Introduction

At the Naval War College’s 2006 Global Legal Challenges conference, I sat as a member of the Public Perceptions Under the Law panel. The panel was charged with the following questions:

1. How does the media shape public perceptions of the law? Does the media generally shape such public perceptions in an accurate way? Does the media understand the law well enough to accurately inform the public of legal issues—and the related law—surrounding such issues? Does the media have an obligation to understand—and then provide an accurate recitation/analysis of—such law? Is there any responsibility on the part of the government to “educate” the media concerning legal issues and the law?

2. Do public perceptions of the law ever serve to help shape national policy decisions? Should policy makers be attuned to the public’s perception of the law affecting a particular legal issue? Or, can policy makers effect...
decisions on the basis that the "national interests" concerns of the American populace will often outweigh its concern as to whether certain US actions are—or are not—lawful?

3. Is the general public generally well or ill informed on legal issues? Should the government play an active role in "educating" the public on such issues through the media? For example, should the government act to correct an incorrect media analysis of the law affecting a current event? Does the government itself have a responsibility to accurately reflect the law? That is, to what extent should the government advocate a particular analysis of a legal issue when there are clearly differing views of the applicable law? Is the American public's view of respect for the law affected by its perception of its elected representatives' "respect" for such law?

4. What role do other "players" in the international community play in shaping the public's view of the law, that is, the Arab, the Israeli, the British, the Chinese, the Russian and Korean street? How?

5. What role should academia play in "educating" the public on the law? Should academia see itself as a counterweight to any governmental attempt to "shape" the public's perception of the law? Is this a productive—or divisive—role that academia might play?

My article answers these provocative questions in four parts: The Media—Profession or Business?; Government and Media: Public Law Diplomacy—Facts and Fictions; The International Community and the Public: The Image Struggle; and The Academic Community—The Proper Role? My goal is to provide perspective on the issues and raise some provocative points for future discussion and analysis.

The Media—Profession or Business?

The media is a critical shaper of public opinion about the law. But the definition of media has evolved. In the modern era we have become inundated with law and media from general press publications, specialized press publications, general television shows, Court TV, movie documentaries, "mockumentaries," Hollywood movies, fiction thrillers, news magazine shows (e.g., Frontline), websites and, the newest, the blogosphere. Since legal opinions on complicated subjects can easily be 50 to 100 pages in length, the logic of legal opinions are hard to summarize for the general public. In the end, the final result of some cases is clear—guilty or not
guilty, constitutional or not constitutional. Many other cases, however, are much more subtle and deal with the nuances of congressional fact-finding and the deference owed to judicial review. These cases construe the inner workings of separation of power, federalism and/or political power. Easy and facile summaries usually distort the meanings. Increasingly fact and fiction, entertainment and education merge, and the lines between advocacy and information blend and blur.

In many cases involving the Supreme Court, there may be vigorous dissents and multiple concurrences in the majority. Sorting out the holding or the center of gravity of the logic of the analysis can be challenging. Television commentators are usually given two or three minutes to explain the case. Print media has more space, but, unless the case addresses a “high-profile” issue, there is immediate coverage the day the opinion is handed down, and then little follow up editorial discussion. Perhaps the Sunday papers will have a more in-depth analysis or the Sunday talk shows will take up the issue. Although law reviews remain the serious vehicle for the legal academic community, their style and format condemn them to the rarified communities of law students and professors.

Occasionally a “news magazine show,” e.g., 60 Minutes, will do an extended 20-minute segment. These shows will help shape the “general” sense of the meaning of the case or issue. Increasingly, websites and blog pages have become, by default, the place of extended commentary, analysis and focus. But this, in the end, is a limited conversation among a select group of the “legal elite chattering class.”

What is the media’s obligation or responsibility? To my mind, this is a tricky question. As a first proposition, and at the risk of being overly controversial, let us conceive of the media as a business, not a profession. Reporters, journalists and producers work for corporations that need to sell their products. Print media is under severe attack by the new emerging technologies. Print reporters for national papers, magazines, blogs and journals have gained personal reputations and followings. Some media or commentators claim to be “neutral” in their reporting and analysis; others clearly reflect a bias or viewpoint and write with a “spin,” e.g., “Activist liberal judges are rewriting the Constitution and should be impeached.” Particular commentators stand out and have become “opinion makers.” Their assessments carry weight, and often in conversation one notes the dialogue: “Did you see X’s (column, commentary or blog)? Do you agree?” Their influence turns on a number of factors—quality of analysis, accuracy in reporting, position in the media, insightfulness and clever commentary. The marketplace determines their influence; some markets prefer reinforcement, others accuracy and some satire, e.g., The Daily Show.

