

“The Dover Ban:”

Wartime Control over Images of Public and Private Deaths

Prepared for

Unblinking:

New Perspectives on Visual Privacy in the 21st Century

A Cross-Disciplinary Symposium

UC Berkeley, November 3-4, 2006

Draft; comments welcome!

Please do not quote or cite without author’s permission.

Brian Gran
Case Western Reserve University
Sociology Department and Law School
10900 Euclid Avenue
Mather Memorial 226
Cleveland, OH 44106-7124
(O) 216 368 2694
Brian.Gran@Case.Edu

“The Dover Ban:”

Wartime Control over Images of Public and Private Deaths

Through its Dover Ban, the U.S. Department of Defense currently bans photographs of coffins carrying deceased soldiers from foreign battlegrounds, yet the ban does not extend to coffins carrying “private” soldiers from the same conflict. Why does the Department of Defense control images of public soldiers, but not private soldiers? This paper examines justifications for and criticisms of the Dover Ban, a policy that forbids the press from taking photographs and video when remains of deceased public soldiers travel to and from U.S. air force bases. Since its inception in 1991, the Department of Defense has inconsistently forbid the press from covering public soldiers, but has not applied the Dover Ban to private soldiers. Through a comparison of public and private soldiers and U.S. military policies, justifications for the Dover Ban are evaluated and found wanting. The Dover Ban appears to be merely a tool military and political leaders use when they fear loss of public support during a military conflict.

“The Dover Ban:”

Wartime Control over Images of Public and Private Deaths

Introduction

The Dover Ban is a ban on photographs of deceased soldiers whose remains are returned to the Dover Air Force Base in Delaware. Because the Dover Ban primarily receives attention during war time, research on the Ban has been fitful. This paper examines the legal status of the Dover Ban and its historical background. The Dover Ban has been inconsistently applied to U.S. soldiers and other U.S. government officials since its inception, raising questions of legitimacy and importance. After a review of justifications offered for and criticisms made of the Dover Ban, this paper asks why the U.S. government has not extended the Dover Ban to photographs of deceased private soldiers. In this paper I contend that relationships between private soldiers and U.S. government officials as well actions of private soldiers have become so blurred and problematic that some private soldiers should be considered as public soldiers. If this contention is true, U.S. government officials should ban photographs of deceased private soldiers. This paper contends that an analysis of why the Dover Ban is extended to public soldiers, but not to private soldiers, will demonstrate strengths and weaknesses for the rationales of the Dover Ban, as well as raise questions about the U.S. government’s reliance on private soldiers in the current Iraq conflict.

Even if the contention that the Dover Ban should be extended to private soldiers is wrong, the U.S. government may not be treating private soldiers properly, at least according to the U.S. military. A U.S. military directive states that deceased private soldiers deserve the same mortuarial treatment as deceased public soldiers. Why has the

U.S. government not followed this policy and extended the Dover Ban to its private soldiers?

A (Very) Brief History of U.S. Military Censorship

Wartime censorship may seem to be as American as apple pie, but its history is not continuous as one might expect. During the Revolutionary War and the War of 1812, newspapers did little of their own reporting on the wars. Instead, they relied on soldiers' reports, including letters sent home. By the Mexican-American War, a news corp had developed. Many members were soldiers, which gave them unique opportunities to report on the battlefield. Steger (1994) asserts these reporters did not face censorship.

The telegraph was invented in 1830 and was a key communication tool by 1851. With transcontinental lines, the telegraph was an important tool for delivering news of the Civil War. Both the Union and Confederate militaries attempted to censor newspaper reporting. Union forces excluded reporters from military camps and closed newspapers that published military secrets. Similar censorship efforts occurred in the Spanish-American War. Newspaper reporters were prevented from reporting on some conflicts. The Navy formally controlled military censorship, which did prevent some reporting.

Starting with World War I, military leaders and members of the press struck a balance. Media generally had broad access to wartime conflict, but they accepted censorship and generally followed government procedures on reporting. This balance was in place for World War II and the Korean conflict. During the Korean conflict; reporters enjoyed wide access, but government had significant control over what was published.

