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Lifting the Dover Ban: The Compromise on Press Access to Fallen Soldiers Returning from War

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**LIFTING THE DOVER BAN: THE COMPROMISE ON PRESS
ACCESS TO FALLEN SOLDIERS RETURNING FROM WAR**

*Jason Zenor**

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A corollary of the right to publish must be a right to gather news. However, in times of war, one of the first rights to be abrogated is the freedom of the press. A contemporary wartime restriction has been the Dover Ban, a policy which has limited press access to arrival ceremonies for fallen soldiers of war. Though the press and veterans have criticized the Dover Ban, and challenged in court—it was never overturned. But, in February 2009, the Obama administration changed the policy so that the press could have access if they received permission from the family of the fallen soldier. This change is progress

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and is clearly less violative of the free press clause than the prior outright ban.

This Article will argue that the new policy is still unconstitutional. First, the Dover arrival ceremonies have been traditionally open to the public and the press. The history of the Dover Ban's creation and enforcement illustrate that it is unconstitutional content-based regulation. Furthermore, the new policy is a de facto license where the family, acting as a surrogate for the government, decides whether the press has access based upon whether the family perceives the content of the coverage will be acceptable. Finally, the policy is not permanent and could be reinstated under a new president.

"Many, having seen it and dreamed of its horrors, would lock it up in some secret drawer . . . as we would have buried the mutilated remains of the dead they too vividly represented."

Oliver Wendell Holmes, Sr. 1863
(Referring to the pictures of the Civil War dead)

"It is well that war is so terrible -- lest we should grow too fond of it."

Robert E. Lee

I. INTRODUCTION

In August 2011, twenty-two members of the U.S. Navy's Seal Team Six were killed in Afghanistan when their helicopter was shot down by a shoulder-rocket grenade.¹ Seal Team Six, an elite team of Special Forces, received great notoriety three months earlier when they completed the ten-year hunt for Osama Bin Laden by raiding his compound and shooting him dead. None of the twenty-two members of Seal Team Six who died in August 2011 were part of the Bin Laden raid. Nevertheless, they were members of this revered team that had done what many thought was impossible. Their deaths were a national news story and a reminder of the fact that, despite Bin Laden's death, American soldiers were still at war in the region. The bodies of the twenty-two Navy Seals returned to the United States and were

1. The casualties occurred on August 6, 2011. In total, 38 members of the NATO coalition were killed, 30 of which were American troops. See Laura King et al., *Seal Team 6 Members Among the 38 Killed in Afghanistan*, L.A. TIMES, Aug. 6, 2011, available at <http://articles.latimes.com/2011/aug/06/world/la-fg-afghanistan-chopper-20110807> (last visited Apr. 15, 2013).

processed at the Dover Air Force Base. The soldiers were honored with an arrival ceremony, the public did not witness the ceremony. The Department of Defense's policy on press access to the ceremonies is that families must consent—and in this case, only 11 of the 30 families did so.² The ceremony was closed off to the press, not seen by the general public,³ and the nation was not able to honor those who sacrificed their lives to make a more secure world.⁴

One of the Obama Administration's early policy changes in 2009 dealt with the press's access to Dover Air Force Base for the arrival ceremony of fallen soldiers from the wars in Iraq and Afghanistan. For 18 years prior, the Department of Defense's policy had been a complete ban on access, though it was only enforced when the country was at war.⁵ Free press advocates and many family members of fallen soldiers called for a complete lifting of the Dover Ban.⁶ Instead, the Obama administration's new policy, implemented in February 2009, allowed the press access to arrival ceremonies only if it receives permission from the families of the fallen soldiers.

This current compromise is a step in the right direction for the free flow of information. Although it is clearly a less egregious violation of the Constitution than the complete ban, it may not pass constitutional scrutiny. First, the history of the Dover Ban's creation and enforcement illustrate that it is a content-based regulation in a designated public forum; thus, it must survive the strict scrutiny test. The Dover Air Force Base has been traditionally open to the public and the press for military ceremonies. As a designated public forum, it must remain open to the public unless there is a compelling state interest forwarded by a narrowly tailored restriction. Accordingly, neither the government's

2. The new policy states that when groups of soldiers return to Dover, the press can take photos of the caskets for which the families have consented to press access. When the caskets of those whose families have not consented are unloaded, the press is "ushered away." In this case, the Pentagon claimed it had not yet identified all of the remains, and thus it would not allow any pictures to be taken. See *White House Photo of Dead Troops Ceremony Sparks Protest*, HUFFINGTON POST, Aug. 10, 2011, available at http://www.huffingtonpost.com/2011/08/10/white-house-photo-of-dead_n_923952.html (last visited Apr. 15, 2013).

3. But a picture of President Barack Obama saluting at the ceremony was allowed to surface. Some have argued that this was another attempt to use the ceremony as a public relations piece in spite of the families' wishes. See *id.*

4. One member of a 9/11 family said upon the death of Bin Laden, "My only regret was not being with the team that went into the compound." Martha Moore, *9/11 Families React to Bin Laden's Death with Relief, Sadness*, USA TODAY, May 2, 2011, available at http://www.usatoday.com/news/nation/2011-05-02-911-families-joy-sadness-osama-bin-laden-death_n.htm (last visited Apr. 15, 2013).

5. See *infra* Part II.

6. See Nat'l Press Photographers Ass'n, *NPPA Calls on President Obama to Lift Dover Photo Ban*, Feb. 10, 2009, available at http://nppa.org/news_and_events/news/2009/02/dover01.html (last visited Apr. 15, 2013).

public relations interest nor the privacy interest of a volunteer soldier's family are compelling. Finally, the new policy is a *de facto* license where the family, acting as the government's surrogate, decides if the press has access based upon whether the family finds the coverage acceptable.

This Article will examine the evolution of the Dover Ban and its constitutionality. First, Part II of this Article examines the history of press access to war casualties. It then details the evolution of the Dover policy and the court cases challenging it. Next, Part III outlines the legal background of press access to government institutions. Finally, Part IV applies precedent to the current policy and questions the policy's constitutionality.

II. THE DOVER BAN

Dover Air Force Base (Dover) is home to the largest mortuary in the U.S. Armed Forces.⁷ All soldiers killed overseas,⁸ as well as government officials and contractors,⁹ are returned to Dover for processing before being released to the family for private burial services. These bodies are returned to the United States in flag-draped coffins on airplanes.¹⁰ Once they arrive to the base, the coffins are moved from the planes to the mortuary and given an honor guard ceremony within view of all those present.¹¹ The Department of Defense began denying press access to Dover in 1991.¹² Subsequently,

7. U.S. Air Force, *Dover Air Force Base*, available at <http://www.dover.af.mil/units/index.asp> (last visited Apr. 3, 2013). See also Michael Linfield, *Hear No Evil, See No Evil, Speak No Evil: The Press and the Persian Gulf War*, 25 BEVERLY HILLS B. ASS'N J. 142, 149 (1991) (discussing press censorship during the first Gulf War).

8. U.S. Air Force, *Air Force Mortuary Affairs Operations Center* [hereinafter *Air Force Mortuary Affairs*], available at <http://www.mortuary.af.mil/library/policydirectives/index.asp> (last visited Apr. 3, 2013); *JB Pictures v. Dep't of Def.*, 21 Media L. Rep. 1564, 1564 (D.C. Cir. 1993) (holding that 1991 Dover Ban was constitutional).

9. For example, when Commerce Secretary Ron Brown died in a plane crash in Europe while on official duties, his body, along with the U.S. Air Force personnel that was aboard, was returned to Dover with an official arrival ceremony open to the public. See Scott McNair, Note, *Is there a Right to View the Dead at Dover?* *JB Pictures v. Dept. of Defense: Limits on the Media's Right to Gather Information*, 4 VILL. SPORTS & ENT. L.J. 387, 390 (1997).

10. *Air Force Mortuary Affairs*, *supra* note 8; Clay Calvert, *Victories for Privacy and Losses for Journalism? Five Privacy Controversies from 2004 and Their Policy Implications for the Future of Reportage*, 13 J.L. & POL'Y 649, 664 (2005) (discussing journalists' FOIA requests for pictures of flag-draped coffins returning from the War in Iraq).

11. *Air Force Mortuary Affairs*, *supra* note 8; see also David Anderson, *Freedom of the Press in Wartime*, 77 COLO. L. REV. 49 (2006) [hereinafter Anderson, *Freedom of the Press*] (discussing press challenges of government restrictions during wartime).

12. See *JB Pictures*, 21 Media L. Rep. at 1564; see also Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic*

the policy became known as the “Dover Ban.”¹³

A. History of Press Access to War Casualties

The press, the military, and the public have had an uncomfortable relationship concerning pictures of the war dead.¹⁴ During the Civil War, Abraham Lincoln had sanctioned press correspondents on the battlefield, specifically famous photographer Matthew Brady, to send stories and pictures to the masses back home.¹⁵ During World War I and World War II, military censors placed a virtual blackout on pictures of war dead.¹⁶ Because of the unofficial build-up during Vietnam, the government had not been able to place such controls on the press, and pictures of war dead proliferated.¹⁷

From 1972 to 1991, the press and public had access to Dover to view and photograph the coffins carrying the deceased soldiers.¹⁸ The press attended a ceremony for 8 U.S. soldiers killed in the rescue attempt of the Tehran Embassy hostages in 1980.¹⁹ In 1983, the press covered the

Culture, 26 LOY. L.A. ENT. L. REV. 133 (2006) (discussing the U.S. Supreme Court’s decision in *Favish v. National Archives & Records Administration* and its implication on privacy rights after death).

13. The phrase was coined by Former Chairman of the Joint Chiefs of Staff Gen. Henry Shelton in 1999 to describe the impact that the images of flag-draped coffins returning to the U.S. would have on public support for a war. Mary Clark, *Keep Your Hands off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity*, 58 RUTGERS L. REV. 45, 67–68 n.75 (2005) (analyzing the control that the military maintains over disposition of war dead).

14. See Robin A. Arzon, Comment, *Exploring Iraq War News Coverage and a New Form of Censorship in Violation of the Quickly Evaporating Public Interest Requirement and Public Right to Receive Information*, 12 VILL. SPORTS & ENT. L.J. 327, 329–35 (2005) (detailing the history of press coverage of U.S. military since the Revolutionary War). “The proper balance between the executive branch, what citizens need to know, and press access has been disputed since the advent of print media and this debate has intensified with increased technological capabilities.” *Id.* at 329–30.

15. See Clark, *supra* note 13, at 64 n.59 (“Antietam was the first battlefield in American history to be covered by cameramen before the dead had been buried.”). Lincoln understood “the public’s perception of the war’s progress was nearly as important as actual events on the battlefield.” HARRY J. MAHAFFER, *WAR OF WORDS: ABRAHAM LINCOLN AND THE CIVIL WAR* PRESS 97 (2001).

16. See Ray Rivera, *Images of War Dead a Sensitive Subject*, SEATTLE TIMES, Apr. 22, 2004. The justification was that if Americans back home saw the sight of war dead, then it would undermine the war effort. *Id.*

17. See *id.*

18. See Melissa Stear, *Operation Media Control: The Military’s Assault on the First Amendment Right to Access*, 65 GEO. WASH. L. REV. 735 (1997) (analyzing the D.C. Circuit’s decision in *JB Pictures* to uphold constitutionality of Dover Ban).

19. President Carter was photographed praying over the flag-draped caskets. National Security Archive, *Chronology of DOD Policy on Images of the Honors Provided to American*

arrival ceremony for the personnel killed in the bombing of the U.S. Embassy in Beirut.²⁰ In 1985, President Ronald Reagan was photographed pinning purple hearts on the flag-draped caskets of soldiers killed in El Salvador.²¹ In 1989, the press was also allowed access to the arrival ceremonies for navy personnel killed in an accidental explosion aboard the battleship *U.S.S. Iowa*.²²

Again, in 1989, 2 American soldiers killed during the Invasion of Panama were brought to Dover and the press and public were there to witness the event.²³ The 3 major television networks decided to broadcast, split screen, the arrival ceremony and President George W. Bush's news conference.²⁴ On one side of the screen, President Bush was shown joking around at the press conference while the other side of the screen featured the solemn arrival ceremony.²⁵ Unknowingly, President Bush appeared insensitive, and the White House received many complaints.²⁶

During Desert Shield in 1990, Dover was used as a supply depot and the press was regularly allowed to provide live feeds from the base.²⁷ Weeks before military action of Desert Storm began, the Department of Defense changed its policy on press access to Dover.²⁸ The policy prohibited press access to Dover AFB when deceased U.S. soldiers returned to the port of entry.²⁹ With consent from the soldier's family, however, the press was allowed access to the other stops that the coffins made along the way to returning to their home base.³⁰ Consequently, during the first Gulf War, the press was not allowed access to Dover AFB when the bodies of soldiers killed in action returned.³¹

Casualties [hereinafter NSA, *Chronology of DOD Policy on Images*], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB136/doverchron.pdf> (last visited Apr. 15, 2013).

20. President Reagan was photographed kneeling in front of a row of flag-draped coffins. *Id.*

21. *Id.*

22. *Id.*

23. See *JB Pictures v. Dep't of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996).

24. See National Security Archive, *Pentagon Releases More Photos of War Casualty Honor Guards* [hereinafter NSA, *Pentagon Releases More Photos*], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB161/index.htm> (last visited Apr. 22, 2013).

25. *Id.*

26. *Id.*

27. See Michael Klein, *The Censor's Red Flair, The Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions*, 19 HASTINGS CONST. L.Q. 1037, 1052 (1992) (examining press censorship during the first Gulf War).

28. See *JB Pictures*, 86 F.3d at 238.

29. *Id.* The public was still able to access the base for other activities on the base, including when soldiers were being shipped out. *Id.*

30. *Id.*

31. In *JB Pictures*, the government unsuccessfully argued that case should be dismissed

After the Gulf War, the Dover Ban was still the official policy but was only intermittently enforced.³² The government never enforced the policy when bodies returned that had not died in battle.³³ For example, in 1996, Secretary Ron Brown was killed in a plane crash in Croatia while on official government duty.³⁴ His body, along with the U.S. Air Force personnel on board, was returned to Dover,³⁵ and the official arrival ceremony was open to the press and public.³⁶ The ceremony was widely broadcasted on television and photographs from the event appeared in newspapers.³⁷

The government also did not enforce the policy for many service members that returned from embassy bombings in Kenya and Tanzania,³⁸ the skirmishes in Somalia and Bosnia, or the bombing of the U.S.S. Cole.³⁹

Prior to March 2003, photographs of deceased soldiers returning in coffins from Afghanistan were published in the media.⁴⁰ On the day before the beginning of the Iraq War, the Pentagon released a directive stating there would be absolutely no arrival ceremonies or press access to Dover AFB.⁴¹ The Bush administration cited an interest in protecting the privacy of the soldiers and their families.⁴² The reinstatement of the policy did not go unchallenged.

In November 2003, the administrator of *The Memory Hole* website filed a Freedom of Information Act (FOIA) request to access photos of coffins returning to Dover.⁴³ In April 2004, the Air Force finally released 360 photographs taken by Dover personnel.⁴⁴ At that time, the

because the plaintiff's challenge was moot since the war had ended. *See id.*

32. *See NSA, Chronology of DOD Policy on Images, supra* note 19.

33. McNair, *supra* note 9, at 390.

34. *Id.*

35. *Id.*

36. President Clinton was present at the ceremony. *Id.*

37. *See Crash Victims Returned Home 33-Flag-Draped Coffins Arrive from Croatia*, FLA. TODAY, Apr. 7, 1996, at A3. Meg Greenfield, *The Long Journey from Mass Graves to Stately Honor Guard*, WASH. POST, Apr. 15, 1996, at A21.

38. *See NSA, Chronology of DOD Policy on Images, supra* note 19.

39. *See Dana Milbank, Curtains Ordered for Media Coverage of Returning Coffins*, WASH. POST, Oct. 21, 2003, at A23.

40. *Id.*

41. Jane Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 499 (2006) (outlining FOIA requests made by the press during the early parts of the War in Iraq).

42. *Pentagon Unhappy at Displays of Coffin Photos*, ASSOC. PRESS, Apr. 23, 2004, available at <http://www.firstamendmentcenter.org> (last visited Apr. 1, 2013).

