

# Wartime Press Freedoms: From the Pentagon Papers to WikiLeaks

Shawn Healy

Resident Scholar and Director of Professional Development

Robert R. McCormick Foundation Civics Program

# Overview: Wartime Press Freedoms

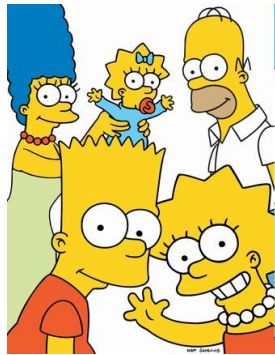
- First Amendment overview: Freedom of speech and press
- Should reporting be limited during times of war?
  - ✓ Historic overview
  - ✓ The modern military-media relationship
  - ✓ Crossing wires, crossing swords: Digital Age challenges
- The special case of WikiLeaks

# First Amendment Overview

- **The State of the First Amendment (2011)**

- ✓ Among survey participants, recall of the five freedoms revealed the following frequencies:

- Speech: 62%
- Religion: 19%
- Press: 17%
- Assembly: 14%
- Petition: 3%



- ✓ Americans increasingly believe that the media are biased in their reporting—66% see bias in the media

- ✓ 75% feel that journalists should be able to keep their sources anonymous, down from 85% in 1997

- ✓ Respondents were asked to identify their most trusted news source:

- TV: 40%
- Newspapers: 21%
- Online news: 16%
- Radio: 12%
- None: 9%

# First Amendment Overview

“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 peaceably to **assemble**, and to **petition** the government for a redress of grievances.”

**THE FIRST AMENDMENT**  
CONGRESS SHALL MAKE NO LAW RESPECT-  
ING 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  
PEACEABLY TO ASSEMBLE, AND TO PETITION THE  
GOVERNMENT FOR A REDRESS OF GRIEVANCES.  
PROTECT THE FIRST AMENDMENT, SUPPORT THE CBLDF

# Freedom of Speech and Press



- Speech and Press Clauses: “Congress shall make no law...abridging...the freedom of speech or of the press...”
- Speech
  - ✓ First protected in the Magna Carta (1215) and the English Bill of Rights (1689)
  - ✓ Appeared in the Massachusetts Body of Liberties (1641)
  - ✓ Mentioned in several state constitutions, and three states recommended inclusion in the Bill of Rights
- Press
  - ✓ Licensing of the press was the norm under colonial legislatures
  - ✓ Seditious libel reigned: Could be convicted for publishing government critiques, and truth was no defense
  - ✓ Virginia the first state to protect press freedoms in its Constitution
  - ✓ More states recommended press freedom for the Bill of Rights than they did speech

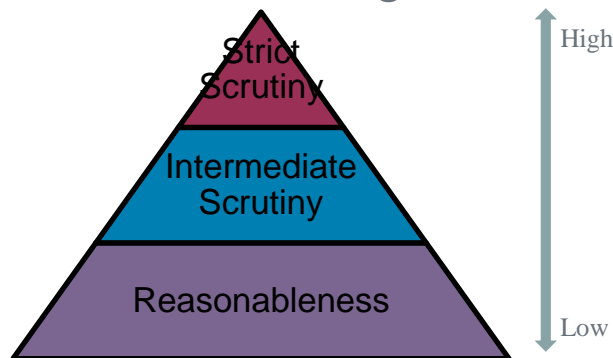
# Freedom of Speech and Press



- Categorical exceptions: Not protected by the First Amendment
  - ✓ Fighting words: Spoken words that instigate violent reactions
    - Controlling case: *Chaplinsky v. New Hampshire* (1942)
  - ✓ Defamation: Actual malice, knowingly false charges, and reckless disregard for the truth
    - Controlling case: *New York Times v. Sullivan* (1964)
  - ✓ Incitement: Imminence between the call for action and the action itself
    - Controlling case: *Brandenburg v. Ohio* (1969)
  - ✓ True Threat: Distinguish true threats from political hyperbole
    - Controlling case: *Watts v. United States* (1969)
  - ✓ Obscenity: Apply three-part *Miller* Test
    - Controlling case: *Miller v. California* (1971)

# Freedom of Speech and Press

- Tiers of constitutional scrutiny
  - ✓ Strict scrutiny: Pure speech
    - Controlling case: *Rosenberger v. Rector and Visitors of the University of Virginia* (1995)
  - ✓ Intermediate scrutiny: Speech plus
    - Controlling case: *United States v. O'Brien* (1968)
  - ✓ Reasonableness: Content-neutral time, place, and manner restrictions
    - Controlling case: *Ward v. Rock Against Racism* (1989)



# Freedom of Speech and Press



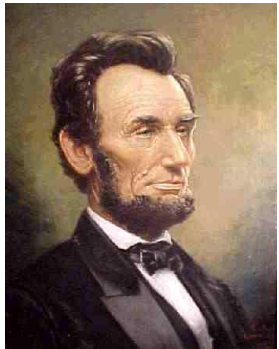
- Prior restraint:
  - ✓ Prohibited with few exceptions
    - Controlling case: *Near v. Minnesota* (1931)
  - ✓ “A form of censorship that allows the government to review the content of printed materials and prevent their publication.”
    - *Encyclopedia of the First Amendment*
  - ✓ British common law generally opposed government licensing and other forms of prior restraint, and this informed the delegates of the Constitutional Convention and adopters of the First Amendment.
  - ✓ The Supreme Court has ruled with strong presumption against government use of prior restraint
  - ✓ The prohibition of prior restraint does not prevent punishment for prosecution after the fact, and protection from prior restraint is not absolute.



