entirely on information coming in over the transom, as in the Pentagon Papers case, would seem to enfeeble rather than empower First Amendment liberties. Furthermore, “only a free and unrestrained press can effectively expose deception in government,” Justice Black stressed.³⁶

Four votes are necessary to grant certiorari, so at best at least six Justices did not see the constitutional point when they denied certiorari in *Rumsfeld III*. The core contention in all the battlefield access cases has been that the press has a First Amendment right to report independently at the scene of American combat operations. “I have no doubt that this question raises a potentially important issue of constitutional law,” Judge Harry T. Edwards of the Court of Appeals for the D.C. Circuit wrote in *Weinberger II*.³⁷ However, the Court of Appeals was able to disingenuously, albeit cleverly, skirt – and ignore – the matter because the issue of constitutional battlefield access was mentioned during oral

³⁰ *Rumsfeld III*, 355 F.3d 697, 703 (D.C. Cir. 2004).

³¹ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

³² *Id.*

³³ *N.Y. Times, Co. v. United States*, 403 U.S. 713, 717 (1971).

³⁴ *Id.*

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

³⁷ *Weinberger II*, 762 F.2d 134, 136 (D.C. Cir. 1985) (Edwards, H., concurring).

arguments but “not encompassed within the complaint before the district court.”³⁸

Federal District Judge Leonard Sand in *Nation* considered a media right of access to the battlefield as a legal novelty, but one that did implicate the First Amendment.³⁹ “[T]here is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the function of government, including, for example, an overt combat operation,” Judge Sand wrote.⁴⁰ Nevertheless, he shied away from the underlying constitutional issue. “In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access,” Judge Sand continued. It was something “courts should refrain from [doing when faced with] issues presented in a highly abstract form, bumping the burden to a higher power, especially in instances where the Supreme Court has not articulated guiding standards,” he added, kicking the decision upstairs to the high court.⁴¹ Judge Sentelle had no such qualms, writing the unanimous opinion of the Court of Appeals in *Rumsfeld II*. “There is nothing we have found in the Constitution, American history, or case law that requires the military to provide the media with access to combat,” he concluded unequivocally.⁴²

B. Special Privileges

Rights often percolate in the imaginations of political philosophers and legal scholars while gaining wider traction in academic and legal journals, before arising in the footnotes, dissents, and concurrences of court decisions. The right to privacy began with Milton, and then Warren and Brandeis, before entering the legal arena.⁴³ New rights emerge from the dim penumbras of the Constitution into the white-heat glare of Supreme Court precedent. And, actually, the Supreme Court *has* already extended special privileges to the press in the past, though most are couched within the speech clause. It provided access to the courtroom in *Richmond Newspapers* for the press as well as the public and accorded protection against harassment by the government in *Branzburg*.⁴⁴ In

³⁸ *Id.*

³⁹ *Nation Magazine v. U.S. Dep't of Def.*, 762 F.Supp. 1558 (S.D.N.Y. 1991).

⁴⁰ *Id.* at 1572.

⁴¹ *Id.*

⁴² *Rumsfeld III*, 355 F.3d 697, 703 (D.C. Cir. 2004).

⁴³ Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) and John Milton, *Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England*, 1644.

⁴⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, the Court prevented the use of taxation as a weapon, and in *New York Times v. Sullivan*, it extended substantial libel protections.⁴⁵ The Court struck down a Florida law requiring a right of reply by newspapers to political candidates in *Miami Herald v. Tornillo*.⁴⁶

In the Pentagon Papers case, the Court reiterated its stance against prior restraint with concurring and dissenting opinions supporting the extension of press access rights.⁴⁷ Somewhat at odds with his overall opinion in *Richmond Newspapers*, Chief Justice Warren Burger admitted journalists often enjoyed “special seating and priority of entry [in courtrooms] so that they may report what people in attendance have seen and heard.”⁴⁸ This seems to suggest at least some separate, albeit amorphous, press access right. Furthermore, Justice Black in his concurrence in the Pentagon Papers case tied the free press to coverage of warfare. “And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”⁴⁹ Justice Black argued “[national] ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁵⁰ He went even further, adding, “[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”⁵¹

C. Rights of Access

In *Zemel v. Rusk*, the Court supported the State Department’s refusal to issue a passport to a journalist wishing to travel to Cuba.⁵² Writing for the Court, Chief Justice Earl Warren stated, “the right to speak and publish does not carry with it the *unrestrained* right to gather information.”⁵³ This could be read to imply there is at least some *restrained* or limited media right of newsgathering, though the extent and location of that right are unclear, but lurking in the constitutional shadows. The majority opinion in *Branzburg* held the press has no rights

⁴⁵ *Minneapolis Star & Tribune Co. v. Minn. Comm’r. of Revenue*, 460 U.S. 575 (1983); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

⁴⁶ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

⁴⁷ *N.Y. Times, Co. v. United States*, 403 U.S. 713, 717 (1971).