Rather than a “profession,” however, the media are more akin to skilled artisans, writers and performers commenting on the law and legal events, giving
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perspectives and views. Although there is some distinction between the “op-ed” section and “news” sections of the media, increasingly the marketplace is eroding what once was an arguable separation. The obligation of the media is to “inform.” There is no constitutional or statutory requirement for “accuracy or analysis.” Reporters are not sanctioned or regulated by the State and are not disbarred from the profession—no one can arrest them for practicing without a license. In fact, the First Amendment protects the media/press function from the preying regulatory interests of Congress:

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.

Both rumor and fact are protected by the speech and press clauses. Lawyers and doctors have no such protection—imagine if they did? Albeit there are libel suits, but for public figures the bar is high. The concept of “if it bleeds, it leads” is alive and well in the United States. Moreover, US news and commentary crowds out news from other parts of the world.

War correspondents have a particular challenge. Reporting the truth may damage the war effort. Revealing military mistakes undermines confidence in the overall ability of US forces. Yet once embedded with the troops, the identification with the effort and the fact that the troops are protecting the reporter has to have an effect. Giving the “soda straw” perspective is powerful, immediate and visceral, but is it relevant to the grand campaign? Finally, a hard professional question for the US media is the following hypothetical. Imagine a situation whereby Osama bin Laden contacts a US reporter and offers an exclusive interview to tell his side of the story in a third country location—not in the United States or in Iraq. Would a US reporter contact the military to tell of the offer? Would the US reporter agree to have a “global positioning” chip embedded in or on his person? Would a foreign journalist, offered the same opportunity, make the same choices as the US journalist? Are US reporters reporters, US nationals or professionals?

Government and Media: Public Law Diplomacy—Facts and Fictions

Faced with a media that is a business and a First Amendment that protects the informing function, broadly defined, how should a government respond? What is the government’s role in the public perception of the law? Should the government play an active role in “educating” the public on such issues through the media? For
example, should the government act to correct an incorrect media analysis of the law affecting a current event? What is the appropriate role for the government in responding to the shaping of the legal message for the public?

First, the concept of government must be defined. Our government is composed of the executive, legislative and judicial branches. Historically, the federal judicial branch has not involved itself in public information or public diplomacy campaigns. State judges, some of whom compete for public office, have been more “active” in explaining themselves during election periods. US federal judges, however, have been unique in the restraint they have shown as controversy mounts about the role of federal judges or the interpretation of an opinion. Although judges have written books, articles and law reviews, they rarely consent to be interviewed and refuse to comment on current cases. Often is heard the refrain, “The case speaks for itself.” This is not true in all legal jurisdictions. In Canada, for example, the Administrative Assistant to the Chief Justice will hold press conferences to explain the meaning of a case recently handed down. This would be unprecedented in the US federal system.

Judicial independence is protected by bar associations, nongovernmental organizations, think tanks and law schools speaking on behalf of the judiciary. In fact, attacking judges’ independence has been a recurring historical phenomenon in the United States and public opinion heretofore has been mobilized to prevent other parts of the government from disciplining the courts. The defeat of the proposed Franklin Delano Roosevelt “court packing” plan in the 1930s resulted in even more independence being granted to the judiciary.1 Prior to the failed plan, the judiciary submitted its budget through the Department of Justice and the Attorney General of the United States. Once the plan was defeated, Congress passed legislation so that the judiciary submits its budget independently and directly to Congress through the Office of Management and Budget.

This leaves the executive and the legislative branches. It is often the case that the government is divided, with one party controlling the presidency and the other controlling one or both houses. The legislature, with its power to hold public hearings, can address judicial opinions directly with extensive deliberations. Scores of witnesses—experts, pundits and academics—can be called to testify even under oath and render their opinions about critical legal issues. A legislative record is created, and these proceedings are covered by the media and commented upon. Virtual media frenzies can be created with daily interviews, stories and gavel-to-gavel coverage of high-interest committee hearings.

Senators and members of the House of Representatives have enormous power to shape the public debate through this process. The legislature can fill the public space with interviews, studies and research papers and conduct behind-the-scenes
lobbying and negotiating with the executive branch. In fact, members of the executive branch can be subpoenaed and forced to testify about events, positions and views. Although the President can invoke executive privilege, the Congress, public and media carefully scrutinize such tactics.

The executive has an enormous array of tools at its disposal to "spin" legal issues and positions taken by the President. It is now a well-established Sunday morning ritual to have the President's men and women fan out across the talk shows with the same song sheet and present the White House position. The President's press conferences and ability to address the nation from the Oval Office, to "go directly" to the people over the heads of the media, is a powerful tool to influence the debate on legal policy issues. Pronouncements on legal issues by the President carry significant weight since it is assumed the leading legal minds of the administration have researched those issues and support the positions being taken.

Recently the prosecution of "leaks" of even high-ranking government officials and the subpoenaing of reporters by US attorneys for the identity of sources have demonstrated a new weapon by the executive to control the flow of information. The revelation by syndicated columnist Robert Novak of Valerie Plame Wilson as an undercover CIA officer, and the subsequent investigation by the US Attorney for the Northern District of Illinois, Patrick J. Fitzgerald, involving I. Lewis "Scooter" Libby, Vice President Dick Cheney's former chief of staff and national security adviser, and the holding of Judith Miller of the New York Times for contempt in not revealing her source is clear evidence of the executive's power to shape the terrain for the flow of information.

Moreover, the prosecution of the American Israel Public Affairs Committee's (AIPAC) director of foreign policy, Steve Rosen, and an Iran specialist, Keith Weissman, in addition to Lawrence Franklin, an Iran analyst at the Department of Defense (DoD), will be the first time the federal government has charged two private citizens with leaking State secrets. According to the indictment, Rosen and Weissman repeatedly sought and received sensitive information, both classified and unclassified, and then passed it on to others in order to advance their policy agenda. In the case, it is alleged that Rosen and Weissman received the information from a DoD official, Franklin, who wanted the information passed on to other officials. For some legal experts, the prosecution threatens political and press freedom by making the flow of information and ideas a crime. Federal prosecutors are using the Espionage Act for the first time against Americans who are not government officials, do not have security clearances and, by all indications, are not a part of a foreign spy operation. The prosecution of the strategic leak whereby one part of the executive charges another part of the executive raises the question of who is using whom in the process of shaping opinion.
The press and the legal communities are carefully watching these cases to see how the courts will strike the balance between leaks, information flow, national security, the First Amendment and the right to know. The resolution will help shape the debate for the future.

**The International Community and the Public: The Image Struggle**

What role do other “players” in the international community have in shaping the public’s view of the law—that is, the Arab, the Israeli, the British, the Chinese, the Russian and Korean street? The issue of the public is best understood in the context of public diplomacy to include the several publics involved, for example, in the War on Terrorism (US, European, Afghani, Iraqi, other Middle Eastern). Since 9/11, the US public’s approval rating for the Iraqi conflict has steadily trended downward from 90% to about 40%. The world media are central to shaping public perceptions, but the expectation that the media will simply be “fair” is misplaced. How much the US public is affected by foreign press is unclear. *Al Jazeera* loops pictures of noncombatant Palestinians being killed by Israeli forces and then cuts to US forces in Iraq and noncombatant Iraqi corpses. The number of Iraqi dead is still not fully reported in the US media, but the world community opposed to the war focuses on the civilian casualties. The world media approaches the subject with its own views and that is the way it is and should be.

Covering the war by leaving Baghdad’s Green Zone is a dangerous enterprise. According to *Reporters Without Borders*, the war in Iraq has proved to be the deadliest for journalists since World War II. As of November 2006, a total of 135 journalists and media assistants have been killed in Iraq since the war began on March 20, 2003. This is more than the number killed during 20 years of war in Vietnam or the civil war in Algeria. Iraq is also one of the world’s biggest marketplaces for hostages, with 38 journalists kidnapped in three years. Five of them were executed. Three are still being held by their abductors. Around 63 journalists were killed in Vietnam during the 20 years from 1955 to 1975. A total of 49 media professionals were killed in the course of their work during the war in the former Yugoslavia from 1991 to 1995. During the civil war in Algeria from 1993 to 1996, 77 journalists and media assistants were killed. 2

One can have only admiration and deep respect for those reporters and commentators willing to sacrifice their lives to tell the story of Iraq. Informing the public accurately on legal issues emanating from the conflict is even more problematic, especially given the growing gap between US and European views on relevant international law questions. The gap is largely a topic of conversation among elites, however, and the participation of the media and the public is not central. The 2006
US election demonstrates, however, that the status of the war affected the American people and coverage and commentary was critical.

But there are critical cultural differences between the United States and the world. Europe, for example, believes that the death penalty is a violation of human rights while the United States and the Supreme Court hold that the death penalty is part of US culture and heritage. In this sense, “soft power,” as understood by Joseph Nye, is not effective if the message runs counter to world opinion.

Legal commentators are a new, vibrant phenomenon; they and other shapers of public perceptions are delivering information very rapidly and in ever-new ways technologically. Commentators on the blogosphere now have tremendous power, as do the dominant images that ultimately become adopted as emblems of a conflict in the public consciousness. Which picture will be the iconic emblem of the war—the statue of Saddam Hussein coming down? Or the hooded detainee from Abu Ghraib? Or the pictures of the long lines of a free and democratic Iraq voting?

For Vietnam, the pictures of Saigon police chief Nguyen Ngoc Loan’s raised pistol to the temple of a suspect and of the young girl, Kim Phuc, who ran naked from the napalm attack on her village became the public’s images of the war frozen in the minds of the US population.

These pictures of Vietnam captured what appeared to be violations of international law, and became metaphors, right or wrong, for the war. Reality may be very different from the image or perception. Recently, Dominic Johnson and Dominic Tierney have argued that the Tet offensive of January 1968 was actually an unmilitated disaster for the communists (no targets were held and approximately 40,000 Vietcong were killed), but the attack was viewed as a defeat for the United States due to the previous overblown expectations of public opinion that victory was near following President Johnson’s expansive rhetoric before the offensive, the fact the US embassy was placed under direct fire, and the way the media portrayed the offensive and the Vietcong resurgence. The fog of battle can cloud press coverage and portrayal. As has often been noted, truth is the first casualty of war. Perception is critical. When the stakes are high, however, and pictures and facts of casualties contradict the government’s portrayal of reality, the public’s mood can swing dramatically, particularly in election season.

The Academic Community—The Proper Role?

What role should academia play in educating the public on the law? Should academia see itself as a counterweight to any governmental attempt to shape the public’s perception of the law? Is this a productive—or divisive—role that academia might play?
The academic role in educating the public is often equivocal: the academic search for long-term truths and guiding principles does not often yield information that readily impacts public perceptions. Increasingly, academics are flooding the airwaves, blogs and documentaries, and giving on-the-spot commentary. The O.J. Simpson trial began a trend that has continued in force. From the perspective of John Stuart Mill, this is all good—the more speech in a democracy the better. Let the marketplace of ideas sort out the cacophony of voices. Often the same “usual suspects” show up for the pithy quote in the article by the well-known journalist or commentator. (I must confess to pleading guilty on this charge.) Other academics have chosen to start their own blogs where they keep a running commentary on the legal issues that fall under their expertise. It is only a question of time before the Supreme Court cites a blog as a source of authority for an opinion.

Independence and tenure give academia a special voice in the legal debates. When the legal community uniformly disagrees with the government’s position, it has an impact on the public’s sense of propriety. How much impact is unclear. Moreover, the most significant question is what effect the community has on the court deciding the issues. Are judges or justices swayed by *amicus* briefs from respected members of the legal community overwhelmingly agreeing on a position? More often than not, the community will be divided, with respected voices on both sides of the “vs.” The judge’s own independence is the final arbiter, not the academic community. The academic community acts more like a searchlight illuminating the different paths. The court must choose the route, and then be held responsible.

**Conclusion**

So where does this leave the debate of national security, media and the government? Piercing the fog of confusion is never an easy task. Essential to our democracy is open debate. Our cacophony, like our democracy, is the best approach given the alternatives. Unlike the United Kingdom, the United States has no Official Secrets Act, although the combination of the Title 18 provisions criminalizing fraud and related activity in connection with computers and the State-secrets privilege, tied to prosecutions under the Espionage Act, brings such a regime closer. Faced with such a threat, some have called for a federal shield law for reporters and Senators Richard Lugar, Arlen Specter, Christopher Dodd and Charles Schumer sponsored the Free Flow of Information Act of 2006.

Until such time when such a United Kingdom approach takes hold, our system remains one of no prior restraints, few media regulations (e.g., the Federal Communication Commission), private law suits for defamation, a private multi-faceted
media, an independent legal system, unregulated new worldwide technologies of communication, a ship of State that “leaks” from the top and a literate audience. True, it is an audience more interested in Monday Night Football, Judge Judy, The Daily Show, and Dancing with the Stars, but it is an audience that has the right and the ability to engage and become involved if it so chooses. We call it, in short, freedom of the press. Warts and all, the best remedy is more commentary, to paraphrase John Stuart Mill.