43. *See Brain Braiker, Russ Kick Uncovers Government Secrets*, NEWSWEEK, May 7, 2004.

44. *See Bill Carter, Pentagon Ban on Pictures of Dead Troops is Broken*, N.Y. TIMES, Apr. 23, 2003. Apparently it was an error by the Air Force and not sanctioned by the Pentagon. Caroline Overington, *Photos Released in Error*, AGE, Apr. 24, 2004. The pictures were

Department of Defense also announced it would tighten restrictions on the release of photographs of coffins of Americans killed in Iraq, following an employee of a private contractor sending pictures from his cell phones that were eventually published nationwide.⁴⁵

In June 2004, the Senate voted down a bill that would have required the military to give press access to Dover arrival ceremonies.⁴⁶ A similar bill was introduced in the House of Representatives in 2008, but it stalled in committee.⁴⁷

In October 2004, a CNN correspondent filed a FOIA lawsuit to force the Pentagon to release images of deceased service members returning in flag-draped coffins.⁴⁸ In 2005, the Department of Defense settled the lawsuit and decided to release scores of pictures taken during arrival ceremonies.⁴⁹ That was the last time any photos were leaked or released until the Obama administration changed the policy on media presence at Dover arrival ceremonies.⁵⁰

B. JB Pictures v. Department of Defense

After the Dover Ban was installed in 1991, a media corporation challenged the policy.⁵¹ The government argued that it had a compelling interest in not burdening the family to travel to official ceremonies and in protecting the privacy of the family.⁵² The media-plaintiff argued the privacy interest could be better protected if the government did not hold any arrival ceremonies.⁵³

eventually published by the traditional mainstream media that had been banned from Dover. *Id.*

45. See David Perlmutter, *Technology Won't Permit It*, *NEWSDAY*, Apr. 27, 2004, at A4. The woman that sent the photo lost her job. Hal Berton, *Woman Loses Her Job Over Coffin Photos*, *SEATTLE TIMES*, Apr. 22, 2004. Dover had started a website in March 2004 that published pictures of coffins returning to the mortuary—the website was shut down in April 2004. NSA, *Chronology of DOD Policy on Images*, *supra* note 19.

46. Sheryl Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, *N.Y. TIMES*, June 22, 2004, at A17.

47. The Fallen Hero Commemoration Act was introduced July 30, 2008 by Rep. Walter B. Jones (R-N.C.). Fallen Hero Commemoration Act, H.R. 6662, 110th Cong. (2d Sess. 2008); see Editorial, *Shrouded Homecomings*, *N.Y. TIMES*, Sept. 8, 2008, available at http://www.nytimes.com/2008/09/08/opinion/08mon3.html?_r=2&emc=tnt&tntemail1=y&oref=slogin (last visited Apr. 23, 2013).

48. George Edmonson, *Suit Seeks Military Coffin Photos*, *ATLANTA J. CONST.*, Oct. 5, 2004, at 7A.

49. See NSA, *Pentagon Releases More Photos*, *supra* note 24.

50. See Ann Scott Tyson, *Pentagon to Lift Press Ban on Coffins at Dover*, *WASH. POST*, Feb. 26, 2009, available at http://voices.washingtonpost.com/44/2009/02/26/pentagon_to_lift_press_ban_on.html (last visited Apr. 21, 2013).

51. See *JB Pictures v. Dep't of Def.*, 86 F.3d 236 (D.C. Cir. 1996) (holding that the Dover Ban is constitutional).

52. *Id.* at 238.

53. *Id.* at 241.

The District Court held that the press did not have special access rights to government institutions.⁵⁴ The Court's analysis was based on its belief that Dover Air Force base was not traditionally open to the public.⁵⁵ The court also stated families may be compelled and burdened to travel to Dover for the broadcasting of the deceased's arrival even if there was no ceremony.⁵⁶ Thus, the U.S. Constitution does not force the government to make a choice whether or not to have a ceremony, possibly appearing insensitive either way.⁵⁷

The District Court also noted a balancing of interests may vary according to the number of caskets returning and the ability to identify the individual soldiers.⁵⁸ The policy of gaining the family's consent for photography at other stops was consistent with the government's interest and was found to be constitutional.⁵⁹

The court also rejected the plaintiff's argument that the Dover Ban constituted viewpoint discrimination.⁶⁰ First, all media and public were denied access to the arrivals.⁶¹ Second, the court felt the photographs were not necessarily negative coverage, so the policy's purpose was not to prohibit content.⁶² Finally, the court held that the policy did not restrict the dissemination of information given that the press could still publish the numbers of soldiers killed, their names, as well as other information.⁶³

54. *JB Pictures, Inc. v. Dep't of Def.*, 86 F.3d 236, 239 (D.C. Cir. 1996).

55. *Id.* at 240.

56. *Id.* at 241.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 240–41.

61. *Id.* at 240.

62. *Id.* at 239. The court stated:

[The press claims] visual images of caskets of deceased soldiers convey a certain message, and images of soldiers or military supplies being loaded onto an outgoing transport plane convey quite a different one. There is undoubtedly some truth in the observation, although we question plaintiffs' apparent view that the return of war dead is an event necessarily laden with anti-war implications. One has only to think of Pericles's famous speech honoring the first Athenians killed in the Peloponnesian War, or the Gettysburg Address, to recognize that one cannot easily pigeonhole the meaning of a return of soldiers killed in battle. Likewise, we are less confident than plaintiffs that images of soldiers *departing* for combat necessarily create a positive image of war in the public mind.

Id.

63. *Id.* at 240 ("Greater access to Dover will [not] reveal new information about the occurrence or magnitude of casualties in military conflict . . . [T]he Dover policy does not impede acquisition of basic facts, the raw material of a story.").

III. LEGAL BACKGROUND

A. Freedom of the Press

The First Amendment was written in clear, unambiguous language—"Congress shall make no law abridging the freedom . . . of the press."⁶⁴ The Founding Fathers gave substantial protections to the press, believing the press had an essential role in our democracy: "to serve the governed, not the governors."⁶⁵ James Madison stated to the First Congress in his Bill of Rights proposal: "the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."⁶⁶

The press has a great responsibility to report fully and accurately the proceedings of government.⁶⁷ As Justice White noted, "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government[.]"⁶⁸ The First

64. U.S. CONST. amend. I; see also *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (holding that the U.S. Government had not met its burden of showing justification for prior restraint of publication of the contents of Vietnam War study). The Court has never held that the press clause gives the press any more rights than the public. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799–800 (1978). Justice Stewart argued that the press should have special rights specifically derived from the press clause. Potter Stewart, *Of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975).

Professor Ugland asserts:

The First Amendment reads "Congress shall make no law . . . abridging the freedom of speech, or of the press" It does not read "speech and press," as if to suggest a single concept, or even "speech or press." It says "of speech, or of the press," which is a more starkly disjunctive wording and suggests, however subtly, a calculated separation. The use of the word "the" before "press" could even be significant. By referring to "*the press*," perhaps the Framers were referring to a distinct institution.

Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, DUKE J. CONST. L. & PUB. POL'Y 113, 155 (2008).

65. *Pentagon Papers*, 403 U.S. at 717 ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.").

66. See David Anderson, *The Origins of The Press Clause*, 30 UCLA L. REV. 455, 534 (1983) ("In the minds of members of the First Congress, the press clause was part of the new plan of government, no less than if it had been in the original Constitution"). See Stewart, "*Of the Press*," *supra* note 64, reprinted in 50 HASTINGS L.J. 705, 708 (1999) ("The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches").