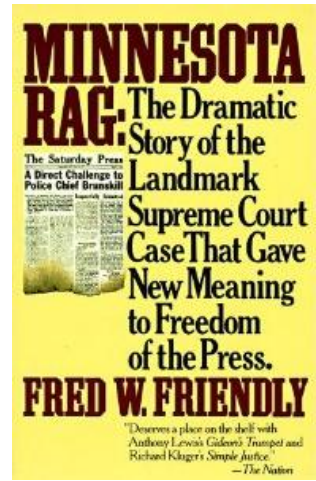
# Should Reporting Be Limited During Times of War?

## Historic Overview:

- During the Civil War, Lincoln used his war powers to shut down or jail employees of nearly a hundred newspapers.
- Under the Sedition Act of 1918, it was illegal to criticize or hamper the World War I effort. Some journalists received stiff fines and prison terms.
- During World War II, Franklin Roosevelt's administration charged the *Tribune* with espionage for its coverage of the Battle of Midway.
- During the Vietnam War, Pentagon employee Daniel Ellsberg leaked top-secret papers to the *New York Times* and *Washington Post*. The government stopped their publication.
- In 2003, TV reporter Geraldo Rivera drew a sand diagram to show U.S. troop positions during the Iraq invasion.



# Should Reporting Be Limited During Times of War?



## Case Law: *Near v. Minnesota* (1931)

**At issue:** Does the Minnesota "gag law" violate the free press provision of the First Amendment?

- “It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion of state action.”
- “In wartime no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops.”

# Should Reporting Be Limited During Times of War?



Case Law: *New York Times v. U.S.* (1971)

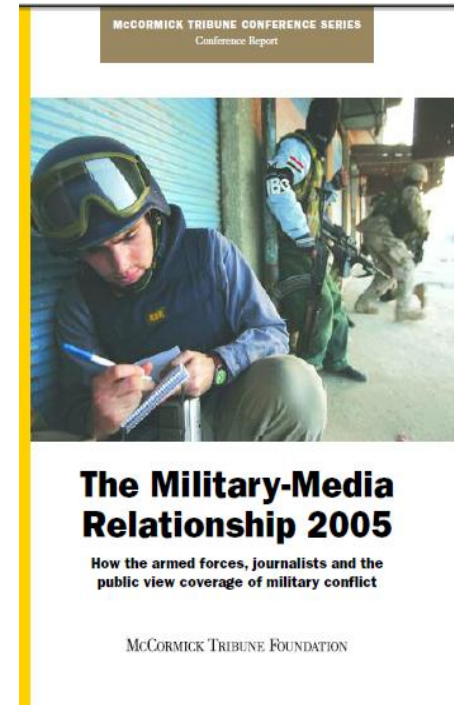
**At issue:** Did the Nixon administration's efforts to prevent the publication of what it termed "classified information" violate the First Amendment?

- In its per curiam opinion the Court held that the government did not overcome the "heavy presumption against" prior restraint of the press in this case.
- Justice Brennan reasoned that since publication would not cause an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was unjustified.

# Should Reporting Be Limited During Times of War?

## The Military Media Relationship:

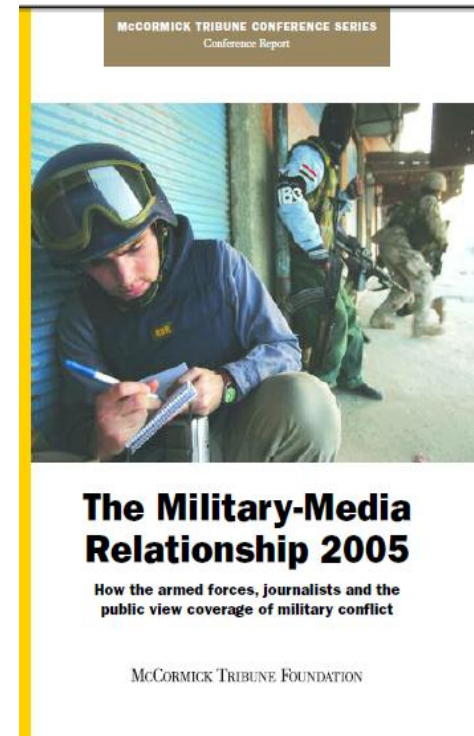
- How to uphold freedom of expression in wartime while at the same time protecting the nation's capacity to fight the war effectively?
- How much should the media know and be able to communicate to the public about battlefield engagements and casualties?
- What kinds of images can the government legitimately prevent being shown out of fear they might 'demoralize' rather than simply inform American citizens?
- How are these boundaries drawn and by whom?
- What are the proper roles of courts, presidents, generals and journalists?



# Should Reporting Be Limited During Times of War?

## The Military Media Relationship:

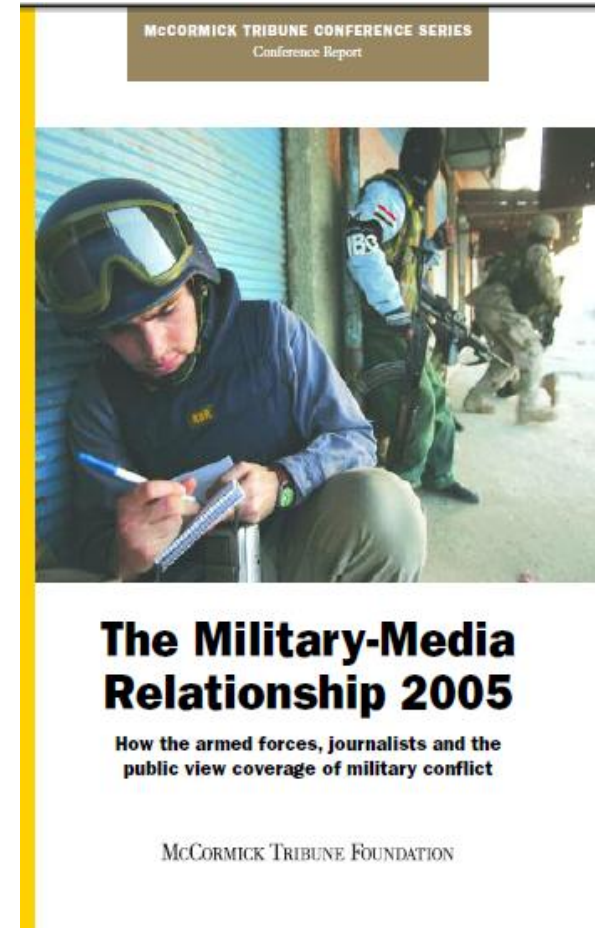
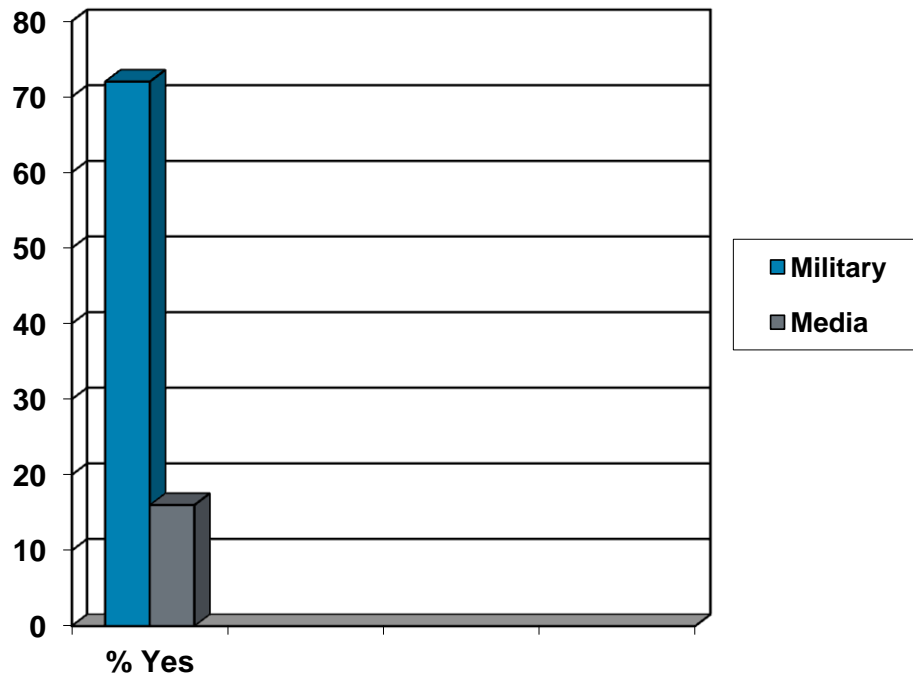
- Conflicts in Afghanistan and Iraq covered exclusively by large news organizations in centralized fashion
- One-dimensional focus on security. Economic, legal and diplomatic efforts are all but ignored
- Easier for reporters to get information in the field overseas than from the Pentagon at home
- Press cannot be a cheerleader, but balance, context, and not undermining the war effort considered media responsibilities





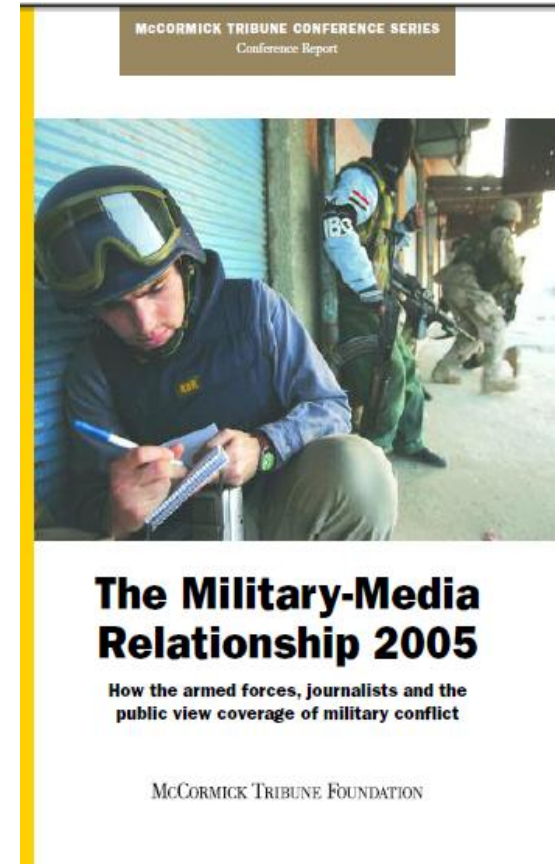
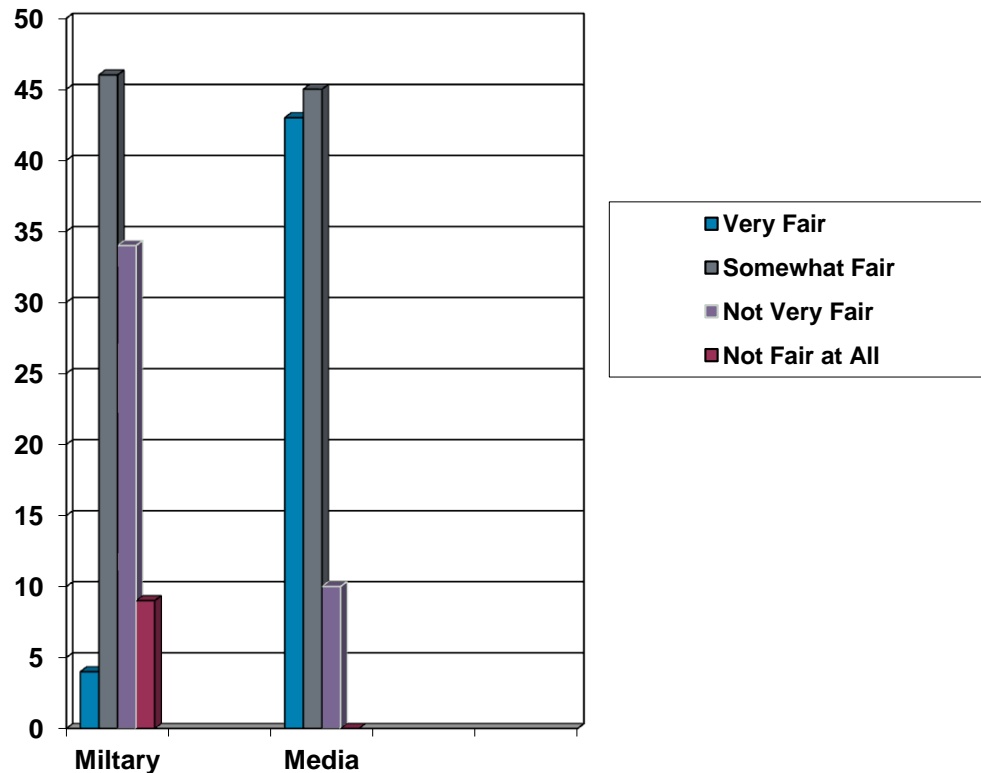
# Should Reporting Be Limited During Times of War?

Do you think media access to military officials and officers is sufficient to cover most military-related stories the public should or want to know about?



