IN BED WITH THE MILITARY: FIRST AMENDMENT IMPLICATIONS OF EMBEDDED JOURNALISM

ELANA J. ZEIDE*

This Note explores the First Amendment implications of embedded journalism and its alternatives. Despite its media-friendly stance, embedding imposes limitations on press access and substantive coverage that raise First Amendment concerns about governmental distortion of the news—most significantly, a substantive and structural tendency to promote pro-military coverage. Despite these concerns, this Note finds that embedding does not facially violate the First Amendment. It further argues that the embed structure promotes free speech principles better than alternative methods of regulating wartime reporting. Unlike a complete ban on press access or the removal of restrictions, embedding at least allows for an abundance of intimate coverage, increases the transparency of governmental discretion, and promotes clear standards for military accountability. Accordingly, this Note concludes that the embed program's sanctioned supervision is the most supportive of First Amendment values and offers some policy suggestions to mitigate worries about distorted coverage.

In the winter of 2002, the Department of Defense (DOD) announced a new media management program to "embed" journalists during the upcoming invasion of Iraq. Through the initiative, reporters from a pool of various media organizations accompanied troops on the campaign—living, sleeping, and eating with soldiers and commanders as they observed and reported on maneuvers and morale. The DOD heralded the program as the dawn of a new age of cooperation between the military and the media, a win-win measure that would give news outlets unprecedented access and counter enemy misinformation with true accounts of American military action.[1] "Embeds" immediately captured the public imagination—the stories of the missions, the portraits of the soldiers, and the adventure of war

 B.A., 1996, Yale University; M.F.A., 2003, Columbia University School of the Arts; J.D., 2005, New York University School of Law. I am grateful to Geoffrey Stone for his advice and inspiration throughout this project, as well as Deborah Malamud for her encouragement and support. I am indebted to the staff of the *New York University Law Review*, especially my editors Kristi Hutchinson, Jon Friedman, Shauna Burgess, and Alex Guerrero. I also owe thanks to Nick Bagley, Frank Schoen, Lisa Vicens, Jodie Morse, Noah Phillips, Mike Burstein, and Shirley Sarna for their invaluable insights.

[1] *NewsNight with Aaron Brown* (CNN television broadcast Dec. 31, 2003) (interviewing Victoria Clark, who oversaw creation of embed program as Assistant Secretary of Defense for Public Affairs, and noting that embed process was means to gain public support and "counterweight" Iraqi disinformation).

reporting itself proved popular in the local and national media.[2] Yet despite the embed program's media-friendly stance, its limitations on press access and substantive coverage implicate important First Amendment concerns about governmental distortion of the news.

The concept behind an embed program goes against the grain of First Amendment doctrine, which disfavors broad governmental discretion to censor and requires access to information about public affairs. The military must protect against the release of sensitive information—like troops' whereabouts—to wage a successful campaign. A tension between the values of free speech and security has run throughout First Amendment jurisprudence for at least half a century.[3] The stereotypes are well-entrenched: a cavalier media chasing a scoop regardless of consequences and a short-sighted military sacrificing constitutional rights for strategic ends. As a result, embedding appears to put two of our most important priorities—protecting free speech and preserving national security—into inevitable conflict.

The choice is not that simple. Military conflict will always create a tension between security and free speech concerns, but the two need not be mutually exclusive. This Note evaluates embedded journalism by exploring the First Amendment implications of the embed program and its alternatives.[4] It examines the program's problematic aspects—most importantly the provision for broad governmental discretion over media content and the possible promotion of pro-military coverage. Despite these concerns, this Note argues that embedding does not violate the First Amendment, and that, paradoxically, embedding provides more support for free speech principles than other alternatives for regulating wartime reporting. In an age of instantaneous news transmission which requires some regulation of battlefields to protect sensitive information, the formalized regulation of an embed program at least allows for an abundance of intimate coverage, increases the transparency of governmental discretion, and promotes identifiable standards for military accountability. It is up to the media

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[2] *See, e.g.*, EMBEDDED: THE MEDIA AT WAR IN IRAQ xiv (Bill Katovsky & Timothy Carlson eds., 2003); TIM ROBBINS, EMBEDDED (Public Theatre, New York 2004); KARL ZINSMEISTER, BOOTS ON THE GROUND: A MONTH WITH THE 82ND AIRBORNE IN THE BATTLE FOR IRAQ (2003).

[3] *See generally* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 19–111 (2d ed. 2003) (exploring circumstances under which government has historically sought to curtail speech that disseminates confidential information).

[4] This Note examines the general prospect of embedding rather than the particularized rules and their application during the Iraq campaign, since such rules will likely evolve to suit the changed context of any new conflict. Further examination of the substantive details of this particular embed program is beyond the scope of this Note.

and the public to monitor the program's application and to mitigate its potential to produce biased coverage.

Part I of this Note describes the current embed program, its application, and the First Amendment difficulties it presents—most significantly, a substantive and structural tendency to pressure reporters and news organizations into publishing predominantly pro-American coverage.

Part II analyzes the potential legal challenges to an embed program. Similar military restrictions have been challenged by publications on two main First Amendment grounds: that prepublication security review constitutes an unconstitutional prior restraint,[5] and that the exclusion from military battlefields violates the press's right of access.[6] Beyond these traditional arguments, the coercive pressure of an embed program's specific publication restrictions and structural dynamics raises the possibility of claims based on viewpoint discrimination. However, both the traditional and novel challenges have little traction under current doctrine.[7]

Part III examines alternatives to embedding and concludes that none will further First Amendment values as much as an embed program. Military restriction of all media access will certainly not facilitate the dissemination of comprehensive information. Neither will the removal of formal governmental support and control, although the limitations of this strategy are less obvious. While unregulated reporting might have been appropriate for past conflicts like the

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[5] *See, e.g.*, Flynt v. Rumsfeld, 355 F.3d 697, 701 (D.C. Cir. 2004) (describing plaintiff's charge that military restrictions constituted impermissible content-based prior restraint); Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 695–98 (1992) (arguing prepublication security review during Persian Gulf War was unconstitutional prior restraint).

[6] *See, e.g.*, *Flynt*, 355 F.3d at 703 (claiming press right of access to accompany ground troops into combat on foreign battlefields); Nation Magazine v. U.S. Dep't of Def., 762 F.Supp. 1558, 1560–61 (S.D.N.Y. 1991) (challenging constitutionality of pooling procedures, which limited press access to military during Persian Gulf War); Flynt v. Weinberger, 588 F.Supp. 57, 58 (D.D.C. 1984), *vacated as moot*, 762 F.2d 134 (D.C. Cir. 1985) (asserting denial of press access during Grenada invasion violated First Amendment).

[7] Media organizations and individuals could bring as-applied challenges claiming discriminatory application of security review, pool administration, and individual access, but courts have yet to be receptive to such claims. *See, e.g.*, *Flynt v. Rumsfeld*, 355 F.3d at 705–06 (rejecting as-applied claims); *Nation Magazine*, 762 F.Supp. at 1569–70 (finding media's claim for injunctive relief moot). Another potential claim would challenge the ground rules and prepublication security review as overly vague or abused in application by creating untoward delays. *See* William E. Lee, *"Security Review" and the First Amendment*, 25 HARV. J.L. & PUB. POL'Y 743, 754, 761–62 (2002) (concluding that security review during wartime military operations are unconstitutional due to potential for governmental abuse of discretion, including "imprecise methods" and lack of procedural safeguards). An in-depth analysis of these issues is beyond the scope of this Note.

Vietnam War,[8] it will no longer provide the greatest support for First Amendment values. With technological advances enabling instant transmissions from the battlefield, the military will inevitably exert some control over coverage in order to avoid exposure of potentially damaging information. Despite the intuitive appeal of a traditionally libertarian stance, a formally "unregulated" battlefield will make governmental discretion even less visible and less accountable than the current system. The media will still depend upon the military for access to in-depth information, with the attendant pressure to publish positive stories. For all their ill effects, the formal restrictions of an embed program at least render governmental authority more transparent and accountable than an officially unregulated media. Accordingly, this Note concludes that the embed program's sanctioned supervision is the most supportive of First Amendment values and offers policy suggestions to mitigate worries about distorted coverage.

I
THE EMBED PROGRAM

This Part discusses the legal framework, structure, and implementation of the Iraq War embed program. It then describes the tendency of the program's substantive rules and structural organization to direct and distort coverage, casting military exploits in a more positive light. As a result, embedding implicates First Amendment concerns about ensuring the quality of public debate and deliberation, which will be addressed in Part II.

A. Background

The legal and administrative structure supporting the embed program has developed over the past thirty years. While not offering unprecedented access,[9] the embed program marked a significant shift in military-press relations. After the Vietnam War, when critical coverage undermined public support for the conflict,[10] the military

[8] Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 965–66 (1994) (describing lack of military restrictions during Vietnam War and reporters' ability to broadcast within twenty-four hours).

[9] Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 GEO. L.J. 931, 932–45 (1985) (noting that reporters have accompanied military units throughout American history with varying degrees of censorship); William A. Wilcox, Jr., *Media Coverage of Military Operations: OPLAW Meets the First Amendment*, ARMY LAW., May 1995, at 42, 45–49 (same).

[10] Most famously, Walter Cronkite commented on CBS after the 1968 Tet Offensive that the Vietnam War was "unwinnable." EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xii.

became increasingly restrictive of journalistic access[11] and developed media management policies that provide the legal and administrative background for the embed program.[12]

For Operation Iraqi Freedom, the DOD adopted a new program of "embedding" journalists with troops. These journalists traveled and lived with American forces, observing and sharing the same living and battlefield conditions.[13] In exchange, embeds agreed to follow the military's ground rules, which imposed restrictions on categories of unpublishable information that would compromise national security and the use of prepublication security review in certain contexts. The DOD touted the program as a revolution in military-press relations that would grant journalists unprecedented access.[14] It

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[11] *See* Cassell, *supra* note 9, at 943–45; Wilcox, *supra* note 9, at 47–49. For example, reporters were completely excluded from the early stages of the Grenada Invasion in 1983, most of the Libyan strikes in 1985, and the invasion of Panama in 1989. *See* Jacobs, *supra* note 5, at 684–85. Operation Restoring Hope in Somalia is a notable exception, resulting in what the military perceived as negative security consequences. *See* Wilcox, *supra* note 9, at 48–49 (arguing that military openness to media and subsequent "overwhelmingly negative" coverage prompted premature withdrawal from Somalia).

[12] After criticism over the military's press exclusion from the Grenada Invasion in 1983, the Pentagon adopted recommendations from the Sidle Panel, composed of war correspondents and military officers. *See* Brian William DelVecchio, Comment, *Press Access to American Military Operations and the First Amendment: The Constitutionality of Imposing Restrictions*, 31 TULSA L.J. 227, 232–35 (1995) (describing military press restrictions during Grenada Invasion, subsequent critique, and Sidle Panel resolutions). The Sidle Panel's recommendations called for the imposition of voluntary security ground rules, the provision of communication facilities for the press, and the institution of a pool system of maximum size and minimum duration where unregulated access is unfeasible. CHAIRMAN OF THE JOINT CHIEFS OF STAFF MEDIA-MILITARY RELATIONS PANEL (SIDLE PANEL), REPORT 3–6 (1984). The military implemented the pool system and prepublication review during Operation Desert Storm in the Persian Gulf War, although commentators criticized the restrictive implementation of the policies. *See* David A. Frenznick, *The First Amendment on the Battlefield: A Constitutional Analysis of Press Access to Military Operations in Grenada, Panama and the Persian Gulf*, 23 PAC. L.J. 315, 326–28 (1991) (describing Persian Gulf War restrictions as imposing both escorted movement and censorship); Jacobs, *supra* note 5, at 686–98 (arguing prepublication security review during Persian Gulf War was unconstitutional prior restraint); Phillip Taylor & Lucy Dalglish, *How the U.S. Government Has Undermined Journalists' Ability to Cover the War on Terrorism*, COMM. LAW., Spring 2002, at 1, 24 (describing flaws in military's media restrictions during Persian Gulf War).

[13] Memorandum from the Sec'y of Def., Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations ¶ 2.A (Feb. 2003) [hereinafter Ground Rules], http://www.dod.mil/news/Feb2003/d20030228pag.pdf.

[14] *See NewsNight with Aaron Brown*, *supra* note 1 (interviewing Victoria Clark, former Assistant Secretary of Defense for Public Affairs, and noting that Pentagon wanted to "get out as much news and information about what the military was doing" as possible); News Transcript, U.S. Dep't of Def., ASD PA Clarke Meeting with Bureau Chiefs (Oct. 30, 2002) (Secretary of Defense, Donald H. Rumsfeld, noting that embedding is useful as means to counter misleading Iraqi propaganda), http://www.dod.mil/transcripts/2002/t11012002_t1030sd.html. The Ground Rules state that the DOD "policy on media coverage of future military operations is that media will have long-term, minimally restrictive access to

designed the program as an exercise in media warfare—to shape worldwide public perception of the "national security environment" by "tell[ing] the factual story—good or bad—before others seed the media with disinformation and distortions."[15]

B. *Overall Structure*

In September 2000, the DOD issued Directive 5122.5, setting forth the military policy on media access that still governs today.[16] It provides the authority for the embed program and the basis for its parameters. The Directive vests the Office of the Assistant Secretary of Defense for Public Affairs ("OASDPA") with the responsibility of ensuring "a free flow of news and information to the news media."[17] Enclosure 3, the Statement of DOD Principles for News Media, calls for "open and independent reporting" as the "principal means of coverage."[18] In conflicts with limited space or in remote locations, the military can implement a pool system, limiting access to representatives of selected media outlets who comply with its ground rules.[19]

In implementing the embed program during Operation Iraqi Freedom, the OASDPA managed, vetted, and assigned media organizations to various positions with troops.[20] More than six hundred journalists eventually embedded.[21] Not all received the same treatment: ABC's Ted Koppel rode with a general, while reporters from more obscure media outlets accompanied junior troops.[22] Application

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U.S. air, ground and naval forces through embedding." Ground Rules, *supra* note 13, ¶ 2.A.

15 *See* Ground Rules, *supra* note 13, ¶ 2.A; Interview with Bryan G. Whitman, Deputy Assistant Sec'y of Def. for Pub. Affairs (DASDPA Whitman), U.S. Dep't of Def., (Apr. 12, 2004) [hereinafter Whitman Interview] ("There's no better way to mitigate disinformation on the battlefield than to put some 600 independent, objective, trained observers out there to report on what's really going on as opposed to what the Ministry in Baghdad might be saying is going on.").

16 U.S. Dep't of Def., Directive No. 5122.5 (Sept. 27, 2000) [hereinafter DOD Directive 5122.5], *available at* http://www.dtic.mil/whs/directives/corres/pdf/d51225_092700/d51225p.pdf.

17 *Id.* ¶ 3.2.

18 *Id.* ¶ E3.1.1.

19 *Id.* ¶¶ E3.1.2, E3.1.3, E3.1.4.

20 Each news organization decides which media representatives fill the assigned embed slots. *See* Ground Rules, *supra* note 13, ¶ 3.A. In practice, DASDPA Whitman took centralized control of placing journalists in particular assignments to ensure "the right mix of domestic versus international was out there as well as a good balance of each of the mediums whether it be television, radio, print, wire, photographers." Whitman Interview, *supra* note 15. For more information on the allocation process, see Joe Strupp, *Journalists Set to Bunk Down with Armed Forces*, EDITOR & PUBLISHER, Feb. 13, 2003, at 6, 6–7.

21 *See* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xiv.

22 *Id.* at xi. Note that while reporters are assigned to entire units, not individuals, they may receive varying access within those confines.

of the ground rules varied as well, depending on the discretion of officers who were more or less media-friendly.[23]

The ground rules indicate that commanders should "ensure the media are provided with every opportunity to observe actual combat operations."[24] Embeds and their media organizations sign a release assuming all liability for the inherently dangerous risks involved,[25] and agree to abide by military ground rules.[26] In return, embeds receive rations, medical attention, transportation, communications assistance, and temporary loans of biological and chemical protective gear.[27]

C. *The Ground Rules*

The ground rules indicate an official stance of openness. "The standard for the release of information should be to ask 'Why Not Release' vice 'Why Release,'"[28] and the ground rules for embeds "are in no way intended to prevent release of derogatory, embarrassing, negative or uncomplimentary information."[29] At the same time, the rules specify categories of content that cannot be published due to security concerns. Embeds may use approximate friendly force numbers, report generalized mission results, employ generic descriptions (like "land-based" maneuvers), and publish service members' names and hometowns (with their consent).[30] Journalists can report American casualties, but cannot reveal their identities until seventy-two hours have elapsed or next of kin have been notified.[31] Embeds cannot release information about the specific number of troops, equipment or vehicles, future operations, security levels, intelligence

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[23] *See* John Koopman, *Once a Marine, Always a Marine*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 111, 115 (describing commanding officer's open approach to embed queries); *cf.* Jennifer LaFleur, *Embed Program Worked, Broader War Coverage Lagged*, THE MEDIA & THE LAW, Spring 2003, at 4, 5 (noting instance of reporter allegedly removed from embed program for violating ground rules); Jack Shafer, *Embeds and Unilaterals: The Press Dun Good in Iraq. But They Could Have Dun Better*, SLATE, May 1, 2003 ("The embed program proved to be only as good as the commanders overseeing it."), http://slate.msn.com/id/2082412.

[24] Ground Rules, *supra* note 13, ¶ 3.G.

[25] *Id.* ¶ 3.E.1; *see also* U.S. Dep't of Def., Release, Indemnification, and Hold Harmless Agreement and Agreement Not to Sue ¶¶ 4, 8, http://www.defenselink.mil/news/Feb2003/d20030210embed.pdf (last visited Mar. 31, 2005) (requiring media employees to assume and indemnify government from risks of embedding, follow government orders, and accept government power to terminate embed status at will and without cause).

[26] Ground Rules, *supra* note 13, ¶ 3.M.

[27] *Id.* ¶¶ 2.C, 2.C.2, 2.C.3, 3.K, 5.A, 5.C.

[28] *Id.* ¶ 3.Q.

[29] *Id.* ¶ 4.

[30] *Id.* ¶¶ 4.F.1, 4.F.6, 4.F.7, 4.F.14.

[31] *Id.* ¶¶ 4.H.1, 4.H.2.

collection, or the effectiveness of enemy action.[32] The rules also prohibit the media from publishing identifying features of enemy war prisoners or other detainees.[33] Journalists can neither use their own vehicles nor carry personal firearms;[34] as a result, they depend on the military for access and protection.

As the first step in ensuring the confidentiality of classified and non-classified but "sensitive" information, the ground rules rely on "security at the source," a policy of withholding classified and sensitive information from the media.[35] Commanders have considerable discretion in implementing this policy. They must inform the media of restrictions before providing access to unclassified sensitive information like "troop movements, battle preparations, materiel capabilities and vulnerabilities" that "may be of operational value to an adversary or when combined with other unclassified information may reveal classified information."[36] If journalists are inadvertently exposed to sensitive information, commanders brief them about what to "avoid covering."[37] Commanders can explicitly grant journalists more access to confidential information,[38] which entails agreeing to military review of coverage before publication, a prepublication "security review."[39] Such review does not entail editorial changes, but indicates what information should be removed from the story or embargoed temporarily to ensure operational security.[40] There is no general security

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[32] *Id.* ¶¶ 4.G.1, 4.G.3, 4.G.6, 4.G.8, 4.G.10, 4.G.14, 4.G.17.

[33] *Id.* ¶ 4.G.18.

[34] *Id.* ¶¶ 2.C.1, 4.C.

[35] *Id.* ¶¶ 3.R, 4.A, 6.A, 6.A.1. "Security at the source" forbids commanders and soldiers from disclosing unauthorized material to anyone without the appropriate level of clearance. *See* Whitman Interview, *supra* note 15. It has also been described as dictating that personnel "would only talk about what could be written about." Lee, *supra* note 7, at 749 (quoting Lt. Cmdr. Cate Mueller).

[36] Ground Rules, *supra* note 13, ¶¶ 6.A.1, 6.A.

[37] *Id.* ¶ 6.A.1.

[38] *Id.* ¶ 3.T (noting that embeds may receive more access), ¶ 6.A.1 (stating that commander may offer access in exchange for security review agreement).

[39] *Id.* ¶ 6.A.1.

> If a commander decided, "I'm going to give my operations order for [an] upcoming mission and am willing to bring in the reporter if the reporter's willing to ensure that there's nothing in their [sic] report that will compromise our mission . . . [and] allow me to review the product before it goes out," that would be something that would have to be agreed to ahead of time [with the reporter].

Whitman Interview, *supra* note 15. *See, e.g.*, Susan Glasser & Peter Baker, *Marriage Under Fire*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 287, 290 (describing how Baker and other embeds gained greater access to classified information by agreeing to more intensive security review).

[40] Ground Rules, *supra* note 13, ¶ 6.A.1.

review of media products,[41] although some correspondents gained greater access by agreeing to automatic security review of every article.[42]

The government stresses that agreement to undergo security review is "strictly voluntary"[43] and that reviewing should be conducted as quickly as possible to avoid delays in reporting.[44] In practice, the voluntary nature of security review is less clear; a reporter who does not want to comply with a commander's recommendations is subject to removal at the commander's discretion for compromising operational security.[45] OASDPA is the final arbiter of any disputes about what commanders feel should be omitted or embargoed;[46] refusal to remove classified information can be appealed through the chain of command to be resolved ultimately by the OASDPA and the media organization's management.[47] The ground rules require OASDPA to resolve any such disputes as quickly as possible to "preserve the news value of the situation."[48]

Typical restrictions included a request for CBS to stop filming a restless Iraqi mob[49] and for NBC to delay broadcasting the existence of American casualties (without their names) to protect the soldiers' families, who might be watching.[50] Many reporters omitted specific locations[51] and landmarks.[52] Most media outlets followed the ground rules without protest.[53] This compliance may have been motivated by a desire to remain within the embed program, but also surely stemmed from market-imposed pressure to appear patriotic and emo-

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41 *See supra* text accompanying notes 35–40.

42 Glasser & Baker, *supra* note 39, at 289–90 (describing Baker's embed experience in combat operations headquarters); Peter Baker, *Inside View*, AM. JOURNALISM REV., May 2003, at 37, 38 (same).

43 Ground Rules, *supra* note 13, ¶ 6.A.1. The voluntary nature of the program should not immunize embedding from scrutiny. *See infra* Part II.B.1.

44 Ground Rules, *supra* note 13, ¶ 6.A.1.

45 Email from Deputy Assistant Sec'y of Def. for Pub. Affairs Bryan G. Whitman to Elana J. Zeide (May 17, 2004, 12:53 EST) (on file with *New York University Law Review*). At the least, access may be denied. Ground Rules, *supra* note 13, ¶ 6.A.1.

46 *Id.* ¶ 3.N.

47 *Id.* ¶ 6.A.2.

48 *Id.* ¶ 3.N.

49 David Bauder, *Embedded Reporters Liked It*, PITTSBURGH POST-GAZETTE, Apr. 30, 2003, at E6.

50 *Id.* (describing experience of embed who negotiated temporary blackout until relatives were notified).

51 Glasser & Baker, *supra* note 39, at 290.

52 *NewsNight with Aaron Brown*, *supra* note 1 (quoting embed speculating that his real-time broadcast was shut down because it showed bridge that could be targeted).

53 *See infra* notes 57–59 and accompanying text.

tionally sensitive.[54] At times, the embed program generated critical coverage, countering military misinformation[55] and exposing military errors.[56]

There have been no reported cases of journalists refusing to undergo security review if asked.[57] However, the military expelled approximately two dozen journalists from Iraq for ground rule violations or clashes with officers.[58] The cases reported in the media typically involved inadvertent or willful disclosure of sensitive information.[59]

An estimated 2100 non-embedded journalists—dubbed "unilaterals"—also covered the invasion.[60] Many represented large American media organizations trying to increase their breadth of coverage, since unilaterals enjoyed a freedom of mobility and publication unhindered by the agreements entered into by embeds.[61] Without military restrictions, unilaterals could roam and report on whatever they encountered, but they faced extreme practical difficulties securing transportation, shelter, and willing American military

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[54] *See* Martin Savidge, *Going Live*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 269, 276 (reporting that domestic networks did not want to make audiences uncomfortable by showing Iraqi casualties); Michael Massing, *The Unseen War*, N.Y. REV. BOOKS, May 29, 2003, at 16, 29 (noting that over two thousand Iraqi troops were killed on first day of Baghdad raid, but CNN only showed Iraqis being "assisted by compassionate Americans"). *But see* Cynthia Cotts, *News of the Dirty War: Stories the Censors Could Not Sink*, VILLAGE VOICE, Apr. 9–15, 2003, at 34 (noting violent images casting American military in unfavorable light reported by European, and some American, media).

[55] Nicholas Kulish, *Embed Cred: How Close is Too Close for Embedded Reporters?*, WASH. MONTHLY, Dec. 1, 2003, at 52, 54 (discussing embed reportage which refuted inaccurate Pentagon briefing).

[56] William Branigin, *The Checkpoint Killing*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 229, 232 (describing incident where troops needlessly shot civilians at checkpoint); *see also* Baker, *supra* note 42, at 39 (noting reporting of military errors by Branigin and *Sunday Times of London*'s Mark Franchetti).

[57] DASDPA Whitman maintains that no disputes over security review came to his attention over the course of the conflict. Whitman Interview, *supra* note 15.

[58] *See* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xvi; *see also* Brett Lieberman, *The Disembed*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 317, 320–21 (embed reporter expelled after revealing unit's plans to change location).

[59] *See supra* note 58. DASDPA Whitman, without discussing specific instances in which embedded journalists were asked to leave, revealed that both print and photographic media violated ground rules and that most violations were inadvertent. News Transcript, U.S. Dep't of Def., Deputy Assistant Sec'y Whitman Interview with the Christian Science Monitor (Apr. 18, 2003), http://www.defenselink.mil/transcripts/2003/tr20030418-0143.html [hereinafter Whitman Christian Science Monitor Interview].

[60] *See* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xiv.

[61] *See, e.g.*, Richard Huff, *Reporters Walking a Fine Line in Sand*, N.Y. DAILY NEWS, Mar. 27, 2003, at 113 (describing major national networks' use of unilaterals to balance coverage); EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xiv (same).

sources.[62] Many unilateral reporters recounted indifferent or hostile treatment from the military due to their "uncredentialed" status, including denial of access to sites and soldier interviews,[63] and denial of transportation and protection in emergency situations.[64] The government justified its refusal to extend benefits and protection to unilaterals by characterizing them as a security risk and claiming the existence of logistical obstacles to offering any ancillary support (e.g., tracking unilaterals on the battlefield to prevent injury from friendly fire).[65]

D. Inevitable Co-option: Substantive and Structural Distortion

The embed program's substantive ground rules and structure inevitably tilt journalistic coverage, no matter how objective their application. The categories of unpublishable information exclude the most graphic elements of war, glossing over its gruesome realities.[66] The program's structure nurtures an extreme dependency, exerting both practical and psychological pressures that even the most professionally scrupulous journalist will have difficulty resisting.[67]

Although the ground rules are facially neutral, the substance of the program's specific restrictions may prevent coverage that would reflect poorly on American troops. To take one example, the ban on

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[62] *See, e.g.*, Sherry Ricchiardi, *Close to the Action*, AM. JOURNALISM REV., May 2003, at 29, 31–32.

[63] *See, e.g.*, Shafer, *supra* note 23 (describing unilateral's complaints about "second-class" treatment).

[64] *See, e.g.*, Glasser & Baker, *supra* note 39, at 292 (describing military's lack of support for independent journalists attempting to cross border into Iraq); Ricchiardi, *supra* note 62, at 31 (describing danger faced by Newsweek unilateral and unwelcoming attitude of Marines when he attempted to join them). *But cf. id.* (noting military provided transport out of Iraq to unilateral at war's end).

[65] Unilateral reporters get no "special status" and, like any other civilians, "if they're doing something . . . on the battlefield to compromise the mission they're going to have to be dealt with." Whitman Interview, *supra* note 15. This lack of special status may mean removal from the battlefield space. *Id.* Officially, "having embedded media does not preclude [military personnel from having] contact with other media." Ground Rules, *supra* note 13, ¶ 3.T.

[66] *See, e.g.*, *infra* notes 68–70 and accompanying text (noting that both domestic and international rules prohibit showing identifying features of enemy captives or casualties).

[67] "You can't spend any time with [a] military unit and not walk away [with] tremendous respect and appreciation for what our men and women in uniform do." Whitman Interview, *supra* note 15. *See also* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xiii (noting that reporters often empathize with soldiers with whom they travel); Gordon Dillow, *Grunts and Pogues: The Embedded Life*, COLUM. JOURNALISM REV., May/June 2003, at 33 (embed describing how experience of living in isolation with troops caused him to "see [his] small corner of the world the same way they do").

showing identifying features of enemy casualties or combatants[68] can be justified as a tactic to prevent enemy forces from assessing the degree of operational success or as an implementation of the Geneva Convention restrictions on subjecting prisoners to public humiliation.[69] However, the ban also impersonalizes the enemy, reduces the appearance of American brutality, and suppresses horrific images like those disseminated during the Vietnam War.[70] This excision of graphic material, including images of prisoners, helps insulate the military from accusations of destructiveness or cruelty.[71] In the absence of such restrictions, more explicit coverage might prompt greater disapproval of a conflict.[72]

Even if the military pared the ground rules' substance down to the minimum necessary to ensure national security and implemented them as objectively as possible, the structure of an embed program cannot help but tilt coverage in the government's favor. It exploits the psychological, professional, and economic pressures faced by both individual journalists and their organizations.[73]

Embed programs capitalize on the media's desperate need for access. Few savvy journalists or media outlets would turn down the opportunity for close and almost continuous contact, barring blatantly unreasonable restrictions. The Pentagon's ground rules have been carefully framed as permissive, not restrictive,[74] and, compared to the military's repressive stance in earlier conflicts like Grenada and Desert Storm,[75] appear magnanimous.

Once embedded, the reporter has every incentive to comply with the ground rules, even in the absence of formal restraints. Currying favor with long-term sources is a temptation faced by all journalists, as prevalent at Page Six and the White House Press Pool as in an embed

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[68] Ground Rules, *supra* note 13, ¶ 4.G.18 ("No photographs or other visual media showing an enemy prisoner of war or detainee's recognizable face, nametag or other identifying feature or item may be taken."). Since criteria may change in future conflicts, this Note presents this example merely to illustrate the potential influence of substantive publication restrictions.

[69] DASDPA Whitman explains the ban on identifying prisoners of war or detainees as a means to avoid "holding [them] up to public curiosity" in contravention of the Geneva Convention. Whitman Interview, *supra* note 15.

[70] *See* DANNY SCHECHTER, EMBEDDED: WEAPONS OF MASS DECEPTION 19 (2003) (quoting former TV reporter as saying "[n]ow, the story of war is seen through the eyes of the American battalions, but without the real violence").

[71] *See* Massing, *supra* note 54, at 19.

[72] *Id.*

[73] An English Ministry of Defense–commissioned commercial analysis of print output by embeds found that "90% of their reporting was either 'positive or neutral.'" David Miller, *The Domination Effect*, GUARDIAN (London), Jan. 8, 2004, at 23.

[74] *See, e.g.*, Ground Rules, *supra* note 13, ¶ 3.Q.

[75] *See supra* note 12.

scenario.[76] Repeat players have a strong motivation to refrain from publishing material which would alienate exclusive sources.[77] Many news outlets also self-imposed a "patriotic" tenor on their coverage, driven by a sense that viewers would be alienated by critical commentary.[78] Embeds' complete immersion exacerbates such source/journalist pressures. Most journalists have little, if any, outside access as relief from constant interaction with their sources.[79] Some reporters with larger news organizations can confirm information with colleagues posted elsewhere or operating unilaterally,[80] but many have a restricted view of the war.[81] Embedding typically takes place in a constrained environment where journalists cannot afford to alienate the limited sources available. Accordingly, most reporters will be reluctant to publish anything that the officers and soldiers surrounding them might receive badly.[82] On an organizational level, this instinct may drive media outlets—especially less established organizations—to take extra measures to ensure their published and broadcast material remains within ground rules as a precaution against any discrimination in a future conflict.[83] Even one of the embed program's heralded successes, William Branigin's story about American soldiers

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[76] *See, e.g.*, James LeMoyne, *Pentagon's Strategy for the Press: Good News or No News*, N.Y. TIMES, Feb. 17, 1991, at E3 (describing military manipulation of pool system during Persian Gulf War to reward favorable coverage).

[77] *See, e.g.*, Gail Russell Chadock, *Bush Administration Blurs Media Boundary*, CHRISTIAN SCI. MONITOR, Feb. 17, 2005, at 1 (describing White House tactic of cutting off press access in response to unfavorable coverage).

[78] CNN, for example, broadcast less congratulatory coverage on its International English language channel than its domestic one. Massing, *supra* note 54, at 17. The influence of the embed program is suggested by the strikingly different coverage of the American civilians killed in Falluja on March 31, 2004, once most embeds had left the program. Many newspapers published graphic, full-color images of the bodies, followed by some public outcry. *See* Martha A. Sandweiss, *Death on the Front Page*, N.Y. TIMES, Apr. 4, 2004, at WK13.

[79] Embedded reporter Gordon Dillow of *The Orange County Register* wrote of his experience traveling in an armored assault vehicle, "Your radius of knowledge was basically about three hundred meters across." EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at xvi.

[80] *See, e.g.*, Huff, *supra* note 61, at 113.

[81] *See supra* note 77 and accompanying text; Shafer, *supra* note 23 (noting embeds' difficulty in determining success of overall campaign).

[82] Jim Wilkinson, the manager of the Coalition Media Center at the Coalition Central Command Headquarters in Qatar, for example, rebuked insufficiently positive reporters and warned one reporter that he was on a "list." *See* Massing, *supra* note 54, at 16.

[83] The press's reluctance to question the administration's claims of Iraqi possession of weapons of mass destruction before the war (and before embedding assignments were made), as opposed to a wave of criticism after the initial campaign and main embed program had subsided, hints at the strength of the media drive not to go against general consensus and burn sources. *See* Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004, at 43.

killing civilians at a checkpoint, does not portray the military completely unfavorably. After describing a horrific incident, Branigin concludes with sympathy for the soldiers and chronicles their sorrow for the "mistake."[84]

The embed program exerts tremendous psychological pressure on journalists as well. Journalists report from unfamiliar, unstable surroundings, with military cohorts as their source for all information, security, and camaraderie.[85] One embed discusses how close quarters, isolation, and fear compelled him to downplay non-combat civilian casualties and frequent gallows humor: "The point wasn't that I wasn't reporting the truth; the point was that I was reporting the marine grunt truth—which had also become my truth."[86] The hermetic environment exacerbates a sense of attachment because, unlike most investigative journalists, an embed cannot revert to an outside life at the end of the day. A visceral sense of loyalty is only natural when your source is literally keeping you alive.[87]

Because these forces influence the tenor of news coverage, the key area of inquiry is the gap between the information that an embed cannot gain access to or report, but which could be covered by a unilateral. As indicated above, this space is difficult to define, in part because of the wide variety of experiences among both embedded and unilateral journalists.[88] The dominance of positive coverage may stem from the substance and structure of the program rather than any conscious military manipulation. Nevertheless, this degree of state influ-

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[84] *See* Bryan Whitman, *The Birth of Embedding as Pentagon War Policy*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 203, 207–08.

[85] Isolated from everyone else, you start to see your small corner of the world the same way they do. I didn't hide anything. For example, when some of my marines fired up a civilian vehicle that was bearing down on them, killing three unarmed Iraqi men, I reported it—but I didn't lead my story with it, and I was careful to put it in the context of scared young men trying to protect themselves.

Dillow, *supra* note 67.

[86] *Id.*

[87] Max Boot, *The New American Way of War*, FOREIGN AFF., July/Aug. 2003, at 41, 54 (noting that embed reporters quickly began to refer to U.S. forces as "we" rather than "they").

[88] *See supra* Part I.A. However, the fact that a significant number of embeds decided to "disembed" may suggest some dissatisfaction with the guideline restraints. *See* News Transcript, U.S. Dep't of Def., Deputy Assistant Sec'y Whitman Interview with NPR (Apr. 25, 2003), http://www.defense.gov/transcripts/2003/tr20030425-0150.html. *But cf.* Whitman Interview, *supra* note 15 ("Once Baghdad fell—Baghdad became the center of gravity for the news story and that's when people left their embeds in great numbers . . . .").

ence triggers fundamental First Amendment concerns about the government's power to curb critique.[89]

II

FIRST AMENDMENT IMPLICATIONS: GOVERNMENTAL INFLUENCE AND PUBLIC DEBATE

While figures are not available, this Note assumes the embed program provides the American public with more news: Embedded journalists have easy access to many otherwise unavailable sources on a daily basis and the technology to file stories at any time. Even if many of these reports have a human-interest rather than a "hard news" core,[90] the publication of more information about such a salient political topic would normally be cause for First Amendment scholars and media pundits to rejoice. However, a focus on quantity alone ignores the importance of quality of information, an essential consideration in evaluating the program's First Amendment propriety.[91]

In this analysis it will be helpful to analogize embedding to the White House Press Pool, where certain reporters from selected media outlets cover presidential press conferences and activities. To compete in this marketplace, the media must again earn access to these sources, which are limited and closely monitored. As in the embed context, the journalistic sources exercise tight control over the flow of information, creating a similar incentive for access-seeking reporters to portray the White House favorably.[92] One important difference between the White House Press Pool and an embed situation is that the government can more effectively control and restrict unauthorized press access to the former. Such control is much more difficult over the larger span of space and more numerous objects of interest in a battlefield.

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89 *See* Randall P. Bezanson & William B. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1487 (2001) ("[G]overnment speech should receive little or no immunity from [the ordinary requirement of viewpoint neutrality] when the government's speech creates a monopoly for a particular point of view, when it distorts the marketplace of ideas, and [when there is] government deception.").

90 *See infra* note 197.

91 *See infra* note 101 and accompanying text.

92 *See, e.g.*, HOWARD KURTZ, SPIN CYCLE: INSIDE THE CLINTON PROPAGANDA MACHINE (1998) (describing Clinton Administration White House press management); Ken Auletta, *Fortress Bush: How the White House Keeps the Press Under Control*, NEW YORKER, Jan. 19, 2004, at 53 (describing Bush Administration's White House press management), *available at* http://www.newyorker.com/fact/content/?040119fa_fact2.

A. *Relevant First Amendment Principles*

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press."[93] This ban has been justified by three primary rationales: promoting an efficient marketplace of ideas,[94] ensuring a well-informed populace for deliberation and self-governance,[95] and allowing for full self-actualization.[96] The embed program is most problematic for the first two rationales. Because of the fundamental interest in having a knowledgeable public, capable of making the complex decisions required in a democracy, the First Amendment does not protect only speakers. The Supreme Court has recognized that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw[ ]"[97] and has implied a "right to receive" information and ideas.[98] While this right has not been held to require affirmative governmental efforts to ensure balanced information in the marketplace,[99] it suggests limits on the government's ability to remove particular ideas from debate.[100] First Amendment protection encompasses the quality as well as the quantity of information; it is "concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate."[101] This concern is particularly acute in the context of improper governmental motiva-

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93 U.S. CONST. amend. I.

94 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

95 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–27 (1948) (arguing that core of free speech is enhancement of self-government through informed public); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) ("[T]he First Amendment is principally about political deliberation.").

96 David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1975) (Value of free expression "rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.").

97 First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978).

98 Martin v. City of Struthers, 319 U.S. 141, 143 (1943). *See also* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original).

99 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–58 (1974).

100 *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) ("Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances. This is so . . . because by effectively excising a specific message from public debate, [the law] mutilates 'the thinking process of the community' . . . .").