67. See *Cox Broad. v. Cohn*, 420 U.S. 469, 492 (1975) ("In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.").

68. *Id.*

Amendment secures “the paramount public interest in a free flow of information to the people concerning public officials[.]”⁶⁹ This Constitutional protection ensures that the press can reveal such government secrets and enlighten the public.⁷⁰

Consequently, the U.S. Supreme Court has recognized that the freedom of the press is a fundamental right.⁷¹ As a fundamental right, any government action abridging the freedom of the press must survive strict scrutiny.⁷² A strict scrutiny standard means that any state action must first be supported by a compelling state interest and that the means used must be necessary to achieve the compelling state interest.⁷³

B. Press Access to Government

Press access is not specifically mentioned in the text of the First Amendment.⁷⁴ However, as Justice Potter Stewart wrote, “a corollary of the right to publish must be a right to gather news[.]”⁷⁵ and in order to gather news, the press needs access to information and events. “[T]he First Amendment goes beyond [just protecting] the press . . . to prohibit[ing] government from limiting the stock of information from which members of the public may draw.”⁷⁶

Secrecy in government is fundamentally anti-democratic.⁷⁷ As Justice Hugo L. Black noted, “[o]nly a free and unrestrained press can

69. *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (“The constitutional guarantee of a free press ‘assures the maintenance of our political system and an open society.’”).

70. *See Pentagon Papers*, 403 U.S. at 717 (“Only a free and unrestrained press can effectively expose deception in government.”) (Black, J., concurring). “[An] informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . To allow it to be fettered is to fetter ourselves.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (holding that state statute that imposed license tax to sell advertising for newspapers and magazines that had a weekly circulation of more than 20,000 copies was unconstitutional).

71. *See Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983).

72. *Id.* at 585 (“Under a long line of precedent, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly.”).

73. *See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–805 (2006) (reviewing the development of strict scrutiny standard).

74. *See infra* note 163.

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

76. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (holding that corporations have First Amendment protections).

77. *See Pentagon Papers*, 403 U.S. 713, 724 (1971) (Justice Douglas concurring). “In a democratic society, secrecy is accountability’s evil twin.” *Brief of Appellant, Argus Leader v. Hagen*, 2007 SD 96, 739 N.W.2d 475 (No. 24191) 2006 WL 4961497, at *23.

effectively expose deception in government.”⁷⁸ Open debate of public issues is vital to national health, and thus information should be open and uninhibited.⁷⁹ Openness increases people’s trust in their government.⁸⁰ According to Justice Warren Burger, in *Richmond Newspapers v. Virginia*, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”⁸¹

1. Press Access to Criminal Proceedings

In *Globe Newspapers Co. v. Superior Court*,⁸² the Supreme Court held that a Massachusetts’s statute that required a judge to deny access for the press and the public to courtrooms during the testimony of sexual assault victims did not pass strict scrutiny.⁸³ The Court held that any government action that restricts First Amendment right of access “in order to inhibit the disclosure of sensitive information” must be supported by a compelling governmental interest that is narrowly tailored to serve that interest.⁸⁴ Furthermore, the compelling state interest must be articulated in the findings of the lower court so that a reviewing court can determine whether the closure order was proper.⁸⁵

The presumption of openness can be defeated by a finding that an overriding interest is essential to preserve higher values, which is only served by denying press access, and that closure is the least restrictive alternative.⁸⁶ For example, the press has no guaranteed right of access to

78. *Pentagon Papers*, 403 U.S. at 717.

79. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1965) (There is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

80. *Press-Enter. Co. v. Super. Ct. (Press-Enter. I)*, 464 U.S. 501, 508 (1984) (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”).

81. 448 U.S. 555, 572 (1980) (holding that without an overriding state interest, a trial must be open to public and press).

82. 457 U.S. 596 (1982).

83. *Id.* at 607 (“Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

84. *Id.* at 604–05 (“[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one”).

85. See *Press-Enter. Co. v. Super. Ct. [hereinafter Press-Enter. II]*, 478 U.S. 1, 13 (1986) (“[S]pecific findings [must be] made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”).

86. See *Globe Newspapers Co.*, 457 U.S. at 606–07 (“[T]he State’s justification in

the scenes of crime, disasters, or any place where the general public is excluded, when public order is a compelling state interest.⁸⁷ The press may be prohibited from attending or publishing certain information about trials if such restrictions are shown necessary to assure a defendant the constitutional guarantee of a fair trial and no other means are available.⁸⁸

In *Press Enterprise II*, the Supreme Court created a less stringent test for press access to criminal proceedings by adding a “historical openness” threshold.⁸⁹ In order to reach strict scrutiny, the media defendant must show that a criminal proceeding was historically open to the public.⁹⁰ This standard equates the press’s right of access with that of the public.⁹¹

The legal standard for press access to court proceedings is still the *Press Enterprise* test—that access laws apply equally to the press and the public. Nevertheless, some scholars argue that in order for the press to perform its adversarial role effectively, it must be given a broader right of access than that enjoyed by the general public.⁹²

2. Press Access to Prisons

In deciding whether press should have access to prisons, the Court has employed a balancing test between the public’s interest in obtaining information and the government’s interest in restricting access.⁹³ In prison access cases, the Court has usually ruled in favor of the government because the compelling state interest of safety in prison administration outweighs the public’s right to know about government institutions.⁹⁴

In *Pell v. Procunier*,⁹⁵ the Court examined whether the government withholding access to a government controlled institution violated the

denying access must be a weighty one.”).

87. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980). However, in these situations, the press is eventually given access or in the alternative, law enforcement will give the press access to information about the events. *Id.*

88. Also, the press cannot ignore general criminal laws. See *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972).

89. See *Press-Enter. II*, 478 U.S. at 1.

90. *Id.* at 8.

91. See *id.* at 1 (holding that First Amendment right of access to criminal proceedings applies to preliminary hearings).

92. See Timothy Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992).

93. See *Branzburg*, 408 U.S. 665 (1972) (Justice Powell develops balancing test for analyzing whether journalists have First Amendment right not to reveal confidential sources).

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

95. *Saxbe*, 417 U.S. at 817.

Free Press Clause. The Court refused to extend the right of press access to prisons and would not compel the government to allow interviews with inmates concerning prison administration.⁹⁶ The Court held that the government did not violate the First Amendment by denying special access to the inmates.⁹⁷ The press could visit the prison just as the public could, but it could be denied special access to inmates because of safety reasons.⁹⁸

Justice Powell dissented in part in *Procunier* as well as in its companion case *Saxbe v. Washington Post*.⁹⁹ He believed that in situations where general public access was denied, the press should have special access to information if the press was acting as an information-gathering agent for the public.¹⁰⁰ He noted the government had an interest in protecting the secrecy of some information, but it had no legitimate interest in preventing the press from obtaining information about the administration, the conditions and the effectiveness of public institutions, which are legitimate matters of public concern.¹⁰¹

Four years later, in *Houchins v. KQED, Inc.*,¹⁰² the Court revisited press access to prison facilities. In *Houchins*, the Court decided whether the press could be denied access to investigate a prison facility where an inmate had committed suicide allegedly because of the prison conditions.¹⁰³ The Court relied on *Pell* and held that press could be denied any access beyond general public access.¹⁰⁴ The Court held that even if the press was gathering information of great public interest, the Constitution does not guarantee that the press will be given that

96. *Id.* at 829.

97. *Id.* The Court held that since alternative channels of communication with prison inmates existed the statute was constitutional. *Id.* at 828.

98. *Id.* at 834.

99. *Id.* at 835 (Powell, J., concurred in part and dissented in part); *id.* at 850.

100. *See id.* at 863:

For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court.

101. *Id.* at 861.

102. 438 U.S. 1 (1978) (holding that the press has no special access rights to prisons).

103. *Id.* at 3. The broadcasting company had been denied access to a portion of the jail where a prisoner's suicide reportedly had occurred and where conditions were rumored to be responsible for prisoners' issues. *Id.*

104. *Id.* at 7-12 (stating that the Court has never held that the First Amendment guarantees a right to access).

information from the government.¹⁰⁵

In dissent, Justice Paul Stevens reiterated Justice Lewis Powell's call for newsgathering protection.¹⁰⁶ Citing James Madison's call for free flow of information,¹⁰⁷ Justice Stevens felt that denying press access to prison conditions was not avoiding giving the press special rights, but instead it was denying information to an informed citizenry:

In this case, however, "[the press does] not assert a right to force disclosure of confidential information or to invade in any way the decision[]making processes of governmental officials." . . . They simply seek an end to petitioner's policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.¹⁰⁸

Justice Stevens further explained that press access to prisons should be allowed because of the special role that it plays in our democracy.¹⁰⁹ Prisons are "public institutions, financed with public funds and administered by public servants . . . [with] citizens confined therein are . . . permanently[] deprived of their liberty[.]"¹¹⁰

3. Access to Military Bases

Traditionally, military bases are not open to the public or the press, and therefore, it is not a public forum. Under the forum doctrine, when the place is a traditional or designated public forum, the government must show a compelling state interest, and the restriction must be the least restrictive alternative. With a non-public forum, however, the government does not need a compelling state interest; rather the Court employs a balancing test where the government's interest must outweigh the media's. Nonetheless, the Court will not tolerate content-based discrimination, no matter the type of forum.