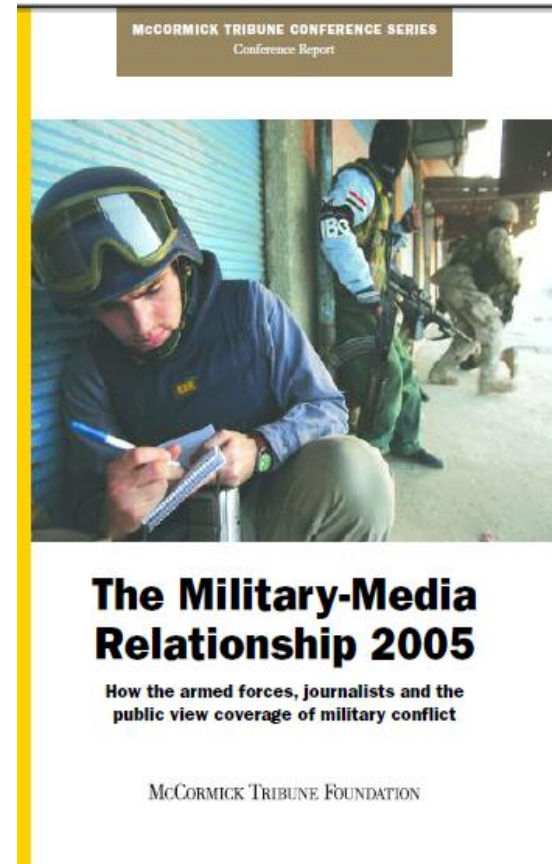
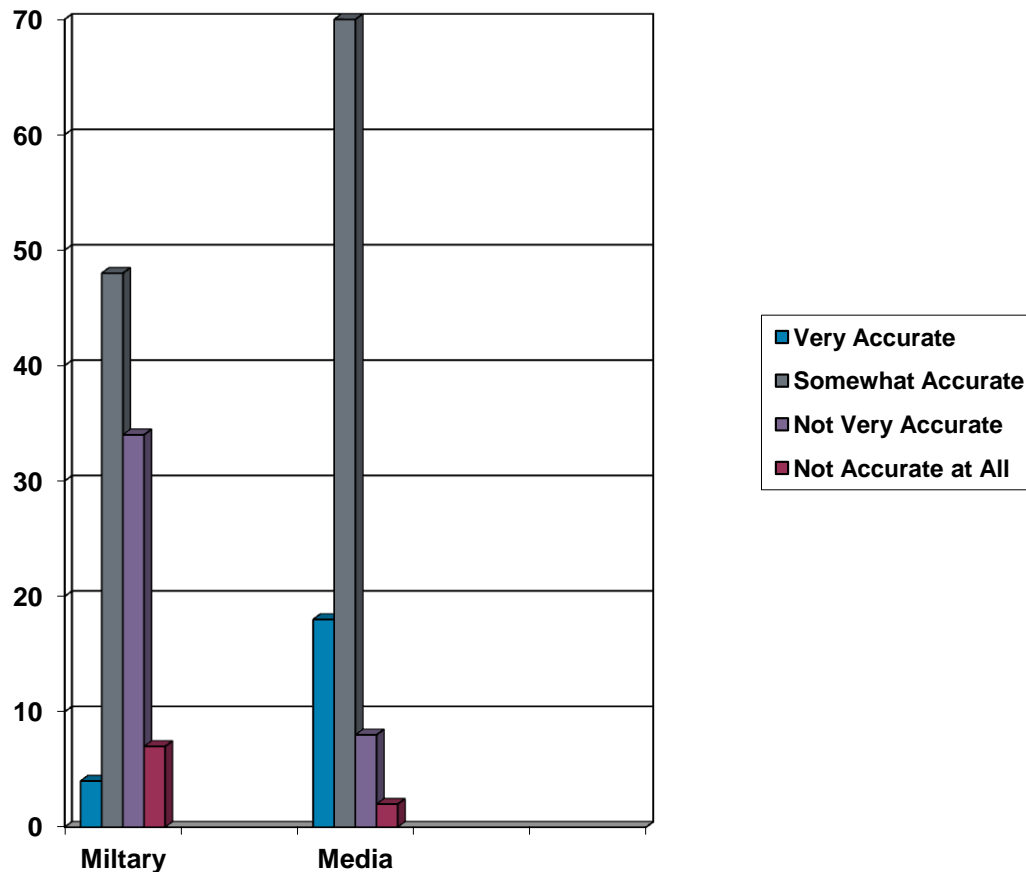
# Should Reporting Be Limited During Times of War?

Overall, how do you rate the fairness of the Iraq War coverage?



