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CONNECTICUT COMPENDIUM OF INTERNATIONAL AND COMPARATIVE LEGAL SCHOLARSHIP

PRESS FREEDOMS
DURING TIMES OF EMERGENCY:
AN EXAMINATION OF SOUTH AFRICA
AND THE UNITED STATES

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INTRODUCTION

As the 1980s unfolded, South Africa prided itself as having the most tolerant press laws on the African continent.¹ Against the recent social and political tumult of some of its neighboring nations, South Africa appeared relatively calm. But storm clouds of unrest loomed ominously on the horizon as the apartheid government of State President P.W. Botha came under increasing pressure from within and abroad to end its policies of racial separation. By mid-decade the winds of domestic dissent had stiffened, and the embattled government girded for the growing storm.²

To strengthen its position, the Botha government imposed increasingly severe limits on dissident elements of the population and on the press -- the latter of which antagonized the government by both reporting about the unrest and by editorializing against the growing oppression.

In this paper we will examine how the growing crisis in South

Africa transformed various laws and government policies that affected the press, both directly and indirectly. We will briefly trace the history of government regulation of the press in South Africa, and review the press-related laws imposed by the Afrikaner government since its rise to power in 1948. The paper will focus on the last half of the 1980s, when press control and suppression of speech became an obsession with the Botha government as it struggled to maintain apartheid policies in the face of growing fears among the white minority government that the storm of black nationalism and international condemnation could not be contained. An attempt also will be made to put South African press restrictions into a more global and historical context by comparing them with those of other nations that from time to time have been faced with internal or external threats to their national security. Of particular interest will be parallels to restrictive measures imposed by the United States, whose constitutional guarantee of a press free from government interference holds the nation up as the bellwether of press freedom.

We will conclude with an examination of the positive changes under the government of F.W. de Klerk and, assuming no overthrow by coup, what the future might hold for that nation's media.³

II

A SOUTH AFRICAN ANALOGY

Any person, corporation, association, organization, or society who...knowingly prints, publishes, edits, issues, circulates, sells or offers for sale, or distributes, or has in his possession for the purpose of distribution, any book, pamphlet, ...or document of any kind, in which is taught, advocated, or advised the use of physical force, violence or physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, social, industrial or economic change in this state... shall be deemed guilty of anarchy and sedition... [And] the officers thereof shall be punished by imprisonment... for a term not exceeding... twenty years.⁴

The government of South Africa over the last forty years has created one of the most regulated environments for the public discourse outside of the now-removed "Iron Curtain." Censorship of all means of communication is codified in an assortment of legislation and executive orders that change literally, and often drastically, upon the midnight publication of the Government Gazette. Some of the restrictions are modeled on laws from other so called "conflict societies."⁵ Others are improvised as Pretoria

perceives a need, and as the courts interpret legality. As of this writing, the restrictions on the publishing of "subversive statements" in South Africa are very similar to the one printed at the opening of this section.⁶ But the drafters of the statute above did not live in a "conflict society" like Israel, the Philippines, Lebanon, or Uganda. Nor was their aim to protect a minority ruling-class from domination by a super-majority. The statute above was enacted in Colorado, U.S.A. in 1953.⁷

Dr. A. S. Mathews, of the University of Natal, a leading expert on National Security in the South African dialogue also emphasizes society's need for security and the laws to insure it. In recent writings Dr. Mathews proposes dissolving the Pretorian security structure in transition to an ideal democracy. He sides with other commentators in advocating modification of the security laws to incorporate due process but maintains that restrictions on liberty will still be necessary to preserve authority in a "divided society."⁸ Or as Machiavelli declared: "[T]hose republics which in time of danger cannot resort to a dictatorship will generally be

ruined when grave occasions occur."⁹

Many modern governments in civil disarray have experience in balancing the security-liberty equation. The structure of regulation in South Africa can be compared to the transitional stages in, for example, Zimbabwe (formerly Rhodesia),¹⁰ Ireland,¹¹ or Israel.¹² The government of the United States has often pursued security through restrictions on civil liberties, and the costs and benefits are still murky. Perhaps what makes the United States different from so-called "conflict societies" is the richness of that debate and the persistent rebound of reason.

But given the similarities among many security laws, there must be more that distinguishes the subversion statute above, from the Media Emergency Regulations of South Africa.¹³ As the South Africa restrictions have a history of political construction, which we will discuss, so too did the subversion laws that have effected censorship in the United States. Though it requires some juggling of history, comparisons can be made between the United States and South Africa in the area of censorship grounded in national

security.

III

HISTORY OF PRESS CENSORSHIP IN THE UNITED STATES

A. Seeds of Censorship

Most of the United States experience with censorship has occurred during times of war, either "hot" or "cold". Other nations exhibit similar patterns. Recall the media-government relationship in the Falklands war,¹⁴ or the Israeli Occupation.

When Thomas Jefferson came into the Presidency in 1801, he rode a wave of popular rejection of the infamous Sedition Act of 1798. Both Jefferson and Madison had adamantly opposed this persecution of the exercise of free speech.¹⁵ Nevertheless, in a confidential letter to Governor Thomas McKean of Pennsylvania, not long after the expiration of the act in 1801, President Jefferson complained of editorial attacks by the "Tory press." Jefferson agreed that since the First Amendment restrained the Congress from controlling press criticism, the states should step in to police and prosecute. Jefferson predicted a "wholesome effect in

restoring the integrity of the presses... place the whole band more on their guard."¹⁶

Various states over the next century responded to Jefferson's suggestion, some for less sympathetic purposes than the President had in mind. Many southern states had laws like Virginia's punishing anyone who "by speaking or writing maintains that owners have no right of property in slaves."¹⁷ But the courts generally did not fully enforce such statutes without some evidence of coercion to violence. President Lincoln also suspended constitutional rights during the (American) Civil War, including the closing of newspapers and imprisonment without trial of over 38,000 suspected of treason.¹⁸

B. Censorship and the "General Welfare"

The Civil War began a new era in journalism¹⁹ because of its thorough coverage through eye-witness accounts.²⁰ No prior war had been so freely reported.²¹ In the beginning, correspondents were well received and given elaborate briefings by United States military commanders.²² The military soon became dismayed, however,

at the speed by which news could be telegraphed to newspapers.²³ Eventually the military established a system of censorship, albeit through trial and error.²⁴

Restrictions during the War took two approaches: one was censorship of the message, and the second was denial of access to the operations. While military controls were more effective in the North than in the South,²⁵ the military in the North attempted to restrict the correspondent's message.²⁶ In August of 1861 the War Department issued a General Order which forbade the reporting of any news of camps or troops and military or naval movements.²⁷ The publication of such information was punishable by court martial or possible death sentence if the information was given directly or indirectly to the enemy.²⁸ By 1862 the Secretary of War declared that correspondents were to submit all copy before transmission.²⁹ The most flagrant violations of the 1862 order were punished by military commanders who suspended the publication of newspapers.³⁰

Government control of access began in the North with a denial by the Post Office to deliver messages sent to enemy areas.³¹ In

January of 1862, the Assistant Secretary of War took complete control of the telegraph system.³² In further attempts to control the media, the military provided "official" war news through official dispatches.³³ General William T. Sherman established a final type of access restriction: all correspondents had to be accredited journalists and must be acceptable to commanders in the field.³⁴ The practice of accreditation has been used in every American war since.

**C. External Threats Impacting Upon Internal Guarantees:
The Path To Desert Storm**

United States involvement in World War I led to a more stringent accreditation process, thereby denying access to non-accredited correspondents. Each correspondent had to register with the American Expeditionary Force (AEF) and promise to convey the truth without disclosing facts which might aid the enemy; write an autobiographical sketch;³⁵ and pay \$3000 to the War Department for transportation and expenses.³⁶ Furthermore, the correspondent's newspaper had to post a \$10,000 bond to ensure that the

correspondent would act "as a gentleman of the Press."³⁷ Once accredited, American correspondents were allowed to visit front-line trenches and travel wherever they pleased.³⁸ However, the government later denied access of correspondents to the mails and telegraphs.³⁹

Censorship of the correspondent's message began 10 days after the United States entered World War I. President Wilson issued a Proclamation which stated that the publication of material giving information to the enemy made the publisher liable for treason.⁴⁰ In June of 1917 the Espionage Act created heavy fines and imprisonment for the making of false reports with the intent to interfere with the military, and for willful attempts to promote disloyalty or obstruct recruitment.⁴¹ The Post Office used the Espionage Act to prohibit the mailings from 44 separate newspaper organisations.⁴² Other severe censorship statutes were passed. The Trading-with-the Enemy Act of October 1917 authorized censorship of all messages abroad.⁴³ The Sedition Act of May 1918 imposed heavy fines and imprisonment for the publication of "any

disloyal, profane, scurrilous, or abusive language" about the U.S. government, Constitution, military forces or any language intended to bring these things into "contempt, scorn, contumely or disrepute."⁴⁴

In addition to enacting the above statutes, one week after the beginning of the war, President Wilson appointed a Committee on Public Information (CPI) with the liberal newspaper editor George Creel as chairman.⁴⁵ CPI opened news channels to Washington correspondents and only prohibited publication of troop movements, ship sailings and other events of strictly military character.⁴⁶ CPI urged newspapers to establish voluntary self-censorship and set minimum explanatory standards.⁴⁷ Most newspapers went beyond minimum requests in order to aid the war effort.⁴⁸ CPI began publishing an Official Bulletin in 1917 which was colored with patriotic propaganda, but on the whole was accurate and newsworthy.⁴⁹

With the coming of World War II came once again a Sedition Act in the guise of the Alien Registration Act of 1940 (known as the

"Smith Act"). This was actually the first peacetime sedition act since the short-lived original in 1798, as it preceded the bombing of Pearl Harbor by six months. It read, in pertinent part:

It shall be unlawful for any person ... with the intent to cause the overthrow or destruction of the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.⁵⁰

Oddly, the act did not see much action during the war, and was finally invoked against a post-war threat: Communism. Eugene Dennis, General Secretary of the Communist party in America, and ten others were convicted under the Smith Act with advocating and conspiring to advocate the forcible overthrow of the United States government.⁵¹ The nine month trial produced a 16,000 page record. Many portions of it would have been illegal for anyone else to publish.

The Supreme Court upheld their conviction in an opinion delivered by Chief Justice Vinson. The concurring opinion of Justice Frankfurter defended the conviction, balancing free speech against the need for national security. In avoiding the question

of how far such a policy should intrude on freedom of speech, Frankfurter defaulted to Congress. "Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?"⁵² James Madison may have answered "yes", holding that people should censor government, not government the people.⁵³

In dissent, Justice Douglas noted that the defendants were imprisoned for what appeared in the books that they advised people to read, not for dangerous words or acts of their own.⁵⁴ Ironically, the books at issue would still be available on most library shelves. Douglas lamented many years later, "They were teachers only - men teaching Marxism."⁵⁵

On December 8, 1941, the day after the bombing of Pearl Harbor, President Roosevelt requested American correspondents to voluntarily respect censorship guidelines.⁵⁶ Eight days later, President Roosevelt created the Office of Censorship which, like the CPI in World War I, monitored and occasionally denied access to all civilian modes of communication including mail, telegraph,

phone, films, newspaper and radio.⁵⁷ On January 15, 1942 the Office of Censorship issued a Code of Wartime Practices for the American Press.⁵⁸ The code prohibited publication of the following information unless made officially available by the appropriate authorities: troops, ships, planes, fortifications, production, weather, photographs, maps, casualty lists, damages, transportation and movement by U.S. officials.⁵⁹

The creation of radio allowed World War II correspondents to have the most immense coverage in American history.⁶⁰ There were no news blackouts, and the reporting was more accurate.⁶¹ A total of 1,646 American correspondents were accredited by the U.S.⁶² Correspondents were encouraged by the military to write favorable accounts, and were treated more like press agents.⁶³ Correspondents were taken on battleships, carriers, and submarines.⁶⁴ However, the geographic nature of the war caused correspondents to be scattered.⁶⁵ For major assignments, correspondents had to become part of a pool. Correspondents were also required to share their stories with their colleagues.⁶⁶

The need for good publicity during World War II was so great that the military informed accredited correspondents of the "D" Day landing two days before the invasion.⁶⁷ The correspondents were summoned to headquarters, given instructions, and told by General Eisenhower that they would "be allowed to report everything possible, consistent of course, with military security."⁶⁸ Correspondents heeded to the military's warning because they were totally dependent upon the military to see the war at all.⁶⁹

The Korean war of 1950 brought print, radio and newsreel correspondents with the troops.⁷⁰ Over 270 correspondents were in Korea during the early months of the war and hundreds came later.⁷¹ About 60 correspondents placed themselves regularly on the front lines.⁷²

At first, there was no denial of access or censorship in Korea, only a voluntary code to preserve military secrecy.⁷³ General MacArthur refused to impose the same censorship guidelines used in the first and second World Wars,⁷⁴ yet the Army accused correspondents of being traitors and aiding the enemy.⁷⁵ Rather

than argue with the military about the contents of their stories, the press asked authorities to introduce official censorship guidelines.⁷⁶

Stringent censorship regulations were imposed in January of 1951.⁷⁷ Correspondents were placed under the complete jurisdiction of the Army and could be punished by suspension of privileges, deportation, or court martial.⁷⁸ The new guidelines prohibited publication of military security information and were extended to include any discussion of air power, the effect of enemy fire, criticism of United Nation troops or commanders,⁷⁹ and any information which would embarrass the United States, its allies or neutral countries.⁸⁰ Some correspondents revolted in reaction to the censorship and evaded security rules.⁸¹ However, others simply stopped critical reporting of the war.⁸²

The Vietnam War has been heralded for its lack of censorship and allowance of access for correspondents, but many correspondents felt manipulated by the military's withholding of certain facts and unnecessary delay in giving information to the press.⁸³ The press

was given access to the battlefield, however, and correspondents were accredited merely upon application.⁸⁴ Reporters were allowed to go anywhere in Vietnam, almost out of necessity because of the lack of a front line and large scale battles in the jungle.⁸⁵ No pools were instituted, correspondents merely drew straws to determine who would go first.⁸⁶ Unlike other wars, correspondents did not have to rely on official sources for information.⁸⁷ Television was widely used and sixty percent of Americans got their war information from television.⁸⁸ Correspondents were not without restrictions, however, and were instructed to follow guidelines issued by the Department of Defense ("DOD") in 1965.⁸⁹

Despite the lack of official censorship, correspondents were once again urged to "get on the team"⁹⁰ and to take part in the government's public relations campaign.⁹¹ The military coaxed correspondents to take conducted tours, some of which were paid for by the government.⁹² The government's plan worked to the extent that many correspondents did not write about the corruption of government officials in Vietnam. As a result, some correspondents

also became part of the tainted system.⁹³ Thus, a self-imposed system of message content restrictions became a part of Vietnam war reporting.

The most flagrant censorship and denial of access of the press to military operations occurred when the United States invaded Grenada in 1983.⁹⁴ President Reagan allowed military commanders to deny access to United States reporters trying to cover the initial operations.⁹⁵ It was not until four days after the invasion that the DOD began allowing journalist pools into Grenada.⁹⁶ Four American journalists arrived on their own two days prior to the DOD announcement, but were taken from the island and placed on a United States naval carrier.⁹⁷ The DOD claimed the news blackout was necessary for the surprise element of the operations.⁹⁸ President Reagan justified the four day exclusion of reporters as necessary to ensure that the conditions were calm enough to be consistent with the safety requirements of the DOD.⁹⁹

The military treatment of the press in Grenada sparked sharp criticism by journalists.¹⁰⁰ In response, the DOD commissioned a

joint military-civilian group to study press involvement in military operations.¹⁰¹ The panel released eight recommendations in August of 1984 which would permit maximum news coverage of United States military operations "consistent with military security and the safety of United States forces."¹⁰² These recommendations, known as the Sidle Report, included: joint planning for media and military; allowing the largest press pools possible for the minimum amount of time; accreditation; voluntary compliance with ground rules; sufficient communication facilities for media; intra- and inter-theatre transportation; and improvement of media-military understanding and cooperation.¹⁰³

Secretary of Defense Caspar Weinberger received the report and recommendations of the panel¹⁰⁴ which was to become a permanent Defense Media Advisory Committee.¹⁰⁵ The DOD later announced that it would establish a permanent national press pool.¹⁰⁶ The pool would consist of 12 members: two news agency reporters (AP and UPI); one radio correspondent , four television reporters (ABC, NBC, CBS, and CNN); one newspaper reporter (chosen on rotating

basis);¹⁰⁷ one camera operator; one sound technician; one still photographer; and one magazine writer (chosen from Time, Newsweek or U.S. News and World Report).¹⁰⁸ The DOD stated that the pool would be available on short notice and may be enlarged to twenty people if space permitted, or made smaller by one or two.¹⁰⁹ The DOD only expected the pool to be used for the first twenty-four hours of an operation, until coverage could be widened.¹¹⁰ Ultimately, the number of correspondents and length of use of the pool would be decided by the military commander of each operation.¹¹¹

The media pool plan was first tested in combat during the United States invasion of Panama in 1989.¹¹² The pool failed miserably.¹¹³ Because of Defense Secretary Richard Cheney's "excessive concern for secrecy",¹¹⁴ the pool of twelve journalists arrived too late to see much shooting and spent too much time at Howard Air Base, about twenty-five miles from Panama City, watching Cable News Network.¹¹⁵

The Panama experience caused the DOD to institute another

study on military-media relations, this time led by Fred Hoffman, former Pentagon correspondent for the Associated Press.¹¹⁶ Their report criticized Cheney for not activating the press pool until after the evening television news the day before the invasion, and for rejecting a plan to organize a pool using reporters already in Panama.¹¹⁷ The Hoffman report stated that the five year history of media pools had shown that reporters could be trusted to respect ground rules, including operational security.¹¹⁸

D. Press Censorship As Understood During Operation Desert Shield

On January 7, 1991, while United States troops were in the Persian Gulf for Operation Desert Shield, the DOD enacted two sets of regulations to govern press coverage of the war entitled "Guidelines" and "Ground Rules"¹¹⁹ which were each revised twice before hostilities began in Operation Desert Storm.¹²⁰ In addition, Central Command (CENTCOM) issued a third set of regulations on January 30, entitled "Pool Membership and Operating Procedures".¹²¹ The pool procedures were basically a codification

of the Sidle Report recommendations¹²² and the ground rules were almost the same as those used in Vietnam.¹²³

The "Guidelines", however, established a rigid form of censorship. News media personnel were required to stay with their "public affairs escort" because of "security, safety, and mission requirements."¹²⁴ Only pool members were allowed to venture to the combat zone.¹²⁵ "Pool products" were reviewed by censors before release to determine if they "contain[ed] sensitive information about military plans, capabilities, operations or vulnerabilities."¹²⁶ The guidelines stated, however, that material which criticized operations or caused embarrassment would not be censored.¹²⁷ In the event of disputes between pool censors and journalists, the materials would be sent to the Joint Information Bureau (JIB) Dhahran for review, and, if no resolution, to the Office of the Assistant Secretary of Defense (Public Affairs) ("OASD") for review with the appropriate bureau chief.¹²⁸ Interestingly, the guidelines stated that the ultimate publication decision rested on the reporter's news organization.¹²⁹

The DOD's denial of access and censorship of news reports, achieved through a combination of the guidelines, ground rules, and pool procedures, received sharp criticism from the press.¹³⁰ Public opinion, however, favored the restrictions.¹³¹ It seemed as though the public agreed with the government's claimed need for secrecy.¹³² Nevertheless, it was suggested that Iraqi leader Saddam Hussein received much of his war information from the round-the-clock broadcasts of CNN.¹³³

The press, however, was not satisfied with the restrictions,¹³⁴ and a lawsuit followed. To understand the focus of the suit and constitutional result it is important to comprehend the history of governmental press restrictions.

IV

THE FEDERAL JUDICIARY AND ITS IMPACT UPON PRESS CENSORSHIP IN THE UNITED STATES

The constitutionality of war time press restrictions has not been addressed by United States courts. Therefore, to establish a background for such restrictions, two components must be examined.

First, press restrictions involve censorship of the written or spoken word. This type of censorship is usually defined by courts as a prior restraint. Censorship, or prior restraint, was usually enacted by the government during wartime to prohibit correspondents from publishing truthful statements which had been deemed to be against national security. For example, the press was generally prohibited from reporting troop locations, casualties and battle plans.¹³⁵

Second, the press has been restricted from access to combat zones.

A. Censorship In Theory - The Language Restriction

Censorship, or prior restraint, of media during wartime can be isolated to two general elements: (1) the censorship of materials during wartime or in the interests of national security, and (2) the censorship of the military in non-military contexts.

While the First Amendment states that "Congress shall make no law...abridging the freedom of speech, or of the press,"¹³⁶ the United States Supreme Court and some United States Federal Courts

have recognized exceptions to the amendment. The United States Supreme Court in Near v. Minnesota¹³⁷ noted that freedom of speech and of the press are not absolute rights. The Court stated that protection from prior restraint was not unlimited, and that libel, obscenity, and words which act as incitement to violence were not protected under the First Amendment.¹³⁸ Most importantly, the Court in Near recognized that speech could be limited during wartime.¹³⁹ The Court stated that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."¹⁴⁰

The majority of the Supreme Court in New York Times Co. v. United States¹⁴¹ agreed with the Near Court's restrictions upon the First Amendment during times of war. Yet the New York Times Court held that in this case the government could not restrict speech because there was no war.¹⁴² In New York Times, the United States government sought to enjoin the New York Times and Washington Post from publishing the contents of a classified study entitled

"History of United States Decision-Making Processes on Viet Nam Policy."¹⁴³ The Court held that the government had not met its heavy burden of showing justification for such a prior restraint, and the injunction was denied.¹⁴⁴

In denying the censorship, each of the concurring Justices in New York Times determined that the government's interests in national security were outweighed by the rights conferred by the First Amendment, yet also recognized limited instances in which the weight might shift. For instance, Justice Black stated that the term "national security" was a broad and vague generality which would not be invoked to abrogate First Amendment rights.¹⁴⁵ Likewise, Justice Brennan noted that there was a "single, extremely narrow" line of cases in which the First Amendment interests would be overridden by government interests.¹⁴⁶ Justice Brennan reasoned that the narrow line occurs when the United States is at war, and the publication must "immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."¹⁴⁷ Additionally, Justice White said that an injunction against

publication of government plans or operations would not violate First Amendment principles.¹⁴⁸

While the Supreme Court in Near and New York Times recognized an exception to First Amendment freedoms for some wartime activities, neither court allowed censorship to occur. However, the Supreme Courts' balancing between First Amendment and national security principles favored national security in another case: Snepp v. United States.¹⁴⁹ National security was also favored over First Amendment protection in two federal court decisions: United States v. Marchetti¹⁵⁰ and United States v. Progressive.¹⁵¹

Both Snepp and Marchetti involved the publication of books by former Central Intelligence Agency ("CIA") agents.¹⁵² Both agents signed secrecy contracts with the CIA.¹⁵³ In Snepp, the agent promised not to "publish...any information or material relating to the [CIA]...without specific prior approval by the [CIA]."¹⁵⁴ In Marchetti, the contract stated that the agent would not "publish or reveal...any classified information...unless specifically authorized...by the [CIA]."¹⁵⁵ While the Snepp and Marchetti

courts reached the same result, that is, they imposed censorship upon the agents,¹⁵⁶ the courts differed in their reasoning.

In Snepp, the Supreme Court interpreted the agent's contract as prohibiting the divulgence of any classified information and restricting the publication of any information without clearance.¹⁵⁷ The Court concluded that the agent's publication of his book violated the agreement which gave the CIA the opportunity to determine if the information was classified.¹⁵⁸ The government recognized the agent's right to publish unclassified information, but objected to the agent's publication without consent.¹⁵⁹ The Court determined that the agent breached the contract and reasoned that the government had a right to protect national security.¹⁶⁰

Like Snepp, the Marchetti court also weighed the government's need for national security heavier than the agent's First Amendment protections. The court interpreted the agent's contract as prohibiting solely the publication of classified information.¹⁶¹ The court recognized the agent's First Amendment right to speak

about and criticize the CIA, but stated that the government's need for secrecy justified the system of prior restraint against publication.¹⁶²

Another federal court decision enjoined the publication of a report for national security reasons. The court in United States v. Progressive¹⁶³ enjoined the publication of an article entitled The H-Bomb Secret; How we Got It, Why We're Telling It, because it contained restricted data as defined in the Atomic Energy Act.¹⁶⁴ The court reflecting upon the Atomic Energy Act, balanced the infringement on First Amendment rights against the "annihilation" of life by thermonuclear weapons and determined that the article fell within the "extremely narrow exception to the rule against prior restraint."¹⁶⁵ The court analogized the publication of the hydrogen bomb article to the publication of troop movements or locations during wartime.¹⁶⁶ Accordingly, the Progressive decision, like Snepp and Marchetti, allowed censorship of publications for national security reasons.¹⁶⁷

B. Flynt v. Weinberger - The Access Restrictions ¹⁶⁸

The first case to encounter the denial of access of the press during wartime was Flynt v. Weinberger.¹⁶⁹ In Flynt, a publisher challenged the prohibitions of press coverage of the United States military invasion of Grenada.¹⁷⁰ The government had banned the press from entering Grenada during the first four days of the operation for security reasons.¹⁷¹ The government lifted the ban on the fifth day and bans on travel were lifted almost two weeks later.¹⁷² The Circuit Court, in a per curiam decision, affirmed the lower court's consideration of the case as moot and refused to rule on the constitutionality of the provision.¹⁷³

The District Court in Flynt offered us more explanation.¹⁷⁴ The District Court determined that the invasion of Grenada was a unique event and the press ban was a discretionary decision of the military commander.¹⁷⁵ The court found little probability that the same press ban would be imposed in the future and therefore the court determined that the ban was not capable of repetition and the case was moot.¹⁷⁶

However, in dicta, the District Court stated that it would uphold the constitutionality of such press restrictions in the future.¹⁷⁷ The court reasoned that to deny press restriction would possibly jeopardize the success of military operations, endanger the lives of military personnel, and damage the national interest.¹⁷⁸ The court deferred to the discretion empowered in military commanders to consider the degree of secrecy required, force size, equipment involved, and geography of operations when deciding to impose press bans.¹⁷⁹

C. Nation Magazine v. United States Dep't of Defense - Gulf War Application of Restrictions

The case relating to Opeartion Desert Storm, earlier referred to, was also dismissed for mootness. In Nation Magazine v. United States Department of Defense,¹⁸⁰ various press members challenged the DOD press regulations during the Persian Gulf War.¹⁸¹ The press primarily challenged the creation of press pools, which limited the access of non-pool members to the war.¹⁸² While the DOD's restrictions were lifted during the case,¹⁸³ the court held

that the press restrictions were capable of repetition, and thus met one exception to the mootness doctrine.¹⁸⁴ However, the court determined that while it had the power to grant declaratory relief, it would "leave the definition of the exact parameter of the press access to military operations abroad for a later date when a full record is available in the unfortunate event that there is another military operation."¹⁸⁵

While refusing to rule on the appropriateness of the DOD's press restrictions, the Nation court discussed the right of the press to have access to the battlefield. The court noted that the question of press restrictions on access was one of first impression and that it must reason by analogy.¹⁸⁶ The court recognized that the press had no more rights than the public and that the government may limit access to such places as prisons and military bases.¹⁸⁷ However, once again a federal court would reaffirm an almost absolute right of access in open places internally, such as streets and parks.¹⁸⁸

The Nation court next balanced the right of access with First Amendment policies. The court noted the media's important role in criticizing and evaluating the government.¹⁸⁹ The court conceded that "it is arguable that generally there is at least some minimal constitutional right to access."¹⁹⁰ However, the court was not ready to conclude that the press had a minimal right of access to report about combat because the court reasoned that military operations were not viewed the same as prisons, parks or courtrooms.¹⁹¹ The court recognized that a delicate balancing was required and refused to perform that balancing.¹⁹²

Finally, the Nation court examined press pools as a limitation of access.¹⁹³ The court held that the government, by opening the door to some press members in the pool, had determined that the war theatre was a limited public forum.¹⁹⁴ Since the government opened the forum, it could not deny access in a discriminatory or arbitrary manner.¹⁹⁵ However, the court refused to equate the prohibitions on discrimination with a guaranteed right of press access on all occasions.¹⁹⁶ Again, the court refused to determine

whether the time, place and manner restrictions in the Persian Gulf or future wars were constitutional because it commented that it could not predict the circumstances of future wars.¹⁹⁷

The Nation court had an underlying reason for not ruling on the constitutionality of the press restrictions. Apparently the court was looking for viable alternatives to press restrictions and the plaintiffs' attorneys were unable to provide any.¹⁹⁸ Since the court was forced to choose between no restrictions and the restrictions used in the Persian Gulf, the court chose the latter.¹⁹⁹ The court was comfortable in its decision because the regulations were allegedly under review for probable revision.²⁰⁰ If more decisively inclined, the Court could have taken the opportunity to declare the Persian Gulf press restrictions unconstitutional and propose its own set of guidelines.

D. Critique of Nation Magazine

The Court in Nation determined that the war theatre was not a public forum. The court viewed the case as somewhat similar to the other limited access arenas such as schools in Perry Education

Ass'n v. Perry Local Educators' Assn.²⁰¹ and Grayned v. Rockford,²⁰² prisons in Pell v. Procunier,²⁰³ and of course military bases in Greer v. Spock²⁰⁴ and Cafeteria Workers Union v. McElroy.²⁰⁵ The court recognized that, as stated in Police Dept. of Chicago v. Mosley,²⁰⁶ the government could impose time, place and manner restrictions, but not content-based restrictions. What the court failed to consider, however, was its previous admission that the battlefield was a limited public forum.²⁰⁷ The court admitted that the war theatre was a forum opened by the government through press pools.²⁰⁸ Thus, the court's back-tracking to determine whether the military operations were a public forum was unnecessary because it admitted that the forum was already opened.

Instead of analogizing the war theatre to prisons, schools and military bases, the court should have compared the battlefield to criminal trials and other public functions. The Nation court ignored the access cases of Richmond Newspapers, Inc. v. Virginia,²⁰⁹ Globe Newspaper Co. v. Superior Court,²¹⁰ Press-Enterprise v. Superior Court,²¹¹ and ABC v. Cuomo²¹² that imply

that the media has a right of access to government operations at the war front, like the public's right of access to government courts. The criminal trial cases all recognized the role the press served as a check on our system of self-government.²¹³ The press argues that there is a need to check government when the government is at war. The reason is to insure the people that the atrocities that have happened and continue to occur under closed governments will never occur in the name of the United States. How is the public to know if a war is justified if the press does not have access to it? How can the government expect citizens to provide a volunteer army to risk their lives in a war that they have no information about?

Judicial deference to Executive War Powers continues to confound the press. Admittedly, it is virtually impossible for the government to accommodate every journalist who wishes to report from a battlefield. Press pools alleviate the overcrowding problem, provided that membership to the pools is given in a non-discriminatory manner.

The Nation court in due deference would only discuss access to the battlefield and would not consider limited censorship as an alternative.²¹⁴ The courts of the United States have historically recognized a right of the government to restrict publications in times of war or when publication would be a threat to national security.²¹⁵ Access restriction is therefore an undue and unjustifiable extension of media regulation.

V

HISTORY OF THE PRESS IN SOUTH AFRICA: A FAMILIAR JOURNEY

In the Republic of South Africa, national security is the equivalent of white security.²¹⁹ No Bill of Rights guarantees freedom of speech to South African citizens. Laws are drafted with the widest possible interpretation to provide the security forces with multi-purpose tools. Dr. Mathews persuasively decries the lack of standards and the arbitrary use of restrictions:

The lack of standards, or court inability to compel compliance with them... is destructive of any notion of balance or equilibrium between national security and basic liberties. Liberties must be converted into civil rights before we can speak of an institutional balancing of security and freedom: and civil rights do not exist

unless the law sets enforceable standards according to which they may be withdrawn or vindicated.²²⁰

What is the method to the security madness that has enmeshed South Africa in hundreds of censorship laws? Is it effective in controlling the flow of information? If so, has this benefitted the South African government in achieving stability? Hard data with which to explore these questions is difficult to come by, that being one of the by-products of a society under governmental censorship. But the information that does get out is quite revealing, as is the substantial portion of the censorship iceberg it describes. To better appreciate the current clash between the South African government and its press, an historical outline of that relationship follows.

The South African press is largely responsible for preventing South Africa from becoming a total police state.²²¹ Although South Africa's apartheid government, to this day, exacts a large toll on its people's freedom, the South African press stands apart from all other newspapers in the continent enjoying the greatest freedom.

It is paradoxical that in a government founded on discrimination and severe repression, unless there is a state of emergency, the press is comparatively free and critical.²²² Still, aspects of the freedom enjoyed by South Africa's press have "strong mythical elements about it."²²³ Further, it is not the Afrikaner government that is responsible for this freedom. The freedom of the South African press enjoys a history that can be traced to the early nineteenth century.

A. The Establishment of the South African Press

The first South African newspaper, the Capetown Gazette and African Advertiser was started in August, 1800, more than 150 years following European settlement of the Cape. Several months later, the Royal Gazette of Sierra Leone was begun.²²⁴ The prolonged delay between settlement of the Cape and the newspaper's formation is particularly curious in that the first settlers of the Cape, the Dutch, came from a society plush with many kinds of publications. Of course, frequent trade between Europe and the Far East provided

by the Dutch East India Company made available to the Cape reading materials from home.

Throughout the first half of the nineteenth century, many attempts were made to establish newspapers. These early efforts were opposed by Lord Charles Somerset, the corrupt British Governor of the Cape, to whom applications to start newspapers were addressed.²²⁵ In 1823, Thomas Pringle, an Englishman and the Reverend Abraham Faure, a Missionary, concerned with the way the Boers treated the natives, applied to Somerset to begin a paper.²²⁶ Another application was filed by George Grieg, an Englishman and printer. Grieg, unlike Pringle and Faure, had promised not to criticize either the government's policy or administration. Nonetheless, Somerset denied both applications.²²⁷

Grieg, along with Pringle and James Fairbairn were subsequently successful in starting the South African Commercial Advertiser due to a loophole in the publication laws which required permission only to begin a periodical, and not a newspaper.²²⁸ Immediately, the Advertiser began to criticize Lord Somerset's

corrupt administration. In response, Lord Somerset demanded that Grieg cease publication. When Grieg refused, Somerset sought to censor publication of the Advertiser. Still, Grieg refused to comply with Somerset's request to examine proofs of the paper prior to publication. Grieg refused to entertain the imposition of any prior restraint. The controversy came to a head when Grieg temporarily suspended publication and left for Britain where he planned to appeal to the British Government for redress.²²⁹ On the advice of powerful friends, Grieg returned to the Cape and continued publication of a less critical and antagonistic Advertiser. However, in May 1827, Somerset again sought to suppress publication. His conduct was too outrageous for London, however, and in an effort to stabilize the situation, a new Colonial Secretary sanctioned South Africa's first Press law based on the Law of England.²³⁰ Publishers were required to deposit three hundred pounds, plus an additional three hundred pounds in guarantees with the authorities.²³¹ After meeting this procedure, they were free to publish, subject only to the law of libel. This

victory for the free press paved the road for numerous other newspapers to begin operation throughout those regions of South Africa that had been settled by Europeans.²³²

The real high point in the historical development of the South African Press came in 1857 with the publication of the Cape Argus followed by the Cape Times in 1876.²³³ These two papers marked the beginning of the great newspaper empires that would predominate in South Africa. Saul Solomon, who took early control over the Argus was one of the first humanitarians at the Cape. He advocated decent treatment for non-Europeans which earned him the label, "negrophilist." The Cape Argus was the first South African paper to use the telegraph. It is thought that the attainment of full self-government for the Cape Colony in 1872 can be attributed to Solomon's efforts and the voice of his newspaper.²³⁴

Regrettably, the African's cause and Solomon's influence would be shortlived. In 1877, Solomon appointed Francis Joseph Dormer editor. So that the paper could keep up with its expansion, it was necessary that financial assistance be found. Dormer solicited the

aid of Cecil John Rhodes, a successful businessman, who recognized the lucrative potential of the Argus. Rhodes provided the financial assistance Dormer needed to expand the Argus and Solomon sold out. Shortly after, the Argus Group was formed, an entity that would come to exert significant influence throughout South Africa.²³⁵ The Argus opened a branch office in the Transvaal in 1886 after gold had been discovered, and in 1889, the Argus took over the Star, which today is the biggest daily newspaper on the African Continent.²³⁶