105. *Id.* at 9.

106. *Id.* at 33 (Stevens, J., dissenting).

107. *Id.* "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* at 31–32 (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)).

108. *Id.* at 35–36.

109. *Id.* at 36–37.

110. *Id.* at 36.

In *Flower v. United States*,¹¹¹ a political activist was distributing leaflets on a military base. The military had regulations against people returning to a base once they have been removed.¹¹² The Court held that because the area was open to public transportation, it was a public forum and the petitioner could not be restricted access.¹¹³

In *Greer v. Spock*,¹¹⁴ a group of military protesters challenged Fort Dix's ban of political demonstrations and distribution of political material.¹¹⁵ The Court held the military had never abandoned its interest in regulating political speeches on the base.¹¹⁶ The military base was not a traditional public forum and the government could regulate speech.¹¹⁷

In *United States v. Albertini*,¹¹⁸ the military base was holding an open house day, where the base was open to the public.¹¹⁹ The base commanders would not allow admission to a person that had been previously barred from the base.¹²⁰ The Court held the bar was constitutional because the base was not a public forum.¹²¹ Even considering the base had been open to the public that day, the Court stated the military had not abandoned control; thus, it may restrict speech because a military base is not a traditional public forum.¹²² The Court decided the restriction was "content-neutral and serve[d] a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrate[d] that they are a threat to security."¹²³

111. 407 U.S. 197, 198 (1972).

112. *Id.* at 197. Flower had been removed from the base once before. *Id.*

113. *Id.* Justice Rehnquist wrote the dissent stating that military bases are not traditional public fora, thus the base commander could restrict political speech. *Id.* at 200-02 (Rehnquist, J., dissenting).

114. 424 U.S. 828 (1976).

115. *Id.* at 834.

116. *Id.* at 837.

117. *Id.* at 836. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

118. 472 U.S. 675, 686 (1985).

119. *Id.* at 677.

120. *Id.* at 678. The plaintiff had been barred from the base because he had destroyed government property ten years earlier. *Id.* at 677.

121. *Id.*

122. *Id.* at 686.

123. *Id.* at 687.

IV. ANALYSIS

A. *The Great Bulwark of Liberty*

“[T]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution.”¹²⁴ The U.S. Supreme Court has acknowledged that “news gathering is not without its First Amendment protections”¹²⁵ and that “without some protection for seeking out the news, freedom of the press could be eviscerated[.]”¹²⁶

The press was explicitly protected in the First Amendment to allow it to “bare the secrets of government and inform the people.”¹²⁷ It is the principle responsibility of the press “to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”¹²⁸ Moreover, it is “[o]nly a free and unrestrained press [that] can effectively expose [such] deception in government.”¹²⁹

Throughout its history, the Dover policy, whether a complete ban or requirement for family permission, has been a restraint on the press.¹³⁰ It has reduced the press’s most important function in being the watchdog of the government—monitoring the government’s ability to take away life and liberty.¹³¹ In order to have an effective democracy, there must be an informed electorate.¹³² To be informed, the citizens need to see the real cost of war, and historically, the Dover policy has played a role in obstructing the gathering of that information.¹³³ The government’s need to uphold an image should not trump the public’s right to know.¹³⁴ Admittedly, the recent change in the policy is a positive step toward press freedom, but the ban is still the precedent; it

124. *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting).

125. *Branzburg v. United States*, 408 U.S. 665, 707 (1972).

126. *Id.* at 681.

127. *Pentagon Papers*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

128. *Id.*

129. *Id.*

130. *See supra* Part III.A.

131. *See infra* notes 137 & 138 and accompanying text.

132. *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976). “[T]here is practically universal agreement that a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs[.]” *Id.* at 14–15 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

133. *See Karen Sinai, Shock and Awe: Does the First Amendment Protect a Media Right of Access to Military Operations?* 22 *CARDOZO ARTS & ENT. L.J.* 179, 210 (2004). Sinai argues: “The First Amendment cannot give way merely because televised pictures of body bags might cause people to question a war, which might spur constituents to write their members of Congress, which might cause members of Congress to restrict funding, which might hamper the war effort.” *Id.* n.183.

134. *See infra* Part V.B.1.

has been upheld by the courts and can be reinstated at anytime.¹³⁵

B. Visual Information is New Content

The court in *JB Pictures* held that the information was not banned and the press could still publish the names and numbers of casualties, but they could not gather or publish pictures.¹³⁶ This argument would only be legitimate if pictures and words were exactly the same type of information.¹³⁷ As exemplified by the government's history of denying access to military,¹³⁸ the government is less concerned about the information being published because it has a less powerful effect than pictures of flag-draped coffins.¹³⁹

The difference in information is further illustrated by the power of television news over radio news and print news.¹⁴⁰ Arguably, the terrorist attack on 9/11 would not have been as haunting without the vivid pictures of the planes crashing into the towers.¹⁴¹ A description of the events broadcasted by a news radio anchor or described by a print journalist would not have had the same impact.¹⁴² The visual "reveals what the words alone cannot describe."¹⁴³ The Supreme Court is

135. The G.W. Bush administration reinstated enforcement of the policy in 2003 after years of no enforcement. *See supra* Part III.A.

136. Though the facts will not be new, the information will be different and thus, more information will be disseminated. *See McNair, supra* note 9, at 413.

137. *See generally* David Domke et al., *The Primes of Our Times? An Examination of the 'Power' of Visual Images*, 3 JOURNALISM 131-59 (2002) (demonstrating news images' ability to trigger powerful emotional responses).

138. *See* *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1580 (S.D.N.Y. 1991) (The court determined that because the war was over the case, in which the media had challenged the military's denial of access to battlefields, the issue was moot and thus dismissed it). *Id.*; *see also* 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, 319 (1992) (examining the history of press access to the military from the Revolutionary War to the Persian Gulf War).

139. This includes name, rank, location and cause of death, hometown, and picture of the soldier. *See JB Pictures v. Dep't of Def.*, 86 F.3d 236, 240 (1996) ("[T]he Dover policy does not impede acquisition of basic facts, the raw material of a story.").

140. *See* Domke et al., *supra* note 137.

141. *See generally* Britta Timm Knudson, *The Eyewitness and the Affected Viewer: September 11 in the Media*, 2 NORDICOM REV. 117 (2003), available at http://www.nordicom.gu.se/common/publ_pdf/32_117-126.pdf (last visited Apr. 15, 2013) (discussing the post-traumatic effects on those who watched the 9/11 attacks on television).

142. A more inconsequential example of the difference between the visual and written word is that a television news broadcast and a newspaper article covering the same story will have separate copyright protection. *See generally* Eric Easton, *Who Owns 'The First Rough Draft of History?' Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521 (2004).

143. *See generally* Glen Ismeal & Jerry Thomas, *Worth a Thousand Words*, 46 J. ADVERTISING RES. 274 (2006) (arguing about the power of using pictures in education).

cognizant of this as it has given free speech protection to “pictures, films, paintings, drawings and engravings”¹⁴⁴ and other symbolic speech.¹⁴⁵

The way in which individuals process images is also different from words in that image processing requires great use of “the right brain, which is more holistic and emotional.”¹⁴⁶ Military experience of this powerful difference occurred during the Vietnam War when the American public watched as thousands of their young men were killed and brought home.¹⁴⁷ It is no coincidence that subsequent to the Vietnam War, the Pentagon created press pools and embedded journalists as well as installed the Dover Ban in order to have control over the images being released to the public.¹⁴⁸

Conversely, the government does not ban press access to soldiers being sent to war.¹⁴⁹ In fact, the military usually welcomes press coverage of young men and women leaving for the battlefield.¹⁵⁰ This is seen as a public relations moment for the military to promote the heroic acts of their soldiers.¹⁵¹ The military also promotes the actions of its soldiers through television commercials, video games, and films.¹⁵² Yet, a soldier killed in action whose body is being returned home does not constitute the type of publicity the military desires.¹⁵³

144. Kaplan v. California, 413 U.S. 115, 119 (1973).

145. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag-burning is protected speech).