# Should Reporting Be Limited During Times of War?

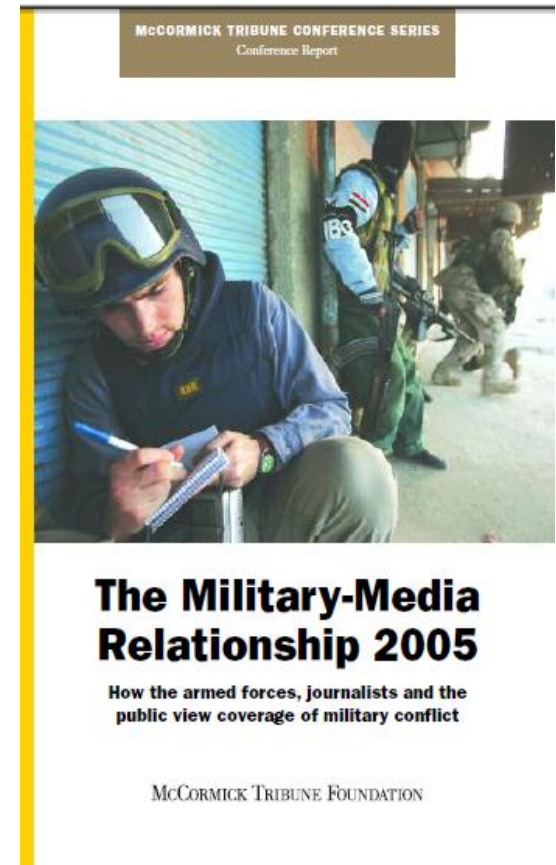
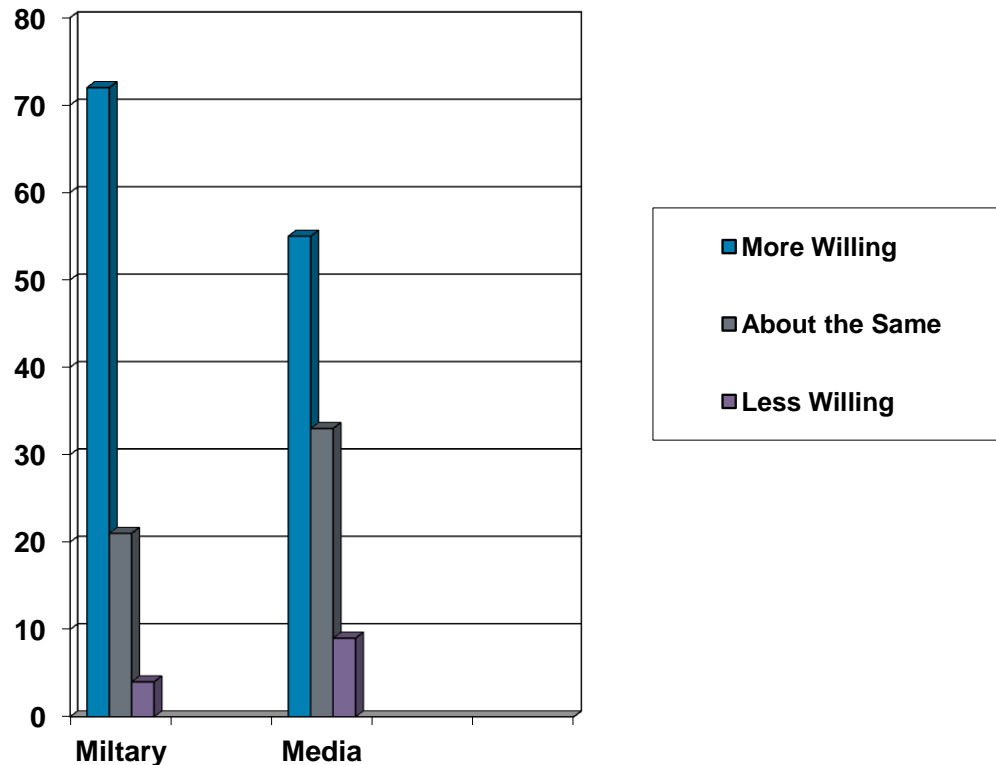
Overall, how do you rate the accuracy of the Iraq War coverage?