101 *Id.* at 198; *see also id.* 198 n.32, 217–21; ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).

tion, where the restriction stems from disagreement with the speaker's views or a desire to avoid governmental embarrassment.[102]

Such motives may underlie the embed restrictions. While the program formally permits uncomplimentary coverage of the American military, that stance is at odds with the embed program's acknowledged purpose to counteract enemy misinformation (which presumably casts United States tactics in an unfavorable light). This inherent tension invites improper favoritism based on the content of coverage. Even in the absence of any military impropriety, the program's substantive rules and structurally created dependencies inevitably tilt media coverage in the military's favor.[103]

This distortion is problematic, given the core First Amendment concern with governmental censorship of criticism.[104] Although the government cannot actively intrude on editorial privilege to balance marketplace inequalities,[105] its influence on public perception through the embed program implicates important First Amendment concerns about the quality of public debate.

B. Potential First Amendment Challenges to an Embed Program

The concept of an embed program should therefore be evaluated in light of the First Amendment interests in governmental discretion and ensuring vigorous public debate—even if not framed as a formal "right to receive." To do so, this Note will consider the constitutionality of restrictions placed on individual journalists and news organizations. The fact that participation in the program is voluntary does not immunize it from further constitutional analysis. Once the government implements any subsidy, like the embed program, its execution and the conditions attached must be constitutional.[106]

Military restrictions similar to those employed in an embed program have been challenged on two traditional First Amendment grounds: first, that excluding the press violates their right of access,[107] based on the idea that the military battlefields are public fora, and second, that prepublication security review constitutes an unconstitu-

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[102] *See* Stone, *supra* note 100, at 227–28 ("[I]mproper motivation consists chiefly of the precept that the government may not restrict expression simply because it disagrees with the speaker's views . . . [or] because it might be embarrassed by publication of the information disclosed.").

[103] *See supra* Part I.D.

[104] *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring). ("The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.").

[105] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. at 256–58.

[106] *See infra* Part II.B.1.

[107] *See supra* notes 6–7 and accompanying text.

tional prior restraint.[108] Viewpoint discrimination, which has yet to be applied to the military context, may also be applicable because of the embed program's potential to skew coverage.[109] While these arguments offer colorable claims, they fail in light of the doctrinal preference for security over speech. Accordingly, this Note concludes that embedding is constitutional.

1. *Voluntary Participation Does Not Negate the Need for Constitutional Scrutiny*

Some commentators have argued that the embed program presents no First Amendment difficulties because journalists have voluntarily traded unlimited access for the substantial benefits of increased access and protection.[110] The press—like any entity—can waive rights in exchange for governmental benefits.[111] First Amendment rights have been upheld as waiveable, particularly in the context of governmental employees and the protection of national security.[112] However, voluntary participation does not alleviate the need for constitutional scrutiny. Taken cumulatively, individual waivers of First Amendment rights can skew the public's perception of events and its deliberative process.[113] As the Court noted in *National Endowment for the Arts v. Finley*, "even in the provision of subsidies, the Government may not 'ai[m] at suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."[114]

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[108] *See supra* notes 5, 7 and accompanying text.

[109] *See supra* Part I.D.

[110] *See* Wilcox, *supra* note 9, at 51 (arguing media agreement to undergo prepublication security reviews during Gulf War, in exchange for access, did not constitute unconstitutional prior restraint); William A. Wilcox, Jr., *Security Review of Media Reports on Military Operations: A Response to Professor Lee*, 26 HARV. J.L. & PUB. POL'Y 355, 361 (2003) [hereinafter Wilcox, *Security Review*] (same). As noted above, governmental imposition of prepublication security review is technically "voluntary," but difficult to refuse in practice. *See* Jacobs, *supra* note 5, at 695–96 (arguing that news organizations had no choice but to participate in "voluntary" review system during Persian Gulf War).

[111] *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938) (affirming that accused may waive right to assistance of counsel).

[112] Snepp v. United States, 444 U.S. 507, 516 (1980) (finding national security concerns justify imposition of prior restraint); *see* Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J., 1101, 1107–13 (2003) (describing national security exception to prior restraint).

[113] For example, the government may not allow voters to bargain away voting rights, even if they willingly agree, because the collective effects of individual waivers would corrode fundamental constitutional rights. Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 915 (1986) (arguing that waiver of First Amendment rights is impermissible even in context of national security).

[114] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (alteration in original) (citations omitted). The concurrence emphasized that those who wished to create

Pragmatically, the embed program works as a subsidy. The government draws upon its resources to provide shelter, food, equipment, access, and protection in exchange for a media organization's agreement to comply by DOD ground rules. Presumably, media organizations with more access have more stories to publish, broadcast, or sell, creating higher profits. While much embed reporting may be more human interest than substantively remarkable, each embed's coverage still generates exclusive—and competitively advantageous—information. Most will not be in an economic position to decline the opportunity to embed.

The provision of such a dramatic advantage invites abuses of discretion and troubling favoritism. The Supreme Court has noted that "[t]he threat of sanctions may deter [the] exercise of [First Amendment rights] almost as potently as the actual application of sanctions."[115] The embed program allows military officials significant discretion, enabling them to decide which media organizations are assigned to what unit, what information to reveal to which reporters, and when to perform security review. The press runs the risk of potential backlash—removal from the program, military reticence, or poor placement in a subsequent program—after publishing unsupportive materials. Since the DOD is the only possible source of troop access to the degree provided by embedded journalism, it exerts an overwhelming influence on the tenor of coverage.[116] Even if well-intentioned or unconscious, this impact cannot be ignored in light of First Amendment concerns about the quality of public debate.[117]

2. *Prior Restraint and the National Security Exception*

Responding to these First Amendment concerns, a media outlet could challenge the embed program as imposing a prior restraint through prepublication security review. A prior restraint—prepubli-

"indecent [or] disrespectful" art could find alternative sources of funding since the NEA is not the sole source of art grants. *Id.* at 597 (Scalia, J., concurring). The situation differs from embedding, where the government has an effective monopoly on access and information.

115 Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 588 (1983) ("[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment.") (emphasis in original).

116 Edward J. Lordan, *Mixed Messages: The Bush Administration Public Relations Campaign in the Iraqi War*, PUB. REL. Q., Fall 2003, at 9, 10 ("Because the military effort was so successful, however, it is difficult to predict whether the embedding policy would be as successful in a war that wasn't so one-sided.").

117 *See supra* note 113 and accompanying text.

cation censorship[118]—is one of the most strongly disfavored forms of governmental restriction on speech.[119] The embed program tries to reduce the use of formal prior restraints by several means. First, the program attempts to avoid journalist exposure to sensitive material that would be subject to prepublication review through "security at the source," a military practice of withholding unauthorized material from those without proper clearance.[120] Second, the ground rules call for commanders to set out restrictions before providing access, in the hopes that journalists will exclude problematic material themselves.[121] Third, the mandated preference for temporary blackouts rather than complete restrictions on sensitive media coverage (like identification of American casualties) also helps the military avoid imposing formalized prior restraints.[122] While this preference may have little impact upon the ultimate survival of a story in practice, since a delayed broadcast rarely retains any public interest or market value for most media organizations,[123] it avoids the imposition of a formal ban. Together, these approaches reduce the possibility that reporters will be exposed to material which would later be deemed a security risk and subject to prepublication review. By avoiding an explicit ban on the publication of information, these policies circumvent classification as prior restraints, providing less fodder for judicial challenges. Nevertheless, as the ground rules recognize and as is borne out in practice,

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118 A prior restraint is a "governmental restriction on speech or publication before its actual expression." BLACK'S LAW DICTIONARY 1074 (7th ed. 1999). Since the government stresses the voluntary nature of security review, there is some dispute about classifying security review as a prior restraint. *See* Wilcox, *Security Review*, *supra* note 110, at 361 (arguing media agreement to undergo prepublication security reviews during Gulf War, in exchange for access, did not constitute "prior restraint"). Nevertheless, the conditions of embedding create substantial pressure to allow security review, and voluntary agreements with the government must still pass constitutional muster. *See supra* II.A.; Jacobs, *supra* note 5, at 695–711 (arguing that "security review" measures instituted in Persian Gulf War were impermissible prior restraints because news organizations had no choice but to participate in "voluntary" review system). It is hard to imagine a more archetypal example of a prior restraint than the government screening press reports to restrict content prior to publication. Accordingly, this Note will assume that security review constitutes prior restraint.

119 Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1973) (noting prior restraints are "the most serious and the least tolerable infringement on First Amendment rights"); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

120 Whitman Interview, *supra* note 15; *see also supra* note 35 and accompanying text.

121 Ground Rules, *supra* note 13, ¶¶ 6.A., 6.A.1.

122 *See* Whitman Christian Science Monitor Interview, *supra* note 59.

123 *See Neb. Press Ass'n*, 427 U.S. at 561 ("As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."); Lee, *supra* note 7, at 760–62 (noting that temporary restrictions are as fatal as permanent ones for news that gets stale).

journalists will inevitably be exposed to some sensitive or classified information and therefore be subject to prepublication review.[124]

The embed use of security review may be one of the few acceptable governmental exercises of prepublication censorship.[125] The Court has explicitly suggested that military security qualifies as a rare exception to the traditional presumption against prior restraints.[126]

The Court has read such an exception very narrowly for much of the last half-century.[127] Most famously, *New York Times Co. v. United States* (*Pentagon Papers Case*) confirmed the weight of First Amendment principles and the importance of airing information potentially critical of the government, despite drastic security, military, and diplomatic repercussions.[128] The government "carries a heavy burden of showing justification for the imposition of such a restraint."[129] The national security exception has been employed, however. In 1979, for example, the government successfully enjoined a magazine from publishing technical information about nuclear weapon design in *United States v. The Progressive, Inc.*[130]

Despite the bold stance of the *Pentagon Papers Case*, the Supreme Court has given little guidance about when national security will be sufficiently endangered to allow prior restraint. The direction it has given suggests that the *Pentagon Papers Case* may not be the most applicable to the embed context. In the *Pentagon Papers Case*,

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124 Ground Rules, *supra* note 13, ¶ 6.A.1.

125 *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting possible wartime exception to rule against prior restraints); Note, *Shutter Control: Confronting Tomorrow's Technology with Yesterday's Regulations*, 19 J.L. & POL. 203, 220 (2003) (arguing that military restrictions on visual reportage withstand constitutional scrutiny). *But cf.* Jacobs, *supra* note 5, at 693–711 (finding national security interests in "logistics, surprise, and morale" during Persian Gulf War insufficient to justify prior restraint); Lee, *supra* note 7, at 744–45, 754, 761–62 (finding security review during wartime military operations unconstitutional due to "imprecise" application and lack of procedural safeguards).