146. Michael Pfau et al., *The Influence of Television News Depictions of the Images of War on Viewers*, 52 J. BROAD. & ELEC. MEDIA 303, 304 (2008). The power of the image was illustrated in the civil rights movements of the 1960s and the non-violent protests and marches that were answered with fire hoses, dog attacks and police brutality. See Clay Calvert, *Every Picture Tell a Story, Don't It? Wrestling with the Complex Relationship between Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 361–63 (2010) (discussing the power of pictures in journalism).

147. See Gara LaMarche, *Managed News, Stifled Views: Free Expression as a Casualty of the Persian Gulf War*, 9 N.Y.L. SCH. J. HUM. RTS. 45, 50 (1991).

148. See *id.* at 53.

149. See *JB Pictures v. Dep't of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996).

150. *Id.*

151. See Anderson, *Freedom of the Press*, *supra* note 11, at 94–95. “Over the past generation, the Department of Defense has edged closer to the view that permitting war coverage is an act of grace, or at least that it is a strategic concern to be permitted or forbidden according to its likelihood of advancing the public relations goals of the military.” *Id.* at 94.

152. See Jim Edwards, ‘America’s Army’ Recruitment Video Game Costs Taxpayers \$33m, CBS MONEY WATCH, Dec. 11, 2009, available at http://www.cbsnews.com/8301-505123_162-42743778/americas-army-recruitment-video-game-cost-taxpayers-33m/ (last visited Apr. 15, 2013). See also James Dao, In ‘Act of Valor,’ a Secret Military World, Approved for Public Viewing, N.Y. TIMES, Feb. 10, 2012, available at <http://atwar.blogs.nytimes.com/2012/02/10/in-act-of-valor-a-secret-military-world-approved-for-public-viewing> (last visited Apr. 15, 2013).

153. The result of the Dover policy change has shown that the concern about publishing

C. Content Based Regulation Receives Strict Scrutiny

The policy was never content neutral neither in purpose nor in effect.¹⁵⁴ First, the Dover Ban was not created until after the beginning of the Gulf War and after George Bush felt he was embarrassed by press coverage at Dover.¹⁵⁵ Before this, the press and public were allowed at Dover for arrival ceremonies.¹⁵⁶

Prior to the start of the Gulf War, the Department of Defense decided to control all aspects of public relations, including the public image of the war.¹⁵⁷ Following the loss of image control as well as the military loss in Vietnam,¹⁵⁸ the government wanted to prevent the same press scrutiny and negative publicity created by pictures of young men dying overseas.¹⁵⁹

Furthermore, the U.S. Government has been arbitrary in its implementation of policy regarding press access during Dover arrival ceremonies.¹⁶⁰ The government has allowed press access when deceased

pictures was conjecture from the government. As of April 2009, 14 of 19 families had agreed to allow press coverage of the arrival ceremony. See Kathleen Cullinan, *Most Families Agree to Media Coverage at Dover*, AP Finds, RCFP.ORG, Apr. 28, 2009, available at <http://www.rcfp.org/browse-media-law-resources/news/most-families-agree-media-coverage-dover-ap-finds> (last visited Apr. 3, 2013). In the August 2011 return of Seal Team Six members killed in Afghanistan, only 11 of the 30 families agreed to press access. See *supra* text accompanying note 3.

154. See *supra* Part III.A.

155. See *JB Pictures*, 86 F.3d at 238.

156. See NSA, *Chronology of DOD Policy on Images*, *supra* note 19.

157. See *supra* Part II.A. The policy was first implemented during the first Gulf War and not reinstated until the War in Iraq in 2003. *Id.* An Air Force officer revealed this opinion when at a briefing in Saudi Arabia in January 1991, he began by telling the press corps: "Let me say up front that I don't like that press. Your presence here can't possibly do me any good, and it can hurt me and my people." LaMarche, *supra* note 147, at 50.

158. See Howard B. Homonoff, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial in Military Operations*, 17 N.Y.U. J. INT'L L. & POL. 369, 382-83 (1985).

159. See LaMarche, *supra* note 147, at 50. According to surveys of U.S. Generals in Vietnam cited in the article:

[Thirty-eight percent] believed that newspaper coverage "[o]n the whole tended to be irresponsible and disruptive of United States efforts in Vietnam." As for television coverage, 39% said it was "probably not a good thing in balance because such coverage tends to be out of context," and 52% said it was "not a good thing, since there was a tendency to go for the sensational, which was counterproductive to the war effort."

See *id.*

160. See National Security Archive, *Chronology of DOD Policy on Images of the Honors Provided to American Casualties*, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm> (last visited Mar. 10, 2010).

non-military personnel return, such as Sec. Ron Brown and embassy workers in Kenya, and when military personnel return during non-combat deaths, such as the U.S.S. Cole and bombings in Tanzania.¹⁶¹ The government has only denied access to Dover during wartime.¹⁶² This is a decision based on content.¹⁶³ The government desires to prevent pictures of soldiers that died in battle from being released because it believes it will affect the armed forces' morale and the nation's political support.¹⁶⁴ Because this is a content-based regulation, the government must overcome strict scrutiny by showing a compelling state interest and a policy that is narrowly tailored to meet that interest.¹⁶⁵

D. Dover AFB has been Designated a Public Forum

The government also argues military installations are non-public fora where public access is traditionally limited.¹⁶⁶ The Court agreed with this argument in *Greer and Albertini*.¹⁶⁷ However, with Dover, the case is more analogous to *Flower*.¹⁶⁸ In *Flower*, the military base was held to be a public forum because a street on the military base had been opened up for people to pass out anti-war leaflets—thus it was a designated public forum.¹⁶⁹ As a public forum, a content based restriction cannot

161. *Id.* Most of the non-wartime arrival ceremonies have been attended by Presidents and broadcasted in the news media. *Id.*

162. George H.W. Bush implemented the Dover Ban policy during the Gulf War 1991 and George W. Bush reinstated the enforcement of the ban during the War in Iraq in 2003. *See* Kirtley, *supra* note 41, at 499.

163. Content-based regulation of the media must survive strict scrutiny in order to be constitutional. *See* *United States v. Playboy Entm't Grp., Inc.* 529 U.S. 803 (2000) (holding that FCC's 'signal bleed' provision was a content-based regulation did not survive strict scrutiny); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (holding that "Son of Sam" statute was a content-based regulation and did not survive strict scrutiny).

164. *See* Sinai, *supra* note 133, at 210; *see also id.* n.183 and accompanying text.

165. *See supra* note 73 and accompanying text. Strict scrutiny is "'strict' in theory and fatal in fact." Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). However, the Court since the 1980s has reduced the challenger success rate in strict scrutiny application. *See* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Strict scrutiny in not 'strict in theory, but fatal in fact.'").

166. *See* *JB Pictures v. Dep't of Def.*, 86 F.3d 236 (D.C. Cir. 1996); *see* *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

167. *See* *Greer v. Spock*, 434 U.S. 828 (1976); *Albertini v. United States*, 472 U.S. 675 (1977).

168. 407 U.S. 197 (1972).