⁴⁸ *Richmond Newspapers*, 448 U.S. at 573.

⁴⁹ *N.Y. Times, Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

⁵⁰ *Id.* at 719 (Black, J., concurring).

⁵¹ *Id.*

⁵² *Zemel v. Rusk*, 381 U.S. 1, 1 (1965).

⁵³ *Id.* at 17. (emphasis added).

separate from those enjoyed by members of the public. However, Justice Stewart in his dissent offered a different point of view and suggested, “[t]he free flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.”⁵⁴ Justice Stewart’s dissenting opinion stressed access to information is essential for citizens to make decisions regarding their governance. “Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised and a free press is thus indispensable to a free society [I]t also is an incontestable precondition of self-government.”⁵⁵ In *Sheppard v. Maxwell*, the Court observed that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”⁵⁶ That same scrutiny, arguably could be constitutionally and perhaps politically extended to other fora, including the battlefield.

D. Press Clause

Another argument centers on the existence of a separate press battlefield access right rooted in the Press Clause. The central argument in *Rumsfeld III* is not about the media satisfying its own curiosity but instead lies in the notion that the media’s secure access to the battlefield is necessary for the proper operation of the American democratic system.⁵⁷ Some Supreme Court justices set great store in this role. Justice William Brennan’s concurrence in *Richmond Newspapers* may be a stepping off point for a Press Clause battlefield access argument. “[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”⁵⁸ Justice Byron White added in the same case, “the First Amendment protects the public *and the press* from abridgment of their rights of access to information about the operation of their government.”⁵⁹ Justice White thought it either necessary or important to add “and the press,” suggesting he believed the public and the press were not identical constitutionally.

⁵⁴ *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting)..

⁵⁵ *Id.* at 726-27 (Stewart, J., dissenting).

⁵⁶ *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

⁵⁷ *See generally*: *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (Oct. 12, 2004) (“*Rumsfeld III*”).

⁵⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

⁵⁹ *Id.* at 584 (White, J., concurring) (emphasis added).

Justice Stewart explained in *Or of the Press* that all Americans are guaranteed free expression, but to him this was only part of the Framers' intention:⁶⁰ "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."⁶¹ "[T]he Founders quite clearly recognized the distinction between the two . . . [, and therefore,] deliberately created an internally competitive system."⁶² Justice Stewart cited Justice Louis Brandeis' dissenting opinion from *Myers v. United States* that stated the Founders designed the American system to take advantage of the "inevitable friction incident to the distribution of the governmental powers . . . to save the people from autocracy."⁶³ Does that same friction exist between the Speech and Press clauses? "By including both guarantees in the First Amendment," Justice Stewart added, "the Founders quite clearly recognized the distinction between the two."⁶⁴

Justice Stewart stated, "[t]he primary purpose of the constitutional guarantee of the free press was . . . to create a fourth institution outside the Government as an additional check on the three branches."⁶⁵ In fact, Justice Stewart explained that in the 12-year run-up to the drafting of the First Amendment, many state constitutions protected freedom of the press "while at the same time recognizing no general freedom of speech."⁶⁶ According to Justice Stewart, the First Amendment Press Clause mandates a checking function on government by the press and defines a structural value for the press in the proper operation of the American constitutional system.⁶⁷ In his view, its role is to be a watchdog on government activities and to inform citizens so they can make educated decisions for their own governance.⁶⁸ And what is the most formidable, obvious, and lethal activity America's government engages in? Battle. In *Branzburg*, Justice Stewart noted, "[w]e have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press."⁶⁹ What needs

⁶⁰ Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634, 636 (1975). This article was excerpted from a speech Justice Stewart gave on Nov. 2, 1974 at the sesquicentennial convocation of Yale Law School, New Haven, CT.

⁶¹ *Id.* at 633.

⁶² *Id.* at 634.

⁶³ *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 85 (1926) (Brandeis, J., dissenting)).

⁶⁴ Stewart, *supra* note 55., at 634.

⁶⁵ *Id.*

⁶⁶ *Id.* at 633-34.

⁶⁷ *See id.* at 631.

⁶⁸ *Id.* at 633.

⁶⁹ *Branzburg v. Hayes*, 408 U.S. 665, 726 n.1 (1972) (Stewart, J., dissenting).

more explaining than the brutal and deadly application of American foreign policy on the battlefield?

E. Surrogate Role

In *Saxbe*, Justice Lewis Powell claimed the media “in seeking out the news acts as an agent of the public at large” when it gathers news and that this, then, accords press representatives at least some level of increased access.⁷⁰ This press as a surrogate (or proxy) argument may well buttress a constitutional battlefield access decision. Justice Black was convinced the “essential purpose and history of the First Amendment” argued for an untrammelled press.⁷¹ “The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government,” Justice Black continued.⁷² Furthermore, “only a free and unrestrained press can effectively expose deception in government.”⁷³ Justice Powell elaborated, adding, “[b]y enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.”⁷⁴

Justice Stewart, concurring in *Houchins v. KQED*, felt the media have access rights as a stand-in on behalf of the general public.⁷⁵ Justice Stewart opined that “terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.”⁷⁶ Chief Justice Burger agreed journalists acted “as surrogates for the public.”⁷⁷ According to Justice Brennan’s majority opinion in *Time, Inc. v. Hill*, freedom of the press is “not for the benefit of the press so much as for the benefit of all of us.”⁷⁸ He indicated that reporters attend the scenes of disasters and wars, not to satisfy their own curiosity, but on behalf of their audiences and the public.

F. Licensing

Licensing the press is another argument that remains in the wake of the Supreme Court’s denial of certiorari. In his complaint brought in the

⁷⁰ *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

⁷¹ *N.Y. Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring).

⁷² *Id.* at 717.

⁷³ *Id.*

⁷⁴ *Saxbe*, 417 U.S. at 863.

⁷⁵ *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

⁷⁶ *Id.* at 17.

⁷⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

⁷⁸ *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

D.C. District Court, Flynt asserted that Enclosure 3 qualified as an unconstitutional licensing requirement because it required permission from the Department of Defense for exercise of First Amendment freedom of the press rights.⁷⁹ In *City of Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court held that “when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity” it can be challenged “without the necessity of first applying for, and being denied a license.”⁸⁰ Judge Friedman refused the government’s attempt to dismiss that portion of the complaint, considering it “not an uncontroversial extension” of previous Supreme Court’s holdings.⁸¹ Conspicuously, he ignored it in his final ruling. Judge Sentelle also rejected the licensing argument.⁸²

In his concurrence in *First National Bank of Boston v. Bellotti*, Chief Justice Burger saw licensing as an important constitutional question.⁸³ “The very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.”⁸⁴ In the majority decision in *Lakewood*, Justice Powell singled out “two major First Amendment risks” that might accrue if courts waited until there were concrete and identifiable harms generated by a denial of expressive rights. The first was “self-censorship by speakers in order to avoid being denied a license to speak” and the second was “the difficulty of effectively detecting, reviewing, and correcting content-based censorship” without some sort of identifiable standards.⁸⁵

G. Historic Openness

Another important question involves the historic openness argument on which Flynt pinned so much hope. This argument for Flynt rests on *Richmond Newspapers*, the 1980 Supreme Court decision establishing media access to the courtroom.⁸⁶ The pivot points are “unbroken” and “uncontradicted” access stretching back centuries, perhaps 1,000 years,

⁷⁹ Rumsfeld I, 180 F. Supp. 2d 174 (D.D.C. 2002)

⁸⁰ *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 755-56 (1988).

⁸¹ *Flynt v. LFP, Inc.*, 245 F. Supp. 2d 94, 108 (D.D.C. 2003) *aff’d on other grounds sub nom.* *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004).

⁸² *Rumsfeld II*, 355 F.3d 697, 703 (D.C. Cir. 2004).

⁸³ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 800-02 (1978) (Burger, J., concurring).

⁸⁴ *Id.* at 801.

⁸⁵ *Lakewood*, 486 U.S. at 759.

⁸⁶ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 556 (1980).

the standard the Court established in *Richmond Newspapers* for public attendance in courtrooms.⁸⁷ Not unexpectedly, the Court of Appeals and Flynt analyzed *Richmond Newspapers* differently. The Court of Appeals in *Rumsfeld II* thought it important this tradition was alive during the late 18th Century when America's "organic laws were adopted."⁸⁸ Flynt urged the court to extend this right to the battlefield.⁸⁹ Judge Sentelle countered that "press access to military units is not remotely as extensive as public access to criminal trials."⁹⁰ Furthermore, he considered that the Supreme Court ruling in *Houchins v. KQED* plainly established that the First Amendment does not "mandate[] a right of access to government information or sources of information within the government's control," in this case access to a county jail where an inmate had reportedly committed suicide.⁹¹ Only to the courtroom, given its long, historic tradition of openness in the United States and England, is the press given access and that access is no greater than access enjoyed by the general public, Judge Sentelle pointed out.⁹² This sort of limitation on the press seems absurd, considering how governmental powers have massively expanded access in so many other spheres. Had Judge Sentelle been in charge, if one were to extend his logic, the entire process of incorporating the First Amendment to cover the states would have been dismissed for failing to meet a millennial-long time standard.

It was in *Richmond Newspapers* that a First Amendment right of access first appeared, involving the closure of a trial of an adult by a judge after a series of mistrials.⁹³ Two years later in *Globe Newspaper Co. v. Superior Court*, the Supreme Court underlined its commitment to open trials, this time in a case involving a juvenile.⁹⁴ Writing for a divided Court in *Richmond Newspapers*, Chief Justice Burger called the media's right to courtroom access coextensive with that of the public, an analogy Flynt tried unsuccessfully to extend to the battlefield.⁹⁵ The

⁸⁷ *Id.*

⁸⁸ *Rumsfeld II*, 355 F.3d 697, 704 (D.C. Cir. 2004) (internal quotations omitted)..

⁸⁹ *Id.* at 704 (quoting and citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)).

⁹⁰ *Id.*

⁹¹ *Rumsfeld II*, 355 F.3d at 704 (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (Burger, C.J., plurality)); *cf. Saxbe v. Washington Post Co.*, 417 U.S. 843, 849-50 (1974) (holding the media had no First Amendment right to access federal prisons); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("Similarly, newsmen have no constitutional right of access to [state] prisons or their inmates beyond that afforded the general public.")

⁹² *Rumsfeld II*, 355 F.3d at 704.

⁹³ *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (Burger, C.J., plurality).

⁹⁴ *See Globe Newspaper Co. v. Sup. Ct. for Norfolk City*, 457 U.S. 596, 607-11 (1982).

⁹⁵ *Richmond Newspapers*, 448 U.S. at 575-77 (Burger, C.J., plurality).

Court in *Globe Newspaper* established a three-part test: that there was a tradition of openness, that it was a significant and traditional role in a government activity, and that a compelling government interest existed warranting narrowly fashioned limitations.⁹⁶ Justice Brennan considered the public's access to the courtroom "plays a particularly significant role in the functioning" of both the judicial system and the government in general, a standard battlefield access very likely could match.⁹⁷ But was there under this test historic openness to the battlefield for the press and could narrowly defined government controls be instituted to satisfy both media and military concerns? When they wish, Supreme Court Justices—or their law clerks—can ignore or discover what they wish in the broad corpus of precedent.

H. Presidential War Powers

Perhaps any final argument or justification for barring press access to the battlefield involves presidential war powers and judicial deference to the military and government when it comes to war and national security. The Department of Defense in *Nation* argued the president's war powers were involved in any claim of battlefield access.⁹⁸ Judge Sand disagreed in his decision, determining press pools did not affect the internal functioning of the military, and therefore, did not implicate the President's Commander-in-Chief powers.⁹⁹ The government did not raise the issue of presidential war powers in any of the *Rumsfeld* cases, though it seems a likely argument should another case advance to the Supreme Court. Justice Oliver Wendell Holmes' majority opinion in *Schenck v. United States* intrudes on any arguments for constitutional press battlefield access: "When a nation is at war many things that might be said in time[s] of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."¹⁰⁰ The Supreme Court in *Korematsu* upheld the constitutionality of the

⁹⁶ See *Globe Newspaper*, 457 U.S. at 607-11..

⁹⁷ *Id.* at 606.