Such a balance continued into the Vietnam conflict. In fact, according to Steger (1994), censorship was weak during the Vietnam war. Television coverage was

unprecedented, with broadcasts almost nightly. After a gap developed between public perceptions and government reports, with weakening public support of the Vietnam campaign, federal officials felt betrayed by media portrayals. It is fair to say that contemporary military censorship has its beginning with the Vietnam war.

The Grenada invasion in 1983 was a turning point for military-media censorship. Media coverage was prohibited for the first two days. Not until five days later did the press have complete access, but by then much of the invasion was complete. This procedure was repeated in Panama in 1989, where a press pool was allowed access to Panama five hours after fighting had started but not near the fighting.

The first Iraq war was a shift away from restricted access of Grenada and Panama. By 1990, news coverage had significantly changed. International cable TV broadcasts were available, notably CNN was a significant presence that offered live coverage. A balance was again struck between military interests and media coverage. It was in February 1991 that the first Dover Ban was instituted.

The Dover Bans

The Dover Ban is a federal ban that prohibits media coverage, including photographs, of public soldiers' remains when they are returned to the United States. The Ban is issued by the Department of Defense; its first instance was in 1991:

Media coverage of the arrival of [] remains at the port of entry or at the interim stops will not be permitted... (Office of the Secretary of Defense 1991).

Although the Department of Defense has issued technically different bans over the last fifteen years, these bans have largely and effectively banned the same behavior.

For the current Iraq War, also called Operation Iraqi Freedom, a Dover Ban was reissued in March, 2003: "There will be no arrival ceremonies for, or media coverage of, deceased military personnel returning to or departing from Ramstein airbase or Dover base, to include interim stops." This Dover Ban continues to be in effect.

The Dover Ban was extended to the Ramstein Air Force Base, located in Germany, because remains of deceased U.S. soldiers were sometimes transported via the Ramstein Air Force Base. Both Dover and Ramstein have mortuary services. The Dover Ban has sometimes been extended to other military bases, including Andrews Air Force Base. The most recent Dover Ban bans media coverage of deceased *military personnel*. Who are military personnel? A person is considered military personnel when she or he is on active duty with a U.S. military branch. Why both returning to and departing from? Background on this change is not available, but it is suspected that this change was made to clarify that the ban applied to both arrivals and departures of the remains.

The Department of Defense, which is part of the Executive Branch, issues the Dover Ban. The Department of Defense was established in 1949, bringing together the Army, Navy, and Air Force under one umbrella. This change also resulted in replacing three cabinet posts, the Secretaries of the Army, Navy, and Air Force, with the Secretary of Defense (Department of Defense 2006). Department of Defense policies are considered legally binding for military personnel, although conflicts sometimes arise between military policies and Supreme Court doctrine (Sharum 2006).

Why Do We Have the Dover Ban?

Four reasons have been articulated in support of the Dover Ban. The first justification is to protect the privacy of the deceased and the deceased's loved ones. The

second is to protect the privacy of the deceased and the deceased's loved ones. The third is to reduce hardship on the families and friends of the deceased. After we consider each of these justifications, we will examine other rationales.

In the primary court case dealing with the Dover Ban, JB Pictures, Inc., et al., v. Department of Defense and Donald B. Rice, Secretary of the Air Force, the U.S. Appellate Court concluded that the Dover Ban did not violate the First Amendment's guarantees of freedom of speech and of the press. JB Pictures, the appellant, primarily challenged the Dover Ban on the grounds that the Dover Ban violated their First Amendment rights. In particular, JB Pictures contended that the Dover Ban constitutes viewpoint discrimination, that is, that free speech cannot be regulated in such a way as to prevent a viewpoint from being presented. The Appellate Court held that the Dover Ban's application is not viewpoint discrimination. The Court said it is not viewpoint discrimination for the government to restrict members of the public and the media from areas that are not historically open to view, such as military bases. It is important to note that some experts contend that the Appellate Court misinterpreted viewpoint discrimination. Their argument is that the Court failed to respond to the claim that the Dover Ban prevents a critical perspective of military conflict to be aired.

