

PHOTOS OF THE FALLEN AND THE DOVER BAN: AN
ANALYSIS OF BANNING THE MEDIA FROM
PHOTOGRAPHING MILITARY COFFINS

*By Bradford J. Kelley**

*It's easy to see. . . . [P]eople go off to war and the bands play and the flags fly.
And it's not quite so easy when the flag is draped over a coffin coming back
through Dover, Delaware.*

—U.S. Senator John Glenn

INTRODUCTION

The image of the flag-draped coffin is an incredibly somber reminder of the costs of war in the American lexicon. The photographs of returning coffins serve to remind the American public of the incalculable costs of war. Nonetheless, from 1991 until 2009, the U.S. government enforced a ban on allowing news photographers into Dover Air Force Base in Delaware and other military facilities where coffins were received from the battlefield.¹ The arrival of coffins at Dover has been known as the “Dover Test” to gauge public perception for how many casualties the American public could tolerate before a war became unsustainable.² However, the instatement of the Dover Ban effectually ended the test and became part of a broader governmental effort to restrict the media during wartime.³

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1. See George J. Annas, *Family Privacy and Death – Antigone, War, and Medical Research*, NEW ENGL. J. MED., Feb. 2005, 501.

2. *Id.* There is no general consensus on how the Dover Test applies. The test is primarily used by politicians to determine whether a war effort is worth supporting. The overarching idea of the test is that pictures of military coffins cause people to question a war which then triggers constituents to contact their representatives or president to oppose the war effort. As a result, this may lead to withdrawal from the war. Alternatively, Congress could restrict funding which could limit or end the war effort.

3. See discussion *infra* Part I.

The Dover Ban was retained during Operation Desert Storm and was inconsistently followed during the Clinton administration.⁴ The Dover Ban remained in effect throughout most of the wars in Iraq and Afghanistan under the President George W. Bush Administration. Consequentially, the American public was almost completely denied the ability to see photographs of the returning coffins for around 5,000 military members killed in Iraq and Afghanistan.⁵ In 2009, President Barack Obama lifted the ban but its impact is irreversible.⁶ It is certainly possible that the ban can go back into place during the current administration or a future presidential administration for political purposes.⁷ As such, there is a pressing need to outline the precise reasons why policies like the media restriction on photographs of military coffins returning from war like the Dover Ban violate the U.S. Constitution. The issue underlying the Dover Ban remains timely and important because the “United States is fighting what amounts to an open-ended, protracted war on terrorism. . . . In brief, the fighting will continue, the death will continue and, in turn, the journalistic dilemma over publishing death-scene images will continue.”⁸

This article argues that efforts to restrict media photography of military coffins returning from the battlefield violate the freedom of press and speech values underlying the First Amendment. Part I discusses the history of the Dover Ban and subsequent litigation and legislative efforts to eliminate the ban. This Part also argues that the Dover Ban was tied to a larger government effort to restrict the media’s access to the broader costs of war suffered during wartime. Part II explores the historical roots and reviews important jurisprudence involving media access to prisons, courtrooms, and other areas. Part III discusses why the Dover Ban is unconstitutional and why policies like it undermine journalistic efforts to fairly and accurately report the costs of war. Part IV argues that there are public policy reasons that militate against policies like the Dover Ban. Finally, Part V proposes a legislative solution to prevent the reinstatement of the ban on Dover coverage.

I. A HISTORICAL REVIEW OF THE DOVER BAN

This Part of the article traces the historical roots of the Dover Ban. In

4. See Annas, *supra* note 1. The Clinton administration allowed for numerous exceptions. See also *infra* notes 29–30 and accompanying text.

5. See *Media Ban on Troops' Coffins May Lift*, L.A. TIMES, Feb. 17, 2009, <http://articles.latimes.com/2009/feb/17/nation/na-dover17> (last visited Feb. 21, 2016). The article notes that the Dover ceremonies for returning military members killed in either Iraq or Afghanistan has occurred about 5,000 times and has been hidden from the public.

6. See Elisabeth Bumiller, *U.S. Lifts Photo Ban on Military Coffins*, N.Y. TIMES, Dec. 7, 2009, <http://www.nytimes.com/2009/02/27/world/americas/27iht-photos.1.20479953.html> (last visited Feb. 6, 2016).

7. See David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 64 (2006); *infra* note 23 and accompanying text.

8. Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 87, 90 (2011).

order to understand the rationale for the Dover Ban, this Part also explores the relationship between the press and the government during past military conflicts. This relationship sets the necessary stage for the Dover Ban. Historically, the media has played an integral role in reporting the costs of America's military operations by showing the coffins of the fallen. However, the tumultuous relationship between the press and the government during wartime has complicated the solemn return of America's fallen. This conflict between the press and the government dates back to the Civil War when General William Tecumseh Sherman remarked, "It's impossible to carry on a war with a free press."⁹

A. The Vietnam War: The Origin of Press Restrictions during Wartime

During the Vietnam War, images of arrival ceremonies and flag-draped coffins of military members appeared regularly on television and in newspapers.¹⁰ The Vietnam War era was largely characterized as an incredibly liberal era of media access.¹¹ There are various explanations for this such as:

Indeed, Pentagon officials at the highest level repeatedly considered and rejected a stricter approach to media censorship. Part of their reticence may have flowed from practical considerations: Since the Johnson Administration steadfastly refused to label the fighting in Vietnam as a war, no grounds existed to justify censorship of war coverage. The Administration's reticence stemmed also from logistical considerations, especially the fact that the military did not control the movements of civilians in Vietnam and thus could not easily monitor reporters' movements. Or perhaps Lyndon Johnson, for all his mastery of old-style politics, simply did not grasp the power of the new medium of television. For whatever reasons, reporters covering the Vietnam War had only to abide by minor, voluntary ground rules, which prohibited the reporting of sensitive security information or the identification of fallen soldiers before their families had been notified.¹²

As a result of broad and largely unrestricted media access to the Vietnam War and its clear impact on public opinion, the government and military resolved to exert more control over media access in future military

9. Thomas C. Terry, *Of Foreign Fevers, Shot, and Shell: Constitutional Rights of Media Access to the Battlefield After Flynt v. Rumsfeld*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 95, 98 (2015) (explaining that the General Sherman quote can be read in two distinct ways: one involving an actual military battlefield or, alternatively, one involving a political and constitutional battlefield).

10. See *Media Ban on Troops' Coffins May Lift*, *supra* note 5 (noting that the coverage of the returning was so common that coverage was "dubbed the 'living-room war' for its extensive television coverage, including footage of coffins rolling off planes at Hickam Air Force Base in Hawaii as if off a conveyor belt.").

11. See generally Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 683-84 (1992) (explaining that the Pentagon did not impose certain restrictions, thus representing a sharp break from earlier wars).

12. *Id.*

operations.¹³ For instance, President Reagan and the Defense Department restricted press access during Grenada and Panama for political purposes designed to protect the image and priorities of key leaders.¹⁴ In many ways, Grenada marked a watershed event in the context of media restrictions. Strikingly, the media was completely barred from the island for the first two days of the invasion and coverage was limited almost exclusively to Pentagon briefings.¹⁵ Despite the media restrictions enacted after the Vietnam War, in 1985, the media was granted access to cover a ceremony at Andrews Air Force Base for military members killed in San Salvador.¹⁶ President Reagan attended the ceremony and pinned Purple Heart medals on the flag-draped caskets.¹⁷

B. Change in the Dover Policy: Military Coffins Returning from War

The ceremony at Dover for fallen soldiers begins with a simple prayer by a chaplain.¹⁸ Then, an eight-member military honor guard removes the metal coffins from the planes and carries them to a mortuary van.¹⁹ Historically, Dover Air Force Base in Delaware served as the only operational mortuary and arrival point for all military branches.²⁰ As a result, virtually all military members killed overseas were returned to the United States through Dover in ceremonies that were open to the public and press.²¹ The media access to Dover led to the development of the “Dover Test,” a phrase created by former Senator John Glenn who queried: “Will public opinion and will support in the Congress still be there when the bodybags or the coffins start coming back

13. See Linda N. Deitch, *Breaking News: Proposing A Pooling Requirement for Media Coverage of Live Hostage Situations*, 47 UCLA L. REV. 243, 294 (1999); see also Karen Turner, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms*, 33 MCGEORGE L. REV. 593, 604–05 (2002). Turner explains that members of the press had relative freedom in World War II and Vietnam but the widespread reporting failures in the Vietnam War led to a situation whereby “the press was viewed by the Department of Defense as a force to be reckoned with and not to be ignored.”

14. See Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 47, 58 (2011). The author explains that these restrictions were the direct result of damaging military studies that showed that media coverage of the Vietnam War had a negative overall impact.

15. See Deitch, *supra* note 13, at 294. The Reagan administration cited five reasons for barring media coverage: (1) the need for secrecy and surprise; (2) the administration’s inability to guarantee the safety of reporters; (3) the fear that live news reports might give opposing forces information about the disposition of American troops on the island; (4) the risk that reporters might be captured and held hostage; and (5) the concern over the difficulty in selecting a small pool of reporters to accompany the invasion.

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

17. See *id.*

18. See *Media Ban on Troops’ Coffins May Lift*, *supra* note 5.

19. *Id.*

20. See Melissa D. Stear, *Operation Media Control: The Military’s Assault on the First Amendment Right to Access*, 65 GEO. WASH. L. REV. 735, 735 (1997).

21. *Id.*

through Dover, Delaware?”²² However, during the Persian Gulf War in February 1991, the United States government changed the policy and denied all access to the ceremonies. The Dover Ban was enacted by then-Secretary of Defense Richard Cheney in the George H.W. Bush administration.²³ As a result, the ban effectually prevented the application of the “Dover Test.”

The government provided several justifications for the policy change.²⁴ First, the policy change was explained as a needed measure to protect the privacy of the deceased and the deceased’s love ones. Underlying this reason is the belief that the press represents a double-edged sword. On one end, the press interferes with the grief that families experience at the military installation. On the other end, the coffin photos appearing either in newspaper or on television news are hurtful.²⁵ Second, the Department of Defense claimed the policy was designed to “reduce the hardship on those of the bereaved who otherwise might have felt obliged to travel to Dover for the arrival ceremonies.”²⁶ Third, there is an implied argument that the Dover Ban promotes national security by keeping secret from our enemies the number of soldiers who have died in military conflicts. In a similar vein, military leaders and politicians have expressed concern that the coffin images could be used for enemy recruitment efforts or to increase enemy morale.²⁷ However, a key impetus for the change in policy was because President George H.W. Bush was embarrassed when television networks showed images of coffins of military members killed during the Panama invasion on one split-screen and a presidential speech lauding the military operation on the other screen.²⁸ During this broadcast, several commentators note that President George H.W. Bush was seen laughing during the split-screen speech, which sparked the instatement of the ban.²⁹

The Dover Ban was part of a broader effort to restrict journalism in wartime during the Gulf War Era. During the Gulf War, the Pentagon perfected the technique of media coverage by permitting only pool coverage of

22. Grant Penrod, *Letting Loose the Images of War*, REP. COMM., <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2004/letting-loose-images-war> (last visited Apr. 1, 2016).

23. See Annas, *supra* note 1, at 501.

24. See Jacobs, *supra* note 11, at 693 (noting that some of the broader justifications included logistics, surprise, and morale).

25. See Calvert & Torres, *supra* note 8, at 100 (offering a scenario involving “waking up and opening the morning newspaper to find an image of one’s son, daughter, brother, or sister wounded or dead on the battlefield. This scenario seems reasonably likely to cause emotional anguish and pain”).

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

27. See Calvert & Torres, *supra* note 8, at 96 (noting that wartime images of the dead can be seen as “giving psychological aid and comfort to the country’s enemies.”).

28. See Anderson, *supra* note 7, at n.109.

29. See Annas, *supra* note 1, at 501; see also Michael Oreskes, *Fighting in Panama: Image; Selling of a Military Strike: Coffins Arriving as Bush Speaks*, N.Y. TIMES (Dec. 22, 1989), <http://www.nytimes.com/1989/12/22/world/fighting-panama-image-selling-military-strike-coffins-arriving-bush-speaks.html>.

combat operations, requiring military personnel escorts, and censoring virtually all of the press' activity.³⁰ The aggregate effect of these efforts was to prevent a candid assessment of the overall operation and to ensure that media emphasized the positive elements of the war effort.³¹ Media restrictions were so pervasive during the Gulf War that the press was denied access to anything resembling a religious service, scenes of fighting, and any situation where casualties were involved.³² Some experts have argued that the so-called "Gulf strategy" was a multipronged attack against the media that "included unofficial tactics, such as the tight-lipped approach to numbering enemy casualties, and official controls including a program to review all news stories prior to publication coupled with limits on journalistic access to the battlefield."³³

C. Clinton Administration and Challenges in Court: JB Pictures, Inc. v. Department of Defense

The Dover Ban remained in effect during the Clinton Administration, although it was not consistently enforced.³⁴ Some of the notable exceptions to the Dover Ban during the Clinton Administration included the photographs that were taken in 1996 of President Clinton attending the arrival and transfer ceremony of the bodies of Commerce Secretary Ron Brown and 32 other Americans killed in a plane crash in Croatia; the photographs in 1998 of the arrival ceremony for remains of Americans killed in the U.S. embassy bombings in Tanzania and Kenya; and photographs taken and shown in 2000 of caskets of military personnel returning to the U.S. after the terrorist attack on the U.S.S. Cole off the coast of Yemen.³⁵

In 1996, the original policy change as applied during Operation Desert Storm was challenged and upheld in *JB Pictures, Inc. v. Department of Defense*.³⁶ In this case, the United States Court of Appeals for the District of Columbia determined that the Dover Ban did not violate First Amendment guarantees of freedom press or freedom of speech.³⁷ In regard to the freedom of speech claim, the plaintiffs, comprised of media and veterans' organizations, argued that the policy was a viewpoint-based restriction aimed at suppressing the implicit anti-war message conveyed by photos of flag-draped coffins being unloaded from cargo planes at a military mortuary.³⁸ After making a

30. See Anderson *supra* note 7, at 54–55.

31. See Kevin P. Kenealey, *The Persian Gulf War and the Press: Is There A Constitutional Right of Access to Military Operations?*, 87 NW. U. L. REV. 287, 289 (1992).

32. *Id.* at 292.

33. See Jacobs, *supra* note 11, at 675 (explaining that exceptions were allowed).

34. Rachel Smolkin, *Photos of the Fallen*, AM. JOURNALISM REV. June–July 2004, <http://www.ajr.org/Article.asp?id=3677>.

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

36. 86 F.3d 236 (D.C. Cir. 1996); see also *infra* Section I.B (discussing the specific policy change during the Gulf War).

37. *Id.* at 242.

38. *Id.* at 238.

determination that the policy was not content-based, the court considered the government's proffered rationales for its policy, including its assertion that the policy attempted to protect the privacy of those mourning the loss of their loved ones.³⁹ Addressing this interest, the court stated that it did "not think the government [was] hypersensitive in thinking that the bereaved may be upset at public display of the caskets of their loved ones."⁴⁰ The court explained that because the press could still have access (if the family consented) when the coffins were unloaded at the soldier's home base, the restriction on newsgathering was not complete and was justified by the government's interests in sparing families the emotional trauma of a major ceremony and the hardship of traveling to Dover.⁴¹

D. The George W. Bush Administration and the Iraq War

The George W. Bush Administration continued the loose enforcement of the Dover Ban during the early part of the war in Afghanistan.⁴² As a result, the media showed images of coffins from Afghanistan arriving at Dover. However, there was a marked change in direction prior to March 2003.⁴³ President Bush reinforced the policy shortly before the invasion of Iraq in 2003.⁴⁴ Specifically, the administration prepared for the invasion by issuing a Pentagon directive in March 2003 that stated that "[t]here will be no arrival ceremonies for, or media coverage of, deceased military personnel returning to or departing from Ramstein [Germany] airbase or Dover [Delaware] base, to include interim stops."⁴⁵ By doing so, the Pentagon effectually "eliminated a nagging public relations problem."⁴⁶ As a result of the change in policy, the Dover Ban quickly became a lightning rod of controversy. Lieutenant Colonel Jon Anderson, a Dover military spokesman, admitted that the reason for the policy change was because "[w]e don't let the media come on the base to perform the 'Dover test'."⁴⁷ One scholar explains that the Dover Ban was strengthened because "President Bush's team well remembered the public relations disaster that his father suffered while commander in chief during the Persian Gulf War."⁴⁸

Like the Gulf War Era press restrictions, the Dover Ban reinforcement

39. *Id.* at 241.

40. *Id.*

41. *See id.*

42. CRAIG CRAWFORD, *ATTACK THE MESSENGER: HOW POLITICIANS TURN YOU AGAINST THE MEDIA* 82 (2006).

43. *Id.*

44. *See* Clay Calvert, *Voyeur War? The First Amendment, Privacy & Images from the War on Terrorism*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 147, 150 (2004) [hereinafter Calvert, *Voyeur War*].

45. CRAWFORD, *supra* note 42, at 81.

46. *Id.*

47. Bryan Bender, *For those receiving US Dead, a Test of Faith*, *BOSTON GLOBE*, Apr. 12, 2004.

48. CRAWFORD, *supra* note 42, at 82; *see also supra* note 23 and accompanying text.

was part of a broader effort to restrict the press during the War on Terror in Iraq and Afghanistan.⁴⁹ One striking example of press restrictions during the War on Terror was the denial of press access to detention facilities in Afghanistan, Iraq, and Cuba.⁵⁰ Many other restrictions used during the Gulf War, such as press pools and other forms of censorship, were also widely used during the wars in Iraq and Afghanistan.⁵¹

The advent of the wars in Iraq and Afghanistan put censorship at the forefront once again. In 2004, the United States Air Force granted a Freedom of Information Act (FOIA) request by journalist Russ Kick for all photographs of caskets containing U.S. military members at Dover.⁵² Accordingly, Kick received hundreds of photographs showing caskets of military personnel arriving at Dover since February 2003. Kick then posted the photographs on a website and many of the pictures were subsequently published by major media outlets.⁵³ Indeed, some of Kick's photographs were featured on the front pages of major newspapers including the *Washington Post* and *New York Times*.⁵⁴ The Dover Ban was in the spotlight again in 2004 when a military contractor, Maytag, fired a Kuwait-based cargo worker, Tami Silico, whose photograph of flag-draped coffins of fallen U.S. soldiers in Kuwait was published in *The Seattle Times*.⁵⁵ In response to these incidents, government officials quickly halted further distribution of the photos and reaffirmed the ban, saying it protected the privacy of servicemen and their families.⁵⁶ The reinforcement was necessary, according to Under Secretary of Defense John Molino, to prevent "the remains of our service members who have made the ultimate sacrifice to be the subject of any kind of attention that is unwarranted or undignified."⁵⁷

During the George W. Bush Administration, there was a legislative effort to eliminate the Dover Ban. In June 2004, the U.S. Senate rejected a measure that would have lifted the ban.⁵⁸ Senator Frank Lautenberg proposed the amendment, which would have instructed the Department of Defense to create a new protocol allowing the press to cover the arrival of the war dead in a way that safeguarded families' privacy concerns.⁵⁹ In support of his amendment, Lautenberg argued that enactment "would bring an end to the shroud of

49. See Anderson, *supra* note 7, at 56–66 (noting that the Pentagon excluded the press entirely from combat operations for the first six weeks of the war in Afghanistan and discusses other restrictions on the press involving the wars in Iraq and Afghanistan).

50. *Id.* at 58.

51. See generally *id.*

52. See Calvert, *Voyeur War*, *supra* note 44, at 149.

53. See Annas, *supra* note 1, at 501.

54. See Calvert, *Voyeur War*, *supra* note 44, at 149.

55. See Hal Bernton, *Woman Loses Her Job Over Coffins Photo*, THE SEATTLE TIMES (Apr. 22, 2004), http://old.seattletimes.com/html/localnews/2001909527_coffin22m.html.

56. Smolkin, *supra* note 34.

57. *Id.*

58. See Sheryl Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES (June 22, 2004), <http://www.nytimes.com/2004/06/22/us/senate-backs-ban-on-photos-of-gi-coffins.html>.

59. *Id.*

secrecy cloaking the hard, difficult truth about war and the sacrifices of our soldiers.”⁶⁰ Senator Lautenberg’s amendment was defeated.

Although widely criticized, the Dover Ban remained in effect until the end of the Bush Administration. Despite the ban, polls conducted between 1991 and 2004 indicated that a majority of Americans favored permitting the public to see the pictures of the arrival of the military coffins.⁶¹ Perhaps more importantly, one survey conducted in 2004 found that U.S. military members and their families did not agree with the Pentagon’s policy of banning these images.⁶²

E. The Dover Ban and the Obama Administration

The Dover Ban remained controversial during the first year of the Obama Administration, and Congress again considered passing new legislation to address the Ban. On July 30, 2008, Representative Walter Jones, a Republican from North Carolina, introduced House Resolution 6662, known as the “Fallen Hero Commemoration Act.”⁶³ This bill called for “the Department of Defense to grant access to accredited members of the media at military commemoration ceremonies and memorial services. . . when the remains of members of the Armed Forces arrive at military installations in the United States.”⁶⁴ Despite widespread bipartisan support, the Act was never enacted.⁶⁵ The next year Representative Jones introduced the same bill but again no legislative action was taken.⁶⁶

On December 3, 2009, Defense Secretary Robert Gates announced that the Dover Ban would be lifted and replaced with a new policy.⁶⁷ Under the new policy, photographs of a coffin will not be permitted if a family declines.⁶⁸ Secretary Gates explained that the policy change reflects the belief that “we should not presume to make the decision for the families; we should actually let them make it.”⁶⁹ In response, Dover Air Base created a new protocol for

60. *Id.*

61. See Tyson & Berman, *supra* note 5 (noting that 60% of respondents supported lifting the ban in most polls conducted between 1991 and 2004).

62. See ANNENBERG PUB. POLICY CTR., UNIV. OF PA., SERVICE MEMBERS, FAMILIES SAY PENTAGON SENT TOO FEW TROOPS TO IRAQ, STRESSED NATIONAL GUARD AND RESERVES, SHOULD ALLOW PHOTOS OF COFFINS AT DOVER, ANNENBERG DATA SHOW (Oct. 16, 2004), http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/NAES/2004_03_2military-data_10-16_pr.pdf.

63. H.R. 6662, 110th Cong. (2008). Of the 10 co-sponsors, seven were Democrats and three were Republicans.

64. *Id.*

65. *Id.* The widespread support for this bill is evidenced by the fact that the bill had 10 co-sponsors.

66. H.R. 269, 111th Cong. (2009).

67. See Bumiller, *supra* note 6 (noting that this is similar to the policy that is used at Arlington National Cemetery). See also *infra* notes 152–54 and accompanying text.

68. See Bumiller, *supra* note 6.

69. *Id.*

media accreditation and access for the returning ceremonies.⁷⁰

II. THE UNCONSTITUTIONAL FOUNDATIONS OF THE DOVER BAN

This article argues that the Dover Ban is unconstitutional. To reach that conclusion, it is necessary to examine the interplay between the press, on one hand, and the government's interests on the other. First, this Part briefly discusses the historical and jurisprudential foundation of media access. In order to articulate how the courts will likely evaluate a Dover access claim, this Part explores the standards used by the Supreme Court in prison access and court proceeding cases.

A. *Freedom of the Press: Media Access*

Media access has undoubtedly played an integral role in our nation's history of free press protection.⁷¹ The Framers felt so strongly about these protections that they codified the freedom of press and speech in the First Amendment.⁷² Because it scrutinizes political activity and promotes understanding, the press has historically been viewed as having a special role within our constitutional framework.⁷³ Indeed, the press has even been referred to as the "Fourth Estate" (*i.e.*, the fourth branch of government), because it provides a necessary check and balance on all levels of government.⁷⁴

The freedom of the press equally applies to wartime coverage of military coffins returning from combat. In his concurring opinion in *New York Times Co. v. United States*, Justice Hugo Black remarked, "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."⁷⁵ The Supreme Court has consistently stressed that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."⁷⁶

70. See *infra* notes 115–53 and accompanying text.

71. See Scott A. MacNair, *Is There A Right to View the Dead at Dover? JB Pictures v. Department of Defense: Limits on the Media's Right to Gather Information*, 4 VILL. SPORTS & ENT. L.J. 387, 387 (1997) (explaining that the Framers believed that an informed society was a necessary ingredient of democracy and that the press acts as a check on governmental abuse).

72. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

73. See Benjamin Barron, *A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 99 (2007).

74. *Id.*

75. 403 U.S. 713, 717 (1964) (Black, J., concurring).

76. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (holding that broadcast television stations are First Amendment speakers whose editorial speech could not be regulated without good reason).

B. The Prison Cases

The media's right to gather information was first addressed in *Zemel v. Rusk*.⁷⁷ In this case, the Supreme Court determined that the First Amendment does not contain an unqualified right to gather information.⁷⁸ In 1972, the Court determined in *Branzburg v. Hayes* that the First Amendment provides protection for news gathering.⁷⁹ In a concurring opinion, Justice Powell established a balancing test that weighs the interest in obtaining information against the government's interest in restricting the media's access.⁸⁰ This balancing test, commonly known as the *Branzburg* balancing test, became the Court's primary way to evaluate whether a restriction on the media's access is constitutional. It has mainly been applied to the media's right of access to prisons and jails.⁸¹

A few years later, the Court again addressed the right of media access in the companion cases of *Pell v. Procunier*⁸² and *Saxbe v. Washington Post Co.*⁸³ The media plaintiffs in *Pell* and *Saxbe* challenged governmental regulations that denied direct interviews with certain prisoners.⁸⁴ The Court held that the press regulations did not violate the First Amendment since there is no requirement for the "government to accord the press special access to information not shared by members of the public generally."⁸⁵ The Court stressed that there were "alternative means of communication" available from which the public could learn of the condition of the prisons and the prisoners.⁸⁶

Just four years later, the Court addressed the right of media access again in *Houchins v. KQED*.⁸⁷ In this matter, the media plaintiffs brought an action against the supervisor of a county jail because he denied a media request to view and take photographs of the jail.⁸⁸ The supervisor based this denial on the grounds that the media could view the jail during public tours.⁸⁹ The Court denied the plaintiffs' claim in a plurality decision.⁹⁰

The prison access cases "revolved in large measure around the media's claim that it deserved a 'special privilege' to the prisons apart from the right of

77. 381 U.S. 1 (1965) (considering whether the Secretary of State could refuse to validate a citizen's passport).

78. *Id.*

79. 408 U.S. 665 (1972).

80. *Id.* at 724.

81. *Id.* at 710.

82. 417 U.S. 817 (1974).

83. 417 U.S. 843 (1974).

84. *Pell*, 417 U.S. at 819–21; *Saxbe*, 417 U.S. at 844.

85. *Pell*, 417 U.S. at 834.

86. *Id.* at 824–28 (noting other alternatives available such as communication through the mail and personal visitation from the friends and families of the prisoners).

87. 438 U.S. 1 (1978).

88. *Id.*

89. *See id.* at 4–5.

90. *Id.* at 16.

access already given to the public.”⁹¹ More importantly, the Court’s opinions in the prison cases emphasize that the restrictions did not appear to be part of an effort to conceal information, which is a qualification that certainly distinguishes the coverage of Dover ceremonies.⁹² In the case of the Dover bans, the government is deliberately trying to conceal the true costs of the nation’s wars.⁹³

C. *The Criminal Trial and other Judicial Proceedings Cases*

The Court has held that the public has a constitutional right to attend criminal trials and other judicial proceedings. In *Richmond Newspapers*, the Court first recognized the media’s right to gather news in the courtroom during a criminal proceeding.⁹⁴ In this case, newspaper reporters sought access to the courtroom by arguing that the judge had not considered alternatives.⁹⁵ The Court held that the First Amendment contains a “right to receive information and ideas.”⁹⁶ Two years later, the Court reinforced the media’s right to gather news during a trial in *Globe Newspaper Co. v. Superior Court*.⁹⁷ In this case, the media plaintiffs challenged a Massachusetts statute that prohibited public access to trials involving certain sexual offenses where the victim was a minor.⁹⁸ The state emphasized two interests: the protection of victims from trauma and humiliation, and the greater likelihood that victims would testify and do so truthfully.⁹⁹ The Court found the statute unconstitutional and rejected both state interests because the first was not compelling enough and the second was empirically unsubstantiated.¹⁰⁰ In ruling for the media plaintiffs, the Court “firmly established. . .that the press and general public have a constitutional right of access to criminal trials.”¹⁰¹ Furthermore, the Court articulated a balancing test similar to the standard used in the prison cases in which the government must show that the denial of media access is “necessitated by a compelling government interest, and is narrowly tailored to serve that interest.”¹⁰² In both *Richmond Newspapers* and *Globe Newspaper*, the Court struck down state statutes prohibiting access to criminal trials because they were not narrowly tailored to serve the government’s stated

91. Kenealey, *supra* note 31, at 305.

92. See Anderson, *supra* note 7, at 84.

93. See Editorial, *Shrouded Homecomings*, N.Y. TIMES (Sept. 8, 2008), <http://www.nytimes.com/2008/09/08/opinion/08mon3.html> (noting that a result of the Dover Ban is that the returning dead “has been treated as a virtual state secret.”).

94. 448 U.S. 555 (1980).

95. *Id.* at 556.

96. *Id.*

97. 457 U.S. 596, 603 (1982).

98. *Id.* at 596.

99. *Id.* at 607.

100. *Id.* at 609–10.

101. *Id.* at 603 (reviewing holding in *Richmond Newspapers*).

102. *Id.* at 607.

interest.¹⁰³

Several years after *Richmond Newspapers*, the Court held that there is a public right of access to preliminary hearings in *Press-Enterprise Co. v. Superior Court*.¹⁰⁴ In reaching this finding, the Court established a two prong test requiring (1) a tradition of openness of the proceeding and (2) that public access play a significant role in the functioning of the criminal proceeding.¹⁰⁵ In recent decades, the Court has consistently held that the media has a right of access to rape trials, voir dire examination of potential jurors, and preliminary hearings, and other judicial procedures and documents.¹⁰⁶ In addition, lower courts have similarly extended the right of media access to other legal proceedings including bail hearings, change of venue hearings, sentencing hearings, parole hearings, and executions.¹⁰⁷

D. Media Access Beyond Prisons and Courtrooms

The right of access cases have mainly involved requests by the media to gain access to prisons and courtrooms. However, the right of access is not limited exclusively to these institutions. The language of the cases themselves does not expressly limit the application of the right of access to certain government institutions.¹⁰⁸

E. Privacy Interests and Media Access: National Archives and Records Administration v. Favish

The Dover Ban also invokes issues regarding media access and family privacy. In 2004, the Court analyzed the right to media access in regards to the conflict between the right to know and the right to privacy in *National Archives and Records Administration v. Favish*.¹⁰⁹ In this case, the Court examined the scope of a FOIA exemption for death-scene photographs of former Clinton White House deputy counsel Vincent Foster, who committed suicide in a northern Virginia public park.¹¹⁰ Allan Favish, a California attorney, requested the photos for what they might show about how Foster died, despite several government investigations that ruled the death a suicide.¹¹¹ The government refused to release the photos, citing FOIA exemption 7(c), which protects law enforcement records when their release

103. See Karen C. Sinai, *Shock and Awe: Does the First Amendment Protect A Media Right of Access to Military Operations?*, 22 CARDOZO ARTS & ENT. L.J. 179, 205 (2004).

104. 478 U.S. 1, 11–12 (1986).

105. *Id.*

106. Ilana Friedman, *Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information*, 75 FORDHAM L. REV. 253, 267 (2006) (internal citations omitted).

107. *Id.*

108. See Kenealey, *supra* note 31, at 309.

109. 541 U.S. 157, 160 (2004).

110. *Id.*

111. *Id.* at 161.

“could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹¹² The Court held that Foster’s family had a privacy interest in the photos, based on ancient traditions of family caring for the remains of the deceased.¹¹³ The Court then ruled that because the Foster family’s privacy interest outweighed the public’s interest in disclosure, an unwarranted invasion of personal privacy could reasonably be expected.¹¹⁴ The Court explained that “[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial.”¹¹⁵ The Court further explained that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”¹¹⁶ The Court thus held that FOIA provides a right of privacy to family members’ control of death-scene images of close relatives.