⁹⁸ *Id.* at 1567 ("In this case, there is no challenge to this country's military establishment, its goals, directives or tactics. As such, the President's Article II powers as Commander-in-Chief are not implicated because resolution of the question does not impact upon the internal functioning and operation of the military.").

⁹⁹ *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1567 (S.D.N.Y. 1991) ("In this case, there is no challenge to this country's military establishment, its goals, directives or tactics. As such, the President's Article II powers as Commander-in-Chief are not implicated because resolution of the question does not impact upon the internal functioning and operation of the military.")

¹⁰⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

internment of Japanese-Americans on national security grounds while the country was still gripped by post-Pearl Harbor hysteria.¹⁰¹ In *Near v. Minnesota*, Chief Justice Hughes acknowledged a governmental right to “prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹⁰² Chief Justice Hughes emphasized this governmental power is not “unlimited” and “has been recognized only in exceptional cases.”¹⁰³ Is media access to the battlefield exceptional? If so, will it remain the standard?

Justice Douglas flatly declared, “The war power stems from a declaration of war . . . The Constitution by Art. I, s 8, gives Congress, not the President, power ‘(t)o declare War.’ Nowhere are presidential wars authorized.”¹⁰⁴ Concurring in the same case, Justice Stewart believed that given the “enormous power” of the executive branch in national defense and international relations, a free press was essential.¹⁰⁵

I. Other Arguments

In *Houchins*, the Court ruled there was no First Amendment right of access to a county jail.¹⁰⁶ The Court of Appeals for the D.C. Circuit repeated its conclusion from *J.B. Pictures, Inc. v. Dep’t. of Defense* that “freedom of speech, [and] of the press do not create any per se right of access to government . . . activities, simply because such access might lead to more thorough or better reporting.”¹⁰⁷ Pointedly, the court in *J.B. Pictures* mentioned both the speech and press clauses as separate. *J.B. Pictures* involved access to Dover Air Force base to photograph arrival ceremonies for the coffins of deceased service members in the wake of the first Gulf War.¹⁰⁸

Turning again to the prison access cases, the Supreme Court ruled unambiguously in *Pell*, “the First and Fourteenth Amendments bar government from interfering in any way with a free press.”¹⁰⁹ Justice Stewart, writing for the majority, blunted that sentiment, “[t]he

¹⁰¹ *Korematsu v. United States*, 323 U.S. 214, 217-20 (1944).

¹⁰² *Near v. Minn.*, 283 U.S. 697, 716 (1931).

¹⁰³ *Id.*

¹⁰⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J., concurring).

¹⁰⁵ *Id.* at 727-28 (Stewart, J., concurring).

¹⁰⁶ *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15-16 (1978) (Burger, C.J., plurality).

¹⁰⁷ *JB Pictures, Inc. v. Dep’t. of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996) (internal quotation marks omitted).

¹⁰⁸ *Id.* (Official arrival ceremonies were to be held nearer family members’ homes, even though the port of entry was at Dover. The Court of Appeals upheld the military’s plans to close the base for this purpose and the Supreme Court denied certiorari on appeal.)

¹⁰⁹ *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”¹¹⁰ Furthermore, the Court stressed a journalist certainly “[was] free to seek out sources of information not available to members of the general public” and had “*some* constitutional protection” for confidentiality of those sources, and was free from prior restraints against publication.¹¹¹ That prescription looks very similar to Judge Sentelle’s suggestion that reporters can have access to the battlefield if they can find a way there themselves, as will be discussed later. The Court drew a clear distinction between access to a newsworthy event and the freedom to receive information, a situation that it looks upon favorably.¹¹² The Court has scrupulously put *access* to information in an inferior position to its protection against prior restraint. Will it always do so? In the wake of Edward Snowden’s revelations of widespread governmental intrusions on personal liberties, has the political and public—and therefore judicial—landscape shifted?

IV. GLIMMERS OF NEW RIGHTS

An uncertain glimmer of hope was left by Judge Sentelle in his Court of Appeals for the D.C. Circuit decision in *Rumsfeld*, expanding a bit the Supreme Court’s decision in *Saxbe* and weakening somewhat his own decision. “The Government has no rule—at least so far as Flynt has made known to us—that prohibits the media from generally covering war,” Judge Sentelle explained.¹¹³ He added, “[a]lthough it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DoD rule.”¹¹⁴ Is a new right of access peering out at some Supreme Court Justice? That independent access, coupled with embedding, would seem to represent precisely what journalists clamor for: unrestricted access to the battlefield. However, there is no guarantee that embedding will continue to be the Pentagon’s policy or that once an independent reporter arrives at battlefield, he or she would be given any

¹¹⁰ *Id.*

¹¹¹ *Id.* (emphasis added). A constitutional basis for a federal shield law might begin with this decision. *See generally id.* 817.