In addition to reasons stated in the JB Pictures case, the Dover Bans have been justified in other ways. One justification is that the Ban is a means of protecting the privacy of the deceased and his or her family members and friends. Senator Warner, chair of the Senate's Armed Services Committee, in regards to the Dover Ban asserted. "To preserve the most important priority, and that's the privacy of the families ... and not open up this matter to greater scrutiny by the press." Preventing public viewing enables family

members and friends to decide whether or not to give access to the deceased's remains. Only recently, in the Favish case, has the Supreme Court stated that an individual maintains privacy interests after his or her death. The Dover Ban is supposed to transfer the decision on burial and related concerns from the Department of Defense to family members and friends. Rather than the Department of Defense, family and friends of the deceased can decide on whether or not to allow media to attend ceremonies and functions on behalf of individual deceased soldiers.

The first Dover Ban was justified as a means of protecting the deceased's family members and friends from logistical difficulties and intrusions while mourning. By preventing public access, the Department of Defense indicated that the Dover Ban would relieve grieving family members and friends from feeling pressured to travel to the Dover Air Force Base to receive the deceased's remains and feeling compelled to participate in a military ceremony. The Dover Ban also relieves the Department of Defense of managing logistical details of travel and other arrangements of family members and friends (Milbank 2003).

Although not raised in the JB Pictures case, another justification of the Dover Ban is that it promotes national security. The Dover Ban protects the United States and its residents by keeping secret from our enemies the number of soldiers who have died in military conflicts.

The Dover Ban arises from the Dover Test, a statement variously attributed to former Senator John Glenn, "It's easy to see...People go off to war and the bands play and the flags fly. And it's not quite so easy when the flag is draped over a coffin coming back through Dover, Delaware," as well as to General Hugh Shelton, "Is the American

public prepared for the sight of our most precious resource coming home in flag-draped caskets into Dover Air Force Base in Delaware – which is a point entry for our Armed Forces?" This realist perspective on public opinion of military conflict suggests the Dover Ban came about to control public opinion of American involvement in a military conflict, especially when that involvement results in soldiers' deaths.

Criticisms of the Dover Ban

Two related criticisms are made of the Dover Ban. The first is that the Dover Ban censors free speech. The second is that the Dover Ban prevents Americans from knowing what their government is doing.

The Dover Ban censors free speech by prohibiting media from taking photographs and video of remains of deceased soldiers traveling to and from the Dover Air Force Base and other air force bases. According to the JB Pictures appellate court, plaintiffs did *not* allege "that greater access to Dover will reveal new information about the occurrence or magnitude of casualties in military conflict...does not impede acquisition of basic factors, the raw material of a story." Whether or not plaintiffs did or did not make this contention, it is a mistake to conclude that the effect of the Dover Ban do not impede a "story." The Dover Ban prevents Americans from viewing important evidence of military successes or failures.

The Dover Ban prevents Americans from knowing what their government is doing. It precludes Americans from gathering information they may want to consider in deciding to give or withdraw their support of a military conflict. The Dover Ban is an attempt to control public support of military conflicts.

Finally, the Dover Ban weakens democratic accountability. In effect, the Dover Test is a test by which political leaders decide whether or not to evade democratic accountability. When the Department of Defense institutes the Dover Ban, it prevents American voters, citizens, and residents from knowing what their government is doing and whether it is successfully reaching goals of which it approves.

Ignoring the Dover Ban

George Washington University's National Security Archive (2006) has set up a brief chronology of policies and acts of the Department of Defense toward the Dover Ban in particular and images of deceased soldiers and prominent government officials in general. This chronology demonstrates that the Dover Ban has not consistently been applied since its first use in 1991. This inconsistency undermines at least some of the justifications for the Dover Ban. It also provides support for some of the criticisms made of the Dover Ban.

During the Clinton administration, the Dover Ban was not applied to the remains of Commerce Secretary Ron Brown and others who died in a plane crash in Croatia. In 1996, the Dover Ban was not applied to the remains of Ron Brown and others killed after their plane crashed in Croatia. President Clinton attended the ceremony of the returning coffins. The Dover Ban was not applied to individuals who were killed in Tanzanian and Kenyan embassy bombings when remains arrived at the Andrews Air Force Base in 1998. The National Security Archive notes that the Department of Defense distributed photographs of these remains. Later in the Clinton administration, the Department of Defense distributed photographs of caskets of military remains from the U.S.S. Cole arriving at the Dover Air Force Base.