Ultimately, it is possible to glean a few guiding principles used by the Court in the prison and criminal trial access and family privacy cases that must be considered when analyzing the Dover Ban. These principles include: (1) the media’s interest; (2) the government’s interest; (3) whether a policy is narrowly tailored; and (4) whether there is an actual privacy interest in the photographs (*i.e.*, whether the deceased can be identified). Overall, “[u]nderlying the Supreme Court’s decisions in the prison and criminal trial right of access cases is a distaste for arbitrary governmental interference with the press’, and indirectly the people’s, free discussion of governmental affairs.”¹¹⁷ It is against this backdrop that the next Part of this article evaluates the constitutionality of the Dover Ban.

III. ANALYSIS OF THE CONSTITUTIONALITY OF THE DOVER BAN

At the crux of right of media access claims in the context of prisons and criminal trials is the notion that there must be a balance between the media’s interests and the state’s interests. This Part discusses the media’s interest in the images at Dover and then discusses the government’s interest. This Part ultimately concludes that the media’s interest is greater than the government’s interest. This Part also explores the family privacy concerns.

A. *The Media’s Interest*

At its core, the media’s interest in gathering and disseminating information is to make the public aware of government policies and the true

112. *Id.* at 165.

113. *Id.* at 167–68. Here, the Court briefly discussed the long history of burial rites and their counterparts.

114. *Id.* at 171.

115. Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 167 (2004).

116. *Id.* at 168.

117. See Sinai, *supra* note 103, at 206.

costs of war. The public should know the true costs of war, and “[t]his interest appears more compelling in a situation. . . in which government decisions resulted in loss of human life rather than a situation where a prison administration possibly violated criminals’ rights.”¹¹⁸ In a Dover ceremony, where the presence of many spectators would be impractical and could potentially upset a grieving family, the media’s role as a stand-in for the public is particularly important. As such, the media’s interest in providing photographs of the military coffins is more significant than in prior right of access cases in the prison or trial contexts. In criticizing the D.C. Circuit Court’s holding in *JB Pictures*,¹¹⁹ “[t]he media’s interest in *JB Pictures* was more significant than in prior right of access cases and the government’s expressed interests lacked both strength and legitimacy.”¹²⁰

The media’s interest in publishing pictures has become even more urgent in recent years. Because of the military’s involvement abroad over the past several decades, “the need for public information is vital for our democracy to function correctly.”¹²¹ In *JB Pictures*, the district court dismissed the media plaintiffs’ claim for access to Dover because the plaintiffs did not “allege that greater access to Dover will reveal new information about the occurrence or magnitude of casualties in military conflict.”¹²² As such, the district court determined that the Dover Ban did not “impede acquisition of basic facts, the raw material of a story.”¹²³ However, the Supreme Court in the Pentagon Papers, a secret Department of Defense study of U.S. political and military involvement in Vietnam, “established that the U.S. government had systematically deceived the American people during several administrations about the purpose of American involvement in South Vietnam, the risks of involvement, and the likely duration, destruction, and costs of the war.”¹²⁴ The Court’s reasoning suggests that the Dover Ban, which categorically suppresses the risks of involvement, destruction, and costs of the American wars in Iraq and Afghanistan, constitutes the raw material of the war story, and therefore the Ban would be unconstitutional.

B. The Government’s Interests

As previously discussed, the government’s interest is threefold and must be balanced against the media’s interest. First, the Dover Ban is designed

118. MacNair, *supra* note 71, at 412.

119. *JB Pictures, Inc. v. Dep’t of Def.*, 86 F.3d 236, 242 (D.C. Cir. 1996).

120. MacNair, *supra* note 71, at 410.

121. Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1101 (2003).

122. *JB Pictures*, 86 F.3d at 240.

123. *Id.*

124. Sinai, *supra* note 103, at 212; *New York Times Co. v. United States*, 403 U.S. 713 (1971). In this case, *The New York Times* and the *Washington Post* had started publishing reports about a classified study on the Vietnam War. The Nixon administration sought to enjoin the publication on the ground that it endangered national security. The Court held 6-3 that enjoining the newspapers would violate the First Amendment.

to protect the bereaved families' privacy interests. Second, the ban is intended to prevent the friends and family of the deceased to feel obligated to travel to Dover for the arrival ceremonies. Third, there is an implied national security concern. These reasons are developed more fully and then refuted below.

The first government interest is family privacy protections. Although it is certainly a noble cause to protect the deceased families' privacy interests, the Dover Ban only provides limited privacy protection for grieving families. Thus, the Supreme Court's reasoning and holding in *Favish* simply does not apply to the Dover Ban. A different analysis applies because "[w]hereas the photos of Foster showed his body as it lay where he died, the coffin photos do not show a body at all. It is not even possible to identify whose remains are in any particular coffin, so the privacy interest at stake is significantly smaller."¹²⁵ Furthermore, there is a greater public interest in the Dover images since "[t]he public has a strong interest in being able to evaluate the human costs of the wars in Iraq and Afghanistan, whereas the interest in access to the Foster photos in *Favish* was diminished by the conclusions of previous investigations."¹²⁶

Ralph Begleiter, a professor and former journalist who challenged the Dover Ban, notes that "none of [the] caskets is identified in any way and there's no invasion of privacy in the first place."¹²⁷ Edward Wasserman, the Chair in Journalism Ethics at Washington and Lee University, agrees and notes, "It's impossible for me to imagine a ground for withholding those pictures either on privacy grounds or on national security grounds."¹²⁸ Furthermore, the arrival ceremonies for flag-draped coffins at Dover are markedly different from funerals, which usually involve a deeply personal occasion with family and friends.¹²⁹ Accordingly, the arrival ceremonies at Dover lack "the personal nature and solemn finality of an actual funeral."¹³⁰

The government's interests underlying the Dover Ban are arguably suspect from the start for two reasons.¹³¹ First, "the deceased's families protested the lack of ceremonies at Dover, which shows that the assertions of government concern over the families' privacy interests and the families' obligation to travel to Dover may have been false."¹³² Second, the military held ceremonies at Dover and allowed the press access after Desert Storm and there was no change. Therefore, "[t]he only difference appears to be that the

125. Penrod, *supra* note 22.

126. *Id.*

127. *Obama Reviewing Ban on Photos of Military Coffins*, USA TODAY (Feb. 10, 2009), http://usatoday30.usatoday.com/news/washington/2009-02-10-obama-coffins_N.htm.

128. Smolkin, *supra* note 34; *see also* Annas, *supra* note 1 (arguing that since there is really no way to identify the soldier in the casket, publication of a photograph does not implicate family privacy).

129. *See* 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).

130. *Id.*

131. *See* MacNair, *supra* note 71, at 413.

132. *Id.*

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.”¹³³ The timing of the directives creates suspicion regarding the legitimacy of the government’s interest to protect the families of the fallen since the original Dover ban was issued after military action in Panama came to an end and just before the Gulf War began.¹³⁴ In a similar vein, the ban was reinforced shortly before the invasion of Iraq in March 2003.¹³⁵

Even if the government’s interest in family privacy passes constitutional muster, the denial of access is likely not the least restrictive means available to ensure family privacy. Resorting to a denial of media access is simply overkill. A less intrusive means of protecting operational security would simply be to allow more liberal press access rights, but with accreditation and access requirements. Since family privacy can be protected by means other than access denial, privacy interests do not validate the Dover Ban on the press.

Like the first government interest, the second interest, preventing the friends and family of the deceased to feel obligated to travel to Dover for the arrival ceremonies, is also insufficient in justifying the ban. Although it is certainly a commendable goal to express concern for the transportation and logistical needs of the families of the fallen, this hardly reaches the level of a compelling government interest.¹³⁶

The third government interest is an implied national security interest regarding the impact of the photographs on morale. The national security interest requires a determination whether the government’s stated security interest is legitimate and not an arbitrary use of executive authority and whether the Dover images are necessary for citizens to see in order to effectively participate in a republican form of government.¹³⁷ During the District Court hearings of *The Pentagon Papers*, Judge Gurfein suggested, “the government had to prove that the continued classification of the Pentagon Papers was not intended to avoid personal or political embarrassment, but rather to protect national security.”¹³⁸ In the case of the Dover Ban, it is sufficiently clear that the justification for access restrictions was to avoid political and personal embarrassment.¹³⁹ As discussed earlier, numerous scholars have explained that the Dover Ban was initially enacted because President George H.W. Bush was embarrassed after he was seen laughing on one screen while images of the coffins were shown on the other screen.¹⁴⁰ In

133. *Id.*

134. *See supra* note 28 and accompanying text.