The Star was banned when one of Rhodes's men led an attack against the Boer Republic in an attempt to seize the gold fields. When the raid failed, Paul Kruger, President of the Transvaal Republic²³⁷ accused the Star and its supporters of participating in the attack. But Kruger was no match for Rhodes and the Argus Group. The day after Kruger's banning order was published, the Comet, a new paper appeared.²³⁸ Then, a year later, following the start of the Boer War, Kruger was displaced from power and The Star was reestablished.²³⁹

Following the Boer War, people from throughout Europe and North America settled in South Africa. The growing population enabled the Argus Group, on its way to becoming the largest newspaper publishing company in Africa, to enlarge its control over evening paper readership throughout South Africa. By the end of World War I, it had purchased the Natal Advertiser, later to become the Natal Daily News, The Friend, and the Diamond Fields Advertiser in 1922 as well as the Pretoria News in 1930.²⁴⁰ Threatened by the Argus Group's influence throughout the country, a group of leading morning newspapers banded together in 1932 and formed the South African Morning Associated Newspapers (SAAN).²⁴¹

Historically, the English-language Press severely dominated the Afrikaans press. However, within the past twenty years, as the political power of the Afrikaners began to emerge, the Afrikaans Press has begun to achieve a greater political influence.²⁴² The two primary architects of apartheid in South Africa were Prime Ministers Daniel Malan and Prime Minister Hendrick Verwoerd. Both Prime Ministers became prominent Afrikaner nationalists. They also

served as senior editors of their party's Cape and Transvaal organs, Die Burger and Die Transvaler. Die Burger, the first Afrikaans daily was begun in 1915 and remains the Nationalist Party's most prestigious newspaper. Die Transvaler was started by Hendrick Verwoerd in 1937.²⁴³

Today there are no South African newspapers owned or controlled by Africans. All attempts to establish a non-European press have failed in light of South Africa's political and economic status. Following World War II, white newspaper groups sought to take advantage of the economic opportunity open to them via the large non-European market.²⁴⁴ In 1951, the monthly magazine Drum was established aimed exclusively at a non-European readership. Drum, owned by one of South Africa's white mining millionaires, grew to become "the most potent journalism, Black or White, South Africa had ever seen."²⁴⁵

With the establishment of Drum, a host of new opportunities opened up for African journalists and photographers. So successful was Drum during the fifties and sixties at reporting pressing

social issues, identifying the government's political infidelities and leveling severe criticism at apartheid policies that it evoked great concern among powerful political circles.²⁴⁶ However, while many left-wing publications were banned just before the Afrikaners came to power in 1948, it was more difficult for the nationalists to suppress Drum. Soon, Drum was distributed beyond the borders of South Africa where it set a new standard of magazine journalism in Central, East and West Africa.²⁴⁷ Owing to political difficulties, editions published outside South Africa eventually became separate companies and the strong tie to South Africa weakened dramatically.²⁴⁸

A sister publication of Drum, the Post, a weekly tabloid, dealt less with political expose's and more with sex and crime.²⁴⁹ It had three separate editions reaching the country's three non-White groups: Africans, Coloureds and Indians. However, financial difficulties caused the owner of the Post to break up his assets and The Argus Group purchased the Post.²⁵⁰ Soon after taking control, the Argus group took the zest out of the Post and

circulation dropped drastically. Eventually, in the late sixties and early seventies, Drum followed the path taken by Post, losing much of its audience. But by 1976, it seemed as if it would recapture some of the market.²⁵¹

In 1963, South Africa's first newspaper for Africans appeared when the Argus Group bought The World.²⁵² The white management and editorial staff focused almost exclusively on crime, sex and violence, avoiding politics. When asked why The World avoided political issues, its General Manager, Clive Kinsley explained that there was little interest of it among the Bantu.²⁵³ However, Kinsley would realize how wrong he was in 1977, when the Africans alleged disinterest in politics would become the World's biggest story as well as its last story.²⁵⁴

The Nationalist Government was pleased with the preoccupation most of South Africa's papers had with crime, sex and violence. The more Africans were identified with these issues, the more effective was the government's propaganda alleging that the Blacks were incompetent to assume any real responsibility for the country.

More recently, black journalists and photographers have been employed by the "White" publications.²⁵⁵ Though this change has occurred with some papers out of principle, the realities of apartheid have necessitated the policy change. Black journalists were largely responsible for reporting stories of the riots occurring throughout the African and Coloured townships during 1976 as non-white townships denied the admittance of white reporters.²⁵⁶ The efforts of these journalists and photographers are responsible for practically all of the reports of these incidents to reach the outside world. Not surprisingly, black journalists risked threats of assault and arrest for their work. During a three month span in 1976, fourteen black newspapermen were picked up by the police and held without trial or explanation. Reports of police beatings and confiscations were commonplace.²⁵⁷ So as to restrict the movement of black journalists, influx control laws, an apartheid construct, were put in place. For example, a Johannesburg-based reporter could not take a job on a Durban or Capetown newspaper, and no

African could remain away from their home towns for more than 48 hours without first obtaining permission.²⁵⁸

In 1965, the Rand Daily Mail published a series of articles criticizing South Africa's prisons for brutalizing many prisoners.²⁵⁹ These stories included personal accounts of black prisoners being beaten, whipped and tortured with an electric machine.²⁶⁰ The Mail had sworn affidavits and statements by those who witnessed the beatings and whose observations were used in writing the story. Following publication, a storm of outrage developed both inside and outside of South Africa.

The government's response was not unpredictable. It prosecuted some reporters under the Prison Act,²⁶¹ a law which makes it an offense to publish false information about prison conditions. Security forces raided the Mail's offices confiscating documents and tape-recorders. Robert Strachan, who originally told the Mail of the beatings, and several other informants were charged with making false statements, judged guilty and sent back to prison.²⁶²

The government then went after the Mail. At trial, the prosecutor argued that the newspapermen were guilty of running a campaign against the Prisons Department.²⁶³ Under the Prison Act, newspapers must take "reasonable steps" to check their information. The burden of proof is on the paper requiring it to have the allegations cleared with the Commissioner of Prisons before publishing any story. It was clear that the Commissioner of Prisons would never have approved of the report and so the Daily never bothered to first clear the story.

The judicial process went on for over three years at a cost of over \$500,000 to the Daily for the trial alone.²⁶⁴ Laurence Gandar, the Mail's editor stood by the story claiming that the paper had gone "well beyond what most newspapers would have considered adequate in checking its facts." Not surprisingly, the Mail was found guilty although the penalties imposed were small.²⁶⁵

In all, the trial was much more than a prosecution of a newspaper. The government was pressured into making an example of the Mail for the rest of the English-speaking press. At trial, the

prosecutor had argued that the role of the press was to serve the interests of the majority of its readers. This message was received. Ultimately, the Mail suffered a significant drop in its readership and although Gandar was internationally recognized for his efforts, he was subsequently dismissed as editor in response to lost profits.²⁶⁶

By 1975, many Europeans, mainly Afrikaners who lived in or near Johannesburg were unhappy that the only English-language morning paper was the ultra-liberal Rand Daily Mail.²⁶⁷ Europeans were becoming increasingly intolerant as it was becoming clear that soon South Africa would be known as the only "White" country on the continent. Movement was underway to counterbalance the Daily's impact by starting a new Johannesburg English-language morning paper. Although his attempt failed, Louis Luyt, an Afrikaner industrialist sought control of the SAAN Group.²⁶⁸ Had his generous bid been accepted, the entire voice of liberalism would have disappeared from South Africa.²⁶⁹ Luyt regrouped and within months, The Citizen was being published.²⁷⁰ The Citizen was strong

on news, light on feature stories, and a big supporter of government policies. The presence of a second morning paper threatened the Mail's market share. While many did not believe that The Citizen could really operate at a profit, it reported a significant readership. Additionally, many believed that the Citizen was partly underwritten by the government.²⁷¹

B. The Newspaper Press Union and Press Restrictions

From the time the National Party rose to power in 1948, the government has maintained a low-level attack on the press, with occasional hard blows thrown every several years. To date, the Suppression of Communism Act remains the principal tool of control.²⁷² There are however, numerous other laws that specifically affect the press.

Despite the laws directed at curbing the antagonism of the press to the government, the English-language press has continued to disturb the Nationalists. In 1962 the Newspaper Press Union drew up a Code of Conduct through which the Board of Reference could reprimand any newspaperman who violated the Code.²⁷³ The

final clause in the Code read: "Comment by newspapers should take due cognisance of the complex racial problems of South Africa and also take into account the general good and the safety of the country and its peoples."²⁷⁴ It was believed by many that this language gave all too much editorial discretion to owners of the papers. Ultimately, the Code was ignored by many of the English-language editors, particularly those outside the Argus Group.²⁷⁵

The government was becoming increasingly nervous with press activity and unimpressed with the force of the Code. The self-regulating Code had failed to prevent Gandar's exposes in the Rand Daily Mail of the brutality evidenced in the prisons. At the Congress of the Transvaal National Party in 1973, Prime Minister Vorster strongly voiced concern that "the opposition Press" was seeking a confrontation with the Government.²⁷⁶ He asserted that the motive of the press was "to crucify the Whiteman, and by name the Nationalist Afrikaner, as a villain or exploiter and a suppressor."²⁷⁷ In response, many managers of the English-language

Press attempted to appease Vorster by asserting greater control over their editors.

The South African Press managers drew up yet another Code of Conduct.²⁷⁸ This time, an offense was committed if a report merely has the "effect" of creating hostility. A Press Commission was set up consisting of a retired judge and two others who would decide whether a newspaper violates the Code. In the event that a paper contravenes the Code, a fine of up to R10,000 could be imposed.²⁷⁹

Response to the amended Code varied. Many editors and journalists throughout the country were outraged. At least nine English-language editors were totally opposed to it. At the same time, both the Argus Group editors and the Afrikaan's-language editors accepted the amendment. Part of the criticism against the Code rested on its ambiguity.²⁸⁰ Those editors opposing the Code felt that censorship of the press, if it were to occur should come from the Government, and not by the press. However, in light of the fact that the government had gotten the press to discipline itself, it was willing to sit back and let things proceed as usual.

C. Regulations In The Name of Security: History and Application

The media regulations imposed in 1985 did not appear out of a vacuum, nor were they the whole cloth. They came into being as a "patch" in the South African government's guilt of edicts constructed to hide the truth from view. The press and other expressive outlets in the country were already smothering under regulations and statutes supporting censorship on a grand scale. With the new regulations, the government pursued a long-established design to protect the empowered white minority.

Dr. Mathews refers to the Suppression of Communism Act of 1950 as the "foundation stone" of the present security regulations.²⁸¹ This may be the first significant internal security regulation employed by the newly ensconced National Party, but to fully comprehend the South African picture we must look to earlier events. Perhaps the real seeds of the apartheid-national security monolith were sewn with the landing of the Dutch East India Trading Company as early as 1652. The overburdening trade demands of the Dutch cattlemen quickly depleted the output of most villages, and

without the resources to trade, many natives became servant-laborers to the Afrikaner masters who stayed on to colonize.²⁸²

The divisive mismanagement of the South African colonies by the British from 1795-1960 certainly contributed to the making of apartheid. "Hut taxes" imposed by British administrators on their native citizens in 1898 compelled even more blacks to enter the labor market. Somewhere along the line Africans in this colonial region became a labor source only, never rising to the level of cash-crop producers so valued in other colonial areas.²⁸³ In the imported white culture where private property was the source of all citizens rights, the natives lost their chance at equality when they lost the land.

After the Mfecane (the "Crushing", a period of prolonged tribal warfare which displaced and consolidated many of the South African tribes into smaller regions), the Afrikaners expanded their holdings into the interior. The discovery of diamonds in 1868 and gold in 1886 irreversibly widened the economic and land gap between the ruling and the ruled. The Natives Land Act of 1913 sealed the

separation of whites and blacks for the 20th Century in South Africa. It was upon this act that the Group Area ("Homelands") and the Separate Amenities Acts were later defined, effectively excluding South African Blacks from ownership of almost 90% of the land in their country.²⁸⁴

The African National Congress (ANC) actually predate their ruling opponent, the National Party (once the Afrikaner National Party), by more than 20 years. The ANC dates back to 1912 and was formed to secure representation for the "rightless" Africans in their white-controlled society. Whatever early gains they may have made were swept away when the ruling ultraseparatist National Party came to power in 1948, and formed its own government when the country was forced from the British Commonwealth in 1960. One of the first sovereign acts was to remove the vote in toto from the Blacks, now officially treated as political noncitizens in their own land.²⁸⁵

Little analysis is required to conclude that many or all of these historical landmarks contributed to the conditions in South

Africa spawning the modern police state. The Suppression of Communism Act may have been the first statute from which a framework for oppression could be constructed. It was not the first act of oppression. The socio-political structures of apartheid were laid centuries before. With this broader foundation in mind, we now return to the block-like construction of state security laws that, from 1950 until 1990, formed South Africa's Berlin Wall separating a government from its people.

The Suppression of Communism Act was subsequently renamed the Internal Security Act of 1950. Its counterpart in America was also passed in 1950.²⁸⁶ Among the other laws intended to legitimize state suppression, censorship of publications counter to the national security interest was established. In 1982, the Internal Security Act 74 replaced the 1950 version.²⁸⁷ It also consolidated many existing laws under its broad authority. These included the Criminal Law Amendment Act 8 of 1953, the Riotous Assemblies Act 17 of 1956, the Unlawful Organizations Act 34 of 1960, the Sabotage

Act (sec. 21, General Law Amendment Act 76 of 1962, and the Terrorism Act 83 of 1967.²⁸⁸

The act was drawn almost entirely from the recommendations of a commission appointed to study the "necessity, adequacy, fairness, and efficacy" of the protections enforced through the internal security legislation.²⁸⁹ This was the Rabie Commission, headed by Chief Justice P. J. Rabie and boasting several prominent academicians, bureaucrats, and attorneys.²⁹⁰ The Commission's report was published only in Afrikaans after two years of hearings.²⁹¹ Though it recommended a few fig leaves of civil liberty safeguards (such as the right to be heard before your publication or organization was banned, and the right of a detainee to a review hearing after six months of detention), the report generally supported Pretoria.²⁹² By the time the Internal Security Act was passed in 1982, over thirty-two organizations had been banned, including the South African Communist Party, the African National Congress (ANC) and the Pan-Africanist Congress (PAC).

The Defence Act 44 of 1957²⁹³ barred publication of "any statement, comment or rumor relating to any member of the South African Defence Force . . . calculated to prejudice or embarrass the Government in its foreign relations or to alarm or depress members of the public."²⁹⁴ It was aimed at prohibiting the publication of three classes of information without ministerial authority. The general effect of this far-reaching provision was to place a blanket ban on knowledge about defense matters.²⁹⁵ Reporting on government misdeeds in many administration departments was gradually eliminated under the Police Act 7 of 1958, the Prisons Act 8 of 1959, the Mental Health Act of 1973, and the Advocate General Act of 1975.²⁹⁶ The first two of these will be briefly discussed.

Section 27B(1) of the Police Act 7 of 1958 makes it a criminal offense to publish any untrue matter about the police force, or any part of it, or about any member of the force in relation to the performance of his functions, without having reasonable grounds for believing the statement to be true.²⁹⁷ The burden of proving

"reasonable grounds" is on the publisher who may be subjected to a R10,000 fine and/or imprisonment if he failed to meet his burden.

A related security-law provision, the Prisons Act makes it a crime to publish any false information concerning the experience in prison of any prisoner or ex-prisoner or relating to the administration of any prison.²⁹⁸ An underlying rationale for the prohibition is that prisoners should be protected against humiliation and the invasion of privacy.²⁹⁹ Its main purpose is to protect the prison administration from criticism. Given that prison officials are ready to swear that there are absolutely no problems with the prisons, it is clear that anyone prosecuted under the act will have difficulty defending against allegations that the publication was false. This problem is evidenced in S v. South African Associated Newspapers,³⁰⁰ a leading case on the law against prison disclosures.

In Associated Newspapers, the prosecution paraded in a variety of witnesses who assured the court that the prison system was well-run and problem-free. As a result, Robert Strachan³⁰¹ one of the

authors of the expose on which the case was founded was returned to prison. Since that trial, there has not been a significant attack on the prison system in any newspaper.³⁰² Thus, the real effect of the prison censorship laws is to protect the prison system not just from false criticism, but from most all criticism.³⁰³ Dr. Mathews believes the provisions of the Prison Act to be a "silencing law which limits the accountability of the prison administration,"³⁰⁴ and that a freedom to publish that is conditioned on proof of the truth of what is published is not real freedom at all.³⁰⁵

Two additional censorship laws warrant discussion. They are the Newspaper and Imprint Registration Act of 1971 and the Publications Act of 1974. Under the Newspaper and Imprint Registration Act of 1971, it is illegal to publish a newspaper in South Africa without first registering the newspaper.³⁰⁶ However, this requirement was initially a formal one and if certain insignificant procedural hurdles were met, the right to publish was guaranteed.³⁰⁷ Recent changes in the security laws have changed

this situation making registration a more exacting and risky venture. Section 15 of the Internal Security Act of 1982³⁰⁸ conditions the registration of a newspaper upon the deposit with the Minister of Home Affairs of an amount up to R40,000 as a guarantee of good behavior. Should the newspaper subsequently be banned under the Act³⁰⁹, this amount will be subject to forfeiture. The deposit provision affects freedom of the press in several ways. First, it severely curtails the establishment of new papers as many owners are either unwilling or unable to provide the necessary amount. Clearly, the poorer black publishers will be the chief victim of this law. Second, those papers that are registered will be continually concerned with losing their license and forfeiting their deposit. As a result, they may curb their criticism of the government.

The Publications Act of 1974³¹⁰ is the motor driving censorship in South Africa.³¹¹ It bans materials that are deemed indecent, obscene and blasphemous. More importantly, it bans materials that are prejudicial to the safety of the state, to

general welfare or to peace and good order. It is on this ground that a great many banning orders have been issued for broadly political reasons. The Publications Act bans publications that are deemed "undesirable."³¹² The prohibition can be applied to newspapers, books, periodicals, posters or other printed material, writing or typescript that is published or duplicated in any way, drawings pictures or illustrations, paintings, prints, photographs or engravings, carvings, statues and models, and records or other forms of sound reproduction.³¹³

A committee consisting of not less than three persons drawn from a list compiled by the Minister of Home Affairs will make the "undesirable" determination.³¹⁴ Thus, banning is under the control of the government in power. Once a publication or object is held to be undesirable, production of it becomes a crime.³¹⁵ A person may be convicted even when the committee makes its determination after the event of publication.