After the start of President Bush's administration in 2001, the Department of Defense released photographs of remains from a training accident in Kuwait. Later that year, the Air Force released a photograph from Dover of one person's remains from the Pentagon attack. After re-stating the Dover Ban in November, 2001, the Dover Ban was not applied to the remains of the first soldier killed in the current Afghanistan conflict. In March and April, 2002, the Dover Ban was not applied to remains of seven individuals and four individuals, respectively, arriving at the Ramstein Air Force Base. In November, 2003, the Dover Ban was not applied when the Department of Defense distributed photographs of a flag-draped coffin containing remains of a soldier killed in the Korean conflict, which were transferred at Hickam Air Force Base.

The current Iraq War started on March 20, 2003. Although it appears to be no longer available, the Dover Air Force Base maintained a website for its mortuary. This website posted a photograph of a flag-draped casket being transferred at the Dover Base.

In April, 2004, the *Seattle Times* published a photograph taken by Tami Silicio, who worked for the military contracting company, Maytag Aircraft. This photo (see Photo A) shows soldiers preparing flag-draped coffins for transport from Kuwait to the United States. Ms. Silicio was eventually fired by Maytag.

In 2004, Mr. Russ Kick filed a Freedom of Information Act petition with the Department of Defense. Mr. Kick's petition asked for photographs from the Dover Air Force Base. The Department of Defense denied this petition, and Mr. Kick appealed. Surprisingly, on nearly the same day the *Seattle Times* published the Silicio photograph, the Department of Defense released a CD to Mr. Kick, which contained over 300

photographs of flag-draped coffins being transferred at the Dover Base. One of the notable photographs released to Kick is below (see Photo B).

In October, 2004, a lawsuit was filed on behalf of Professor Ralph Begleiter that, among other issues, sought photographs and video taken at the Dover Air Force Base of deceased remains. Until parties to the lawsuit agreed to its dismissal in July, 2005, the Department of Defense released additional photographs, which it had not released to Kick (the Department of Defense has not released video). One of the photos release to Begleiter is below (see Photo C). Many of the photos Professor Begleiter received were redacted.

More recently, the Department of Defense appears to have assumed the policy of not taking photographs or video of deceased's remains. Critics contend this approach, which contrasts with previous policies of the Department of Defense, is followed so that the Department of Defense is not obligated to release other photographs of deceased soldiers.

This brief chronology raises important questions for the Dover Ban, but more important, provides evidence about applications of the Dover Ban. First, it is important to emphasize that in its short history, both Democrat and Republic presidents have applied and decided against applying the Dover Ban. Second, these decisions emphasize that the Department of Defense looks at the Dover Ban as discretionary. The Department of Defense decides in what situations it will apply the Dover Ban. For outsiders, especially media, this discretionary policy may make their reporting challenging. For members of the public, we may be confused as to why the Dover Ban is or is not applied. For

example, does the Department of Defense apply the Dover Ban to remains of individuals it considers more important or less?

Because of the dearth of information on how the Department of Defense makes its decision to apply or not apply the Dover Ban, this paper will attempt to infer reasons for the Department of Defense's decisions not to apply the Dover Ban. The Dover Ban has not been applied when the number of individuals whose remains are traveling through air force bases is small. From this author's perspective, the Dover Ban is not applied when the number of coffins would not trigger the Dover Test. The Department of Defense seems to apply the Dover Ban when public opinion would be negative after viewing photographs of deceased's remains, and does not apply the Dover Ban when public opinion would support the Department of Defense after viewing the photographs.

Decisions of the Department of Defense *not* to apply the Dover Ban challenges some justifications made for the Dover Ban. Indeed, that the Department of Defense has taken its own photographs, which it has on occasion released, violates its own policy. The Department of Defense does not seem to take seriously privacy interests of the deceased and his or her loved ones. It seems much easier to identify the remains of a small number of soldiers and far more difficult to protect the privacy interests of these deceased individuals and their family and friends.