Notes

1. FDR allegedly presented the Judiciary Reorganization Bill of 1937 to relieve the workload of elderly judges. The bill would have allowed FDR to appoint one judge for each sitting judge over age 70 and six months with at least ten years of experience. FDR could have appointed six more Supreme Court justices immediately, increasing the size of the court to 15 members. A Congress dominated by Democrats would have been expected to appoint judges friendly to FDR and his New Deal agenda. The measure was opposed by senior leaders of the Democratic party and defeated. Controversy still surrounds the reason why Supreme Court Justice Owen Roberts changed his vote, prior to the bill’s defeat in Congress, on a minimum wage law, but his vote became known as “the switch in time that saved nine.”

2. This information is compiled from the Reporters Without Borders website. See http://www.rsf.org/special_iraq_en.php3 and http://www.rsf.org/article.php3?id_article=16793 (both last visited Dec. 27, 2006). The numbers of journalists and media killed in Iraq are continually increasing. For example, by December that figure had risen from 135 in November to 139.


7. Public Law No. 65-24, 40 Statutes at Large 217 (1917).
In reviewing the recent events in Iraq and the War on Terrorism vis-à-vis the media, the one obvious question asked by all Americans today, including those in military service, is who do the media represent. Do they represent the voice of the American people, or do they represent a defined elite concerned with a change in the political landscape in the United States?

Recent Background to Current Contentiousness

Two recent incidents, I believe, are indicative of the current unease between the military and the media and force us to reflect on who and what the media represents in their reporting on military activities. In early 2005, Newsweek, owned by the Washington Post Company, published a story by Michael Isikoff claiming that a copy of the Koran had been flushed down a toilet by an American interrogator at Guantanamo, Cuba, in front of Muslim interviewees. When evidence was produced that showed it to be false, Newsweek belatedly retracted the story but only after much damage to the US military’s image occurred in those countries with whom we must cooperate in the War on Terrorism.1 More importantly, the rioting that followed resulted in 16 deaths in Afghanistan and elsewhere. Newsweek,

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moreover, wanted no part of the White House’s request that it help repair the damage. And, unfortunately, no journalist from any major news organization wrote that they should.

The current reporting of the Haditha story also bears mentioning. The rush to judgment of the Marines involved by the US media without waiting until the facts are determined has been viewed by many as simply reflective of the media’s tendency to believe the worst. More significantly, the fact that the incident was reported immediately to superiors by the Marines involved, that those in command were made aware of the civilian deaths contemporaneous with the incident, and that the squad involved has consistently claimed that they followed their rules of engagement in clearing the buildings from which they took fire, have all been conveniently overlooked by the mainstream media in their reporting. More importantly, there has been no investigative reporting on standard procedures for clearing buildings from which fire is taken and no interest in reporting the context in which these deaths occurred.

What is most difficult to understand is why the press, most of whom have not served in the military, so often chooses to believe foreign sources proven incorrect in the past, and disregard the voices of fellow Americans who are daily placing themselves in harm’s way for our nation’s foreign interests. Military lawyers also ask why the press ignores the basic legal principles that apply in irregular belligerencies where unlawful combatants are engaged with national forces—in this case coalition forces and forces of the new Iraqi government. We must also ask why there is such a bent to discredit and criticize US efforts rather than understand the rationale behind coalition actions aimed at ensuring we can “stay the course” in Iraq and the reasons for the immediate actions in support thereof.

With that said, our charge must be to assess the relationship between the media and the military as it relates to an understanding and articulation of the legal parameters of the current conflict in Iraq as covered by the press—that is, Operation Iraqi Freedom. Our goal should be to increase mutual understanding at both the personal and institutional levels of what the legal regime actually represents with respect to the military’s operational requirements in the War on Terrorism and the legal framework under which the current conflict is being pursued. One would hope that the effort here today can help lead to practical solutions to areas of friction in communication between the two. Finally, our ultimate quest must be how can we maintain a vibrant, robust freedom of expression while protecting the nation’s capacity to fight our wars effectively.
James P. Terry

The Legal Principles Underlying Irregular Belligerencies:
Often Ignored in the Reporting on Iraq

The Nature of the Current Violence
As discussed below in detail, the media's use of the now firmly ingrained term, "insurgents," or "insurgency," is both factually and legally incorrect and reflects the media's misunderstanding of the conflict.