¹¹² *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972). In *Kleindienst*, the Court denied an avowed Belgian communist’s appeal against a visa denial to attend an academic conference, while remarking approvingly of a general right to receive information. *See id.*

¹¹³ *Rumsfeld II*, 355 F.3d 697, 702 (D.C. Cir. 2004).

¹¹⁴ *Id.*

sort of accommodation or protection from the inevitable hazards of a combat zone. Given the history of access over the past two decades, these are not unreasonable worries. Only a Supreme Court decision will remove this uncertainty.

The federal district court in *Rumsfeld I* was “persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable [security concerns].”¹¹⁵ There are the rubs: What is reasonable and who decides? The Pentagon is allowed, constitutionally, as emphasized by the court in *Rumsfeld II*, to “impose reasonable limitations” when dealing with the media.¹¹⁶ Judge Sentelle stated, “[a]t no time has Flynt ever claimed that he, or *Hustler*, was treated differently under the [Department of Defense] Directive . . . Nor has he claimed that the Directive is some sort of sham that was not followed.”¹¹⁷ He added, “Even if there were some underlying constitutional right of media access to U.S. troops in battle, the Directive, and its application to appellants in this case, certainly would not have violated it.”¹¹⁸ The court said the Pentagon’s responses to Flynt’s various requests were handled expeditiously, and it found compelling the government’s position that there was inherent danger and unique circumstances involved in Special Forces combat that permitted curbs on media access.¹¹⁹ What about a “normal” combat environment?

A. New Rights

New rights have been discovered in the Constitution, and the existence of these rights is guaranteed by the Ninth Amendment, which states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹²⁰ Historian Bernard Bailyn, in a speech at the White House in 1998, observed that the Ninth Amendment is “a universe of rights, possessed by the people – latent rights, still to be evoked and enacted into law.”¹²¹ He termed it a “reservoir of other, unenumerated rights that the people

¹¹⁵ *Rumsfeld I*, 180 F. Supp. 2d 174, 175 (D.D.C. 2002)

¹¹⁶ *Rumsfeld II*, 355 F.3d at 705

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 705-06.

¹¹⁹ *Id.*

¹²⁰ U.S. CONST., amend. IX.

¹²¹ Bernard Bailyn, Remarks at a White House Millennium Meeting Evening, (Feb. 11, 1998), available at <http://clinton4.nara.gov/Initiatives/Millennium/bbailyn.html>.

retain.”¹²² This view builds on James Madison’s speech introducing the Bill of Rights in 1789 that there was a “great residuum” of rights of the people existing outside the Constitution that were not limited, circumscribed, or preempted by the Constitution.¹²³

Just because a right is not historic—and of course the definition of the word historic can be elastic—does not mean that the Supreme Court will not discover evidence of it resident in the Constitution. *Roe v. Wade*, basing abortion rights on a right to privacy, is the most obvious recent example of a new right being discerned in the Constitution.¹²⁴ It was also by no means certain at one point that the Court would guarantee press access to the courtroom.

B. Dissents and an Analog

Past dissents have eventually influenced the Court to alter previous positions. Justice Brandeis’ dissent in *Olmstead v. United States* is a prominent example.¹²⁵ In *Olmstead*, the Court upheld the constitutionality of wiretapping private telephone conversations. This brought a stinging rebuke from Justice Brandeis, who noted the Constitution “conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹²⁶ *Olmstead* was specifically overturned by *Katz v. United States* nearly 40 years later in 1967.¹²⁷ And ultimately the *Olmstead* dissent led to *Roe*.

There have been several dissents involving freedom of the press. In his *Pell v. Procunier* dissent, Justice Douglas insisted, “[t]he press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public’s right to know.”¹²⁸ How can you meet that high purpose if journalists cannot go and look where they wish independently? Justice Stewart in his dissent in *Branzburg* stated the “corollary” to a right to publish “must be the right to gather news” and that newsgathering is “no

¹²² *Id.*; See also DAN FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (Basic Books, 2007).

¹²³ James Madison, Speech introducing the Bill of Rights at the Second Congress (June 8, 1789).

¹²⁴ *Roe v. Wade*, 410 U.S. 113, 114 (1973).

¹²⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹²⁶ *Id.* Within seven years, Justice Brandeis’ dissent was being quoted in various Supreme Court decisions. In all, his dissent was quoted in eleven Court decisions from 1945-1967, five dissents and six majority opinions.

¹²⁷ See *Katz v. United States*, 389 U.S. 347, 352-53 (1967). Brandeis had a long history of supporting a right to privacy, writing along those lines in a law journal article 38 years earlier: Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹²⁸ *Pell v. Procunier*, 417 U.S. 817, 840 (1984).

less important” than news dissemination.¹²⁹ Both could be building blocks for a potentially successful First Amendment battlefield access right.

Then there is the Second Amendment, perhaps the poster child for hopes for a constitutional battlefield access decision by the Supreme Court. Rights and the make-up of the Court are moveable feasts. For decades, the country wrestled with the constitutional issue of individual gun ownership. Was it constitutionally protected within the context of a militia or was it an individual right? For seven decades the final word rested on a Depression-era Supreme Court decision—*United States v. Miller*—proclaiming the Second Amendment applied only to a well-regulated militia.¹³⁰ Furthermore, in 1992, the Court shied away from ruling on the Second Amendment by declining to grant certiorari in *United States v. Hale*, a case it could have used to rule on the constitutional limits of an individual or collective right to bear arms.¹³¹

Then, in 2008, with a different and more conservative composition, the Supreme Court declared 5-4 in *District of Columbia v. Heller* that gun ownership was an individual constitutional right.¹³² Whether a similar set of circumstances is likely to produce constitutionally guaranteed access to the battlefield by the media is, of course, impossible to predict. However, it is at least plausible such a scenario could unfold as the shifting alliances and changing membership of the Court and the wider political climate presents new opportunities for such a decision.

V. CONCLUSION

What arguments realistically remain to be brought before the Supreme Court, providing both the metaphorical and legal traction for the Humvee and its reporter struggling across the sand at the start of this study? Justice White claimed in *Branzburg* that without some protection for “seeking out the news, freedom of the press would be eviscerated.”¹³³ Justice Stewart in his dissent in the same case stated, “Without freedom to acquire information, the right to publish would be impermissibly compromised.”¹³⁴ Accordingly, Justice Stewart continued, “[A] right to gather news, of some dimension, must exist.”¹³⁵ One place to gather that information, unfiltered and immediate, is on the battlefield where

¹²⁹ *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972).

¹³⁰ *See U.S. v. Miller*, 307 U.S. 174 (1939).

¹³¹ *See U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992).

¹³² *See District of Columbia et al v. Heller*, 554 U.S. 570 (2008).

¹³³ *Branzburg*, 408 U.S. at 681.

¹³⁴ *Id.* at 728.

¹³⁵ *Id.*

American foreign policy is being played out with deadly consequences. It is from there that citizens most need information from the media to evaluate the propriety, purpose, and price of war.

There have been intriguing and suggestive intimations from various courts that *might* open the door ever so slightly to shape a constitutional access decision. In *Nation*, Judge Sand found a “minimal right” for the media to view and report about “overt combat operations” and that a conditional right of access existed.¹³⁶ In *Weinberger II*, Judge Edwards considered media battlefield access rights a “potentially important issue of constitutional law.”¹³⁷ In *Rumsfeld I*, the federal district court foresaw an “appropriate case” in which there would be “a substantial likelihood of demonstrating” a constitutional right to “gather and report” military activities “on foreign soil.”¹³⁸ Even Chief Justice Burger admitted journalists had “priority of entry” to courtrooms.¹³⁹

Justice Stewart in *Branzburg* considered that some protection was essential for “the process by which news is assembled” to ensure the proper functioning of the American constitutional system.¹⁴⁰ In *Richmond Newspapers*, Justice Stevens supported protection for the media “from abridgement of their rights of access to information about the operation of their government.”¹⁴¹ In *Sheppard*, Justice Stewart praised the media as the Fourth Estate, performing an independent checking function on government.¹⁴² Moreover, in *Houchins*, Justice Stewart in his concurrence expanded this view, believing access restrictions for the public were “unreasonable as applied to journalists . . . there to convey” information to the public.¹⁴³ Judge Sentelle saw no bar to journalists finding their own way to a battlefield, and perhaps without realizing it, suggested journalists had a right to be there.¹⁴⁴ Means of transportation seems a pretty thin rationale when evaluating levels of constitutional rights and privilege. And in stirring language, Justice Black, in his concurrence, stated support for a rhetorical base for the “paramount” duty of journalists to report from the battlefield to prevent the government “from deceiving the people and

¹³⁶ *Nation Magazine v. U.S. Dep’t of Def.*, 762 F.Supp. 1558, 1572 (S.D.N.Y. 1991).