By taking and publicly releasing photographs, the Department of Defense has ignored its own concerns about logistical arrangements of having family members and friends travel to attend ceremonies dedicated to the deceased. It is questionable whether family members were contacted about a photograph's release. Unilaterally taking and

publishing photographs implies secrecy concerns are ignored, or perhaps more likely, are considered when the Department of Defense is worried about triggering the Dover Test.

Private Contractors

Turner and Norton (2001) define three categories of participants in military conflicts who are not public soldiers: civilian employees of the Department of Defense, non-affiliated civilians, and contractors. Non-affiliated civilians may participate in the conflict on behalf of a non-governmental organization or may be a stateless person. There are three kinds of contractors, according to Turner and Norton: systems support, external theater support, and theater support contractors. Systems support contractors provide support, including maintenance and parts replacement, of hardware and mechanisms. A theater support contractor typically provides support by delivering goods and services; they also may undertake “minor” construction. An external theater support contractor does similar work, but is hired from outside the military theater.

Contractors have played key roles in military conflicts since the start of the United States. In more recent conflicts, the number of contractors has been high. According to Turner and Norton (2001), the ratio of contractors to public soldiers was 1:36 for Desert Shield, but for the Balkans conflict, the ratio was 1:10. The ratio for the current Iraq conflict also is 1:10.

Should the Dover Ban Apply to Private Soldiers?

Referring to the killings of four civilian contractors, Brigadier General Mark Kimmitt, a U.S. Army spokesman, said "we will be back in Fallujah. It will be at the time and place of our choosing. We will hunt down the criminals." CNN, April 1, 2004

“U.S. officials vow to hunt down and punish those responsible for killing four civilian contractors in Fallujah.” CNN, April 2, 2004

In the past, concerns have arisen about whether a private soldier should be treated like a public soldier. Military officials have set up rules for when to treat a private soldier like a public soldier. The rules basically decree that a private soldier should be treated like a public soldier when he or she acts like a public soldier.

Various qualities are considered when determining whether a private soldier has acted like a public soldier, but two qualities seem most important: actions and appearances. Many of these rules seem to be in place in recognition of international laws and customs bearing on prisoners of war. The thrust of these rules is that if a contractor *acts* or *looks* like a soldier, she or he should reasonably expect to be treated as an unlawful combatant. By actions, questions arise as to whether the private soldier has acted in some way like a public soldier. By appearances, questions arise as to whether the private soldier has appeared like a public soldier. Both qualities, of course, can combine.

A handful of companies employ military contractors. An important and prominent company is Blackwater Security Consulting. Blackwater (www.blackwaterusa.com) is a U.S. company that provides a multitude of services: “We are a professional military, law enforcement, security, peacekeeping, and stability operations firm who provides turnkey solutions.” According to a CNN report (2004), Blackwater provided security for Paul Bremer, the U.S. civil administrator in Iraq (more recently, this and similar reports have been disputed). According to the PBS Frontline television show, in the current Iraq conflict, contractors make up the second largest

“force,” approximately numbering 100,000. Frontline contends that over 20,000 “private security forces” are present in Iraq. Not all contractors are U.S.-based companies.

As of October 30, 2006, according to the Iraq Coalition Casualty Count website (www.icasualties.org/oif 2006), 2814 U.S. soldiers and 120 U.K. soldiers have died in the current Iraq conflict. The total number of all deceased coalition soldiers, according to this website, is 3053. The data sources for this information are the U.S. Department of Defense, Centcom, MNF, and the British Ministry of Defense. Many contractors have also lost their lives; 367 have been killed, of which 146 were American.

Should the Department of Defense apply the Dover Ban to private soldiers? First, a restatement of the current Dover Ban:

There will be no arrival ceremonies for, or media coverage of, deceased military personnel returning to or departing from Ramstein airbase or Dover base, to include interim stops.

Very simply, it seems that if a private soldier could be considered a member of military personnel, the Dover Ban would apply to his or her remains, interests, and grieving family and friends. The question would then become whether a private soldier has acted like a public soldier, sufficiently enough for the Dover Ban to apply.

The Department of Defense Says So

More significantly, a Department of Defense Directive states that,

It is the DoD policy that:

4.9 The remains of U.S. non-combatant civilians living overseas or U.S. contractor personnel who are fatalities resulting from an incident in support of military operations deserve the same dignity and respect

afforded military remains and shall be rendered in accordance with references (c) and (e)....