126 *Near*, 238 U.S. at 716 ("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.").

127 *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."); *Neb. Press Ass'n*, 427 U.S. at 559 (finding no exception for prior restraint in context of criminal trial).

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

129 *Id.* at 714 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

130 467 F. Supp. 990 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). The government lifted the injunction after seven months when another publication published the information. *See generally* L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990) (discussing history of *The Progressive* case and arguing that prior restraints against publisher may be ineffectual because of alternative means of distributing information).

the information at issue regarded already completed military actions. In contrast, the ongoing nature of combat during embed reporting makes the impact of released information more consequential. As a result, the *Pentagon Papers Case* is not as relevant to embedding as *Snepp v. United States*, which confirmed that national security is a compelling interest.[131] In *Snepp*, a former CIA agent agreed upon employment to submit manuscripts to prepublication review. The Court condoned this, implying such review would be constitutional when a beneficiary receives access to confidential sources, even in the absence of an explicit agreement.[132] In the embed program, journalists agree to abide by the ground rules in exchange for access, suggesting that their waiver is appropriate and that the conditions are a similarly reasonable means of serving the compelling governmental interest in national security. Both *Snepp* and the *Pentagon Papers Case* involve the government's conditional grant of access based upon an explicit agreement to allow prepublication review; if the Court did not find the agreement offensive in *Snepp*, it is unlikely to do so in the case of this program, particularly because the apparent danger of the security breach on a battlefield seems more dire in comparison.[133]

3. *The Right of Access*

A traditional challenge to the constitutionality of military restrictions posits that they violate a press right of access. The D.C. Circuit recently denied similar claims in *Flynt v. Rumsfeld*, which considered the right of access to foreign battlefields in general rather than the specifics of an embed program.[134] *Flynt* characterized foreign battlefields as public fora, imposing an affirmative duty on the government to provide access.[135] In an alternative argument, a formal embed pro-

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[131] *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (finding CIA imposition of prepublication security review even in absence of employment agreement "entirely appropriate" exercise of power to protect "substantial government interests").

[132] *Id.* at 509, 511 n.6 ("Quite apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship.").

[133] Strengthening this doctrinal support, the ground rules delineate plausible matters of military importance whose release could adversely affect operation success. *See, e.g.*, Wilcox, *Security Review*, *supra* note 110, at 361 (arguing that security review of reportage from military operations is constitutional). With public support behind the program, most courts will be reluctant to overturn anything less than prohibitively vague or blatantly self-interested restrictions, especially since the information barred will probably be of little use to the press by the time the issue reaches adjudication.

[134] 355 F.3d 697, 703–05 (D.C. Cir. 2004).

[135] After complete press exclusion from the early stages of the Grenada Invasion in 1983, Larry Flynt sued on behalf of his *Hustler* reporter, claiming a First Amendment right to access the battlefield. *See* Flynt v. Weinberger, 762 F.2d 134, 135 (D.C. Cir. 1985) (finding case moot since press was eventually granted access); EMBEDDED: THE MEDIA AT

gram could also be found to create a limited public forum and a qualified right of access. If a right of access were found, it would limit the government's ability to impose press restrictions in conflict areas to reasonable ones that serve compelling interests. Such arguments are stronger than those employed in *Flynt*, but find shaky support in current doctrine.

a. Right of Access to Battlefields as Traditional Public Fora

The press does not have special access privileges beyond the public at large,[136] so arguments asserting a right to access battlefields rest on public forum doctrine. The doctrine provides for general access to areas traditionally open to the public, like streets and parks, subject only to reasonable time, place, and manner restrictions.[137] In *Richmond Newspapers, Inc. v. Virginia*, for example, the Supreme Court upheld criminal trials as public fora, finding a constitutional right of public access based on the "unbroken, uncontradicted history" of such access.[138] In public fora, the government bears a higher burden to justify speech restrictions.[139]

Building on this doctrine, *Flynt* centered on reporter access to Special Operations ground troops during the Afghanistan offensive in late 2003, before the implementation of the embed program.[140] Therefore, the D.C. Circuit's opinion does not address embedding itself, which has yet to be considered by the courts (despite a confusing reference to the term "embed").[141] Instead, the decision turns on the government's alleged duty to provide general battlefield

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WAR IN IRAQ, *supra* note 2, at xii (describing exclusion of press from Grenada Invasion); Cassell, *supra* note 9, at 943–44 (same). A coalition of alternative media outlets challenged access restrictions imposed during Operation Desert Storm in *Nation Magazine v. U.S. Department of Defense*. 762 F. Supp. 1558, 1568 (S.D.N.Y. 1991) (finding limited right of media access to Persian Gulf battlefield, but finding claim moot because conflict had ended).

136 Pell v. Procunier, 417 U.S. 817, 834 (1974) (finding no "affirmative duty to make available to journalists sources of information not available to members of the public generally").

137 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("[Streets and parks] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.") (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

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

139 *See infra* notes 163–66 and accompanying text.

140 Flynt claimed that this denial, authorized under Directive Number 5122.5, violated the press's First Amendment right of access to battlefields. Flynt v. Rumsfeld, 355 F.3d 697, 700 (D.C. Cir. 2004).

141 *Id.* at 699. *See infra* note 144 and accompanying text.

access.[142] Flynt argued that battlefields are public fora, so reporters have the right to accompany ground troops, and that the government's refusal to provide this access went beyond the permitted reasonable time, place, and manner restrictions.[143] The D.C. Circuit disagreed, finding no "right to travel *with* military units into combat, with all of the accommodations and protections that entails—essentially what is currently known as 'embedding.'"[144] The result rests on firm doctrinal foundations—to be characterized as a public forum, a court would have to find foreign battlefields enjoyed a traditional openness similar to that found in streets and parks.[145] This is an all but impossible task given the restrictions placed on war reporting throughout American history.[146]

b. Right of Access to Battlefields as a Limited Public Forum

Even if the government has no affirmative duty to provide the public access to a particular forum, the government can create a limited or qualified public forum if it provides access or subsidies "to encourage a diversity of views"[147] or "facilitate private speech."[148] Examples of limited public fora include state university meeting facilities opened for student groups,[149] open school board meetings,[150] and

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142 *Id.* at 702.

143 *Id.* at 700–01.

144 *Id.* at 702. Here, the Court denies that government has any affirmative duty to provide press access to military units' combat. It incorrectly equates this right with embedding, which is more accurately described as the military's voluntary provision of press access in exchange for the imposition of specified restrictions.

145 *See supra* notes 136–37 and accompanying text.

146 *See supra* notes 9, 11–12. The D.C. Circuit explicitly found that *Richmond Newspapers* did not apply to Flynt's claims. *See Flynt*, 355 F.3d at 704 ("[I]t is obvious that military bases do not share the tradition of openness on which the Court relied in striking down restrictions on access to criminal court proceedings in . . . *Richmond Newspapers*." (internal citations omitted)). It also pointed out that the Supreme Court has never applied *Richmond Newspapers* outside the context of criminal proceedings. *Id. See also* Lee, *supra* note 7, at 744 (arguing that right of access does not apply in wartime military operations).

147 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) ("[V]iewpoint-based restrictions are [not] proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

148 *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (holding ban on speech unconstitutional since "program was designed to facilitate private speech, not to promote a governmental message").

149 *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981) (finding state university meeting facilities opened for student groups limited public fora).

150 *See* City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 174–76 (1976) (finding open school board meetings limited public fora).

city-leased theaters.[151] Such status has been denied to airport terminals,[152] military bases[153] and restricted access military stores,[154] jailhouse grounds,[155] and sports complexes.[156] If battlefields qualify as limited public fora, then media restrictions on battlefield access would be subject to similarly strict scrutiny as traditional public fora.

In *Flynt*, neither the district nor the circuit courts used this traditional test for a limited public form to support their positions. The district court speculated in dicta that the press may enjoy a limited right of access to cover foreign combat,[157] but offered only minimal support. It made no reference to the encouragement of diverse viewpoints or facilitation of private speech, but instead seemed to rely on some notion of a right to receive information. For support, the court cited dicta from *Nation Magazine*, which hypothesized that, because of the importance of protecting the flow of information to the public, there "is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation."[158] This view would entail closer scrutiny of substantive embed restrictions, as discussed below.[159]

The D.C. Circuit rejected this argument upon *de novo* review, finding no precedent supporting the assertion that the press has any

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151 *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555–56 (1975) (finding city-leased theaters limited public fora).

152 *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (finding airport terminals non-public fora).

153 *See* Greer v. Spock, 424 U.S. 828, 838 (1976) (finding military bases non-public fora).

154 *See* Gen. Media Commc'ns, Inc. v. Cohen, 131 F.3d 273, 280 (2d Cir. 1997) (finding restricted access military stores non-public fora).

155 *See* Adderley v. Florida, 385 U.S. 39, 47–48 (1966) (finding jailhouse grounds non-public fora).

156 *See* Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 691 F.2d 155, 161 (3d Cir. 1982) (finding Meadowlands Sports Complex non-public fora).

157 [I]n an appropriate case there could be a substantial likelihood of demonstrating that . . . the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations . . . .

Flynt v. Rumsfeld, 180 F. Supp. 2d 174, 175–76 (D.D.C. 2002). The Department of Defense denied Flynt's request to place reporters with ground forces at the commencement of combat in Afghanistan, citing practical and security obstacles. It suggested Flynt use alternative access and cover air strikes or interview soldiers. *See* Flynt v. Rumsfeld, 355 F.3d 697, 698–99 (D.C. Cir. 2004). The district court ultimately declined to reach the merits of the claims under the Declaratory Judgment Act, finding the controversy too abstract to justify reaching a significant constitutional question since Flynt had not exhausted all available channels for seeking access. Flynt v. Rumsfeld, 245 F. Supp. 2d 94, 107–10 (D.D.C. 2003).

158 Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558, 1571–74 (S.D.N.Y. 1991).

159 *See infra* Part II.B.3.d.