135. *See supra* notes 35–40 and accompanying text.

136. It is worth noting that *JB Pictures* did not state what the necessary standard should be as applied to the Dover Ban.

137. *See Sinai, supra* note 103, at 208–09.

138. *Id.* at 208–09.

139. *See supra* notes 28–29 and accompanying text.

140. *See supra* notes 23, 28–29 and accompanying text; *see also Annas, supra* note 1.

addition, there is no evidence that the pictures of the coffins will affect morale. Additionally, there is certainly a strong argument that secrecy or lack of a ceremony may have a negative impact on morale.¹⁴¹ Furthermore, the Dover Ban was reinforced immediately before the invasion of Iraq in 2003. This measure surely suggests that the reinforcement was designed to avoid the political fallout and potential embarrassment from coffins being shown on television or in the newspapers, thus severely undermining any national security claim. Moreover, morale does not constitute a legitimate state interest based on the overwhelming benefit of public debate on wartime policy.¹⁴² In any event, any national security interest regarding the Dover Ban is highly speculative and baseless.

In conclusion, the government's interest in restricting access to the Dover images does not outweigh the people's interest in viewing the images showing the coffins returning from the battlefield, yielding a First Amendment victory for the press.¹⁴³ The three governmental interests do not survive judicial scrutiny. In order to reinforce this conclusion, the next Part discusses the public policy arguments against the reinstatement of the Dover Ban.

IV. PUBLIC POLICY ARGUMENTS

There are a number of compelling public policy arguments that militate against the Dover Ban. This Part discusses three particular public policy arguments against the Dover Ban. The first argument is that the images of the coffins arriving at Dover have enormous social value and make war a visceral reality. The second argument is that the Dover Ban undermines democratic accountability. The final argument is that the Dover Ban widens the civilian-military divide and undermines the military-press relationship.

A. *Social Value*

There is inherent social value in publishing the photographs of returning coffins. In other words, the photographs of the coffins showcase the realities of war and thus should be made public. Images of the costs of war “have enormous social value because those images, whether relatively pristine images of inanimate flag-draped coffins, or graphic images of death and suffering, convey the power and emotion to affect public opinion about war

141. See Jason Zenor, *Lifting the Dover Ban: The Compromise on Press Access to Fallen Soldiers Returning from War*, 24 U. FLA. J.L. & PUB. POL'Y 97, 121 (2013) (arguing that the “morale interest” is not compelling).

142. See Jacobs *supra* note 11, at 706 (explaining that “[t]he First Amendment cannot give way merely because televised pictures of bodybags 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.”).

143. See MacNair, *supra* note 71 (concluding that “the less substantial government interest and the greater media interest in JB Pictures, suggest that the D.C. Circuit Court should have concluded that the media's interest outweighed that of the government.”). *Id.* at 413.

and, by extension, to influence the outcome” of elections.¹⁴⁴ Similarly, former U.S. Senator and Secretary of Defense William Cohen once remarked, “And the hearts that beat so loudly and enthusiastically to do something, to intervene in areas where there is not an immediate threat to our vital interests, when those hearts that had beaten so loudly see the coffins, then they switch, and they say: ‘What are we doing there?’”¹⁴⁵

Photographs have an impact that goes beyond what words and depictions can convey and greatly enhance journalism.¹⁴⁶ The media’s role in distributing images of the coffins returning from the battlefield is “critical because it plays an emotive role that words, standing alone, simply cannot deliver to readers.”¹⁴⁷ The media’s role to provide this coverage is strongly embedded in their journalistic mission.¹⁴⁸ The ethics code of the National Press Photographers Association provides that “visual journalists operate as trustees of the public. Our primary goal is to report visually on the significant events and varied viewpoints in our common world. Our primary goal is the faithful and comprehensive depiction of the subject at hand.”¹⁴⁹ The ethics code also provides that “[a]s visual journalists, we have the responsibility to document society and to preserve its history through images.”¹⁵⁰ Similarly, the American Society of News Editors Statement of Principles states that “[t]he primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time.”¹⁵¹ Providing the public with pictures of the returning coffins at Dover undoubtedly furthers this mission by providing viewers with information regarding the true costs of wars. In addition, the images taken at Dover may increase the press’ credibility. Publishing such images could potentially strengthen credibility “because it demonstrates that a newspaper is not afraid to tell a difficult, hard-hitting story, no matter how unpleasant it may be to some readers.”¹⁵² Furthermore, the credibility may also be increased when “readers see for themselves that a real person is dead, not simply a name listed in a newspaper.”¹⁵³

B. Democratic Accountability

The second public policy argument is that the Dover Ban severely

144. See Calvert, *Voyeur War*, *supra* note 44, at 156.

145. DAVID HALBERSTAM, *WAR IN A TIME OF PEACE* 441 (2001).

146. See Richard J. Dalton, *Media Firestorm; Photos Ignited ‘A Power Keg,’* *NEWSDAY*, May 9, 2004, at A9.

147. Calvert & Torres, *supra* note 8, at 113.

148. See generally *id.* (discussing the media’s mission in covering such events).

149. *National Press Photographers Association Code of Ethics*, NAT’L PRESS PHOTOGRAPHERS ASS’N, https://nppa.org/code_of_ethics (last visited Feb. 26, 2016).

150. *Id.*

151. *American Society of News Editors Statement of Principles*, AM. SOC’Y OF NEWS EDITORS, <http://asne.org/content.asp?pl=24&sl=171&contentid=171> (last visited Feb. 26, 2016).

152. Calvert & Torres, *supra* note 8, at 96.

153. *Id.*

undermines democratic accountability by preventing the essential function of the press to serve as a monitor of government action. The “Dover Test” provides an effective way to gauge public support for military action and America’s tolerance for casualties. The Dover Ban prevents American voters, citizens, and residents from knowing what their government is doing and whether it is successfully reaching goals of which it approves. This is vitally important because “[w]hen officials attempt involuntary suppression and the doctoring of information, they alienate journalists and undermine the credibility of all concerned. Such actions violate democratic principles and can be seen as avoidable if the realities of war are taken into account.”¹⁵⁴ Perhaps rather ironically, in May 2005, shortly after reinforcing the Dover Ban, President George W. Bush remarked, “First, all successful democracies need freedom of speech, with a vibrant press that informs the public, ensures transparency, and prevents authoritarian backsliding.”¹⁵⁵ Watergate and the Vietnam War are two examples of the press’ value in ensuring transparency and accountability.¹⁵⁶

The Supreme Court has echoed this belief by stating that First Amendment regulations are wholly insufficient to justify a burden on the “the exercise of rights so vital to the maintenance of democratic institutions.”¹⁵⁷ In *Times-Picayune Publishing Co. v. United States*, the Court declared that “[t]he daily newspaper . . . [is] essential to the effective functioning of our political system” because it seeks to “vigilantly scrutiniz[e] the official conduct of those who administer the state” and serves “as a potent check on arbitrary action or abuse.”¹⁵⁸ Similarly, the legislature has also endorsed the belief that the freedom to access information regarding how the government functions is essential in a democratic system. Perhaps one of the most obvious examples of this was the enactment of the FOIA in 1966.¹⁵⁹ The FOIA is “based on the premise that access to government information is essential for citizens of a democracy to make informed decisions.”¹⁶⁰ Other examples of the legislature’s support of the freedom to access information include statutes such as the Government in the Sunshine Act and the Federal Advisory Committee Act, both of which impose significant transparency requirements.¹⁶¹

154. JEFFERY A. SMITH, *WAR AND PRESS FREEDOM* 197 (1999).

155. ILONA MEAGHER, *MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA’S RETURNING TROOPS* 41 (2007).

156. See Kenealey, *supra* note 31, at 320.

157. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

158. 345 U.S. 594, 602 (1953).