¹³⁷ *Weinberger II*, 762 F.2d 134, 136 (D.C. Cir. 1985) (Edwards, J., concurring).

¹³⁸ *Rumsfeld I*, 180 F. Supp. 2d 174, 175 (D.D.C. 2002).

¹³⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

¹⁴⁰ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

¹⁴¹ *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring).

¹⁴² *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966).

¹⁴³ *Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

¹⁴⁴ *Rumsfeld II*, 355 F.3d 697, 702 (D.C. Cir. 2004).

sending [soldiers] off to distant lands to die of foreign fevers and foreign shot and shell."¹⁴⁵

Despite comments to the contrary, the Supreme Court *has* established press rights separate from the Speech Clause, most notably prohibiting prior restraint, favoring free press over fair trial rights, protecting the media against libel, supporting parody, and extending press freedoms online.¹⁴⁶ Jurists and historians have maintained that, like Justice Stewart, the Framers would not have inserted a constitutional superfluity into the First Amendment, suggesting that there is *some* sort of independent meaning to the Press Clause. Without media rights separate from the Speech Clause nested in the Press Clause, the Court is unlikely ever to suggest, let alone decide, that private citizens have a constitutional right to be present on the battlefield. If so, the question of media access necessary to acquire information is an essential and unavoidable consideration the Supreme Court needs to confront. That the media play structural watchdog and surrogate roles in the American democracy are important arguments that have already found support from the Supreme Court. Independent access to where news happens is essential if the media are to convey independent—and independently obtained—information to the general citizenry to formulate educated decisions.

What actually remains in wake of the high court's denial of certiorari in *Flynt v. Rumsfeld*?¹⁴⁷ Only suggestions and hints and hopes. Some promising but ephemeral language about the value of actual "in the field" newsgathering to underpin the purpose of the First Amendment. And yet, a Supreme Court decision is not in the best interests of the media, government, and military. A political solution should preempt a judicial one, and a compromise is preferable to a high court ruling. Why? Because both sides risk an unacceptable and unpalatable resolution to this constitutional conundrum. "There can be few professions that more readily misunderstand each other," British Major S. F. Crozier observed, "than journalists and soldiers."¹⁴⁸ Both professions must learn to respect the other and acknowledge or at least tolerate the other's role in the

¹⁴⁵ N.Y. Times, Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

¹⁴⁶ See, e.g., New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); New York Times v. Sullivan, 376 U.S. 254 (1964); Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); and Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

¹⁴⁷ Rumsfeld III, 543 U.S. 925 (2004).

¹⁴⁸ ALAN HOOPER, THE MILITARY AND THE MEDIA (Cambridge: Cambridge University Press, 1993), 3 (quoting S.F. Crozier, THE PRESS AND THE ARMY, *Army Quarterly*, July 1954, at 214).

American constitutional framework. Both should seek a *rapprochement* to find a middle ground that guarantees some sort of expeditious and uncensored media access to the battlefield so Americans can be provided with the necessary information to make informed decisions about their country's future, while ensuring their continuing safety and security. And it would allow the journalist at the opening of this study to report with confidence wherever her instincts, battle, and a story take her.

“Good! Now we shall have news from Hell before breakfast.”

– General William Tecumseh Sherman, after being told, erroneously, that three reporters had been killed in an artillery barrage, c. 1863¹⁴⁹



¹⁴⁹ Carl Sessions, Artful Snippets on a Somewhat Noble Profession, AMERICAN JOURNALISM REVIEW (Mar. 2000) (reviewing CRUSADERS, SCOUNDRELS, JOURNALISTS: THE NEWSEUM'S MOST INTRIGUING NEWSPEOPLE (Eric Newton ed., Crown 2000), available at <http://www.ajr.org/Article.asp?id=3114>).