169. Furthermore, none of the military base cases ever addressed the question as to whether the press has a right to access for news gathering purposes. Michelle Boydston, *Press Censorship and Access Restrictions During the Persian Gulf War: A First Amendment Analysis*,

survive unless there is a narrowly tailored restriction supported by a compelling state interest.¹⁷⁰

Similarly, the Dover Air Force Base has been open to the public for all sorts of activities, including departure ceremonies.¹⁷¹ Furthermore, prior to 1991, and during both the Clinton Administration and the first two years of the Bush administration, the press and public had access to Dover arrival ceremonies.¹⁷² The act of public mourning and showing respect is a type of speech that is protected by the First Amendment.¹⁷³ Arrival ceremonies have traditionally been open to the public and only blocked during unpopular times or when a family denied access to the media. Thus, the Dover policy is a content-based regulation, and the press cannot be denied access without a compelling state interest that is supported with a narrowly tailored restriction.¹⁷⁴

E. Applying Strict Scrutiny to the Dover Ban

1. No Compelling State Interest

The government asserts the denial of press access to Dover is supported by the government's interest in protecting the families' privacy.¹⁷⁵ The government also argues in favor of two other interests: publishing photos of flag-draped coffins will hurt the morale of the troops and the images will be exploited in foreign media by terrorist organizations.¹⁷⁶

a. Privacy Interest is Not Compelling

In *Globe Newspapers*,¹⁷⁷ the Court considered whether the press could be denied access to a court proceeding when rape victims were

25 LOY. L.A. REV. 1073, 1095 (1992).

170. See *Globe Newspapers Co. v. Super. Ct.*, 457 U.S. 596 (1982).

171. See *supra* text accompanying note 53.

172. See *supra* Part III.A.

173. In *JB Pictures*, the court argued that the press was not practicing speech, instead simply retransmitting information. *JB Pictures v. Dep't of Def.*, 86 F.3d 236 (D.C. Cir. 1996). This argument seems to forget that the First Amendment protects both free speech and free press. See U.S. CONST. amend. I.

174. See *Press-Enter. II*, 478 U.S. 1, 13 (1986); *Globe Newspapers*, 457 U.S. at 596; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

175. The Obama, Bush II, and Bush I Administrations all claimed privacy as the government interest in not lifting the ban completely. See Tyson, *supra* note 50; see Dana Milbank, *Curtains Ordered for Media Coverage of Returning Coffins*, WASH. POST, Oct. 21, 2003, at A23; *JB Pictures*, 86 F.3d at 236.

176. See *supra* note 151 and accompanying text.

177. *Globe Newspapers*, 457 U.S. at 596.

testifying.¹⁷⁸ The government asserted similar compelling interest arguments as it had with the Dover policy.¹⁷⁹ The first interest was in protecting victims from more trauma and humiliation.¹⁸⁰ The second interest was that victims would be more likely to testify if they did not fear humiliation.¹⁸¹ The Court rejected both interests stating the first interest, although compelling, was not narrowly tailored,¹⁸² and the second was not empirically substantiated.¹⁸³

Similarly, the government's stated interests with regard to the Dover policy are not compelling or substantiated.¹⁸⁴ In *Globe Newspapers*, the Court decided not to protect a living victim from the emotional distress of retelling the moment of his or her victimization.¹⁸⁵ With the Dover policy, the government is arguing the need to protect the family (not the deceased soldier) from the distress of having the solemn and respectful ceremony be viewed by the public and the press. Though pictures of the moment of death and treatment of the body receive protections of the highest order,¹⁸⁶ pictures of the iconic flag-covered coffin do not.¹⁸⁷

The deceased soldier is not a private individual that has been attacked against his or her will, as is the case with rape, where shield laws apply.¹⁸⁸ The soldiers are voluntary members of the armed forces

178. *Id.*

179. *Id.* at 606–07.

180. *Id.*

181. *Id.*

182. In *Press Enterprise I*, the Court held that press access to *voir dire* proceedings did not compromise a potential juror's privacy interest. *Press-Enter. I v. Super. Ct.*, 464 U.S. 501, 513 (1984); see also *Presley v. Georgia*, 130 S. Ct. 721 (2010) (per curiam) (holding that in order to close off *voir dire* proceedings to the public, the party seeking closure must "advance an overriding interest," "closure must be no broader than necessary" and the judge "must consider reasonable alternatives" and "make findings adequate to support closure").

183. See *Globe Newspapers*, 457 U.S. at 609. "[A] rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm." *Id.* at 611 n.27.

184. See *supra* text accompanying notes 203 & 204.

185. See *Globe Newspapers*, 457 U.S. at 596 (Court held press ban to be unconstitutional because it was not narrowly tailored).

186. For example, in *National Archives and Records Administration v. Favish*, the U.S. Supreme Court extended FOIA's "invasion of privacy" exemption to include the surviving family members' privacy. 541 U.S. 157 (2004). Favish was an attorney and wanted to access the death scene photos of White Counsel Vince Foster. *Id.* at 161. Favish was suspicious of the government's finding that it was suicide. *Id.* The Court stated that in common law, death scene photos were in the control in the family and if it were to rule in favor of Favish, then child molesters and necrophiliacs could gain access to autopsy photos. *Id.* at 165–70. Pursuant to FOIA, a requestor must prove that there is a public interest in the information release, that is a significant one, and that the release will advance that interest. *Id.* at 172.

187. See, e.g., *Showler v. Harper's Magazine Found.*, 35 Media L. Rep. 1577 (9th Cir. 2007) (ruling that *Favish* only applied to FOIA, not a leaked picture of a soldier in a casket).

188. See *Globe Newspapers*, 457 U.S. at 607. "It is important to note that in the context of [protecting minor victims] the measure of the State's interest lies not in the extent to which

who are aware of their position in a matter of the most important public interest.¹⁸⁹ Additionally, the government has not found it necessary to argue in favor of a compelling interest to protect the privacy of the families of public officials or private contractors returned to Dover.¹⁹⁰ Finally, protection of the family's privacy does not extend off base.¹⁹¹ Members of the Westboro Baptist Church have initiated protests of the funerals of fallen soldiers—as a way of expressing their dissatisfaction with war—and the press has attended the cemeteries to photograph the protests. Although perhaps more humiliating, offensive and traumatic to the families, the Court has upheld the right to protest at these funerals.¹⁹²

minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*" *Id.* n.19.

189. See, e.g., *Sipple v. Chronicle Publ'g*, 10 Media L. Rep. 1690 (Cal. Ct. App. 4th 1984) (holding that otherwise non-public individual can have private information about him revealed if the event he is involved in is newsworthy [Ford Assassination attempt]). According to the court:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. *The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.*

Id. at 1048–49 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)). The court went on to quote the Restatement (Second of Torts), stating:

Restatement Second of Torts section 625D, comment f, sets out in part as follows: There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news." . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

Id. at 1049–50 (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. f).

190. See *McNair*, *supra* note 9, at 413. "The only difference appears to be that the government restricted access during a war when media coverage of deaths could sway public opinion against military involvement, but permitted access at a time when governmental decisions did not result in deaths." *Id.* at 413–14.

191. See *JB Pictures v. Dep't of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996) (stating that the 1991 Dover Policy only banned the press from arrival ceremonies).

192. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (overturning a intentional infliction of emotional distress verdict against funeral protestors as violative of the group's free

b. "Morale" Interest is not Compelling

The second government assertion is that pictures of flag-draped caskets will affect morale and be exploited by the enemy.¹⁹³ Under strict scrutiny, the burden is on the government to prove that the interest is compelling and real.¹⁹⁴ However, there is no empirical evidence that these pictures will actually affect morale.¹⁹⁵ It can even be argued that a secrecy and lack of ceremony may have a greater effect on morale.¹⁹⁶

Even if a court analogized Dover to the prison cases, as the Court did in the military base cases, and applied a balancing test, the press's

speech rights). In comparing the overturning of the Kentucky law to the Dover Ban, one author argues:

Although the return of a soldier in a flag-draped coffin is undoubtedly a ceremonial event deserving of respect, it lacks the personal nature and solemn finality of an actual funeral. A funeral, with family and friends present, is a deeply personal occasion allowing those present to say their final goodbyes.

Amanda Asbury, *Finding Rest in Peace and Not in Speech: The Government's Interest in Privacy Protection in and around Funerals*, 41 IND. L. REV. 383, 411 (2008) (examining statutorily mandated buffer zones for protests at funerals).

193. See *supra* text accompanying note 204. See also *Gates blocks Release of Detainee-abuse Photos*, ASSOC. PRESS, Nov. 16, 2009, available at http://www.firstamendmentcenter.org/news.aspx?id=22312&SearchString=torture_pictures (quoting Secretary of Defense Robert M. Gates, "Public disclosure of these photographs would endanger citizens of the United States, members of the United States armed forces, or employees of the United States government deployed outside the United States").

194. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Justice O'Connor explained:

[The Government] has taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored. . . . such an argument "eliminates the entire inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech."