First Amendment right of access to battlefield reporting.[160] Although the opinion does not explicitly discuss battlefields as spaces opened by the government for expressive purpose, it implies that such a characterization is impossible given the historical lack of unrestricted access to battlefields.[161] The argument is difficult to refute. The historical prevalence of battlefield censorship weighs against finding a right of access. Beyond this, most people think that the primary purpose of a battlefield is to wage and win wars, not to encourage expression, which conflicts with the notion that governmental tolerance of war correspondents is opening a forum for speech. Arguments for battlefield access cannot provide a shield against embed regulation.[162]

c. The Embed Program as a Limited Public Forum

There is a stronger argument that the embed program—as opposed to mere battlefields—creates a limited public forum; embedding is not a mere toleration of various viewpoints, but an invitation to express them. The ground rules describe the program as a means to "organize for and facilitate access of national and international media to our forces" with the aim of ensuring that "the media get to the story alongside the troops."[163] By opening military units to reporters in an official and regulated manner, the government could easily be characterized as facilitating private speech.[164] The speech-friendly rhetoric surrounding the program might lead a court to conclude that embedding "was designed to facilitate private speech, not to promote a governmental message"[165] and therefore that its substantive restrictions must be subject to strict scrutiny as a limited public forum.

However, the explicit limitations of the pool system and ground rules undercut this characterization. The Supreme Court has held that a limited public forum is created only where the government "makes its property generally available to a certain class of speakers," and not when it reserves eligibility for select individuals who must first obtain permission to gain access.[166] By credentialing and limiting the

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160 *Flynt*, 355 F.3d at 703.

161 *Id.* at 704–05.

162 *See* Karen C. Sinai, Note, *Shock and Awe: Does the First Amendment Protect a Media Right of Access to Military Operations?*, 22 CARDOZO ARTS & ENT. L.J. 179, 197–200 (finding no constitutional right of press access to foreign battlefields).

163 Ground Rules, *supra* note 13, ¶ 2.A.

164 *See supra* note 148 and accompanying text.

165 *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 549 (2001) (holding that Congress could not prohibit legal services–funded attorneys from challenging constitutionality of welfare laws).

166 *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998).

number of embeds, the government might be characterized as only offering its access to "select individuals."

The success of either argument depends on the political climate and the deciding court's view of First Amendment values. Either way, any attempt to support embed-type access rests on shaky foundations. In *Flynt*, for example, the D.C. Circuit reiterated a prior holding 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."[167] While the prospects of finding a constitutional violation based on limited public forum claims do exist, they are very dim.

d. The Constitutionality of Substantive Restrictions

If a court did find a right of access under one of the above arguments, the court would still have to invalidate specific program components to find the restrictions unconstitutional. In a public or limited public forum, the government can impose content-based restrictions only if they are narrowly drawn and justified by a compelling state interest,[168] and can impose content-neutral "time, place, and manner" restrictions only if they are reasonable.[169]

Based on the inconsistent administration of the rules described above,[170] a court could easily find some content-based rules to be too broad or not to further a compelling government interest. For example, a publication could argue that the restriction on showing identifying features of enemy casualties and combatants attempts to cleanse reportage of any apparent brutality by American forces.[171]

However, the embed guidelines have been drafted with a media-friendly tone, which suggests their rationality, and with an emphasis on maintaining national security, which suggests a discernable compel-

167 Flynt v. Rumsfeld, 355 F.3d 697, 703 (D.C. Cir. 2004) (alteration in original) (internal citations omitted).

168 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Carey v. Brown, 447 U.S. 455, 461 (1980).

169 *See* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (reasonable restriction that regulates only time, place, or manner of speech is permissible); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (same); Schneider v. State, 308 U.S. 147, 160 (1939) (same); *Perry*, 460 U.S. at 45 (same).

170 *See supra* Part I.D.

171 *See* SCHECHTER, *supra* note 70, at 19 (quoting former TV reporter as saying: "Now, the story of war is seen through the eyes of the American battalions, but without the real violence."). The government maintains that this decision was not designed to skew coverage, but was made in deference to the Geneva Convention's restriction on holding up prisoners to public scrutiny. Whitman Interview, *supra* note 15.

ling justification.[172] The ground rules' emphasis on providing reporters with as much access and information as possible undercuts allegations of overly broad tailoring.[173] It would be even more difficult to prove that the restrictions do not serve a compelling governmental interest. As long as the constraints are not wildly inappropriate, the military can always claim paramount security concerns, citing the instantaneous and widespread transmission of current reporting and the unpredictability of battle. These arguments are difficult to counter, particularly in the midst of combat.[174]

Security concerns will also increase the possibility that almost any content-neutral restriction will be found "reasonable," a capacious category even in contexts that do not involve warfare and national defense. Since security has traditionally trumped very strong First Amendment prohibitions in the prior restraint context, it should take the highest priority in evaluating the ground rules' substantive restrictions as well. In this context, the current rules would pass constitutional muster.[175]

4. *Viewpoint Discrimination: Substantive and Structural*

A more novel approach would challenge the substantive and structural dynamics of the embed program as viewpoint discrimination. In *R.A.V. v. City of St. Paul*, the Supreme Court overturned on First Amendment grounds a statute that criminalized hate speech based on race, color, creed, religion, or gender.[176] Even though the statute banned unprotected "fighting words," it was constitutionally impermissible for the legislature to criminalize some fighting words and not others on the basis of viewpoint.[177] This limitation holds even

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172 *See Flynt*, 355 F.3d at 705 (offering textual analysis to support view that Directive 5122.5 is "incredibly supportive" of media rights).

173 *See, e.g.*, Ground Rules, *supra* note 13, ¶ 3.Q ("The standard for release of information should be to ask 'Why Not Release' vice 'Why Release.' Decisions should be made ASAP, preferably in minutes, not hours.").

174 *See, e.g.*, *Flynt*, 355 F.3d at 705 (finding military restrictions reasonable). Tania Cruz, Note, *Civil Liberties Post-September 11: Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused,"* 2 SEATTLE J. SOC. JUST. 129, 130, 153–155 (2003) (noting historical trend of judicial deference to executive during times of "national security fears").

175 I do not mean to suggest that individual restrictions—whether content-based or content-neutral—could never constitute constitutional violations; they might be deemed unconstitutional as parameters and restrictions change in future conflicts. As discussed in Part II.D.4, there may be valid claims against the substance of particular restrictions as viewpoint discrimination. They might also be struck down as content-based regulations for not being narrowly tailored or serving a compelling governmental interest, or as unreasonable content-neutral restrictions.

176 505 U.S. 377, 391 (1992).

177 *Id.*

if a state actor has no obligation to open a particular forum or provide subsidies "to encourage a diversity of views"[178] or "facilitate private speech;"[179] once the government does so, it cannot "silence the expression of selected viewpoints."[180]

The First Amendment permits viewpoint discrimination only when the government speaks or uses "private speakers to transmit information pertaining to its own program[s]."[181] In *Legal Services Corporation v. Velazquez*, the Supreme Court held that Congress could not prohibit Legal Services–funded attorneys from challenging the constitutionality of welfare laws, expressing concern that the restrictions would impede critique of the government's welfare policy and "distort[ ] the legal system."[182] The government "may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."[183] To prove that an embed program constitutes viewpoint discrimination, a challenger would have to frame embedding as a subsidy exceeding constitutional bounds and demonstrate that the program's criteria or structure creates a distortion similar to that prohibited in *Velazquez*,[184] perhaps by pointing towards substantive rules like the enemy casualty restriction[185] or the program's structural pressures.[186] In essence, this argument asserts that the embed program goes too far in shaping favorable reportage as a means of combating enemy "misinformation."

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178 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) (finding viewpoint-based restrictions not proper when government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

179 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (holding ban on content-based speech unconstitutional since legal services program "was designed to facilitate private speech, not to promote a governmental message").

180 *Rosenberger*, 515 U.S. at 835.

181 Rust v. Sullivan, 500 U.S. 173, 193 (1991) (finding government decision not to fund family planning services that provide abortion information not viewpoint discrimination, but valid exercise of congressional power to spend selectively); *see also Rosenberger*, 515 U.S. at 834 ("Having offered to pay [the printing costs] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.").

182 *Velazquez*, 531 U.S. at 544, 549.

183 *Id.* at 544 (arguing that such a subsidy would distort legal system by "altering the traditional role of the attorneys").

184 *See id.* at 542; *Rosenberger*, 515 U.S. at 834–35 (finding viewpoint discrimination unconstitutional when government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers").

185 *See supra* notes 66–70 and accompanying text.

186 *See supra* Part II.B.3.d.

The program's indistinct effects make it difficult to establish a constitutional violation. The secrecy surrounding the restricted information, the variation of embed experience, and the ambiguity about the ground rules' influence on pro-American coverage undermine arguments based on the distorting impact of the substantive ground rules or embed structure. Market pressures on media organizations to seem patriotic might explain the overwhelmingly positive coverage of the Iraq conflict.[187] Most media outlets voluntarily followed the ground rules, in part due to a perceived market pressure to appear patriotic and emotionally sensitive.[188] Without any explicit coercion, the causal connections between the Grounds Rules and the content of the reports are too tenuous to amount to viewpoint discrimination.[189]

III
ALTERNATIVES AND IMPROVEMENTS TO THE EMBED PROGRAM

Failure to find a constitutional violation does not end the analysis. Policy alternatives should be evaluated in terms of First Amendment principles—limiting governmental discretion, providing for diverse public debate—without losing sight of the counterbalancing security concerns.

As discussed in Parts I and II above, an embed program provides more information to the public about the details of war, which undoubtedly serves to provide a more vivid sense of the experience and conduct of modern warfare. On the other hand, embedding entails significant governmental discretion, the risk of less vigorous public debate, and an emphasis on security. Yet the alternatives to embedding—prohibiting press access or removing all governmental regulation—will not necessarily provide more protection for free speech. A complete ban not only severely restricts access to information, but is also pragmatically and politically unlikely. The dismantling of governmental regulation—essentially making all reporters

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187 *See supra* Part I; Mario Carvalho, *Choosing the Right Target*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 379, 385 ("Some TV crews complained about not being allowed by their editors to show the horrors of war . . . ."); SCHECHTER, *supra* note 70, at 18 (quoting TV executives promoting their networks' war coverage as emphasizing "the positive, not the negative"); Massing, *supra* note 54.