The mere possession of a banned publication may also constitute a crime. Similarly distribution of a publication

declared to be unlawful is a crime. However, the crime of distribution as opposed to production requires a previous declaration of unlawfulness.

D. The Cost of Freedom

The freedom that the South African press boasts can be attributed not so much to the government's reluctant tolerance of press activity, but to the extremely heroic efforts of numerous editors and reporters. What government toleration there is, is undoubtedly owed to the governments desire to be seen as part of the Western world.³¹⁶ Nonetheless, many are the occasions where editors pushed their papers into terrain causing great discomfort to the government, oftentimes at great personal cost.

Two examples loom large. One is the work of Percy Qoboza, editor of the World. The other is the efforts of Donald Woods, editor of the Daily Dispatch following the death of Steve Biko. Both have been effectively silenced due to the message they sought to bring to the world.

The World was ultimately shut down because of the recalcitrant efforts of its editor, Percy Qoboza. The World, a mass circulation black newspaper was mainly concerned with crime, violence and sex in the black urban ghettos of Johannesburg.³¹⁷ However, when the huge black townships of Soweto erupted in 1976 leaving hundreds of Blacks dead from police shooting, Qoboza began to refocus The World and wrote about the Soweto violence.³¹⁸ When violence erupted again and continued through much of 1977, it became clear to many that Soweto was a water-shed. Crime and sex disappeared from The World as Qoboza covered the Soweto story as diligently and courageously as any other journalist had ever acted in South Africa.

Kruger, increasingly fearful of black uprising threatened to close down The World if Qoboza refused to stop criticizing government policy.³¹⁹ BOSS men continued to harass and threaten Qoboza and his staff, and all through 1976 and 1977 black journalists were being arrested. Qoboza refused to obey Kruger's

orders and in October, 1977 he was imprisoned and The World was closed down.³²⁰

Although Donald Woods' paper, the Daily Dispatch was not banned, Woods was. Woods, an ardent supporter of non-whites was a close friend with Steven Biko, the highly respected leader of the South African Black Consciousness Movement.³²¹ When BOSS announced that Biko had died in a prison cell by starving himself, Woods knew it was a lie and he spoke out against BOSS's claim. Biko had been imprisoned before without trial and had told Woods that he would never kill himself while in prison.³²² In the event he were to die while in prison and the government claimed he took his own life, Woods promised to let the world know the truth.³²³

During the next several days, Woods and a team of reporters sought the truth to Biko's death, tearing apart BOSS's story and finally accusing them of murder.³²⁴ On the front page of the Daily Dispatch, Woods challenged the South African Minister of Justice, Kruger, to reveal whether the post-mortem report on Biko referred to brain damage due to severe impact to the forehead and internal

chest injuries.³²⁵ These claims were subsequently found to be true. Woods pursued the issue and the story became of international interest. Kruger was fed up with the extensive damage that was being done to South Africa's already suffering reputation. In an effort to silence Woods, Kruger personally signed a Banning Order which was served on Woods.³²⁶ The nine-page Order listed item by item what Woods could not do for five years. The Order completely restricted Woods from any form of reporting. Kruger could have banned the Daily Dispatch, but that would not have stopped Woods who would have then written for other papers. Following an attack on his daughter, Woods decided to flee the country.³²⁷

Ironically, in apparent pursuit of information control, Pretoria's choke-hold on free speech triggered massive anti-apartheid sympathy worldwide, and at least three media bonanzas for Biko's views. Woods published Biko's story worldwide in a popular biography made into an internationally released 1988 film, Cry Freedom.³²⁸ The transcripts from the medical inquest were smuggled

to producers in London, performed in a stage play that same year (1978), and broadcast over Showtime cable as The Biko Inquest, in 1985.³²⁹

VI

A RISING STATE OF EMERGENCY: A GEOGRAPHICAL DIFFERENCE?

"We do not have censorship. What we have is a limitation on what can be reported."

-- Louis Nel, Deputy Minister of Information³³⁰

The drama of South Africa's racial conflict and news media suppression had remained essentially an internal affair until the 1978 death of Steven Biko, which raised the curtain on government excesses in the name of apartheid and national security.

The Biko incident focused media attention on South African apartheid policies, and in turn focused government attention -- and increasingly stringent restrictions -- on the media. Buffeted by both internal criticism and the growing attention of the international media, the government of P.W. Botha retrenched in the mid-1980s, bringing to bear the full powers of his government to muzzle individual critics and the media. During the period from

September 1984 to June 1986, for example, more than 1,900 people were killed during protests and other turmoil -- most of them black.³³¹ South Africa, which once prided itself on having the freest news media in Africa, now imposed some of the most restrictive censorship among the nations calling themselves democracies,³³² such as the outlawing of The World in 1977.³³³

A. Rationale for Media Suppression

The first of a series of executive acts of suppression came in July 1985, when the Botha government declared a regional state of emergency under the Public Safety Act of 1953.³³⁴ Under this Act, an emergency could be declared for as long as twelve months.³³⁵ Using the powers granted the executive branch by the Act, Botha, independent of the legislative branch, formulated rules known as the Security Emergency Regulations.³³⁶ By declaring an emergency and thereby skirting provisions of the Internal Security Act,³³⁷ Botha implemented regulations without the limitations of legal due process. Among the powers set forth in the Security Emergency Regulations were the use of deadly force to disperse dissidents,

warrantless search and seizures, banning persons from public access, and the replacement of due process with subjective executive authority.³³⁸

On July 21, 1985, the day the security measures went into effect, South African police and security forces arrested 113 anti-apartheid activists and black community leaders.³³⁹ Government forces also sealed off black townships and conducted searches under the sweeping emergency powers.³⁴⁰ The government refused to provide details of the operations, citing provisions of the emergency regulations.

In early November 1985, the Botha government expanded limitations on the news media, barring news coverage of areas of unrest.³⁴¹ The three major United States television networks lodged protests with the South African government over the new limitations.³⁴² The protest came in response to a statement by Law and Order Minister Louis Le Grange that television and other camera crews would be prohibited from operating in certain troubled areas.³⁴³ ABC News President Roone Arledge said in a statement

to Le Grange: "This act of censorship goes far beyond what is needed to protect journalists in the areas of unrest . . . We urge you to rescind the ban and restore the respect your government has previously shown to free expression."³⁴⁴ CBS News President Edward Joyce noted: "Clearly, these measures are so restrictive that our people will be, in effect, denied the capability of doing their jobs."³⁴⁵

B. Emergency Rescinded, Then Expanded

In March of 1986, the Botha government rescinded the regional emergency. But after only a brief respite for the media, the government on June 12 imposed new emergency restrictions -- this time on a national level. Outspoken South African Bishop Desmond Tutu, a Nobel Peace Prize winner, became the first well-known victim of the press censorship powers under the national emergency regulations.³⁴⁶ Tutu announced plans to hold a ceremony commemorating the beginning of 1976 riots in the black city of Soweto³⁴⁷ near Johannesburg. The emergency regulations forbade announcements of illegal gatherings, so media reference to Tutu's

planned ceremony violated the regulations. The emergency regulations also forbade photographs of riots, boycotts and strikes without police permission, and statements calling for sanctions or other foreign actions against South Africa.³⁴⁸

On June 17, the government's information bureau tightened restrictions on foreign reporting, barring telecast of live reports from South Africa. The government's aim was to prevent airing of "subversive statements."³⁴⁹ In particular, the ban was aimed at ABC's Nightline program, which planned a live on-air interview with Winnie Mandela, wife of African National Congress leader Nelson Mandela. Nelson Mandela had been imprisoned for three decades as a subversive.³⁵⁰ The ban also was directed at the news magazine Newsweek, which featured in its next issue a cover story titled "South Africa's Civil War -- the Making of a Bloodbath."³⁵¹

Many South African newspapers, across the ideological landscape, protested the censorship provisions of the emergency regulations by leaving black spaces in their news pages.³⁵² The black-edited Sowetan newspaper offered a brief commentary in the space usually

devoted to its daily editorial. "All that we and other media have to contribute at this time when the country is facing its worst-ever crisis has been effectively banned," the commentary said.³⁵³

The protest also was taken up by Business Day, a financial newspaper directed at South Africa's business elite. The newspaper, citing government prohibitions on news about security force actions and any news related to racial unrest, stated in a front-page editor's note: "This newspaper has been produced under restrictions that amount to censorship."³⁵⁴

Even the Citizen, a strident pro-government publication formed eleven years earlier with secret government funds, refused to stand silent. It complained that newspapers "are not publishing all the news fit to print, but only news that the authorities believe should be printed" and said the media were shackled and could "not fulfill their basic function of keeping the public informed of what is going on."³⁵⁵

In response to critical commentary from South Africa's leading newspapers about the emergency regulations, the government, on June 25, 1986 admonished them to "toe the line" or risk closure.³⁵⁶ Louis Nel, Deputy Minister of Information, said: "The government expects the newspapers to toe the line, that is to adhere to the emergency regulations. This is the law of the country at the moment." ³⁵⁷

Also in June 1986, President Botha signed two new security laws over objections from both the Indian and Colored (mixed-race) houses of the tricameral Parliament.³⁵⁸ One law extended the period during which police could detain suspects without charges from two weeks to six months; the other permitted the government to declare "unrest areas" and take whatever emergency steps deemed necessary to restore order.³⁵⁹ The effect of the new laws was to give government the same powers it had under the state of emergency, but without the attendant political embarrassment.³⁶⁰ "I would say that we will keep it as long as is necessary to ensure the protection of human lives and property of the great majority of

the population," Botha said.³⁶¹ By early July, one journalist had been killed attempting to report on unrest, and at least a half dozen injured.³⁶² Twelve local reporters were held in detention. Three foreign reporters had been expelled from the country, and a score more feared their work visas would not be renewed.³⁶³

On Sept. 3, 1986, the eve of mass funerals for twenty Blacks killed during a disturbance the week before in the Soweto township near Johannesburg, the South African government imposed tough new restrictions barring reporters from covering any actions by the security forces. The new measures forbade reporters from being "within sight" of any unrest, restricted gathering or police action.³⁶⁴ The measures also barred reporting on any arrests made under the emergency regulations. Previously, newspapers could report on cases that were brought before the courts.³⁶⁵ In banning coverage of any "security action," the order by General Johan Coetzee, Commissioner of Police, gave an expansive definition to the term to include any action taken to quell unrest or taken as a consequence of unrest, any "follow-up" action after unrest, any

arrests or detentions under the emergency declaration and any deployment of forces or equipment.³⁶⁶

By early December, the country's main newspapers began to "toe the line." After meeting with Botha and his Cabinet, the chairman of the Newspaper Press Union, which represents South Africa's major newspaper chains, and executives of the largest publishing firms agreed to stronger media self-censorship.³⁶⁷ The publishers represented the biggest English-language and Afrikaans daily and weekly newspaper groups. In the unprecedented agreement, the newspapers agreed to harsher disciplinary measures by the Media Council, an independent watch-dog group, that allowed the council to help enforce press limits under the current state of emergency, declared in June.³⁶⁸ The newspaper representatives issued a statement saying they agreed with Botha's assertion that existing means available to the three-year-old Media Council "needed pepping up."³⁶⁹

On December 11, the South African government for the second time in 1986 imposed new sweeping limits on reports of racial and

political violence.³⁷⁰ The new rules banned reporters from being at scenes of racial unrest, forbade publication of any security force action and barred reporting of any statement, even by opposition members of Parliament, that the government deemed subversive. The ten-page proclamation broadly defined "subversive statements" and permitted police to confiscate without warning any publication, film or recording suspected of violating the new rules. To enforce the new media curbs, the regulations, published in the official Government Gazette, allowed for stiff fines, seizure of newspapers violating censorship regulations, and imprisonment. The regulations even forbade newspapers from carrying blank spaces indicating that material had been censored.³⁷¹ The new rules also required publishers to submit potentially sensitive reports to the government for approval before publication.³⁷²

In an editorial, Johannesburg's Business Day summed up the state media's reaction to the rules banning all reports of unrest and anti-government action without prior government approval: "The

government today unceremoniously dumps this country into the totalitarian camp."³⁷³ The Natal Mercury in Durban put it more bluntly, accusing the government of resorting to "banana republic tactics of totalitarian regimes."³⁷⁴

Five days after the new media laws were imposed, the government Bureau of Information said the censorship center in Pretoria had cleared for publication only 15 of 120 news reports submitted for clearance.³⁷⁵ While the press censorship system proved arbitrary and cumbersome as local and foreign journalists had feared, it did achieve its aim of suppressing the reporting of unrest.³⁷⁶

On December 18, 1986, a Supreme Court justice upheld the new regulations barring publishing of "subversive statements." Responding to a request by the Weekly Mail to rule on the validity of the regulations, Justice N. M. MacArthur gave the news rules at least the court's temporary blessing when he ruled that the matter was not urgent enough to warrant an immediate hearing. Without ruling on the merit of the regulations themselves, the Justice said

they must be obeyed until the full court decided whether President Botha had the authority to impose such severe restrictions on free speech and the press.³⁷⁷

The Weekly Mail was one of three newspapers served with police orders barring them from publishing calls for anti-apartheid protests over the Christmas holiday. The Weekly Mail had argued before the court that the regulations sharply curbed press freedom and that this matter, in itself, was grounds for urgency.³⁷⁸ The Sowetan, the nation's top-selling black newspaper, withdrew a court challenge to the censorship orders due to tighter publishing restrictions ordered against the newspaper over the previous weekend.³⁷⁹

On January 9, 1987, the South African government acted to further its control over news reports. Using its emergency powers, the government barred local media from printing reports or advertisements that improved the image or explained the policies of banned organizations, such as the ANC. The police order, published in a special Government Gazette, was imposed less than a

day after some newspapers printed full-page advertisements calling for Pretoria to lift its ban on the ANC.³⁸⁰

The government also took action that effectively closed The New York Times' bureau when it ordered the newspaper's correspondent to leave the country and refused to issue a visa to his replacement. Times correspondent Alan Cowell was the sixth foreign reporter asked to leave the country since the national state of emergency was declared in June 1985.³⁸¹ South Africa's two largest English-language newspaper chains said they would challenge the newest press restrictions in court.³⁸² Lawyers for the Argus chain and for South African Associated Newspapers said they would challenge the laws, arguing that Commissioner of Police Johan Coeteez exceeded his powers because the laws were vague and exceeded what was reasonably necessary.³⁸³

In February, President Botha issued a statement saying that newspapers had failed to regulate themselves and accused some newspapers of fomenting revolution. As a result, he ruled out an early end to press censorship.³⁸⁴ "The government accordingly has

no choice but to continue with the general implementation of the existing media regulations," Botha's statement said.³⁸⁵

After almost a year of setbacks, the South African media finally heard some good news. On April 24, 1987, the Supreme Court for the Natal Province quashed several key clauses in the December 11, 1986, censorship decrees ordered by President Botha under the national state of emergency declared in June 1986.³⁸⁶ The ruling, without an accompanying detailed explanation of its reasoning, in effect rejected the government contention that sweeping media restrictions were necessary to quell a "revolutionary onslaught" aimed at overthrowing the minority white rule. The key clauses the court rejected included restrictions on reporting or photographing actions by security forces to quell racial unrest and the reporting of the gatherings of outlawed organizations. The court also rejected prohibitions against the publication of advertisements defending or justifying the activities of outlawed organizations.³⁸⁷ The Natal court's ruling was binding only in the Natal Province, but under judicial custom would be followed in

the other three South African provinces, barring contrary rulings by other provincial Supreme Courts, unless the Appellate Court, the nation's highest court, overturned the ruling on appeal by the state.³⁸⁸

The court's ruling appeared to be a substantial rejection of the government's interpretation of the powers it granted itself under the June 12, 1986, emergency declaration.³⁸⁹ Its immediate effect was to allow broader foreign and domestic news coverage of South Africa's political protests and government reactions.³⁹⁰ On August 28, 1987, South Africa imposed new curbs on the media, allowing the Botha government to bypass the courts in censoring or banning newspapers that officials believed to be fomenting anti-government sentiment.³⁹¹ The restrictions, imposed under the 14-month-old national emergency declaration, were announced by Home Affairs Minister Soffel Botha and published in the official Government Gazette.³⁹²

Under the terms of the new rules, the home affairs minister was to first warn a publication that it was under scrutiny. If the

publication continued to publish stories the minister considered "a threat to the maintenance of public order," it could be banned for up to three months, or the minister could appoint a censor. Publications could be banned for promoting or fanning revolution; stirring hatred against local authorities or security forces or a racial group; promoting the image of banned organizations, such as the ANC; and promoting strikes, rent or school boycotts, or civil disobedience.³⁹³ A week after the new censorship measures were unveiled, the government announced the appointment of a panel of censors to monitor newspapers the government believed were inciting the public against it.³⁹⁴ Soon after the censorship panel was announced, Home Affairs Minister Soffel Botha met with twenty-five editors in Cape Town. He told the editors he was "a firm believer in the free flow of information" and assured them he would use the censorship powers "very carefully."³⁹⁵ "I realize I have to distinguish between criticism which is fully justified against the existing government . . . and criticism which entails the overthrow of the existing power by violence," Botha said.³⁹⁶

The editors expressed concern that it would be difficult for them to obey such vague government orders, which only the home affairs minister could interpret.³⁹⁷ On January 12, 1988, a government official announced that legal action would be taken against a Johannesburg newspaper that advertised the anti-apartheid film Cry Freedom, even though the advertisement had been approved by government censors.³⁹⁸ Klaus von Lieres, Attorney General for Witwatersrand, said the newspaper would be prosecuted because the advertisement quoted people who had been banned -- people whose words could not be legally reported in South Africa.³⁹⁹

In March of 1988, the legality of the government's emergency powers was again before a provincial Supreme Court. The suit was brought by the newspaper New Nation, which covered black politics and labor issues extensively. The suit asked the court to overturn the authority of Home Affairs Minister Soffel Botha under the state of emergency to suspend newspapers or appoint in-house censors.⁴⁰⁰ A three-judge panel refused to overturn the government's emergency powers to censor and close down newspapers.⁴⁰¹ Two weeks later,

the government used those emergency powers to close down the New Nation for twelve weeks.⁴⁰² In the order closing down the weekly published by the Southern Africa Catholic Bishops Conference, Home Affairs Minister Soffel Botha accused the newspaper of "fanning revolution."⁴⁰³

In response to the closing of New Nation, acting editor Rex Gibson of the Star, South Africa's largest newspaper, took the Home Affairs minister to task. "The minister's whim is now mightier than the pen. There is no telling what news and views he will find unacceptable tomorrow," Gibson said.⁴⁰⁴ In an editorial, the Johannesburg Star said the closing of New Nation was a "chilling reminder of the lengths to which the government is ready to go in its attempts to impose thought control. . . . After this, no other newspaper in South Africa is safe."⁴⁰⁵

Several other South African newspapers were warned they faced possible closure, including the black-oriented Sowetan, the nation's second-largest daily; the weekly South in Cape Town; and the staunchly anti-government Weekly Mail.⁴⁰⁶ On June 11, 1988,

the government extended the state of emergency for a third year. In doing so, it adopted sweeping new media regulations that, among other things, made it an offense to quote certain anti-apartheid organizations. The regulations also required that all domestic and foreign free-lance correspondents who worked for more than one employer register with the government and submit reports or broadcasts to state censors.⁴⁰⁷ However, on September 9, the government withdrew the free-lance restrictions.⁴⁰⁸

After more than three years of severe media restrictions, the anti-media tide changed dramatically following the election of Frederik W. de Klerk to replace P.W. Botha as President of South Africa. In a speech to Parliament on February 2, 1990, De Klerk said media regulations imposed under the state of emergency would be abolished.⁴⁰⁹ De Klerk, however, said he would continue restrictions on television and photographic coverage of unrest. The government blamed international television coverage of racial rioting in the mid-1980s for national instability and the turning of foreign public opinion against South Africa.⁴¹⁰ Newspapers were

quick to respond. "Within minutes of Mr. De Klerk's announcement, we removed the front-page reminder to readers that The Star was being produced under the severest restrictions," said editor Harvey Tyson of The Star, South Africa's largest daily.