159. See Karen Turner, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms*, 33 MCGEORGE L. REV. 593, 602 (2002).

160. *Id.*

161. David C. Vladeck, *Information Access-Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1787–88 (2008) (explaining that FOIA is “the backbone” of the country’s right-to-know legal regime but other general and specific statutes reinforce FOIA’s overall ideal that “information is the lifeblood of democracy”).

Historically, photographs have provided an effective check on government action, thereby ensuring accountability and responsiveness. For example, during the Civil War a small number of photographs of starving Union prisoners had an effect that was “merciless, shocking, and utterly irrefutable. . . .photography was so new and the images of human beings so unlike any ever seen before that the last vestiges of indifference were swept away. Public opinion was galvanized, Congress itself was stirred.”¹⁶² Like the Civil War photographs, the powerful effect of photography and other media coverage was also acutely demonstrated during the Vietnam War.¹⁶³ Strikingly, “[n]o other war in history can match the Vietnam War either in terms of the complete and open access given to the press or in terms of the controversy that the press’s efforts generated. To this day many still believe that the press ‘lost’ the war by turning the American public against the military.”¹⁶⁴

C. *The Civilian-Military Divide*

The third public policy argument is that the Dover Ban reinforces and widens the civilian-military divide.¹⁶⁵ The chief reason for this divide is that the public becomes increasingly ignorant of the costs of war as the government chips away at media coverage during wartime.¹⁶⁶ In addition to the important roles of the press already discussed, the media can also serve as an important public relations tool for the military. Media coverage of a Dover ceremony, especially by photojournalists, allows the public to have a visceral sense of what is happening in distant battlefields and the consequential effects on families and the troops. This allows the public to see what military members and their families must deal with on a routine basis and helps bring the military and their families and communities closer together. The images from the Dover ceremonies do more than provide a view of the ceremony; they give all members of society a personal and holistic view into the tragedy itself, from the emotional pains experienced by the families to the professional conduct of the military members conducting the ceremony.¹⁶⁷ Indeed, this serves as a common ground designed to bring the community closer together.

By denying this opportunity, the civilian-military divide unfortunately grows. Government policies like the Dover Ban have largely contributed to the wars in Iraq and Afghanistan lasting over a decade because many citizens are so far removed from the reality of warfare.¹⁶⁸ Underlying the Dover Ban is a

162. VICKI GOLDBERG, *THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES* 25 (Nancy Grubb, ed., 1991).

163. See *supra* notes 9–10 and accompanying text.

164. Kenealey, *supra* note 31, at 315.

165. See Stear, *supra* note 20, at 742 (arguing that the Dover ban results in a situation whereby the “American public’s open window into the activities of the military has been partially closed.”).

166. See MacNair, *supra* note 71, at 415.

167. See *Media Ban on Troops’ Coffins May Lift*, *supra* note 5.

168. See MEAGHER, *supra* note 158, at 45 (explaining that an escapist attitude of the

misperception that the public cannot accept a visual reminder of the costs of war. However, this is a patently false view that lubricates the civilian-military divide. One commentator explains, “a misperception of the public’s willingness to accept casualties distorts the cost-benefit calculations of civilian and military leaders as they consider when to use military force and how.”¹⁶⁹

A corollary to the civilian-military divide is that the Dover Ban simultaneously widens the divide between the military and the press. The relationship between the press and the military has been rather antagonistic historically, but a symbiotic partnership is exceedingly necessary during armed conflicts.¹⁷⁰ On one hand, the military needs the press in order to galvanize support for any conflict while the media relies on the military for access to information on the other hand.¹⁷¹ The symbiotic relationship between the military and the press was strongly evidenced during World War II. General Dwight Eisenhower summarized the government’s policy towards the press during World War II and the benefits of a liberal media access policy:

In the handling of the press, the American practice was to provide every facility that would permit an individual to go wherever he wanted, whenever he wanted. While this imposed upon us some additional administrative burdens, it paid off in big dividends because of the conviction in the minds of all that there was no attempt to conceal error and stupidity.¹⁷²

V. MARCHING FORWARD: THE NEED FOR NEW LAW

Although the Dover Ban is now a part of America’s military history, the success of the ban in controlling the media’s coverage of the costs of war creates a distinct possibility that the military will use the Dover Ban as a model in existing or future conflicts. This is a distinct possibility in light of existing case law, because “there appears to be nothing to prevent the Pentagon from eliminating on-scene coverage of military operations, detention facilities, military hospitals, and other auxiliaries of war.”¹⁷³ Since it is entirely possible that the Dover Ban could go into effect in the future, this Part discusses a reasonable legislative solution that directly addresses the systemic problems created by policies like the Dover Ban. Proactive measures should be considered to address both the compelling need to allow the press access to the military coffins while simultaneously preserving the country’s free press

American public has developed as a result of policies like the Dover Ban: “[t]his attitude has also been reflected in the government’s ban on publishing the photos of the flag-draped coffins of service members who have been killed in action, which the media has followed almost without question.”)

169. Lt. Col. Richard A. Lacquement, *The Casualty Aversion Myth*, 57 NAVAL WAR COLLEGE REVIEW 38, 52 (2004).

170. See Sinai, *supra* note 103, at 189.

171. *Id.*

172. DWIGHT EISENHOWER, CRUSADE IN EUROPE 300–01 (1948).

173. Anderson, *supra* note 7, at 66 (noting that “[i]n the absence of either a constitutional or statutory right of access, the press has no clear legal ground to challenge no-access policies.”).

tradition.

A. A Proposal

The first and most obvious solution to the possible reinstatement of the Dover Ban is a legislative solution. Fortunately, legislation considered in the past provides the necessary framework for the consideration of new legislative efforts. As previously discussed, there have been two congressional measures considered by Congress in the recent past.¹⁷⁴ The first measure was the Lautenberg amendment, which would have instructed the Department of Defense to work out a new protocol permitting the news media to cover the arrival of the war dead in a manner that protected families' privacy.¹⁷⁵ The second legislative measure was House Resolution 269, known as the "Fallen Hero Commemoration Act," which was considered in 2009 to provide the media accreditation and access to Dover.¹⁷⁶ House Resolution 269 required that the Secretary of Defense grant access to accredited members of the media when the remains of military members arrive at military installations in the United States.¹⁷⁷ In addition, the resolution vested the Secretary of Defense the authority to establish a policy for accreditation of members of the media for purposes of granting access to Dover.¹⁷⁸

To be effective, a new anti-Dover Ban statute must: (1) provide baseline guidelines for media accreditation procedures; (2) establish access procedures for accredited media; (3) permit the accredited media to photograph the coffins as long as there is no means of identifying the deceased; (4) only allow photographs of the family members with the coffins if the families grant permission; and (5) place the burden of proof on the government for any denial of media access. The inclusion of these components is vital to achieve an effective weapon against the reinstatement of the Dover Ban. Such a statute could also be implemented without violating any of the Constitution's free press protections or family privacy concerns. At its core, the legislation should create a presumptive right of media access to Dover ceremonies.

New law should first address authentication requirements. Photojournalists simply will not be allowed on Dover for the ceremonies until they have been pre-approved. Requiring some level of authentication is critical to ensuring military base security. Furthermore, authentication is critical since military bases normally require that a military public information officer escort journalists; therefore, access often depends on a scheduled appointment.¹⁷⁹

The second major focus of new law should be on access requirements to

174. See Part I.E *supra* discussing recent legislative efforts.

175. See Stolberg, *supra* note 58 and accompanying text.

176. See H.R. 269, 111th Cong. (2009).

177. *Id.*

178. *Id.*

179. See *Military facilities*, REPS. COMM., <http://www.rcfp.org/reporter%E2%80%99s-field-guide/military-facilities> (last visited Feb. 5, 2016).

the military bases receiving coffins. U.S. military branches have different policies and broad guidelines regarding media access.¹⁸⁰ In addition, each base often has the authority to implement its own regulations. The legislative solution outlined in this article provides an overarching framework for access requirements.