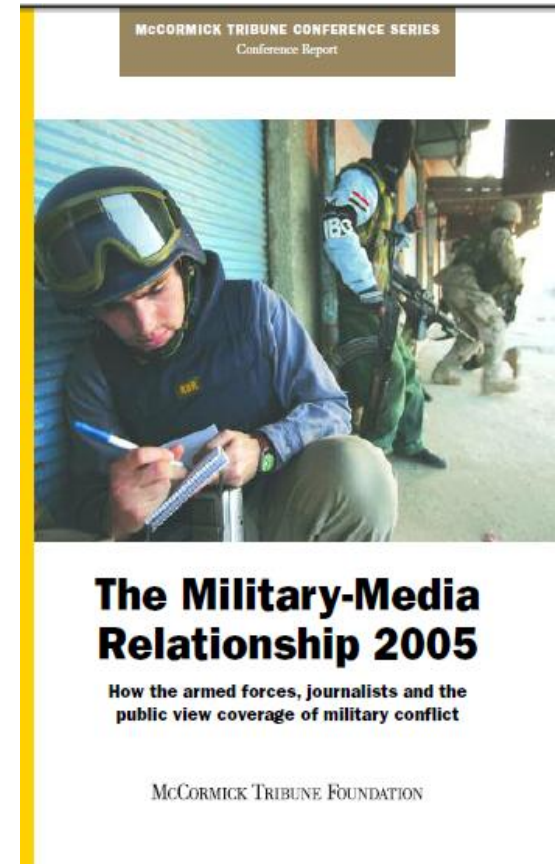
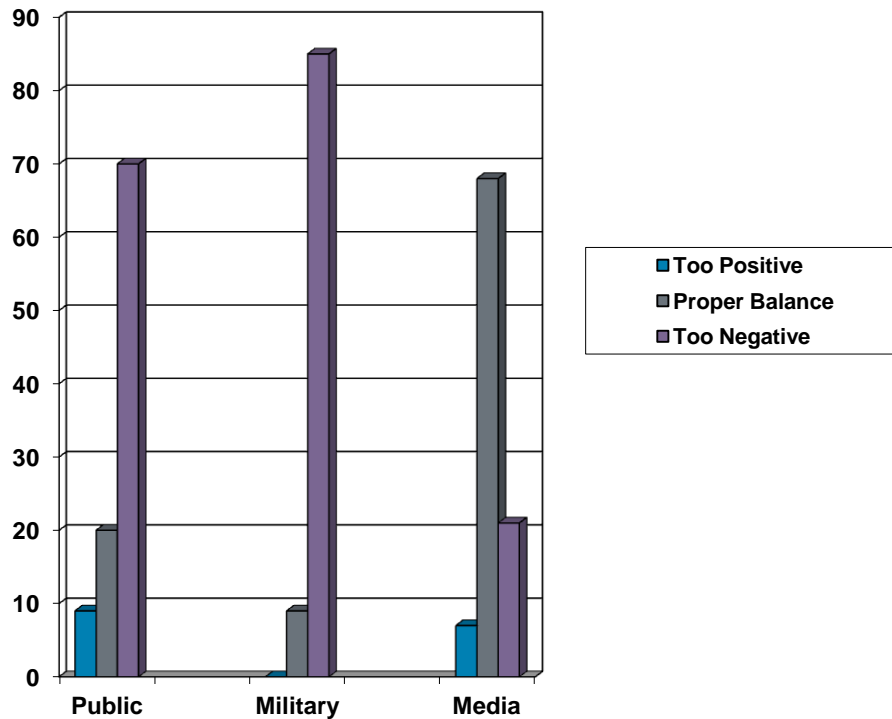
# Should Reporting Be Limited During Times of War?

Compared with 5 or 6 years ago, do you think military officers are more or less willing to speak to the media in wartime?



# Should Reporting Be Limited During Times of War?

Which do you think is the most accurate characterization of the news media's coverage of military and national security issues?



# Should Reporting Be Limited During Times of War?



## Modern Manifestations:

- Pete Williams: On the battlefield during war time, the interests of the press are not paramount.
- Embedded reporters: follow and live with a single military unit for the duration of their assignment.
- Major networks also assign reporters to cover wars from a broader, independent perspective, although their numbers are dwindling.
- There is a need to keep information flowing from the battlefield in order to maintain public support for the war.
- Reporters play an important role in asking the tough questions that hold the military accountable.
- Williams advocates military review of wartime correspondence given the commanders' obligations to protect the lives of men and women in uniform.
- Most reporters do not have previous military experience, and they are transported to conflict locations in cooperation with the military, so prior review is a logical extension of this partnership.

# Should Reporting Be Limited During Times of War?



## Modern Manifestations:

- Victoria Clarke: During her tenure at the Pentagon, she learned more from the reporters stationed there than anyone else.
- Clarke pioneered embedding during her tenure. She argued that reporters covered conflict since the Civil War, but her contribution was quantitatively and qualitatively different.
- Through embedding, Clarke hoped that battlefield truths would emerge, and that the public could handle them. This she felt she owed the troops who placed their lives on the line in battle.
- The effectiveness of embedding is still being measured by the war colleges, but she claimed that the military brass held “healthy and enlightened” attitudes toward the press upon her departure.
- The number of embedded journalists fell from roughly 700 in 2003 to 25 two years later.

# Should Reporting Be Limited During Times of War?

## Crossing Wires, Crossing Swords:

- During the Civil War, General Robert E. Lee read days-old Northern newspapers to track troop movements that could take weeks. Information today travels 3.5 million times faster.
- The 24-hour news cycle places new demands on both the military and media to provide battle-related information at the same time staff and resources are being cut back or eliminated.
- Real time shots and stories are easily produced at lower costs
- The Pentagon itself has its own television channel, mostly for the purposes of internal communication.
- News organizations are increasingly using “stringers” to cover international conflict. This may undermine accuracy and objectivity.
- The military seeks positive coverage through strategic communication.

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# Should Reporting Be Limited During Times of War?

## Crossing Wires, Crossing Swords (cont):

- There is often a gap between when the media receives a tip regarding battlefield activity and when it is confirmed by military officials. Repeated denials before confirmation weaken this relationship.
- Embedding operations have “dried up” due to cost and danger.
- Given the accessibility of the Internet and the ability to misrepresent facts and inject bias, the mainstream media has an even greater responsibility to be fair and accurate.
- Inevitable tension between the military and the media centers on the tendency for the former to exert control while the latter relies on the lack of it to obtain information.
- This can be offset with speedy delivery of information from the military to the media and greater awareness of the military and its operations by the media.