The Global War on Terrorism was clearly not contemplated when the four Geneva Conventions, addressing wars between national entities, were signed in 1949. The violence in Iraq currently perpetrated by al Qaeda and elements of the former regime is being spearheaded by individuals under no known national authority, with no command structure that enforces the laws and customs of warfare, and with no recognizable, distinguishing military insignia. More importantly, they represent no identifiable national minority in Iraq. Their attacks have injured and killed civilians of all ethnic groups, as well as more than 2,500 US military personnel attempting to assist the democratic government in Baghdad to succeed. Their use of children and women as lookouts and information gatherers is reminiscent of Vietnam and raises serious questions about the status of those individuals when acting on behalf of terrorist fighters in Iraq. The fact that this status is seldom, if ever, acknowledged by the press raises serious concerns for the military in their efforts to assure the public of our adherence to the law of war.

It is important to understand that terrorist violence provides no legal gloss for its perpetrators. The critical international law principles applicable to the violence in Iraq are found in the 1949 Geneva Conventions in Common Article 3 relating to internal armed conflicts and the principles enunciated in the two Additional Protocols to these Conventions negotiated in 1977. The minimal protections afforded by Common Article 3, for example, include prohibitions on inhumane treatment of noncombatants, including members of the armed forces who have laid down their arms. Specifically forbidden are "murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment," and extrajudicial executions. Provision must also be made for collecting and caring for the sick and wounded.

The 1977 Geneva Protocols had their roots in wars of national liberation following World War II. Colonial powers, to include the United States, France, Great Britain, and the Netherlands, had engaged these liberation movements militarily, often with little regard for the law of armed conflict. In the 1974 conference hosted by the Swiss government in Geneva, the need to regulate conflicts of a non-international character was addressed in Article 96(3) of Additional Protocol I and is the subject of Additional Protocol II. At the conference, the Swiss
Government invited members of national liberation organizations to participate, but not vote.

The participation of non-State actors helped shape the drafting of Article 96, paragraph 3 of Additional Protocol I. This section provides that a party to a conflict with a State army can unilaterally declare it wants the 1949 Geneva Conventions and the 1977 Protocols to apply. This would, of course, offer greater protection for members of national liberation movements. Under Article 96, however, parties authorized to make such a declaration had to establish that they were involved in “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” In Iraq, however, terrorists are trying to unseat the government that has been overwhelmingly approved by the people. Moreover, al Qaeda has made no statement that it desires the Geneva Conventions to apply.

These terrorists, or unlawful combatants, however described, have no juridical existence other than as common criminals. Additional Protocol I, Article I conflicts, or those between a nation and a recognized insurgency seeking a legal status, differ from the present terrorist violence in that participants in Article I conflicts opposing government forces are required to meet certain minimum requirements. These are: (1) that they operate under responsible command and are subject to internal military discipline; (2) that they carry their arms openly; and (3) that they otherwise distinguish themselves clearly from the civilian population. In return they are accorded certain protections when captured. It is doubtful that those perpetuating violence in Iraq today meet these criteria for the status of insurgent. Moreover, they are exploiting every ethnic group for their own vicious ends, without regard for these requirements.

The fact that these terrorists have no recognized and protected status under the Geneva Conventions or their Protocols, and employ methods completely banned by the laws of armed conflict, is likewise seldom articulated by mainstream reporters. In addition, al Qaeda’s failure to adhere to the most basic tenets of international law on the battlefield is never addressed. What is addressed is every claimed violation of the law by American service members, often responding to acts of savagery by Muslim extremists claiming to act on behalf of Allah, not on behalf of a national or sub-national entity. The fact that these claimed violations of the law of war by Americans are often subsequently found to be without substance seems to never appear in print.

The Status of the Al Qaeda and Other Anti-Government Participants
While the press today insists on calling these terrorists “insurgents,” the fact that they are the basest of criminals, and not insurgents with minimal juridical status
under Article I, Protocol I, as discussed above, is never recited. The fact that they do not represent even a significant minority of the Sunnis, Shiites or Kurds is never explained. (We know this because 70% from all sectors voted in the December 2005 elections for a democratic government.) And there is never a call in the press for the Iraqi people to stand up and denounce these perpetrators of violence who are even now sucking the lifeblood from the fledgling Iraqi Government.