This Directive is not new; it predates the present Dover Ban and is current. The bottom line of this Directive is that the Department of Defense has established a policy similar to the Dover Ban, which mandates that private soldiers who are killed overseas deserve the same dignity and respect afforded to public soldiers. Given this Directive, why is the Dover Ban not applied to private soldiers?

The first, most obvious response is that the Department of Defense has not considered the ramifications of this Directive for the Dover Ban and private soldiers. Given this response requires an assumption that the Department of Defense is not doing its job, we will assume it is incorrect.

The second response is that the Department of Defense does not consider the Dover Ban to have much to do with dignity and respect of public soldiers. This response perhaps deserves more attention than the first. This response seems to conflict with the justification of protecting the deceased and his or her loved ones, and their privacy interests. Senator Warner's comment seems to imply that at least some people think privacy is an important matter and it seems reasonable to assume that privacy promotes dignity and respect. This conflict suggests, however, that privacy is not important.

One reason the Department of Defense institutes the Dover Ban is to prevent hardship for the deceased's loved ones. For instance, the Dover Ban is used to limit logistical concerns for the deceased's family members and friends. The Dover Ban allows family members and friends to decide on whether or not to allow media access to burial

and memorial ceremonies. This use of the Dover Ban does seem focused on respect for the loved ones.

Another justification for the Dover Ban is that it prevents enemies from knowing the number of soldiers killed in a conflict. Given the number of private soldiers and their contributions to the current Iraq War, as strongly acknowledged by military leaders, it is strange that the Department of Defense does not go to greater lengths to maintain secrecy of the number of private soldiers who have died in the current Iraq War.

Conclusion

This paper has sought to raise questions for the Dover Ban and its use by the Department of Defense. It has challenged justifications made for the Dover Ban. The Department of Defense has not deployed the Dover Ban to prohibit media and news organizations from publishing images of deceased private soldiers, in apparent conflict with Department of Defense policy of treating deceased private and public soldiers alike. This paper asks whether the inconsistent institution and use of the Dover Ban reveals the ultimate objective of the Dover Ban is protecting political interests when military and government officials fear they will fail the Dover Test. If so, then military and political officials use the Dover Ban to protect their own interests, not the interests of Americans who strive to hold their leaders democratically accountable.

References

- Defense Press Office, Assistant Secretary of Defense (Public Affairs). 2001. *Public Affairs Guidance-Casualty and Mortuary Affairs-Operation Enduring Freedom*. November 1, 2001.
- Department of Defense. 2006. <http://www.defenselink.mil/pubs/dod101/>. Accessed October 27, 2006.
- National Archives & Records Administration v. Favish. 124 S.Ct. 1570. 2004.
- George Washington University's National Security Archive. 2006. www.gwu.edu/~nsarchiv. Accessed October 30, 2006.
- Iraq Coalition Casualty Count. 2006. www.icasualties.org/oif 2006. Accessed October 28, 2006.
- JB Pictures, Inc., et al., v. Department of Defense and Donald B. Rice, Secretary of the Air Force. United States Court of Appeals for the District of Columbia Circuit. Decided June 18, 1996. No. 93-5194
- Lacquement, Lt. Col. Richard A. Lacquement, Jr., U.S. Army. 2004. "The Casualty Aversion Myth." Winter 2004 *Naval War College Review*.
- Milbank, Dana. 2003. "Curtains Ordered for Media Coverage of Returning Coffins." *New York Times* Editorial, October 21, 2003.
- Office of the Secretary of Defense. *Public Affairs Guidance – Operation Desert Storm*. Arlington, VA: Casualty and Mortuary Affairs, Office of the Secretary of Defense. February 2, 1991.
- Sharum, Jerald. 2006. "Controlling Conduct." 69 (4) *Albany Law Review* 1195.
- Steger, Michael D. 1994. "Slicing the Gordian Knot." 28 *U.S.F. L. Rev.* 957

Turner, Major Lisa L., and Major Lynn G. 2001. "Civilians at the Tip of the Spear." 51
Air Force Law Review 1.

Photograph A



Photograph B



Photograph C