While De Klerk's new policies allowed some of the most unrestricted coverage of South African government since the rise of the Afrikaners in 1948, many laws remained in force that could be used to silence the media.⁴¹¹ Nevertheless, the media responded to the new freedom with a raft of newspaper and magazine articles, radio and television shows, and a number of quickly published books on the racial strife.⁴¹²

Harvey Tyson, editor of The Star, probably sums up the current state of the media in South Africa the best:

The South African press, though by no means free, appears at the moment to be 'more free' to report events than are the media in at least half of the countries of the world. But the fact remains that there are still many bad laws on the statute books affecting freedom of expression.⁴¹³

VII

THE IMPACT OF CENSORSHIP UPON THE RIGHTS OF THE PRESS AND THE PEOPLE

South Africa presents us with a singularly unique laboratory for the study of the effects of censorship. It is unique in many ways that may separate it from universal significance, to be sure - i.e. the obvious imbalance and complexity of the ethnic population, or the political isolation from its neighbors. But never before has such a confined region received as much global media focus while trying so hard to control or avoid the media limelight. Surely there are lessons to be learned from South Africa by those who would emulate her restrictive choices, or by others who value the liberty of information.

To build up a background against which to judge the effect of the Media Emergency Regulations, we first look at censorship laws under the Publications Act 42 of 1974. Government restriction under this act is triggered by a finding of "undesirability."⁴¹⁴

A publications committee can make such a finding based on any of several target criteria that the work:

- (a) is indecent or obscene or is offensive to public morals,
- (b) is blasphemous or offensive to the religious convictions or feelings of any section of the inhabitants of the Republic,
- (c) brings any section of the inhabitants of the Republic into ridicule or contempt,
- (d) is harmful to the relations between any sections of the inhabitants of the Republic, [or]
- (e) is prejudicial to the safety of the State, the general welfare or the peace and good order...⁴¹⁵

The publications committee and the Publications Appeal Board are charged with finding "undesirability" in books, periodicals, objects (carvings, paintings, record albums, etc.), films, or public entertainments.⁴¹⁶ This discussion will focus on political censorship, specifically determinations under paragraphs "(c), (d), and (e),"⁴¹⁷ though obscenity and blasphemy within this context are

fraught with political undertones, and are included in the overall statistics.

Once a submission is found undesirable it can be prohibited from distribution (past, current or future editions),⁴¹⁸ released with restrictions,⁴¹⁹ or prohibited from possession.⁴²⁰ Restrictions can amount to age limitations or required excisions.⁴²¹ A 1979 amendment made a finding under the act binding on the courts, removing the material from judicial scrutiny.⁴²² But the courts did contribute to censorship under the act. In one case, State President v. Simoko, the court upheld a conviction based on charges that the publisher should have known that his topic might be declared unlawful, even though the then current guidelines did not proscribe it at the time of publication.⁴²³

Overall the Publications Act is broad enough to afford the government great control over the public's reading and viewing material, and requires only minimal administrative procedure. The members of the Publications Appeal Board have espoused the position

that prohibition is appropriate for: portraying segregation as absurd and wrong, exposing security forces to criticism while describing them as "white," bringing the White population into ridicule or contempt, or satirizing racially based legislation.⁴²⁴ As mentioned above, Pretoria initially relied on the Publications Appeal Board to prevent the release of Cry Freedom, but resorted to the broadsword of emergency regulations when the board would not capitulate.⁴²⁵

Between April 1975 and June 1982 approximately 8,688 publications and 499 films were found "undesirable" and rejected as not suitable for release.⁴²⁶ Of these over 2,502 were prohibited from possession within the Republic.⁴²⁷ Though the ratio of films screened to banned only yields an average reject percentage of 9%, restrictions and self-censorship are not reflected in the figures. A film must receive approval before exhibition in South Africa.⁴²⁸ The interest cost and distribution contracts compel film-makers to make sure their product gets approved without delay. As a result, the invisible hand of the

government directs the film all along the production line. In fact, under a Catch-22 definition of "publications," a submission for review may qualify as published material and thereby trigger criminal action under the subversive clause.⁴²⁹

Another factor is the exercise of censorship in the cutting room. Over this same period only 44% of the films were released as submitted.⁴³⁰ The rest were subjected to age or house size restrictions (selective placement via zoning regulations, perhaps), revision by excisions, or some combination of release conditions. "Big Brother" editor may be even more insidious than outright prohibition. In a sense, the film creator provides an original story to the government, who then recasts it to reflect the status quo.

Of the publications censored, over 39% were suppressed for political considerations under paragraphs (c), (d), or (e).⁴³¹ The spotty figures available for 1983 and 1984 indicate this trend continued.⁴³² In keeping these ideas from the public whether to the right or left of the political spectrum, the people of South

Africa were denied the opportunity to consider the wrongness or rightness of those views for themselves. More importantly the government denied the governed the ability to monitor the performance of law enforcement in the community. "And the further danger is that reporters, sensitive to a chill in the air, may come to censor themselves before they file anything for the editor to see."⁴³³

The rest of the world of course, may also be denied access to these unpublished South African ideas. Though one may debate who the target of censorship actually is, it is undeniable that censorship of the gathering of news affects us all. The media ban announced in November, 1985 established censorship as a favored tool of Pretoria. This poses the question whether the government was well-served and preserved by the use of censorship.

One collection of credible data on this issue was published by the American Association for Public Opinion Research.⁴³⁴ The study predominantly covers the period six months prior to the November regulations, and four months after.⁴³⁵ There is also

additional summarized data through March of 1987. The study was aimed at American news organizations and opinion surveys, but it included a barometer of South African political violence as well. It also reveals the journalists' response to the regulations as they impacted on their service bureaus on the ground in South Africa.

The study set out with the hypothesis that the ban would result in a curtailment of the number of South African news stories, and a significant decline in public awareness of the conflict. What they found was the opposite effect, and makes a noteworthy case for authoritarian regimes to avoid censorship, lest they hasten their demise. In totaling and weighting by prominence all the South African news stories on major networks and front pages, the study showed a definite rise in the number of stories following the ban.⁴³⁶ This response might be credited to the failure of the government to efficiently turn off the underground news valve, and to the rebellion of journalists in general towards allowing governments to tell them what not to cover.⁴³⁷

The data also showed a sharp and continuous increase in the number of protest-related deaths from November through February rising to a level of 110 that month.⁴³⁸ When the "deaths" figures are overlaid on the number of news stories, the study showed that censorship after the ban did not keep pace with the level of violence, which rose more rapidly.⁴³⁹ Whether or not this was a positive effect for Pretoria again raises the question of what the aim of the censorship was in the first place. Did the government hope to curtail the amount of unrest, or the number of people who heard about it? A more cynical interpretation might be that the troops felt less constrained in their use of lethal force with the absence of reporters on the scene. The "watchdog" role of the fourth estate is greatly proclaimed. But no data exists to validate such a conjecture regarding the South African Police.

Further surveys demonstrated what effect the ban may have had on the American viewer. Here it is interesting to compare the results with the level of coverage and the protest-related deaths. The month of August, 1985 showed a dramatic increase in both

prominent news stories and the number of deaths from the violence, almost a 300% increase from the previous month's average.⁴⁴⁰ The audience at that time registered a 59% viewer identification with the plight of the Blacks in South Africa as opposed to 11% for the government. Just before the announcement of the news ban, that rating had dropped to 50%. By March of 1986, the level of Black sympathizers among the American audience had risen to 64%. Though news coverage had significantly increased during this same period, only the level of actual violence on the ground in South Africa showed a steady rise following the ban.⁴⁴¹

This increase in the American people's support after the ban may have been marginally affected by protests in the United States itself or discussions of possible sanctions. A logical interpretation of the data is that the American audience, even more so than the American press, reacts quite negatively when told it will not be allowed to "know" something. Not only will the audience pay even closer attention than before, but the censor will be damned as well. This conclusion appears to be supported by the

fact that the increase in Black support was found to come from those who claimed neutrality and those who had given the subject the least attention before the ban.⁴⁴²

The November regulations covered video and film pictures, plus sound recordings.⁴⁴³ In June, 1986 the ban expanded to the printed word as well. In December, journalists were required to submit reports for the censor's knife before publishing.⁴⁴⁴ As a result, further reports included in the research article indicated that Pretoria achieved a more efficient restriction on the volume of reporting following this strengthened ban.⁴⁴⁵ But note, The Times of London, a major daily with correspondents stationed in South Africa, published sixty-six stories in 1987 on the media restrictions alone.⁴⁴⁶ The level of American support for South African Blacks did not decline from March, 1986 through March, 1987.⁴⁴⁷

Katherine Graham, chairwoman of The Washington Post, acknowledged that the regulations had some success in suppressing South African reporting in 1987, but insisted that news still got

out to the world.⁴⁴⁸ The media ban was so broad that even the government owned SABC television network violated it on occasion, reporting hunger strikes and work stay-aways in contravention of the Media Emergency Regulations.⁴⁴⁹

Returning to the question of who Pretoria wanted to keep the news from reaching, one can conclude that the outside world was not effectively deprived. Due to the global focus and foreign media entrenchment already evident in the country before the ban, the size of that task would have been formidable. Assuming that Pretoria did not undertake that challenge, the obvious target was the people of South Africa. One wonders what the effects are of censorship upon a subject population?

State President Botha once remarked that South Africa "will not hesitate to muzzle [the press] even further by emulating the example set by the British Government in denying television coverage to the IRA [Irish Republican Army]."⁴⁵⁰ An interesting society comparison, and one referred to in Dr. Mathews writings as well.⁴⁵¹ A closer look at the Irish experience with censorship,

especially of the broadcast media, may cool the eagerness of those who would extol its virtues. According to an historical study of the subject published in 1985, censorship has had a crushing effect on liberty and buttressed the health of the subversives at which it was aimed.⁴⁵²

By the Broadcasting Authority Act of 1976 the IRA and related organizations were banned from the airwaves of Ireland.⁴⁵³ The government thought to purge the radicals from the marketplace of ideas and deny them sustenance. In fact, the squelching of the IRA's message saved them from public debate, criticism, and probable discard. Television often acts as a public divining rod for truth. Perhaps controversial organizations should be required to submit to media coverage on a regular basis in order to expose their weaknesses to the public gauntlet.

The South African government thought to banish ANC leader Nelson Mandela from the airwaves and the minds of black South Africans for almost 30 years. News coverage of Mandela's release

to cheering millions after 30 years of detention brought this analysis on one American network:

[The] celebration is of the stature of the man largely because of what the government tried to do to him. ... [B]anning publication of his image and of his words - as if wiping him from the public mind will remove him from the public memory - created a man more powerful than they could've imagined.⁴⁵⁴

In today's technological revolution, signals penetrate the Irish and the South African air from satellites of all political persuasions. When the citizens learn local news from foreign sources that their own stations censor, the government and its mouthpiece are wounded in their credibility. Black townships in South Africa may soon display cable or home satellite dishes like the villages in Ireland (if they don't already), and the news can no longer be held at the border - either coming in or going out.⁴⁵⁵

Some commentators detect a deeper censorship at work outside the direct regulations of media. There is agreement that Pretoria promotes its goals through the manipulation of social policy, both in white and black society.⁴⁵⁶ For instance, an example of "dependency" manipulation is the moving of community welfare and

utility services from one locale to another.⁴⁵⁷ In this way the government motivates entire populations to come to the new service site without the confrontation that accompanies expulsion orders. Can the same manipulation of information services cause the audience to follow the government line?

There is some basis for analysis of the South African model as an Orwellian, or perhaps Huxleyan system, controlling its citizens politics by media saturation.⁴⁵⁸ The South African version would not produce a seamless society, but a fragmented one, preventing the coalescence of ethnic segments required to out-muscle the white minority regime. One theory, espoused in several interpretations, styles the government manipulation as two-fold. On one front the government lulls the white minority into ignorance of the true magnitude of unrest and injustice in the country.⁴⁵⁹ This effort embodies the major thrust of the censorship laws. It is the whites that must not know what their government is doing. Only the white community can be isolated from the front lines of conflict. The

Blacks see it daily in their neighborhoods and hear of it through the churches, grass root meetings, schoolyards and athletic fields.

The second government front is aimed at the black townships. It has been noted that considering the size of the dominated population, South Africa manages to physically persecute only a minuscule percentage of dissidents.⁴⁶⁰ Compared to Turkey, the Marcos-era Philippines, or Duvalier-era Haiti, South Africa has maintained a fairly lethargic revolutionary movement.⁴⁶¹ It is suggested that this is achieved through co-optation by modernization of the subject population.⁴⁶² In a media sense, the Blacks have been enticed into the White's value system by Madison Avenue marketing strategies.

In 1984 research showed that 20% of the black households in the Rand area owned a color tv and 30% more ranked that as their next purchase, if they had electricity.⁴⁶³ Other surveys revealed evidence that media advertising had penetrated urban black culture. In the same year, 687,000 Blacks tried losing weight, and 164,000 recently bought life insurance.⁴⁶⁴ Add in the fact that over 20%

of the Republic's black work force are civil servants, and the non-existence of significant black-owned media, and the potential for co-optation and dependence is apparent.⁴⁶⁵

There are long term problems in such a program. One is the increasing costs to maintain the facade on two closing fronts. Media control and consumer production must keep pace with the images the government promotes. Another problem is dominating the public discourse among the multi-ethnic groups that are alternately divided and recombined as more under-privileged come to work within the privileged system. At the same time, the government has been under sanction from the U.N., virtual embargo from the western world, and attack from the disaffected and unconvinced opposition. All for the lack of due process.

Lon Fuller called due process the "inner morality" of law.⁴⁶⁶ He described eight tenets necessary to the existence of a just legal system:

1. Laws must be generalized as rules.
2. Laws must be made public.
3. Laws must impose liability for prospective, not retroactive, acts.

4. Laws must be clear, not vague.
5. Laws must avoid practical contradictions.
6. Laws should not require the impossible.
7. Laws should be sufficiently stable in order to insure reliance.
8. Laws must be implemented according to their terms.⁴⁶⁷

One commentator has called due process the critical element in the American legal system - the very foundation of civil rights.⁴⁶⁸ At the time Fuller published his conditions for "inner morality," South African officials were already hard at work writing due process out of their statute books. It cropped up now and again in small concessions. As in 1988, when newspapers were permitted an opportunity to be heard before prohibition. This prompted one South African jurist to observe, "[C]ensorship is very like a guillotine, and there is very little use in growing honeysuckle over a guillotine."⁴⁶⁹ Perhaps due process is the most significant difference between United States laws and those of South Africa. Due process is cultivated in the one, while pulled out by the roots in the other.

In an absurd but oddly desperate exercise repeated every year in the bowels of the South African bureaucracy, 519 people

classified as "Coloured" became "White" in 1989.⁴⁷⁰ No "Black" became "White," but fifteen are now "Coloured."⁴⁷¹ This information is available for public consumption; not processed through the censor's grinder.

VIII

CONCLUSION, A QUESTION:

FREEDOM OF THE PRESS IN THE UNITED STATES AND IN SOUTH AFRICA: ARE THEY REALLY THAT DIFFERENT?

The first impression one gets when analyzing freedom of the press in the United States and freedom of the press in South Africa is that we sense that freedom of the press exists in the United States and not in South Africa. The two countries seem very different, because we are constantly told how different they are. Perhaps there is a difference and perhaps that difference stems from the fact that in the United States, the main body of law governing the press is the First Amendment which, of course, guarantees freedom of the press or at least freedom of the press to complain about freedom of the press. Whereas in South Africa, the

press is governed by a series of laws severely restricting the acceptable areas of coverage. However, the real distinction that does exist, becomes a bit more hazy when considering the press in each country during times of emergency. In the United States times of emergency usually coincide with external threats; in South Africa as well as many other struggling nations, emergency usually coincides with internal threats.⁴⁷²

Thus, the first distinction is the difference in the type of conflict each country faced during the state of emergency. If there is a state of emergency declared in the United States it usually means the nation is at war with some outside force. A South African state of emergency is the result of turmoil within its borders. However, the similarity in the effect of this perception on the regulations enacted in each country is profound.

Certainly, during a war, the United States is concerned about the release of troop locations and troop movements. As a result, some laws enacted during war were intended to prevent the release of vital information. The security reviews were to prevent

disclosure of tactical information through instant communications which could prove useful to the external enemy and endanger American lives. No one questions that such information should be withheld to protect against such external threats. However, it seems that some of the restrictions were enacted to enhance public support of the war.

If this is true, then clearly those restrictions come dangerously close to South African restrictions in that the reality is that they were enacted to protect the United States from internal threats.