The law of armed conflict is based largely on the distinction between combatants and noncombatants. Unfortunately, in Iraq, the clear distinction normally witnessed in conflict (i.e., belligerents on the one hand and the civilian populace on the other) is significantly blurred. Nor are all elements that are perpetuating the violence today working toward the same ends. Baathist operatives within the Sunni elite who were formerly within Saddam’s inner circle are trying to prevent the fledgling democracy from succeeding. The al Qaeda leadership is focused on driving the Western influences from Iraq and it is likewise targeting any supporters of the current coalition effort to help the new Iraqi government sustain democracy. Certain members of the Shiite leadership have used the turmoil as an opportunity to settle scores while at the same time refusing to commit completely to the new regime until it is determined that it can succeed. Shiite religious leaders like Sistani are remaining silent. The Kurds have opted to remain on the sidelines in the north and take a wait and see approach while at the same time ostensibly supporting the new regime. Then there are the local rivalries, and in Iraq, all politics are local. I saw that in Fallujah in late 2004 and in early 2005 when I was there on behalf of the Secretary of State.

The point is that the Marines under scrutiny at Haditha responded to attack in a very complex environment. The key question had to be whether they followed the legally scrubbed rules of engagement and, equally important, whether the rules of engagement followed, if in fact they were followed, actually applied to the facts on the ground as they presented themselves to the Marines involved. Major General Bargewell, the investigating officer, is now carefully examining these questions on behalf of the Secretary of Defense.

These cross currents, and the fact that our Marines and Army forces are dealing with a period of carefully orchestrated violence, need to be more accurately portrayed by the media. The fact that individuals, including women and children, who participate actively and directly in support of combat activities (such as providing combat intelligence, physically shielding combatants, etc.) themselves become combatants and are legitimate targets of attack, needs to be explained. That is why it is so critical that reporting on events such as the Haditha killings receive careful review and careful attention.
Finding the Appropriate Military-Media Relationship

We must ask then, what is the appropriate balance in reporting in the current struggle in Iraq? How can the media report events in a more accurate way? What can the military do to provide the legal insights necessary for the media to fully understand the operational legal issues that have and will arise? There is no question that public perceptions of the law and, more specifically, perceived violations of the law shape national policy decisions. This was never more true than in Vietnam, where the My Lai murders helped to sour the Vietnamese public on our continued presence there, and the US public on our continued participation in that conflict.

In the present conflict in Iraq, the allegations concerning the alleged murders at Haditha and other similar incidents are even now shaping national policy decisions. It was no accident that when President Bush visited Baghdad on June 13, 2006 he met with the new Iraqi Prime Minister and expressed support for continued US presence on the one hand, while urging the Iraqis to move quickly to train their own forces and to take the lead in their own defense.

There is also no question that the climate under which the military and the media operate has intensified since September 11, 2001. A 2005 Gallup Poll found that large majorities of both the military respondents and the public believe that news stories about the military tend to be too negative. Members of all three groups, military, media and the public, however, believe that embedding the media within the operational forces enhances the public’s understanding of the war, helps the morale of the troops, improves the public’s perception of the military and improves the credibility of the media coverage. It is the understanding which flows from embedding, not mere information, which makes the difference between fair coverage and something less.

The Practical Effects of Embedding

It was during the Bosnian peacekeeping operation in 1995 that reporters were first authorized and assigned to accompany US forces as part of an authorized comprehensive program. This was short-lived, however, as a sensitive conversation between a commander and his men concerning racist attitudes of one of the Balkan parties to the conflict was reported by a Wall Street Journal reporter (Tom Ricks). The program was robustly adopted, however, by US military commanders in Operation Iraqi Freedom in 2003. The more than 600 reporters who were approved for the program received a week-long “boot camp” of sorts aboard ship and at sites such as Marine Corps Base Quantico, Virginia; Fort Dix, New Jersey; and facilities...
James P. Terry

in Kuwait. New York Times journalist Andrew Jacobs found it to be “alternatively enlightening, entertaining, horrifying, and physically exhausting.”

While nearly all reporters involved in the program during Operation Iraqi Freedom believed it gave them a greater feel for the war and a better understanding of the military as a result of their training and experience, there were concerns by publishers that negative stories by embedded reporters never caught the public’s attention. These included stories of failed supply planning, civilian casualties, fratricide and theft. I believe that this lack of traction for negative stories can be largely attributed to the overwhelming success of the initial campaign and the belief on the part of most Americans that the coalition force had done a remarkable job, despite the reported negative events.