Id. (quoting *Simon & Schuster v. Fischetti*, 916 F.2d 777 (2d Cir. 1990) (Newman, J., dissenting)).

195. See *Globe Newspapers, Co. v. Super. Ct.*, 457 U.S. 596, 622 (1982) (holding that state had not proven that press access to minor victims' testimony would deter victims from coming forward); see also *Pentagon Papers*, 403 U.S. 713, 713 (1971) (holding that the U.S. Government had not met its burden of showing justification for prior restraint of publication of the contents of Vietnam War study).

196. See Sinai, *supra* note 133, at 210–12 (arguing that suppression of press and expression is not necessary to garner popular support for military efforts and may have the opposite effect).

interest outweighs the government interest.¹⁹⁷ In the prison access cases, the government interest involved maintaining prison safety.¹⁹⁸ The press's interest concerned reporting information to the public about the mismanagement at the prison.¹⁹⁹ With the Dover arrival ceremonies, the government asserts two interests that have been either disproven²⁰⁰ or unsubstantiated.²⁰¹ Yet, the press's interests are: (1) visually informing the public about the terrible toll of war (which mere description and numbers cannot convey); and (2) allowing the public to honor heroes that have died for their country.²⁰² Ultimately, the press is keeping accountable government officials who ask the public to sacrifice its young men and women.²⁰³

2. Narrowly Tailored

a. Privacy Interest is not being Protected

Assuming that privacy of the deceased soldier's family is a compelling state interest, the ban is not narrowly tailored.²⁰⁴ The complete ban on the press was obviously not a narrowly tailored restriction, as illustrated by the Obama administration's amending of the policy.²⁰⁵ If the privacy interest of the soldiers and their families had been a primary concern, the military would never have held ceremonies in which press access was allowed prior to the policy's amendment, whether a ceremony was during wartime or peacetime, departure, or arrival.²⁰⁶ Furthermore, the Pentagon certainly would not have

197. See *supra* Part III.B.2.

198. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 871 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1, 35 (1978).

199. See *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Houchins*, 438 U.S. at 14.

200. See Cullinan, *supra* note 153 and accompanying text.

201. See *supra* Part IV.E.1.b.

202. See *supra* text accompanying notes.

203. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (stating that the primary purpose of the press is keep elected officials accountable). This is especially important during times of war because citizens need to make political decisions about issues that are occurring thousands of miles away and out of sight. See Mark Rahdert, *The First Amendment and Media Rights During Wartime: Some Thoughts After Operation Desert Storm*, 36 VILL. L. REV. 1513, 1540 (1991) (arguing that there is compelling public interest in the free flow of information during war time in order to maintain democratic control).

204. See *supra* text accompanying note 177.

205. See Elisabeth Bumiller, *Defense Chief Lifts Ban on Pictures of Coffins*, N.Y. TIMES, Feb. 26, 2009, available at http://www.nytimes.com/2009/02/27/washington/27coffins.html?_r=0 (last visited Apr. 15, 2013).

206. See NSA, *Chronology of DOD Policy on Images*, *supra* note 19.

embedded journalists with the troops to record the horrors of war.²⁰⁷

Additionally, prior to and after the Gulf War, the Pentagon allowed the press to have access to Dover arrival ceremonies.²⁰⁸ During the early parts of the War in Afghanistan, the press was allowed to access Dover.²⁰⁹ It was not until the less popular Invasion of Iraq in 2003 the Bush administration reinstated the Dover Ban.²¹⁰ Nonetheless, private citizens released photos to the press and the Pentagon also agreed to release photos once FOIA challenges arose.²¹¹ Yet, the publishing of these pictures did not destroy the privacy of the families and, in fact, the soldiers were never easily identifiable.²¹² Pictures of flag-draped coffins being honored at an arrival ceremony are not arguably as traumatizing as pictures appearing on the news and Internet of soldiers at the moment of their deaths.²¹³

b. *De Facto* License

The new policy is a step in the right direction and a compromise of interests, yet it is unconstitutional because the new Dover policy is a *de facto* license.²¹⁴ The press must get permission from the family, and the family decides whether or not the press will have access.²¹⁵ Although this seems to be content neutral, it is not. Families, acting as the government surrogate, will likely make their decisions based upon what they believe will be the message conveyed by the press.²¹⁶ The families

207. See *supra* Part II; *infra* note 213.

208. See *supra* Part II. Much of the information that the Department of Defense has tried to stop from reaching the public has already been published and released, including pictures of soldiers dying from improvised roadside bombs. See *infra* note 213 and accompanying text.

209. See NSA, *Chronology of DOD Policy on Images*, *supra* note 19.

210. *Id.*

211. See *supra* Part II.A.

212. The identities of fallen soldiers are usually broadcasted on national television and published in local newspapers in the fallen soldier's hometown. See Clay Calvert, *Support Our [Dead] Troops: Sacrificing Political Expression Rights for Familial Control over Names and Likenesses*, 16 WM. & MARY BILL RTS. J. 1169, 1186 (2008) (discussing the 2004 episode of *Nightline*, where Ted Koppel read the names of 700 soldiers that had been killed in Iraq).

213. These images are often captured by the journalists that the military has embedded with troops but also by troops themselves, as well as insurgents. See Gaby Hinsliff, *Pictures of Dying Marine Bring War Home to America*, *GUARDIAN* (Sept. 6, 2009), available at <http://www.guardian.co.uk/world/2009/sep/06/dying-marine-fury-america-afghanistan> (last visited Apr. 15, 2013).

214. *De facto* licenses chill speech because publishers will self-censor according to the desires of the licensor. See Katherine Den Bleyker, *The First Amendment Versus Operational Security: Where Should the Miliblogging Balance Lie?* 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 401, 432–33 (2007) (discussing the *de facto* license placed on soldiers blogging).

215. See *supra* note 2.

216. See Assoc. Press, *Pentagon Lifts Media Ban on Coffin Photos*, *NBCNEWS.COM*, Feb. 26, 2009, available at http://www.nbcnews.com/id/29410258/ns/us_news-military/t/pentagon-

that deny access may base their decisions upon the perception of the press's use of the photographs.²¹⁷

V. CONCLUSION

The Obama administration's amendment of the Dover policy from an outright ban to one requiring the family's permission before photos can be released to the public is progress for the freedom of information and the public interest. The new policy has long been overdue and seems like a nice compromise. In practice, it has been a victory for open government in free flow of information, as families of fallen soldiers have wanted their loved one to be honored by those for whom the sacrifice was made. Unfortunately, this current policy is not a statute; therefore it is not permanent. Inevitably in politics, there will be a new administration. An escalation of war casualties could lead to reinstatement of the Dover Ban.

The number of families that have agreed to allow press access illustrates that many families want to honor their fallen family member publically and want the nation to know the true sacrifice of war.²¹⁸ It is the government that wants to hide the pictures. Accordingly, the original Dover Ban was a public relations move by the government to protect an image, which can never be a compelling interest.²¹⁹ Similarly, the new policy needs to be challenged, and either the courts need to hold it unconstitutional or Congress needs to intervene and make press access the law.

This call for press freedom is not about voyeurism, morbid curiosity or profits. This call for press freedom is about holding our elected leaders accountable, especially in times of war, during which families sacrifice their young men and women. The electorate needs to know the true cost of war, and this is not always easily conveyed with mere words and numbers. It is the solemn pictures of flag-draped coffins, occupied by those who paid the ultimate price, which tells the whole story.

In a democracy, the free flow of information is necessary in order for it to function properly. The press requires protection to publish such information as well as the right to access such information. Most

lifts-media-ban-coffin-photos/ (last visited Apr. 15, 2013); *but cf.* Cullinan, *supra* note 153.

217. The *de facto* license is thus a content-based regulation and must survive strict scrutiny. *See supra* note 214 and accompanying text. *See supra* Part I.

218. During the first Gulf War, families protested the military's lack of public arrival ceremonies, contradicting the government's assertion of protecting family's privacy interest and convenience. McNair, *supra* note 9, at 413.

219. "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." Pentagon Papers, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring).

importantly, the Constitution, which soldiers defend, was created not only to protect the press's free expression but also to restrict the government's ability to limit the supply of information available to the public.²²⁰

220. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980).