Similarly, in South Africa, the Media Emergency Regulations were enacted because of what the government saw as both external and internal threats. Worldwide coverage of burning buildings and bloodied bodies drew a great deal of attention to the conditions in South Africa. Such extensive coverage led to the effective sanctions imposed against South Africa, delivering a blow from outside its borders.

Obviously, some of the South African regulations were enacted to address the internal threats facing the republic. The government thought coverage of the strife would lead to increased violence. To deal with this, the government enacted regulations severely limiting areas and topics of coverage. This rationale is rather common-place throughout Africa.⁴⁷³ Thus, the reasons each country have for enacting regulations are essentially the same, to deal with both external and internal threats.

The actual effects of the regulations in each country, however, differ considerably. The United States succeeded in its goals. It prevented external threats by not disclosing any unnecessary information to an enemy. It also succeeded in maintaining public support for the war. In South Africa, however, the results are more problematic. Externally, the studies indicate mixed results, and it is not clear whether the government succeeded in decreasing the violence or in merely decreasing the number of people who learned about it.

One factor accounting for the severe regulations enacted in both countries during the state of emergency is the level of technology. Today, the world can see what is happening anywhere within seconds. This means that the government does not have virtually any time to "soften the blow" to the public of witnessing bloodshed almost instantaneously. For the United States, this has a severe effect internally. As noted, this could destroy public support for a war, which is crucial for success. In South Africa, the internal effects may not be as severe because the government owns several broadcasting channels.

South Africa must worry about all foreign countries witnessing in explicit detail the bloodshed in its country as it unfolds. This was precisely what the government sought to avoid, and perhaps it would have become even worse if the government had not enacted the regulations. Thus, both countries enacted regulations at least in part to deal with the effects of today's technology.

Although there are similarities between the countries and their reasons for enacting the press regulations, there are more

differences than similarities. Perhaps the most striking difference is that there is not the same level of due process in South Africa. The cornerstone of democracy in the United States is due process. Even when press regulations were enacted, the press was still entitled to notice and an opportunity to be heard. In South Africa, there was no real opportunity to be heard when accused of violating a regulation. This means that in South Africa, the press is even more constrained than the regulations themselves indicate. The press in South Africa had more to lose by violating a regulation than in the United States, simply because of the lack of an opportunity to be heard or to marshal public support. In the United States, at least when a news organization is accused of violating a regulation, that organization has a chance of proving in the press and courtroom that the regulation is invalid or that they did not violate it. This allows journalists much greater latitude with which to publish news stories.

Finally, it is ironic to note the directions in which the United States and South Africa seem to be moving during times of

announced emergency. The United States seems to have moved from virtually absolute press freedom to strict control over the press during a state of emergency. The government apparently can now regulate the amount of coverage, the topics of coverage; they have even withdrawn the press' access to the battlefield.⁴⁷⁴ Although technological advances are partly to blame, they cannot bear full responsibility for all restrictions.

South Africa, on the other hand, has always circumscribed freedom of the press. Restrictions on press coverage were in effect even before the state of emergency was declared. The Media Emergency Regulations intensified the restrictions already in place. However, with democracy knocking at its door, South Africa may soon experience a liberalized change in the regulations affecting the press.

Sadly, if one focuses upon the period during a state of emergency, it seems that the effects of regulations in both countries are virtually indistinguishable. Perhaps it is too much to ask of any government to honor freedoms as best it can during

times of emergency.⁴⁷⁵ Thus, we suggest that the answer to our question lies more in a government's perception of self-preservation than a peoples' concept of press freedoms. In that sense, as governments by and for the people, we have all failed.

ENDNOTES

1. C. Smith, Death Rattle of S. Africa Press Freedom Stirs Little Fuss, L.a. Times July 1, 1986, at 5.
2. F. Baldwin, Freedom and Constitutionalism in Emerging African States. A Special look at Uganda With Possible Lessons for a United South Africa, 9 WISC. Jo. INT'L LAW -- (1991).
3. Id. See also South Africa Constitution Watch Commission, Report on the Positions of Major Parties in South Africa (Report No. 1, August 1991).
4. STAFF OF SENATE COMM. ON THE JUDICIARY, 89 CONG., 1ST SESS. SUBCOMM. TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS. INTERNAL SECURITY AND SUBVERSION: PRINCIPAL STATE LAWS AND CASES (Comm. Print 1965) (prepared by Legislative Reference Service of the Library of Congress, American Law Division). reprinted in Internal Security and Subversion: Principal State Laws and Cases at 63 (1971) [hereinafter American Internal Security].
5. P.W. Botha referred to the British regulations imposed in Northern Ireland as potential models for South African media controls. See The Times (London), Oct. 22, 1988, at 7.
6. See, Section 5 of Proclamation R89 CG 11948. Regulation Gazette No. 4375 (June 9, 1989) (Media Emergency Regs.).
7. American Internal Security, supra note 4, at 63-64. See also, N. HENTOFF, THE FIRST FREEDOM 97 (1980).
8. See, A. S. Mathews, National Security, Freedom and Reform in South Africa 46 (Jan. 27, 1988) (unpublished manuscript, University of Florida, Law Library) [hereinafter Mathews, National Security]; A. S. MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW 192 (1988).
9. MATHEWS, supra note 8 at 288-89. The Commission of Enquiry Concerning Certain Activities of the Royal Canadian Mounted Police, referred to as the McDonald Commission, published an extensive report detailing the goals and structure of a national security system in a free society. See Commission of Enquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security Under Law. 2d Report, Canadian Government Publishing Center, Ottawa, (1981)
10. See generally M. Tamarkin, Armed Struggle and Conflict Resolution in Rhodesia [Zimbabwe], 1974-1979 - Lessons for South Africa (July 1989) (Unpublished manuscript); The Times (London), Aug. 24, 1987, at 11 (an editorial appraising Zimbabwe's transition in light of other newly emerged African nations).

11. Mathews, National Security, supra note 8 at 18; see also, MATHEWS, supra note 8, at 222-80.
12. MATHEWS, supra note 8, at 222-80.
13. Codified in Proclamation R97 GG 10772. Regulation Gazette No. 4093 (June 11, 1987) (as amended by Proclamation R123 GG 10880. Regulation Gazette No. 4126 (August 8, 1987), and Proclamation R7 GG 11105, Regulation Gazette No. 4171 (January 15, 1988)) (Media Emergency Regs.).
14. See generally, V. ADAMS, THE MEDIA AND THE FALKLANDS CAMPAIGN (1986).
15. N. HENTOFF, supra note 7, at 84; See also NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[H]. n. 134 (quoting IX WRITINGS OF JAMES MADISON. "... a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").
16. See HENTOFF Id. at 86. Later in life, Jefferson remarked that the only items he read in the newspaper were the advertisements, as they contained the only reliable truths. Three years before his death he demurred that the press was a "formidable censor of the public functionaries," balanced by the review of public opinion. Id. at 87.
17. Id. at 89 (1849 Virginia Code).
18. Id. at 93.
19. M.L. STEIN, UNDER FIRE 14 (1968).
20. F. L. MOTT, AMERICAN JOURNALISM 329 (1941). The reporters in the war were accredited as being irresponsible, ignorant, dishonest and unethical. See MICHAEL EMERY & EDWIN EMERY, THE PRESS AND AMERICA 156 (1988); PHILLIP KNIGHTLEY, THE FIRST CASUALTY 21 (1975).
21. EMERY & E. EMERY, supra note 20, at 160.
22. STEIN, supra note 19, at 16.
23. Id.
24. EMERY & EMERY, supra note 20, at 160.
25. J. J. MATHEWS, REPORTING THE WARS 89 (1957). The Confederate Congress made it a crime to publish troop or naval movements, but poor mail and telegraph service hampered the flow of information in the South. STEIN, supra note 19, at 19.

26. Early in the war the North suggested a voluntary censorship plan which failed. Jack A. Gottschalk, "Consistent with Security" ... A History of American Military Press Censorship, Comm. and the Law, Summer 1983, at 36, reprinted in 1984: Civil Liberties and the Nat'l Security State: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the comm. on the Judiciary House of Rep., 98th Cong., 1st and 2d Sess. 463-480 (1984).
27. MOTT, supra note 20, at 337.
28. Id.
29. EMERY & EMERY, supra note 20, at 161.
30. Id. at 162. Two newspapers were suspended from publication for two days because they published a forged letter, purportedly written by President Lincoln which called for a 400,000 man draft. Gottschalk, supra note 26, at 36.
31. EMERY & EMERY, supra note 20, at 161.
32. J. J. MATHEWS, supra note 25, at 88.
33. Id. at 89.
34. EMERY & EMERY, supra note 20, at 162.
35. P. KNIGHTLEY, supra note 20, at 124.
36. STEIN, supra note 19, at 70.
37. KNIGHTLEY, supra note 20, at 124.
38. MOTT, supra note 20, at 621. See also STEIN, Id. note 11, at 73. But see KNIGHTLEY, supra note 20, at 130 (censorship had reached ludicrous proportions. For example, correspondents wanted to send a story how the Americans were given wine by the French as a kind gesture, but the story was vetoed by censors because it would show the indulgence of the U.S.).
39. MOTT, supra note 20, at 622.
40. Id. at 623.
41. EMERY & EMERY, supra note 20, at 296.
42. Id. at 297. Thirty additional newspapers retained their mailing privileges by promising to print nothing concerning the war. Id.
43. MOTT, supra note 20, at 623.
44. Id. at 623-624.

45. EMERY & EMERY, supra note 20, at 297. See also MOTT, supra note 20, at 626.
46. EMERY & EMERY, supra note 20, at 296.
47. Id.
48. Id.
49. MOTT, supra note 20, at 626.
50. 54 Stat. 670-71 (1940), incorporated in 18 U.S.C. §§ 2385 and 2387 (1948), repealed.
51. Dennis v. United States, 341 U.S. 494 (1951).
52. Id. at 551 (Justice Frankfurter's concurring opinion).
53. N. HENTOFF, supra note 7, at 85.
54. Dennis v. United States, 341 U.S. 494, (1951).
55. N. HENTOFF, supra note 7, at 144.
56. Gottschalk, supra note 26, at 39.
57. KNIGHTLEY, supra note 20, at 275. The Office of Censorship did not release news information, however. That was left to the Office of War Information which, like its predecessor CPI, withheld news and propagandized information. EMERY & EMERY, supra note 20, at 398-399.
58. EMERY & EMERY, supra note 20, at 398.
59. R. E. SUMMERS, WARTIME CENSORSHIP OF PRESS AND RADIO 100-101 (1942).
60. STEIN, supra note 19, at 94.
61. MATHEWS, supra note 25, at 177.
62. STEIN, supra note 19, at 94.
63. MATHEWS, supra note 25, at 190.
64. Id.
65. STEIN, supra note 19, at 97.
66. KNIGHTLEY, supra note 20, at 295.
67. STEIN, supra note 19, at 118.

68. Id.
69. KNIGHTLEY, supra note 20, at 322.
70. Gottschalk, supra note 26, at 45. At this time, television was still in its infancy. Id.
71. STEIN, supra note 19, at 151.
72. KNIGHTLEY, supra note 20, at 338.
73. Id. at 337. See also Emery & Emery, supra note 20, at 414.
74. EMERY & EMERY, supra note 20, at 414.
75. KNIGHTLEY, supra note 20, at 337. One correspondent described this voluntary censorship as "you-write-what-you-like-and-we'll-shoot-you-if-we-don't-like-it." Id.
76. Id. See also M. B. VOORHES, KOREAN TALES 102 (1952) (90% of the press wanted censorship and many campaigned to get it).
77. EMERY & EMERY, supra note 20, at 415.
78. KNIGHTLEY, supra note 20, at 345. The regulation of censorship was passed around by the agencies. On January 11, 1951 headquarters decided to give the censorship responsibilities to the Eighth Army. VOORHES, supra note 76, at 112. The Army adopted the World War II restrictions in toto. Id. at 111. However, on March 13, headquarters jumped back in the game by reviewing stories passed through Tokyo, thus creating a system of "double censorship." Id. at 112. Three months later, headquarters took back all censorship functions. Id.
79. KNIGHTLEY, supra note 20, at 345-346.
80. EMERY & EMERY, supra note 20, at 415. Censors interpreted the word "retreat" as embarrassing and prohibited censors from using it. Id.
81. VOORHES, supra note 76, at 106. Some correspondents used the "Twenty Questions Trick" to reveal censored information to agents over the telephone. Id. The censor could only hear one side of the conversation and could not determine that censored information was being revealed. Id. at 107.

The actual conversation went as follows:

- Q. Where is Joe?
A. Seventeen ess.
Q. Where's Sam?
A. Ten enn.

- Q. How's the weather?
 A. Stormy.
 Q. Any lightning?
 A. Sharp in the mountains.
 Q. Are you coming over soon?
 A. I think so.
 Q. When do you expect to come?
 A. I'll try to leave in three or four days.

The translation would reveal the following information:

- Q. Where is the enemy?
 A. Seventeen miles south of the 38th Parallel.
 Q. Where are our troops?
 A. Ten miles north of Seoul.
 Q. What's the military situation?
 A. Not good for our side.
 Q. Is the enemy attacking?
 A. Yes, in the mountains.
 Q. Do you expect that we will surrender Seoul?
 A. Yes.
 Q. When do you think we'll retreat from Seoul and go south of the Han?
 A. In the next three or four days.
Id. at 106-107.

82. KNIGHTLEY, supra note 20, at 346.

83. Stein, supra note 20, at 175. There were also claims that the military falsified information. EMERY & EMERY, supra note 20, at 475.

84. KNIGHTLEY, supra note 20, at 403.

85. STEIN, supra note 19, at 163.

86. KNIGHTLEY, supra note 20, at 404.

87. Id. at 378.

88. Id. at 410.

89. News Policies in Vietnam: Hearings Before the Comm. on Foreign Relations of U.S. Senate, 89th Cong., 2d Sess. 73-75 (1966).

90. KNIGHTLEY, supra note 20, at 379.

91. Id. at 382.

92. Id. at 384.

93. Id. at 384. Senate hearings in Washington released the story of pilfering, theft, hijacking, bribery, smuggling, extortion, black-market dealings and opium-smuggling. Id.

94. EMERY & EMERY, supra note 20, at 533.
95. Id.
96. W. E. Farrell, U.S. Allows 15 Reporters to Go to Grenada for Day, N.Y. Times, at A13, (Oct. 28, 1983).
97. Id.
98. Phil Galey, U.S. Bars Coverage of Grenada Action; News Groups Protest, N.Y. Times, Oct. 27, 1983, at A1.
99. Id. Journalists claimed that the government used the news blackout to provide misinformation to the American public such as inflation of Cuban strength, danger of hostage takings of Americans in Grenada, and casualties. See Stuart Taylor, Jr., In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light, N.Y. TIMES, Nov. 6, 1983, § at 1. See also Edward Cody, Information Out of Sync; Marines Overpowered undefended Capital, Wash. Post, Oct. 29, 1991, at A1; Military v. Press: Troubled History, N.Y. Times, Oct. 29, 1991, § 1 at 1.
100. Galey, supra note 99, at A1. The press restrictions imposed in Grenada created a flurry of articles generated from the legal community. See Cassell, Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars", 73 GEO. L.J. 931 (1985); Pincus, Press Access to Military Operations: Grenada and the Need for a New Analytical Framework, 135 U. PA. L. REV. 813 (1987); Engber, Comment, The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press a Right of Access to Wartime News? 58 TEMP. L. Q. 873 (1985); 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 (1985).
101. C. Mohr, The Pentagon; The Continuing Battle Over Covering Wars, N.Y. Times, Sept. 14, 1984, at A24.
102. SIDLE REPORT: Looks to Insure Most Combat Coverage Possible, 107 BROADCASTING 41 (1984).
103. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary, House of Rep., 98th Cong., 1st and 2d Sess., Final Report of the CJCS Media Military Relations Panel (Winant J. Sidle, Chairman) 432-435 (1984). A second study of media-military relations reached mostly of the same conclusions as the Sidle report. Media Should Be Insured Access to Military Actions, 108 BROADCASTING 105 (1985). The Study entitled "Battle Line" was commissioned by 20th Century Fund, a non-profit research foundation. Id. The report stated that media coverage must be guaranteed by the government. Id. The report also stated that waning public enthusiasm of U.S. involvement in Vietnam was not a

result of television coverage. Id.

104. Side Report: Looks to Insure Most Combat Coverage Possible, supra note 102, at 41.

105. Id.

106. R. Halloran, Pentagon Forms War Press Pool; Newspaper Reporters Excluded, N.Y. Times, Oct. 11, 1984, at A1.

107. Originally the DOD excluded newspapers, but, after public outcry, included newspapers one day later. See R. Halloran, Pentagon Plans to Add Newspaper as Member of Its War Press Pool, N.Y. Times, Oct. 12, 1984, at A1.

108. Id.

109. Holloran, supra note 106, at A1.

110. Id.

111. Id.

112. P. Almond, Pentagon Fumbled on 'Media Pool', Wash. Times, Mar. 19, 1990, at A6. The DOD put the pool through ten "dry runs" before the invasion of Panama without problems. See Pentagon's Press Policy in Panama, L.A. Times, Jan. 25, 1990, at B1.

113. Almond, supra note 112, at A6.

114. M. R. Gordon, Cheney Blamed for Press Problems in Panama, N.Y. Times, Mar. 20, 1990, at A8.

115. Almond, supra note 112, at A6.

116. Gordon, supra note 114, at A8.

117. Id. See also Almond, supra note 112, at A6. In a DOD press briefing, P. Williams said, "I think our experience with the Panama pool make the point of what the perils are in not handling the pool properly. There's been hell to pay for this, and I think that message has gotten through." Pete Williams, Defense Dep't Regular Briefing (Mar. 20, 1990) (transcript available on Federal Information Systems, Corp. Computers).

118. Robert MacKay, U.P.I., Mar. 20, 1990. The report cited further frustration of the pool with only four phones for 500 reporters, and fax machines which did not work. Peter Almond, Panama Media Pool Vexed by Donaldson, Wash. Times, Mar. 21, 1990, at A1. Furthermore, the pool was resentful of the preferential treatment afforded Sam Donaldson of ABC-TV News. Id. One escort officer was quoted as saying that the chief public affairs officer

was "given over basically to supporting Sam Donaldson" instead of helping the pool. Id.

119. The guidelines, ground rules and pool restrictions appear in *Nation Magazine v. U.S. Dep't. of Defense*, 762 F.Supp. 1558, 1575-1582 (S.D.N.Y. 1991).

120. Id.

121. Id.

122. Id.

123. Id.

124. U.S. Dep't. of Defense, Guidelines for News Media 14 Jan. 91.

125. Id.

126. Id.

127. Id.

128. Id.

129. U.S. Dep't. of Defense, Guidelines for News Media 14 Jan 91.

130. See T. Wicker, A Free Press Was One Casualty of the Gulf War, L.A. Daily J., Mar. 25, 1991, at 6.

131. Thomas B. Rosenstiel, Americans Press Media But Still Lack Censorship, Postwar Poll Says, L.A. Times, Mar. 25, 1991, at A9. A Times-Mirror survey found that Americans nearly 2 to 1 felt that military censorship was more important than the media's right to report. Id.

132. See id.

133. See infra note 214 and accompanying text.

134. Gary Sturgess, Media Powers Oppose War Rules But Shun Suit, Legal Times, Feb. 4, 1991, at 2.

135. See supra Section III.C.

136. U.S. Const. amend. I. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." Id.

137. 283 U.S. 697, 708 (1931). The Near court held that a Minnesota statute providing for the abatement of a "malicious, scandalous, and defamatory newspaper, magazine or other periodical" was an infringement of the "liberty of the press." Id. at 626, 633.
138. Id. at 715-716.
139. Id. at 716.
140. Id.
141. 403 U.S. 713 (1971).
142. Id. at 714. C.f. Nimmer, National Security Secrets v. Free Speech: The Issue Left Undecided in the Ellsberg Case, 26 STAN L. REV. 311, 312 (1974) (the penalties for disclosure of official secrets hangs over government officials, newsmen and others who wish to disclose government documents).
143. New York Times, 403 U.S. at 714.
144. Id. at 714.
145. Id. at 719 (Black, J., concurring).
146. Id. at 726 (Brennan, J., concurring.)
147. Id. at 726 (Brennan, J., concurring.)
148. New York Times, 403 U.S. at 731 (White, J., concurring.) Interestingly, the dissenting opinions did not argue for censorship but argued against the cursory review given the case and the documents involved. See id. at 749 (Berger C.J., dissenting); id. at 753 (Harlan, J., dissenting), id. at 760 (Blackmun, J., dissenting).
149. 444 U.S. 507 (1980).
150. 466 F.2d 1309 (4th Cir. 1972).
151. 467 F.Supp. 990 (W.D. Wis. 1979).
152. Snepp, 444 U.S. at 507; Marchetti, 466 F.2d at 1311.
153. Snepp, 444 U.S. at 507-508; Marchetti, 466 F.2d at 1311.
154. Snepp, 444 U.S. at 508.
155. Marchetti, 466 F.2d at 1312 n.1.
156. Snepp, 444 U.S. at 516; Marchetti, 466 F.2d at 1318. Although

Snepp's book was already published, the government sued to receive Snepp's profits. Snepp, 444 U.S. at 507.

157. Snepp, 444 U.S. at 509 (emphasis added).

158. Id. at 511.

159. Id.

160. Id. at 516. The court imposed a constructive trust to give the government the agent's profits from the sale of the book. Id.

161. Marchetti, 466 F.2d at 1317 (emphasis added).

162. Id. at 1316-1317.

163. 467 F. Supp. 990 (W.D. Wis. 1979). See also United States v. Morison, 844 F.2d 1057, 1068 (4th Cir. 1988) (military defendant's conviction under the Espionage Act for transmitting Top Secret photographs to an English publication affirmed, however, the court stated that the First Amendment did not apply in this case because it was not a prior restraint and transmission of photographs did not warrant First Amendment protection when an employee who had notice willfully violated the statute.

164. Progressive, 467 F. Supp. at 991, 999. The Atomic Energy Act is cited in 42 U.S.C. § 2274(b). Restricted Data is defined in § 2014 of the Act.

165. Progressive, 467 F. Supp. at 996. The court stated that when "[f]aced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression." Id. at 995.

166. Id. at 996.

167. Not only will courts allow censorship for national security reasons, courts will also censor the speech of military personnel on military bases. For example, in Parker v. Levy, 417 U.S. 733, 736 (1974) the Supreme Court upheld an Army physician's court-martial for refusing to conduct a clinic for Vietnam soldiers and for telling the soldiers that they should not go to Vietnam. The captain was charged with, amount other things, promoting disloyalty among troops by publicly uttering statements which were "intemperate, defamatory, provoking, disloyal, contemptuous and disrespectful to Special Forces personnel." Id. at 736-738.

The Supreme Court refused to apply the captain's void for vagueness challenge to the Army's rules. The Court noted that while the military was not excluded from First Amendment

protection, the community of the military required a different application of the protections. Id. at 739. The Court stated that the fundamental necessity for obedience and discipline rendered First Amendment restrictions permissible in the military which would not be permitted outside. Id. at 758. The court held that the military's statute was not overbroad because prohibited conduct, similar to the captain's, under that statute could be identified and constitutionally prohibited under the First Amendment. Id. at 761.

168. 762 F.2d 134 (D.C.Cir. 1985).

169. 762 F.2d 134 (D.C.Cir. 1985).

170. Id. at 134.

171. Consider somewhat similar actions by President Bush, see Will Bush Plan Mean Martial Law in Our Time?, Guardian, Jan. 18, 1991. p. 1.

172. Flynt, 762 F.2d at 135.

173. Id. at 135.

174. Flynt, 762 F.2d 134.

175. Flynt, 588 F.Supp at 59.

176. Id.

177. Id. at 60.

178. Id.

179. Id. at 61.

180. 762 F.Supp. 1558 (S.D.N.Y. 1991).

181. Id. at 1560.

182. Nation, 762 F.Supp. at 1561.

183. The restrictions were lifted on March 4, 1991. Id. at 1560.

184. Id. at 1569. However, the court determined that the plaintiffs claims for injunctive relief were moot because the lifted restrictions prevented any irreparable harm. Id.

185. Id. at 1572.

186. Nation, 762 F.Supp. at 1571.

187. Id. at 1571.

188. Id. at 1572.

189. Id.

190. Id.

191. Nation, 762 F.Supp. at 1572.

192. Id.

193. See id. at 1573-1575.

194. Id. at 1573.

195. Id.

196. Nation, 762 F.Supp. at 1574.

197. Id.

198. See id. "Yet, when asked at oral argument about how the government may design appropriate non-content based regulations that had reasonable time, place, and manner restrictions, counsel for the Nation responded, 'Fortunately, I don't have to make that decision.'" Id. at 1575. The court continued:

"The Court, repeatedly and unsuccessfully, pressed plaintiffs to propose specific alternatives for the DOD regulations that the press believed would pass constitutional scrutiny ... plaintiffs' only response was that the press be allowed unlimited unilateral access ... Rather than make specific proposals, such as suggesting that any regulations must include provisions for a speech administrative review process for those who claim they were improperly excluded from a pool, plaintiffs have adhered to an absolute 'no limitation' approach."

Id. at 1575.

199. Nation, 762 F. Supp. at 1575.

200. Id.

201. 460 U.S. 37, 40, 47 (1983).

202. 408 U.S. 102 (1979).

203. 417 U.S. 817 (1974).

204. 424 U.S. 828 (1976).

205. 367 U.S. 886 (1961).

206. 408 U.S. 92 (1972).

207. See supra note 193.

208. See id.

209. 448 U.S. 554 (1980).

210. 457 U.S. 596 (1982).

211. 464 U.S. 503 (1984).

212. 570 F.2d 1080 (2d Cir. 1977).

213. See supra note 211.

214. For example let us examine the Gulf War, the military and the press guidelines:

First, the military should require all correspondents to be accredited. Accreditation serves two purposes: it acts as a background check to weed out any spies, and it registers journalists for admittance purposes. Accreditation would serve as an alternative to the pool process. Media who are accredited would have the option to join press pools, but would not be required to do so.

Second, the military should abolish the requirement that the media must remain with their escorts. The military should provide escorts for media who wish to become members of a pool and take conducted tours without endangering their lives. All other accredited media personnel, however, should be allowed to travel freely by their own means and at their own risk. Non-pool representatives should not be denied access from areas of operation. Additionally, non-pool journalists must recognize that they are risking their life and that no extra precautions or steps

will be taken by the U.S. military to protect them. Journalists who interfere with the military operation will be removed and banned from the operation.

Third, the government should allow correspondents who are venturing out on their own to carry personal weapons. If the journalists are willing to risk their lives to get news, they should be given every chance to survive. The military should instruct correspondents that they are not soldiers, however, and are only to use weapons when absolutely necessary to save their own lives.

Fourth, there must not be any pre-publication review of the media, except when asked for by the press. Correspondents should not have to submit copy to censors before giving it to their editors. Pre-publication review unfairly prohibits all live television coverage. The elimination of prior review does not mean no censorship, however. Instead a system of self-censorship would be established through sanctions imposed upon correspondents who published prohibited information as defined in the ground rules. Anyone publishing restricted information would be removed from the battlefield, have their accreditation revoked, and would be effectively shut out from reporting the war. The media is not likely to publish any prohibited materials because war sells newspapers and increases ratings. Since the press would not do something which would restrict them from covering the war and cause them to lose profits, a system of voluntary self-censorship would be effective.

A system of prior review would be available, however, for correspondents to use at their option. Journalists would submit questionable copy to the censors before publication for clearance. A time-sensitive system of review should be enacted, to provide incentive for journalists to submit their questionable material before publication. If the system is too slow, the press would probably take the risk of publication. For example, censors should be required to read material and provide clearance or explanations within 2 hours. If clearance is denied, the material should be sent to the JIB Dharhan director who must respond within 2 hours. Any further review must also be completed within 2 hours. Any delay by the censors allows the media to presume that their story has been cleared, and the media would not be liable for publication. The military must provide adequate censor personnel and an accurate logging system to avoid publications simply by default. See United States Dep't of Defense, Guidelines for News Media 14 Jan. 1991. CENTCOM Pool Membership and Operating Procedures 30 Jan 91, Operation Desert Shield Ground Rules 14 Jan 91.

In order to operate as a limited censorship restriction, the ground rules should remain in tact. Each rule is designed to protect the effectiveness of the military operation and thereby protect the lives of American soldiers. Sanctions for violation of the rules should be strict in order to create a system of self-censorship upon the media. For example, a publication of clearly prohibited material without submission to a censor for clearance

should result in expulsion of the journalist (and, possibly, his or her employer) from the military zone. The sanction would apply to all journalists, whether pool members are not.

The above system of unlimited access and a self-imposed censorship system would alleviate three problems which arose in the Gulf War. First, the proposed system, unlike the Gulf War restrictions, would receive support from the media and the public. The proposed system would also prevent some of the censorship blunders that occurred during the Gulf War. Thirdly, tensions between the media and the military would be relieved, and they should be able to work side by side.

The majority of the general public approved of the press coverage of the Gulf War and favored press restrictions. Eight out of 10 Americans supported the restrictions. P. Duke, Censorship and the Press, Title News, Mar.-Apr. 1991 at 15. In fact, the public saw the media as being "rude, pushy and insensitive to the need for secrecy." President Bush was reassured of public support for press restrictions by the February 9, 1991 broadcast of a Saturday Night Live television show which depicted reporters in a briefing room as "comically self-absorbed with little understanding of national security and less concern." See J. De Parle, After The War; Keeping the News in Step: Are Pentagon's Gulf War Rules Here to Stay? N.Y. Times, May 6, 1991, at A9.

Some members of the press agreed with the public and favored the press restrictions. See B. Fein and W. B. Reynolds, Making A War, Not A Movie, Legal Times Feb. 18, 1991 at 22. Reporters

claimed that 1300 reports were released with only five reports delayed. J. W. Hart, Persian Gulf War: Desert Snow Job or Accurate Betrayal by Military, P. R. Services, Nov. 1991, at 24. Others chastised the press for submitting to the government's restrictions. See Selling Newspapers, N.J.L.Jo. Mar. 7, 1991 at 8. Critics cited examples of ABC's Peter Jennings' characterization of America's "brilliant laser-guided bombs" and Iraqi missiles as "horrificing killer[s]." N. Salomon, The Media Protest Too Much, N.Y. Times, May 24, 1991, at A31. Also cited was Time magazine's definition of "collateral damage" as "a term meaning dead or wounded civilians who should have picked a safer neighborhood." Id.

In contrast, other members of the press criticized the public for believing the controlled war information released by the government. T. Wicker, A Free Press Was One Casualty of the Gulf War, L. A. Daily Jo. Mar. 25, 1991 at 6. Journalists claimed that the public received a "sanitized version" of the war. See P. Duke, supra. Correspondents were frustrated by the lack of access and censorship. ABC's Forrest Sawyer stated on the show Nightline, that "there is a beast of a war out there, an elephant we're trying to describe. Based on information we're given, we're about at the toenail range." See 137 Cong. Rec. H 760, H 808 102d Cong. 1st Sess. (1991).

The media's criticism of the restrictions was furthered by examples of government control and censorship. A Time photographer was blindfolded and held at gunpoint after taking pictures of a

tank convoy near an Army camp. See, P. Duke, supra. A New York Times reporter was detained for five hours merely for asking to speak to a military hospital spokesperson. Id. Other reporters were banned for not staying with their public affairs escort when he chose to stay in his sleeping bag during an air attack instead of getting up with the reporters to put on his gas mask. Some reporters were given unauthorized viewings of videotape of Apache helicopter attacks on Iraqi positions by a military commander. See De Parle, supra. When an article about the tape was published, the reporters were never again allowed near the Apache unit. Id.

Photographs showing dead and wounded Iraqis and the caskets of American War casualties at Dover Air Force Base were censored. 137 Cong. Rec. S6851, at S6854, 102d Cong., 1st Sess. (1991) (remarks by Ted Koppel) Video footage showing bullet holes from anti-aircraft batteries was delayed for hours, then released. 137 Cong. Rec. supra note 294, at H762 (citing Robert Kaiser, Trust Me. Wash. Post, Jan. 27, 1991).

Reports were also censored for no apparent reason. One report used the word "giddy" to describe fighter pilots and censors changed the word to "proud." M. Browne, The Military vs. The Press, N.Y. Times, Mar. 3, 1991 § 6 at 27. A report describing a tank named "Arnold the Battle Pig" was censored so as not to offend the Muslim People. 137 Cong. Rec. supra note 294, at H761 (statement of Rep. Owens). Reports of pilots watching pornographic movies before flying bombing missions were deleted because they were too embarrassing. Id. at H769 (citing Howard Kurtz,

Correspondents Chafe Over Curbs on News-- Rules Meant to Protect Troops, Officials Say, Wash. Post, Jan. 26, 1991).

The press was also disappointed with the control of information by the government. For instance, the DOD withheld information on the estimated number of Iraqi casualties. 137 Cong. Rec., supra at H762 (citing Robert Kaiser, Trust Me, Wash. Post, Jan. 27, 1991). The DOD did not tell the public that the vast majority of bombs dropped on Iraq were not "smart bombs," and that 70% of U.S. bombs missed their targets. 137 Cong. Rec., supra at S6854. The DOD censored bombing videos before releasing them [Secretary Cheney, when asked about the tapes, stated "I will admit we did clean it up." DeParle, supra at A9.] and simply forgot requests by journalists for footage of errant bombs. Id. In addition, military spokespeople were forbidden from appearing on television programs along side any of the plaintiffs in the Nation case. Id. Furthermore, there were reports of military public affairs officers signaling to service men during interviews. 137 Cong. Rec., supra at H762 (citing Robert Kaiser, Trust Me, Wash. Post, Jan. 27, 1991).

Because of the withholding of information and censorship restrictions in the Gulf, the relationship between the military and the media was strained. General Norman Schwarzkopf, commander of the U.S. forces, charged CNN with "aiding and abetting the enemy." Michael J. Dugan, Generals v. Journalists, N.Y. Times, May 24, 1991, at A31. In turn, reporters charged the government with choreographing public opinion. See DeParle, supra at A9. In fact,

the daily press briefings were rehearsed with public affairs aides probing journalists for possible questions. Id.

The tension between the military and the media was evidenced by a letter and report sent by major news organizations to Cheney. Thomas B. Rosenstiel, Gulf War No. Model for Coverage, Media Tell Pentagon, L.A. Times, July 1, 1991, at A4. The letter was signed by presidents of the television news divisions of ABC, CBS, NBC and CNN, the chairman of the Washington Post Co., the publishers of the Los Angeles Times, the editors of the New York Times, the Wall Street Journal, and USA Today, and executives of wire services and weekly news magazines, among others. Id. The report stated that military officials suppressed news, controlled interviews, limited press access, and delayed transmission of stories. Both parties made efforts to resolve the tension in a meeting between news executives and Cheney which discussed the press restrictions. Some journalists felt that Cheney was hearing many details about the effects of the restrictions for the first time. It's Your Right to Know; A Necessary Protest About Manipulative Pentagon Press Policy in The Gulf, L.A. Times, Sept. 14, 1991, at B5.

In conclusion, the proposed system of self-censorship and unlimited access makes sense in light of U.S. war and constitutional history. Historically, the press and courts have agreed with the need for censorship of information which would endanger lives in time of war. Correspondents historically become annoyed, however, when their freedom of access and self-restraint is taken over by the government. The press, in order to fulfill

its role of checking on our system of government, needs access to information so that it may decide for itself which information is suitable for publication. Admittedly, some journalists make mistakes. But under the proposed restrictions, mistakes will be severely punished and will encourage self-restraint.

More importantly, with current advances in technology, timely news reporting is essential and demanded by the public. Reporters cannot wait more than a few hours to release their reports, for news easily becomes stale. Furthermore, with live television coverage and 24-hour news networks such as CNN, the military cannot review every piece of wartime news which leaves the battlefield. Should the press be prevented from using television and technology during wartime? No. Instead, the government should modernize their restrictions to allow reporters to have access to the battlefield with a system of self-restraint which would produce speedy, efficient, constitutionally protected reporting of our government in action. See H. Kurtz, News Media Ask Freer Hand In Future Conflicts, Executives Tell Cheney Independent Reporting Should be Principal Means of Coverage, *Wash. Post*, July 1991 at A4. 215. See generally, Rostow, Once More Unto the Breach: The War Powers Resolution Revisited, 21 *VA.U.L.REV.* 1 (1986).

216. See Mathews, National Security, *supra* note 7, at 25.

217. *Id.* at 8.

218. The independent Supreme Court also plays an important role. Its door are open to any individual who may resort for protection against state action, oftentimes with success.

219. S. Kentridge, Civil Rights in Southern Africa: The Prospect For the Future, 47 MD. L. REV. 271, 274 (1987).
220. Mathews, National Security supra note 8, at 148.
221. F. Barton, The White South, in THE PRESS OF AFRICA: PERSECUTION AND PERSEVERANCE (1980).
222. Id. at 188.
223. Id.
224. Id.
225. Id.
226. Id. at 189.
227. Id.
228. Id.
229. Id.
230. Id. at 190.
231. Id. at 191.
232. Id.
233. Id.
234. Kruger had previously provided government funds to aid in the establishment of two newspapers sympathetic to the Boers and concerned with Cecil Rhodes's impact on the country.
235. F. Barton, supra note 221, at 192.
236. Id.
237. Id. at 193.
238. SAAN membership included, the Rand Daily Mail, the Sunday Times, the Natal Mercury, the Johannesburg Sunday Express, the Eastern Province Herald, and the Evening Post of Port Elizabeth.
239. F. Barton, supra, note 221, at 193.
240. Id.
241. Id. at 196.

242. Id. 36, at 196-97.

243. Id. at 197.

244. Id.

245. Id.

246. Id.

247. Id. at 198.

248. Id.

249. Id. at 198.

250. Id. "Bantu" is the Afrikaner's slang reference to native Africans, vaguely recalling one of the super-tribes historically classified by anthropologists in this region as many sub-tribes linked by shared language and customs.

251. Id. at 217.

252. Id. at 199.

253. Id.

254. Id.

255. Id. at 200.

256. Id. at 203.

257. Id.

258. Prisons Act 8 of 1959, § 44 (1) (f). See also, A.S. Mathews, supra note 8 at 154.

259. F. Barton, supra note 221.

260. Id.

261. Id. at 204.

262. Id. at 204.

263. Id. at 204-06.

264. Id. at 207.

265. Id.

266. Id.

267. Id.

268. Indeed, the information in certain stories published by the Citizen could only have come from the files of the Bureau of State Security (BOSS), South Africa's Intelligence Service.

269. See generally MATHEWS, supra note 8, at 118-153. XX 98

270. The Code was designed to broadly ensure that newspaper reports were accurate and not indecent.

271. F. Barton, supra note 221, at 209.

272. In six years, the Board of Reference of the Code only heard fifteen complaints.

273. Id. at 209-10.

274. Id.

275. Id. at 210.

276. Id.

277. Joel Mervis, editor of the country's largest paper, the Sunday Times said, "It will be quite impossible for any editors to agree on what constitutes material which has the effect of inflaming race relations. What appears to one person to be perfectly innocuous might appear to another to be highly inflammable."

278. Mathews, National Security, supra note 8, at 277.

279. See generally 17 ENCYCLOPEDIA BRITANNICA, MACROPAEDIA 279-299 (1981).

280. Id. at 289, 291.

281. Id. at 291.

282. See generally Baldwin, supra note 2.

283. Internal Security Act 44 of 1950.

284. The power to ban an organization was conferred on the Minister of Law and Order by the Internal Security Act of 1982. This Act has existed as a permanent peace-time power since 1950 when the Suppression of Communism Act was introduced.

285. Dugard, A Triumph for Executive Power - an Examination of the Rabie Report and the Internal Security Act 74 of 1982, 99 S. AFR.

L. J. 589, 603 (1982).

286. Id. at 590, 603.

287. Id. at 590-91.

288. Id.

289. Id.

290. Act 44 of 1957, s. 118.

291. Van der Vyver, Parliamentary Sovereignty, Fundamental Freedoms, and a Bill of Rights, 99 S. AFR. L. J. 557, 580 n. 117 (1982).

292. Mathews, National Security supra note 8, at 158.

293. Id. at 590-91.

294. Mathews, National Security supra note 8, at 153.

295. Section 44(1)(f) of the Prisons Act 9 of 1959.

296. See S v. South African Associated Newspapers 1970 (1) SA 469 (W).

297. Id.

298. See F. Barton, supra note 221, at 203.

299. See Mathews, National Security, supra note 8, at 151.

300. Dr. Mathews notes that minor criticism of the prison system is usually permitted and that the authorities will simply respond with official denial. Usually there is little harm involved and prosecution would only arouse interest in the alleged problem. Mathews, National Security, supra note 9, at 151-52.

301. Id. at 152.

302. Id. at 153.

303. Section 2 of the Newspaper and Imprint Registration Act 63 of 1971.

304. See MATHEWS, supra note 8, at 149.

305. Section 15 of Act 74 of 1982.

306. Section 5 of Act 74 of 1982.

307. Act 2 of 1974.

308. See generally J. C. W. VAN ROOYEN, CENSORSHIP IN SOUTH AFRICA: BEING A COMMENTARY ON THE APPLICATION OF THE PUBLICATIONS ACT (1987).

309. Any newspaper that is not a member of the Newspaper Press Union is subject to being banned. All of the prominent daily and weekly newspapers of South Africa are excluded under this exception. MATHEWS, supra, note 8, at 120. Still, newspapers belonging to the press union can be banned under the Internal Security Act. Id.

310. See section 47(1).

311. Sections 4 and 5.

312. Section 8(1). Penalties are prescribed by s. 43.

313. See Kentridge, supra note 219, at 274.

314. Barton, supra, note 221, at 216.

315. Id.

316. Id. at 217.

317. Id. at 217-18.

318. Id. at 214.

319. The Rabie Commission was formed in response to an international outcry against the Gestapo tactics that led to the detention and death of Steven Biko in 1977. Biko was a "banned" person who led the South African Student Organisation's "Black Consciousness" movement of the '70's. He was arrested near Port Elizabeth the night of August 18, 1977. He was outside of his restricted area and was suspected of preparing seditious pamphlets. While in interrogative detention, Biko died three weeks later from a severe brain injury and renal failure. He was detainee number 45 to die while in detention under the security laws. A superficial medical inquest was held in 1978, exonerating all security force personnel involved in the death.

320. Id.

321. Id.

322. Id. at 215.

323. Id.

324. Id.

325. See DONALD WOODS, BIKO (1978), (2d ed. 1987); Cry Freedom (Universal Pictures 1987); See also DONALD WOODS, ASKING FOR TROUBLE (1987)). Donald Woods announced he would return to S.A. as a journalist in 1990 after President De Klerk passed the word that all pending charges against Woods were dropped, Woods claimed Cry Freedom had broken all house records in 45 cinemas, and that he would resume his investigation into Biko's death. All Things Considered (National Public Radio, May 25, 1990).

326. See Unger, Biko Inquest is the Ultimate Courtroom Drama, Houston Post, Sept. 12, 1985; Mitchell, The Biko Inquest - Fascinating Docudrama, L. A. Herald Exam., Sept. 12, 1985. In one of many farcical exchanges, Biko's interrogator claims to have won Biko's confidence and alleged confession early in the three weeks of detention by simply confronting him with extended incarceration. The Biko family lawyer, Sidney Kentridge, shakes the officer's credibility with the fact that Biko had previously survived 101 days of detention because he wouldn't talk. Id. Albert Finney also directed the docudrama which premiered on the Showtime cable network on September 12, 1985.

327. See Smith, supra note 1.

328. Alan Cowell, Pretoria Frees 12 Labor Leaders; Easing of Emergency Rule Barred, N.Y. Times June 27, 1986, at A-6. See also Editors Revel As Press Curbs Are Lifted; Media: A Sense of Freedom Sweeps Through South Africa's Newsrooms After De Klerk's Speech, L. A. Times, Feb 3, 1990, at 11. The government accused international television coverage of riots exploding throughout black townships between 1984 and 1986 for provoking violent response in these areas. Id.

329. See Smith, supra note 1.

330. GN R301 of 1977 (GG 5784 of October 19, 1977) As elaborated on in the previous section, the many security-law provisions impact severely on the freedom of expression and information and of the press. Some of these restrictions directly impact on these freedoms (i.e., the banning of publications) while others do so indirectly (i.e., imposition of a detention or banning order)

331. See MATHEWS, supra note 8, at 194; Michael Parks, 113 Seized by Police in S. Africa, L. A. TIMES, July 22, 1985, at 1, col. 6. The state of emergency covered the Johannesburg area, the Vaal River industrial center, the industrial Port Elizabeth-Uitenhage area of Eastern Cape province, and several other communities. Id. See also text accompanying notes 317 - 320.

332. Id.

333. Id.

334. D Rogers, South African Tightens Censorship, N. Y. Times, Jan. 10, 1987.

335. Michael Parks, 113 Seized By Police in S. Africa; 7 Blacks Reported Slain as Emergency Powers Take Effect, L. A. Times, July 22, 1985, at 1.

336. Id.

337. Reuters, Nov. 3, 1985.

338. Id.

339. Id.

340. Id.

341. Id.

342. S. Africa Emergency Bars Publication of Tutu's Reaction, Reuter, June 13, 1986.

343. See F. Barton, supra note 221 at 216.

344. Id.

345. Michael Parks, Blank Spaces in S. Africa Papers Protest Censorship, L. A. Times, June 18, 1986, at 1.

346. Id.

347. Id.

348. Id.

349. Id.

350. Id.

351. Id.

352. Michael Parks, S. African Crackdown Extended to White Opposition; Editors Told to "Toe the Line," L. A. Times, June 26, 1986, at 5.

353. Id.

354. Id.

355. Id.

356. Id.
357. Id.
358. See Smith, supra note 1.
359. Id.
360. Serge Schmemmann, South Africa Tightens Press Curbs on the Eve of Funerals in Soweto, N. Y. Times, Sept. 4, 1986, at A1, col. 4.
361. Id.
362. Id.
363. See William Claiborne, S. Africa Curbs Press; Newspapers to Tighten Self-Censorship, Wash. Post, December 7, 1986, at A44; Michael Parks, Pretoria Moving Toward Stricter Curbs on the Press, L. A. Times, Dec. 7, 1986, at 1.
364. Id.
365. Id.
366. Kevin Jacobs, UPI, Dec. 11, 1986.
367. Id.
368. Id.
369. Id.
370. South African Newspapers Lament Censorship, Reuter, Dec. 12, 1986.
371. William Claiborne, New Censorship System Effective for S. Africa; Ban Against Publicity All But Blacks Out Christmas Campaign Against Apartheid, Wash. Post, Dec. 17, 1986, at A29.
372. Id.
373. S. African Court Refuses to Hear Press Ban Case, L. A. Times, Dec. 19, 1986, at A44.
374. Id.
375. The World, L. A. Times, Dec. 23, 1986, at 2, col. 2.
376. David Rogers, South Africa Tightens Censorship, New York Times Hit, Reuter, Jan. 9, 1987.
377. David Rogers, South Africa Tightens Censorship, Bans Courses

For Blacks, Reuter, Jan. 10, 1987.

378. See Pretoria's Curb of News on Banned Groups Faces Test, L. A. Times, Jan 11, 1987, at 5.

379. Id.

380. David Rogers, Censorship Will Continue, Botha Tells Newspapers, Reuters, Feb. 12, 1987.

381. Id.

382. William Claiborne, S. Africa Press Rules Overturned; Violence Escalates in Black Townships, Wash. Post, April 24, 1987, at A-25.

383. Id.

384. Id.

385. Id.

386. Michael Parks, S. Africa Censorship Rules Invalidated by High Court; Government Plans Appeal, L. A. Times, April 25, 1987, at 8.

387. South Africa Details New Media Censorship Regulations, Reuters, Aug. 28, 1987.

388. Id.

389. Id.

390. S. Africa Names Censorship Panel, Wash. Post, Sept. 3, 1987, at A-26.

391. Michael Parks, Press Curbs To Aid Security, S. Africa Says, L. A. Times, Sept. 3, 1987, at 9.

392. Id.

393. Id.

394. Legal Action Planned Against Papers Advertising "Cry Freedom", Reuter, Jan. 12, 1988.

395. Id.

396. Newspaper Challenge to S. African Press Curbs Fails, Reuter, Mar. 8, 1988.

397. Id.

398. Barbara A. Borst, Anti-Apartheid Paper Silenced in South

Africa, Newsday, Mar. 23, 1988, at 12.

399. Id.

400. Id.

401. South Africa Warns Tenth Anti-Apartheid Newspaper, Reuter, Mar. 28, 1988.

402. Id.

403. William Claiborne, South Africa to Require Registration of Reporters; Rule to Affect Foreign, Local Freelancers, Wash. Post, July 21, 1988, at A14.

404. South Africa Drops Plan to Censor Press Agencies, Reuter, Sept. 9, 1988.

405. Editors Revel as Press Curbs are Lifted; Media: A Sense of Freedom Sweeps Through South Africa's Newsrooms After De Klerk's Speech, L. A. Times, Feb 3, 1990, at A11.

406. Id.

407. John F. Burns, South Africa Loosens Gag, and the Press Pipes Up, N. Y. Times, Mar. 18, 1990, at 12.

408. Id.

409. Id.

410. Section 47(a) through (e).

411. Id.; See also Silver, Trends in Publication Control: A Statistical Analysis, 100 S. AFR. L. J. 520, 521 (1983); MATHEWS, supra note 7, at 119-124.

412. See MATHEWS, supra note 8, at 120 n.177 (newspapers belonging to the press union not covered).

413. These tables are found in Silver, supra, note 411.

414. Section 9(1)(a), (b).

415. Silver, supra note 411, at 524.

416. Section 9(5).

417. Silver, supra note 411, at 524.

418. MATHEWS, supra note 8, at 120-21 (Section 1 of the Publications Amendment Act 44 of 1979).

419. Id.
420. MATHEWS, supra note 8, at 120-24.
421. L. A. Times, July 30, 1988.
422. Silver, supra note 411, at 525 (Table 3).
423. Id. at 526 (Table 4).
424. Id. at 521.
425. MATHEWS supra note 8, at 124.
426. Silver, supra note 411, at 524 (Table 2).
427. Id. at 525 (Table 3).
428. MATHEWS, supra note 8, at 123 (citing 1983 and 1984 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 208 and 883).
429. HENTOFF, supra note 7, at 268 (referring to the fear invoked in journalists by the wide swath of libel law in the U.S.).
430. Singer & Ludwig, South Africa's Press Restrictions-Effects on Press Coverage and Public Opinion, 51 Pub. OPINION Q., 315.
431. May of 1985 through February of 1986. Id. at 318-319.
432. Id.
433. Id.
434. Singer & Ludwig, supra note 430 at 321.
435. Id. at 322-23.
436. Id. at 319-21.
437. Id. at 321.
438. Id. at 328.
439. Id.
440. Singer & Ludwig, supra note 430, at 333.
441. Id.
442. THE TIMES INDEX 942 (Jan.-Dec. 1987).
443. Singer & Ludwig, supra note 430, at 333.

444. The Times (London), Oct. 9, 1987, at 12.

445. A. S. Mathews, The Media Emergency Regulations 19-20 (1989) (unpublished manuscript).

446. The Times (London), Oct. 22, 1988, at 7.

447. See MATHEWS, supra note 8, at 222-86.

448. K. WOODMAN, MEDIA CONTROL IN IRELAND 1923-1983 210, 229-231 (1985). Woodman summarizes:

[I]t is the unanimous opinion of broadcasters that the information which treats of Northern Ireland subversives, since it will enter the State anyway, should be allowed the freedom of the air if only to ensure that it is subjected to that critical appraisal the Irish have a right to expect from their public service... Rights which atrophy through confinement and disuse are least valuable in recognizing those less obvious dangers to the democratic institutions that have made the struggle to enlist as an independent nation worthwhile. Id. at 230.

449. Id. at 188.

450. Nightline (ABC television broadcast, Feb. 12, 1990) (reporter Jeff Greenfield). See generally Freedom for Mandela, Newsweek, Feb. 19, 1990, at 36 and The Leader No One Knows, Id. at 44.

451. See, WOODMAN, supra note 448, at 229 ("Political censorship is no longer effective when what is denied transmission is available to the Irish viewer at the turn of a dial").

452. See generally MATHEWS, supra note 8; A. S. Mathews, The Newsweek Version of Sabotage, 1988 S. AFR. J. OF CRIM. JUSTICE 175 [hereafter, Mathews, Sabotage]; Adams, Engineering Compliance: The Management of Dissent in South Africa, in LAW AND JUSTICE IN SOUTH AFRICA 173 (J. Hund ed. 1988); and M. Tamarkin, Armed Struggle and Conflict Resolution in Rhodesia, 1974-1979 - Lessons for South Africa (July 1989) (unpublished manuscript).

453. Adams, supra note 456, at 177.

454. Mathews, Sabotage, supra note 452, at 175 ("South African internal security would impress Orwell"): Adams, supra, note 452, at 173-74 (distinguishes Orwellian South Africa as authoritarian-corporate state, using Huxleyan conditioning). South Africa's Pretoria-controlled SABC television network actually held a debate about the analogy of Orwell to state policies. Id. at 185.

455. Adams, supra note 452, at 182.

456. Id. at 174. But see MATHEWS, supra note 8, at 278 (quoting

the Northern Ireland Office, Whitehall, London and the S.A. Institute of Race Relations). Mathews notes that although the deaths from unrest in S.A. were less than those in the much smaller country of Ireland in 1986, the percentage of those deaths caused by security forces in S.A. was more than five times that of Ireland. Id.

457. Id.

458. Id. at 178: Mathews, National Security, supra note 8, at 13.

459. Adams, supra note 452, at 183.

460. Id.

461. Id. at 177-178.

462. F. Baldwin, Due Process and the Exclusionary Rule: Integrity and Justification, 39 U. FLA. L. Rev. 505, 506 (1987) (quoting L. FULLER, THE MORALITY OF LAW 33 (1964)).

463. Id. (citing L. FULLER, THE MORALITY OF LAW 33, 39 (1964)).

464. Id.

465. E. Cameron, G. Marcus & D. van Zyl Smit, The Administration of Justice, Law Reform and Jurisprudence, ANNUAL SURVEY OF SO. AFR. L. 500, 503 (quoting Judge Curlewis, Catholic Bishops Publishing Co. v. The State President, unreported WLD case, Mar. 8, 1988).

466. World News Tonight with Peter Jennings (ABC broadcast, March. 15, 1990).

467. Id.

468. See generally, Baldwin, supra note 2.

469. Id.

470. See generally Lobel, Emergency Power and the Decline of Liberalism, 98 YALE L.JO. 1385 (1989).

471. See, i.e., Korematsu v. United States, 323 U.S. 214 (1944).