While the embedding program was not institutionalized during Vietnam and earlier, one only has to recall the excellent reporting of Ernie Pyle in the Pacific during World War II to understand that the embedding of individual reporters has a long and proud history. In Vietnam, Joe Galloway, who subsequently wrote We Were Soldiers Once, with Major General Hal Moore, spent 25 years traveling “up close and personal” with military units—primarily Marine and Army infantry commands. It was his reporting in the Ia Drang Valley (pronounced Na Trang) in November 1965 with an Army Battalion of the 1st Cavalry Division facing overwhelming odds which catapulted him onto the world stage. Galloway described his feelings on his reporting this way:

There, in the mud, is where war is most visible and easiest understood. There no one will lie to you; no one will try to put a spin on the truth. Those for whom death waits around the next bend or across the next rice paddy have no time and little taste for the games that are played with such relish in the rear. No one ever lied to me within the sounds of the guns.

The commitment by the media to embedding their reporters in Iraq has now waned. While at one time several hundred reporters were assigned to operating units, today that number stands at no more than 25. More than 40 media personnel, to include reporters, cameramen and assistants, have perished in attacks during the War on Terror. When a newsperson is attacked, as has happened recently in the case of Bob Woodruff and others, the story becomes their injuries and their prognosis and not that of the American servicemen who may have died in service to his or her nation while providing them protection. That aspect of the military-media relationship and the related reporting has not been ignored by the American people.

What marked the initial success of the embedding process, in my view, was the fact that the additional experience and training provided these reporters enabled
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them to turn the situation into an educational opportunity for their audience. Through their understanding of the events in the context of the operational requirements of the conflict, they were less likely to resort to quick criticism, "gotcha" reporting and wildly negative predictions. As Navy Commander Brendon McClane has suggested in an excellent recent article in Parameters magazine, the next step should be to bring trusted reporters into the operations center to gain a needed context for their stories. While this would have to be carefully tailored depending on the conflict and the sensitivity of the information, one can reasonably conclude that reporters like Rick Atkinson, Major Garrett and Ted Koppel, with a long history of trust by commanders, would be likely first candidates.

Access to the operations center would also give access to an understanding of the rules of engagement approved for and employed by the force involved. Rules of engagement, although highly classified, nevertheless provide the legal and operational roadmap for our military's response to attack, both geographically and with regard to weapons systems and procedures. The understanding of these approved operational procedures, which are trained to by our forces, would preclude unfounded claims of violations, because these rules are drafted after careful review of the legal restrictions applicable and after a careful review of the combatant status of individuals engaged. When a civilian woman or child is acting as a combatant, the fact that the individual no longer enjoys civilian protections should be understood by every journalist reporting the story, even if that fact is personally distasteful. When a civilian family is harboring a terrorist in their house who is firing on US troops serving in Iraq and representing the interests of the democratically elected government, as is alleged to have happened at Haditha, the reporters need to know that the home is no longer a protected place but has become a safe haven for the enemy. These are the basics, but they often seem not to be within the lexicon used by the fourth estate.

When we have reporters who understand the law, have good judgment and have integrity, their reporting tends to be clear, more accurate and in context. When they do not exhibit these traits, their reporting can be misleading and worse, it tends to frustrate the military and, as we witnessed after Vietnam, preclude an effective dialogue in future military engagements.

Notes

1. See Howard Kurtz, Media vs. the Military, WASHINGTONPOST.COM, May 23, 2005, http://www.findarticles.com/p/articles/mi_m0NTQ/is_2005_May_23/ai_n13810168 for an insightful discussion of how this unfounded report and the similar inaccurate reporting by Dan Rather on 60 Minutes Wednesday in late 2004 concerning President Bush's Air National Guard service have soured many Americans on the credibility of the press with respect to military reporting.

3. The text of Common Article 3 may be found in id. at 198.


6. DOCUMENTS ON THE LAWS OF WAR, supra note 2, at 423. Article 1(2) of Protocol I states that "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Id.

7. The Gallup Poll conducted in 2005 showed a comparison of public perceptions and the changes that have occurred in the military-media relationship since a similar poll was conducted in 1999. The complete Gallup Poll results can be found at http://www.mccormicktribune.org/journalism/militarymedia2005.pdf#search=%22site%3Awww.mccormicktribune.org%22 (last visited Aug. 24, 2005).