188 *See, e.g.*, SCHECHTER, *supra* note 70, at 21 (noting "Fox Effect," whereby Fox's success in attracting viewers via pro-American coverage caused other media outlets to adopt similar approaches).

189 The Court has been deferential when evaluating the criteria attached to receipt of government benefits in less dire contexts. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583, 590 (1998) (finding "decency and respect" considerations used in granting NEA funding constitutional).

unilaterals—seems more promising. But while this may increase the probability that more dissenting voices will reach the public, it runs a significant risk of devolving into an informal embedding system, where favored sources receive more access than others without any transparency or accountability for such discrepancies.

Despite its difficulties, the embed program may well be the best alternative to preserve free speech concerns. This is not to imply that imposition of stricter substantive restrictions or less even-handed application of the ground rules could not rise to the level of a constitutional violation. Nevertheless, the transparency, accountability, and security precautions of embedding suggest that the policy balances free speech and security interests as best as can be expected in a situation that implicates two such opposing and fundamental concerns.

A. No Press Access

One way to eliminate improper discretion would be to ban all press access to battlefields. In future conflicts the government could simply refuse to allow press any access to battlegrounds, as it did during the Grenada invasion.[190] However, restricting all press access is not so much an option as a negation—it would be equivalent to erecting a barrier around the White House and forcing all reporters to stay beyond its limits. While reporters would still be able to track the President's visible comings and goings, they would have to rely upon government press releases for any insight into more intricate activities within the White House walls.

While this alternative allows little room for improper discretion or security breaches, it does not further First Amendment principles. Instead of relying on distorted information, the public would make decisions based on speculation and government propaganda. This option eliminates any potential check on information by the "Fourth Estate," going well beyond the difficulties caused by embedding-induced favoritism.

Moreover, a comprehensive ban may not be practically possible. In environments less isolated than Grenada, the military may not be physically able to restrict the press completely. It would still have to develop a policy to manage intruding journalists, with a range of possible reactions so dependent upon individual circumstance that they could easily become discretionary.

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[190] *See supra* note 11.

Such a ban may also be politically infeasible given the favorable public response to embedding.[191] Beyond this, a complete ban strikes at the symbolic core of the First Amendment. Denying all press coverage of so vital an event would be at odds with a national commitment to free speech. Widespread acceptance of such a stance would constitute a weakening, not a strengthening, of First Amendment values.

B. Informal Embedding

If it were possible to allow close access without requiring governmental supervision for security reasons, then the embed structure might be abandoned for being overly susceptible to governmental discretion and likely to encourage media bias. The military could decide not to institute any formal embed program so that all journalists would be free to take their own risks but publish whatever they uncover: in essence, making all reporters unilateral. The resulting free-for-all might resemble reporting on the Vietnam War, which faced minimal military restriction and resulted in copious and critical coverage.[192] The increased risk of personal harm would stop neither media outlets nor journalists from covering the war (although their numbers might decrease). Reporters would simply operate without military protection, endangering both themselves and American troops.[193] The security threat would be magnified, in fact, since modern technology increases the ramifications of inadvertent security breaches. The modern possibility of instantaneous transmission renders the exposure of sensitive information potentially catastrophic.[194] As a result, the government is likely to continue to monitor and regulate reportage to some degree.

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191 *See* Ken Paulson, *Upon Further Review*, AM. JOURNALISM REV., Aug.–Sept. 2003, at 60, 60 (finding 65% of Americans favored embedding, 68% thought media war coverage was excellent, and over two-thirds approved of universal prepublication review from combat zones); Rem Rieder, *In the Zone*, AM. JOURNALISM REV., May 2003, at 6, 6 (arguing that embedded program was successful); Ricchiardi, *supra* note 62, at 35 (reporting that many would like to see embedding adopted as permanent Pentagon war coverage plan); Whitman Interview, *supra* note 15 (noting that reporters will inevitably be at scene of any war and that embedding provides safer conditions for reporters and troops).

192 *See supra* note 10 and accompanying text.

193 Whitman Interview, *supra* note 15; Wilcox, *supra* note 9, at 51 (noting difficulty of determining identity of uncredentialed civilians); Baker, *supra* note 42, at 292 (describing dangers faced by unilaterals in field).

194 This threat is most acute in the context of visual broadcasts, where strategic information might easily be conveyed inadvertently. While print published on a longer timeline avoids most of this risk, up-to-the-moment print journalism still shares the potential to expose not-yet-stale sensitive information due to the capability to convey information to the media outlet instantaneously and publish a story on the Internet soon afterwards.

Nor will this alternative truly eliminate the military's discretion in granting access and regulating content. Certain media outlets and individual reporters will always be favored, whether on the basis of clout, favorable coverage, security review concessions, or simply personal charm. This is partly due to human nature, but, more significantly for these purposes, would also build upon the expectations and procedures already established by the Iraq embed program. Both media outlets and their audiences have become acclimated to close-up embed coverage. Journalists will be under pressure to get similar scoops, even in the absence of an official embed structure that would facilitate this access.

An informal embed situation would be akin to reporters swarming around the White House walls, trying to catch glimpses behind windows and opened doors. Some would bribe or charm or slip past guards to get inside the White House for a closer look, or perhaps simply agree to publish only favorable things or submit to security review in order to be allowed within the White House perimeters. Others would simply wait outside and come to their own conclusions. The outsiders would not care about publishing unflattering information—they have no access to lose by offending their sources. The favored reporters would, however, strive to maintain their privilege as long as it did not impair their fundamental mission to provide information.

This dynamic risks diminishing the quality of information the American public receives. There may be more objective and critical coverage because the military would have no formal power to strip reporter credentials and exclude them from the environment. Surely, some brave journalists would use this opportunity to publish exposés, while others would curry favor as long as possible in order to get as much access as they can. Without any formal procedure for accountability if conditions seem improper, the process for discrimination becomes less transparent and more susceptible to abuse. The freedom allotted by this distance would result in fewer journalists reporting at close range. This reduction might only lead to a decrease in human interest adventure tales, but it might also mean less information about the tenor of military life and combat. The result is the potential for more coverage critical of military actions, balanced by less overall information, increased security risk, and less visible military discretion.

In short, dismantling the embed program might reduce the incidence of bias due to governmental influence, but it will not come close to eradicating the problem. Nor would it eradicate governmental discretion with regard to access and permissible topics of coverage.

Removing the embed restrictions would only mean that control would not be imposed in a formalized fashion.

For all its distorting effects and discretionary potential, embedding at least allows for a unified program whose particulars are open to public scrutiny.[195] In an ideal world, the military regulation of reportage would be transparent and accountable; the embed program at least provides a system of appeal to make this a possibility. It is up to the public and the media to make it a reality.

C. Measures for Potential Mitigation

This is not to say that embedding does not still present difficulties. The program is potentially misleading, giving a veneer of objectivity to coverage that may only be marginally so. It will only support First Amendment values if the military, and, more importantly, the media remain aggressive in making the program's structure as explicit and transparent as possible.

It will fall predominantly on the media outlets and the American public to take responsibility to ensure embedding indeed promotes First Amendment values, by complaining about improper restrictions and challenging suspicious rules and discretion. The media should also increase the transparency of the embed program by making its parameters clearer to the public. This act alone may increase viewer skepticism and motivation to seek out alternative corroboration of information. It may also assure greater military accountability.

Media outlets should also attempt to mitigate the program's problematic aspects by encouraging unregulated voices. The DOD has admitted that embed coverage alone is insufficient.[196] Without the balance of unilaterals, smaller media organizations have a very limited perspective on the conflict, often filing human interest stories that are episodic and jingoistic.[197] Since unilateral coverage provides

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[195] *See* Steger, *supra* note 8, at 1000–05 (recommending ex ante military commitment to media strategy, guideline establishment, and judicial review to reform military wartime press restrictions).

[196] "[E]mbedding was never designed to be the sole means of coverage. . . . [T]he embedded reporter sees just a very small slice of life [which provides] a richness and a human element . . . [but] it has to be a part of a more comprehensive coverage . . . ." Deputy Assistant Secretary Whitman Interview with NPR, *supra* note 88.

[197] "[I] can't give you this gigantic wide-ranging view of the war. I'm the only reporter there from my newspaper and I'm embedded in the middle of Iraq . . . . All a guy like me can do is give really detailed, if possible, gut-wrenching snapshots of what's going on," said a *Detroit News* reporter. John Bebow, *Charging Into Bad-Guy Country with Custer*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 7. *See also* David Zucchino, *Sorry, No Room Service at Saddam's Presidential Palace*, *in* EMBEDDED: THE MEDIA AT WAR IN IRAQ, *supra* note 2, at 141–42 (discussing his narrow perspective as embed). *But cf.* Wilcox, *Security Review*, *supra* note 110, at 364 (arguing that unilateral reporters are

a counterbalance to embed reports, news organizations—both individually and collectively—should compliment embed reports by devoting more resources to unilaterals.

A military program providing limited aid for unilaterals would help counteract the inherent bias of the embedding. Ideally, this would involve provision of several collective centers for communication and shelter. This type of solution may be outside the scope of military power, however, which necessarily prioritizes maintaining operational security above unilaterals' mission to gather information. At a minimum, the government should develop official standards for interacting with unilaterals, including contingencies for emergency medical aid and transportation.

CONCLUSION

The public, press, and military view the embed experiment as a success[198] and similar programs will probably be implemented in future conflicts.[199] While the program allows a greater amount of information to flow to the American public, its specific criteria and structure exert significant influence on the critical content of war reportage. Nevertheless, the program passes constitutional muster. While its vulnerability to bias implicates important free speech concerns, embedding offers a promising solution in a challenging context. In a world where untarnished objectivity is an impossibility, embedding remains the alternative most supportive of First Amendment values. An embed program at least allows for an abundance of intimate coverage, greater transparency of governmental discretion, and establishment of standards for military accountability. It is up to the media and the public to ensure that embedded journalism fulfills its potential.

dangerous and suggesting that reporters without access to military briefings provided by embed program have inferior understanding of military information).

198 *See supra* note 191.

199 Whitman Interview, *supra* note 15 ("I think the embedding concept is good and we should try to do it more often.").