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# The Special Case of WikiLeaks

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"COULD BECOME AS IMPORTANT A JOURNALISTIC TOOL AS THE FREEDOM OF INFORMATION ACT." -  
TIME MAGAZINE

WikiLeaks is a non-profit media organization dedicated to bringing important news and information to the public. We provide an innovative, secure and anonymous way for independent sources around the world to leak information to our journalists. We publish material of ethical, political and historical significance while keeping the identity of our sources anonymous, thus providing a universal way for the revealing of suppressed and censored injustices.

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2011-04-25

# The Special Case of WikiLeaks

- How Wikileaks works: “Like other media outlets conducting investigative journalism, we accept (but do not solicit) anonymous sources of information. Unlike other outlets, we provide a high security anonymous drop box fortified by cutting-edge cryptographic information technologies.”
- Why Wikileaks is important: “In the years leading up to the founding of WikiLeaks, we observed the world’s publishing media becoming less independent and far less willing to ask the hard questions of government, corporations and other institutions. We believed this needed to change.”
- Accuracy: Forensic document analysis and traditional investigative reporting
- Anonymity: “As far as we can ascertain, WikiLeaks has never revealed any of its sources.”
- People: Journalists, software programmers, network engineers, mathematicians





# The Special Case of WikiLeaks



- Information is power: In the past 4 years, Wikileaks has ...
  - ✓ Played some role in deciding the 2007 election in Kenya
  - ✓ Fueled the anger that brought down the government in Tunisia
  - ✓ Divulged the membership rolls of a neo Nazi organization in Great Britain
  - ✓ Published secret documents related to the Church of Scientology
- Implicating the U.S.: Since last April, Wikileaks released...
  - ✓ A video of an Apache helicopter gunning down suspected insurgents in Baghdad
  - ✓ 76,000 classified field reports of U.S. operations in Afghanistan revealing chaos and a bleak view of the prospects of success
  - ✓ 400,000 classified documents showing civilians deaths in Iraq much higher than reported by Pentagon
  - ✓ Sensitive diplomatic State Department cables:
    - Arabs leaders lobbying U.S. to attack Iran
    - State Department collecting secret intelligence on world leaders at the U.N.

# The Special Case of Wikileaks

- State Department cables allegedly provided by Private First Class Bradley Manning
  - ✓ Manning a low-level intelligence analyst in Iraq
  - ✓ Accused of accessed a network open to 500 others and copying classified files
- Prosecution:
  - ✓ U.S. Attorney General Eric Holder has condemned the release of the State Department cables: “There is a predicate for us to believe that crimes have been committed here”
  - ✓ Justice Department conducting a criminal investigation
  - ✓ Espionage Act of 1917 as a vehicle to prosecute Assange and extradite him to U.S.
    - Prohibits retaining information, recording pictures, or copying descriptions of any information related to the national defense with the intent or reason to believe that the information may harm the U.S. to benefit a foreign nation
- Parallels to Daniel Ellsberg and the Pentagon Papers?
  - ✓ 60 Minutes [interview clip](#)



# The Special Case of WikiLeaks

- “A Clear Danger to Free Speech”
  - ✓ Geoffrey Stone writes in response to a proposed shield bill which would amend the Espionage Act of 1917
  - ✓ Criminalizes dissemination “in any manner prejudicial to the U.S.” any classified information “concerning the human intelligence activities of the U.S.”
  - ✓ Constitutional as applied to government officials, but not those who would publish or circulate classified information after the fact
  - ✓ Government transparency not required by the First Amendment, but government cannot suppress free speech of others when it fails to keep secrets



- The information may be valuable to the public (i.e., no WMD in Iraq)
- Government has inherent tendency to overstate the need for secrecy (recommends age-old “clear and present danger” standard)
- First Amendment allows prior restraints on speech only as last resort

# The Special Case of WikiLeaks



- “Why Wikileaks Is Unlike the Pentagon Papers”
  - ✓ Floyd Abrams, who represented the New York Times in the Pentagon Papers case, differentiates between Ellsberg and Assange
  - ✓ Pentagon Papers a discrete topic revealing “duplicity” of leaders related to our nation’s involvement in Vietnam
  - ✓ Wikileaks reveals secret information for this purpose alone
    - Has served public interest at times, but caused great harm in other instances
  - ✓ Ellsberg saw the need for government secrecy and withheld 4 volumes of the Pentagon Papers related to U.S. diplomatic efforts to end the war
  - ✓ Wikileaks writes no articles and provides no context; does little more than issue press releases and data dumps
  - ✓ Assange will likely escape punishment under First Amendment auspices unless it can be proven that he conspired with Manning to steal classified government documents
  - ✓ “Mr. Assange is no boon to American journalists”
    - Shield law doomed
    - More speech-restricting legal decisions and legislation may be in tow

# Wartime Press Freedoms

Questions?