The current protocol for media access at Dover Air Base that was put in place after the ban was lifted is a more effective, albeit flawed, policy than the former Dover Ban. The new policy became effective on April 6, 2009, and provides that the media will be notified about a Dover ceremony and permitted to attend after the family consents to such coverage.¹⁸¹ The current procedures provide that notification of Dover ceremonies will be emailed to journalists who register with the Air Force Mortuary Affairs Operations Center Public Affairs office. Media registration is completed by submitting a journalist's name, media organization, email, and the name, phone number, and email of an immediate supervisor for credentialing verification.¹⁸² Notification of the media is done through email and includes the time and date of the ceremony, the time and location that media representatives will be required to meet with the Air Force public affairs officer to be escorted onto the military facility, and the identification of the deceased service member, including the service member's name, rank, military service, hometown, and theater where the death occurred.¹⁸³ The military has not reported any problems since this protocol was implemented.¹⁸⁴

There are a number of organizations that can ensure that media accreditation and access is done in accordance with military regulations. For example, the Association of Military Journalists is designed to "advance public understanding of the military, national security and homeland defense. . .[and] to represent the interests of working journalists to the government and military; and to assure that journalists have access to places where the U.S. military and its allies operate."¹⁸⁵ Since the proposed legislation is flexible and the precise procedures are open to debate, journalistic organizations can play a critical role in the process of designing better access requirements. For instance, after the groundswell of opposition to the press's exclusion in Grenada, the Joint Chiefs of Staff established a panel to assess the concerns over press access during wartime; representatives included faculty and staff from various journalism

180. *Id.*

181. See DOD Policy - Media Access to Dignified Transfer, <http://www.mortuary.af.mil/About-Us/Policy-Directives/> (under "Secretary of Defense Policy"; then follow "DOD Policy - Media Access to Dignified Transfer" hyperlink) (last visited Feb. 10, 2016).

182. *Id.*

183. *Id.*

184. See Jamie McIntyre, *Documenting the Return of War Dead at Dover*, *AJR*, <http://www.ajr.org/article.asp?id=4757> (last visited Feb. 6, 2016).

185. *Mission Statement*, MILITARY REPORTERS & EDITORS ASSOC., <http://militaryreporters.org/about/> (last visited Feb. 5, 2016).

schools, military members, and retired members of the press.¹⁸⁶ The panel issued a detailed report that urged the Pentagon to (1) conduct planning for news coverage simultaneously with operational planning; (2) create a press accreditation system; (3) actively promote voluntary compliance with limitations on publishing sensitive information; and (4) devise a system of press pools.¹⁸⁷ This historical instance can serve as an effective template for how to draft effective legislation for Dover access.

B. Criticisms of the Proposal

One of the first and most obvious criticisms of the proposal is that it is difficult to determine accredited media in an age when so many individuals and organizations claim to be journalists.¹⁸⁸ In other words, there may be a void for vagueness problem with the proposal. A second criticism is that such a bill as a preemptive strike may not be necessary today since America is in a constant state of war.¹⁸⁹ As a result, military coffins will continue to trickle home from somewhere. A third criticism is that the proposal is unnecessary since the Dover Ban has already been lifted and thus would only be based on phantom fears.¹⁹⁰ As a result, the proposal might be analogized to the efforts of some Republicans to pass a bill that would have prohibited the resurrection of the Fairness Doctrine after President Obama was elected.¹⁹¹

However, these criticisms are unfounded for a few reasons. First, congressional measures can at the very least send a strong signal of disapproval regarding any future action to the executive branch. Second, passing new legislation will prevent the executive branch from modifying or ignoring protocols, especially in the event that a new war breaks out.¹⁹² Third,

186. See Kenealey, *supra* note 31, at 317.

187. See Jacobs, *supra* note 11, at 685.

188. Clay Calvert, *And You Call Yourself A Journalist?: Wrestling with A Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 448 (1999) [hereinafter Calvert, *Journalist in the Law*] (discussing how accreditation is a difficult concept when used to determine who qualifies as a journalist).

189. See generally *id.* This criticism posits that legislative action is no longer necessary because of the current state of perpetual war has led to a situation whereby Americans are so accustomed to continual warfare that there is no longer a problem in need of a solution. Put differently, the constant state of war has normalized a problem that previously existed, thus a solution is not needed. To cite the popular adage: "Why fix what isn't broken?" Here, perpetual warfare has strangely and unfortunately healed what once was broken, or at least normalized the landscape.

190. *Id.*

191. *Id.* See also Gautham Nagesh, *House Republicans ask FCC to take Fairness Doctrine off the books*, THE HILL, May 31, 2011, <http://thehill.com/blogs/hillicon-valley/technology/164029-house-republicans-tell-fcc-to-take-fairness-doctrine-off-the-books>. The Fairness Doctrine was introduced in 1949 and required broadcasters to present controversial public issues in a manner deemed fair and balanced by the Federal Communications Commission.

192. See Anderson, *supra* note 7, at 95 (explaining that historically the Pentagon has felt free to "modify or ignore [protocols formed by negotiations] when a new war starts on the ground that conditions are different from those contemplated by the agreement.").

legislation can serve as an effective check to ensure that America does not remain in a constant state of war.¹⁹³ Fourth, the potential for raising phantom fears is perfectly legitimate considering the dark and deep history of the Dover Ban. The Ban has been used for political purposes to misguide and deny the public information regarding the nature and costs of America's wars. As such, the legislative solution is hardly based on phantom fears but instead provides a proactive solution to prevent a real problem from recurring. To reiterate, the proposal outlined in this paper is malleable. As a result, the precise mechanics of the legislation are certainly open to debate. The basic principle underlying this legislative proposal is that a legal solution is needed to ensure that the Dover Ban is not reinstated.

C. Principles to Guide the Press in the Absence of the Dover Ban

At the present time, the Dover Ban is not in effect. However, the media must remain mindful of certain principles when deciding whether to publish pictures of the returning coffins. The press must be guided by three fundamental principles when making decisions whether to publish pictures of the coffins returning.¹⁹⁴ First, the press should consider the need to maximize truth-telling; second, the press should evaluate the impact of an image or piece of information on public policy and democracy; and, third, the press should weigh the need to let the marketplace of ideas function unfettered by censorship.¹⁹⁵

In regards to the need to maximize truth-telling, "It is important to publish images of war casualties because, although the images may shock and disturb, photographs and videotape convey a literal snapshot of the truth (unless they are altered or manipulated)."¹⁹⁶ Similarly, there is a pressing need to evaluate the impact of an image on public policy and the democratic process. There is a journalistic obligation to answer this question before printing pictures that have far-reaching consequences. As such, journalists must remain mindful that the publication of photos documenting the costs of war have widespread effects.¹⁹⁷ Policies adhering to these central values will serve an important role to undermine public ignorance with respect to U.S. military conflicts abroad. The images reflecting the costs of war have the ultimate power to increase the public's interests in war and, as a direct result, have the potential to save lives in the future.¹⁹⁸

193. See MEAGHER, *supra* note 155.

194. Calvert, *Voyeur War*, *supra* note 44, at 159.

195. *Id.*

196. *Id.*

197. See Carlos A. Kelly, *The Pen Is Mightier Than the Sword or Why the Media Should Exercise Self-Restraint in Time of War*, FLA. B.J. 22, 28 (2003).

198. Calvert, *Voyeur War*, *supra* note 44, at 168.

IV. CONCLUSION

Images of military coffins returning from the battlefield are an essential tool for the press to provide a complete and accurate view into our country's wars. The former Dover Ban aimed to sanitize the wars in Iraq and Afghanistan and had a political purpose to control public anger over the conflicts. As a result, the Dover Ban significantly undermined accountability and transparency. It should therefore come as no surprise that the wars in Iraq and Afghanistan have lasted as long as they have.¹⁹⁹ Although the Obama administration lifted the Dover Ban, the history of the ban demonstrates the possibility of overarching reaction in the future, which places the rights guaranteed by the First Amendment in jeopardy. For this reason, a legislative solution is needed.

This article has argued that the Dover Ban is unconstitutional. Public policy requires that the media covers the Dover ceremonies since the images have enormous social value, ensure democratic accountability, and prevent an enlarged civilian-military divide. The flag-draped coffins arriving at Dover and other American military bases should be honored, not hidden from the public.

199. See Terry, *supra* note 9, at 98 (noting that even though military operations have ended in Iraq and have been winding down in Afghanistan, U.S. soldiers are still deployed to those countries and hundreds of advisors have been deployed to Iraq to combat the Islamic State of Iraq and Syria ("ISIS") threat).