

D.C. Circuit Rules That Reporters Have No Constitutional Right of Access to Military Operations

The U.S. Court of Appeals for the D.C. Circuit ruled on Feb. 3, 2004, that reporters do not have a constitutional right to be embedded with U.S. troops during combat. That case was brought before the court by *Hustler* publisher Larry Flynt.

Flynt has been a player on the stage of First Amendment rights of access for the media for a number of years. He had first brought a lawsuit seeking access to military operations during the invasion of Granada in 1983. In that case, *Flynt v. Weinberger*, 246 U.S. App. D. C. 40 (D.C. Cir. 1985), federal judges ruled in a *per curiam* opinion that different war circumstances require different restrictions on media access. Furthermore, these conflicts are so short in duration that media organizations must move quickly to initiate a lawsuit, or else the question before the court becomes moot.

Flynt's most recent case, *Flynt v. Rumsfeld*, 2004 U.S. App. Lexis 1561 (D.C. Cir. 2004), began when *Hustler* magazine publisher Flynt asked the military to allow reporters from his magazine to follow troops fighting the war against terrorism in Afghanistan during the fall of 2001. Flynt had written a letter to Victoria Clarke in her capacity as Assistant Secretary of Defense for Public Affairs, requesting that *Hustler* correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom."

When Clarke did not respond after two weeks, Flynt wrote to her again. Three days later, Clarke sent Flynt a fax stating that there were only a small number of troops then located in Afghanistan and "the highly dangerous and unique nature of their work makes it very difficult to embed media" with the ground troops currently stationed there. But Clarke wrote that "scores of reporters and photographers have covered [air] strikes, witnessed humanitarian drops and interviewed dozens of [soldiers]." Clarke provided Flynt with information necessary to contact the Public Affairs Officer (PAO) for the Fifth Fleet so that Flynt could arrange similar access for correspondents from *Hustler*.

Rather than contacting the Fifth Fleet's PAO, Flynt filed suit, then wrote to Clarke saying that his request did not take into consideration the kind of access

that would have been available through those channels. “Rather,” Flynt wrote, “I specifically requested reporter access to actual battlefield combat activities.” In further correspondence between Flynt and Clarke, Flynt was provided with an “extensive” list of contact persons and informed that Department of Defense (DoD) decisions regarding media access were controlled by DoD Directive 5122.5. One portion of Directive 5122.5, Enclosure 3, negotiated between the media and the Pentagon after the Persian Gulf War in 1992, states that “open and independent reporting shall be the principal means of coverage of U.S. military operations,” and allows for media pools, but states that pools are not to be the “standard means of covering U.S. military operations.” Enclosure 3 further states that “field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible” but does include the caveat that special operations may limit access in some cases.”

In Flynt’s initial complaint, filed Nov. 16, 2001 in federal District Court in the District of Columbia, he challenged Directive 5122.5 and Enclosure 3 in part on the grounds that enforcement of the policies violated the media’s historical and constitutional rights of access to the battlefield, and that enforcement of the policies constituted a content-based form of prior restraint. The District Court denied Flynt’s motion for a preliminary injunction in *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174 (D.D.C. 2002), stating that the rapidly changing situation with the war in Afghanistan “would have to await the development of a fuller record.

On Jan. 17, 2002, Flynt filed an amended complaint with the D.C. District Court, saying in part that the First Amendment guaranteed a reporter’s access to the battlefield and that Directive 5122.5 does not recognize that right. But in May 2002, David Buchbinder, a reporter for *Hustler*, arrived in Afghanistan. Buchbinder subsequently filed several stories for the magazine, including one written after he was allowed to accompany troops on a mission searching for al-Qaida operatives.

The D.C. District Court rejected Flynt’s additional complaints in *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003), stating that there was no record that the DoD ever made a final decision regarding Flynt’s request, and that Flynt could not prove that he had suffered “concrete injury” as a result of a lack of final decision. Flynt appealed to the D.C. Circuit Appeals court.

Writing for a unanimous three-judge panel, Judge David Sentelle affirmed the District Court’s ruling, saying that “The Government has no rule — at least as far as Flynt has made known to us — that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably

purchase a vehicle, equip it with necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DoD rule.” But Sentelle concluded that there is no First Amendment right requiring the military to provide the media with access to combat. “There is nothing,” Sentelle wrote, “we have found in the Constitution, American history, or our case law to support this claim.”

Flynt, however, argued that the right is supported by the U.S. Supreme Court’s decisions in *New York Times v. United States*, 403 U.S. 713 (1971) and *Mills v. Alabama*, 384 U.S. 214 (1966), both of which centered on the importance of access to government in order to cultivate an informed public. But Sentelle disagreed, stating, “These cases say nothing about media access to U.S. combat units engaged in battle.”

Flynt also cited *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), saying that the right of the press to court proceedings also applied to access to battlefields. Again Sentelle disagreed, stating, “[T]he history of press access to military units is not remotely as extensive as public access to criminal trials. . . . No comparable history exists to support a right of media access to U.S. military units in combat. . . . Beginning with the American Revolution, war reporting was primarily in the form of private letters from soldiers and official reports that were sent home and published in newspapers. Indeed, the rise of the professional war correspondent did not begin until at least the time of the Civil War. In addition it is not entirely clear that in any of our early wars the media was actively embedded into units, which is the right appellants seek.”

In a story posted by the Reporters Committee for Freedom of the Press, Eugene Fidell, president of the National Institute of Military Justice is quoted as saying, “I think Flynt’s lawsuit was unrealistic. [Sentelle] made it clear that the case would have been different if *Hustler* had been treated differently from other news outlets. It’s a signal to the Pentagon, if one was needed, that it cannot play favorites.” Fidell further commented that the “media will likely always be at the mercy of the Pentagon.” That story is available online at www.rcfp.org/news/2004/0205flyntv.html.

The Flynt case was not the first time Sentelle handed down a ruling hostile to the concept of the First Amendment rights of access. He wrote for a unanimous three-judge panel in *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), that exemptions to the federal Freedom of Information Act (FOIA) which allow the government to withhold the names of detainees taken into custody following the September 11, 2001 terrorist attacks

do not violate the Constitution. (See “*Center for National Security Studies v. Department of Justice*” in the Summer 2003 issue of the *Silha Bulletin*.)

No other news organization joined Flynt in his lawsuit. At the time the *Bulletin* went to press, it was not known whether Flynt would appeal the decision to the U.S. Supreme Court.

— Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor