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## MEMORANDUM

To: The National Press Photographers Association

From: Kurt Wimmer and John Blevins

Re: Rights of Journalists on Public Streets

Since the terrorist attacks of September 11, 2001, photojournalists have begun to experience unprecedented levels of interference from security guards, state law enforcement officials and federal officials. This interference with newsgathering activities is often based on claims that photography of certain public areas, buildings or landmarks is impermissible because of anti-terrorism concerns. This memorandum assesses the authority of federal and state officers to remove the media and, in particular, photojournalists engaging in newsgathering, from public streets and sidewalks, especially around government buildings such as federal courthouses. It outlines both the scope of the media's constitutional rights, as well as the basis of the government's authority to remove or restrict the media within these areas. It also includes some recommended precautions that media personnel can take to minimize the chance of their being removed.

In summary, we find that there is no federal law that justifies the broad prohibitions that are being imposed on photography in public areas. There is no new federal law, including the Patriot Act, that restricts photography of public buildings and installations on the basis of concerns over terrorism. Restrictions of photojournalism that proceed on this basis may constitute violations of journalists' First Amendment right to gather news.

### **I. The Scope of the Constitutional Right of Newsgathering**

Though not unlimited, the media enjoys a broad right under the First Amendment to photograph in public places such as streets and sidewalks. These rights are rooted in the First Amendment's strong protection of speech within "public forums." A "public forum" refers to a public place historically associated with free expression.<sup>1</sup> The most commonly recognized

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<sup>1</sup> *United States v. Grace*, 461 U.S. 171, 176-77 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

examples include streets, sidewalks, and parks.<sup>2</sup> Within these areas, the government's ability to limit the public's speech is extremely limited.<sup>3</sup>

Courts have extended the public's broad First Amendment protections within public forums to newsgathering as well. For instance, the media has the same right of access to a public forum as any member of the general public.<sup>4</sup> In addition, courts have found that photography and videotaping by the press constitute protected "speech" under the First Amendment.<sup>5</sup> The basic rule of thumb is that if the general public has access to a public forum and may operate cameras within it, the press may do so as well.<sup>6</sup>

## II. The Government's Authority to Regulate and Remove the Media

Despite these broad First Amendment protections, the government has the authority in certain circumstances to restrict media operations such as photography and videotaping.

### *What Constitutes a Public Forum?*

The government's authority to remove news cameras grows stronger when media personnel are not within a "public forum." Thus, when possible, the media should try to seek out public forums in order to maximize its First Amendment protections.

Courts have narrowed these rights, however, within public properties such as prisons, military bases, and courthouses under the theory that these areas have not traditionally

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<sup>2</sup> *Grace*, 461 U.S. at 177; *Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999) ("The archetypical examples of traditional public fora are streets, sidewalks, and parks.") (Murnaghan, J., dissenting).

<sup>3</sup> *Grace*, 461 U.S. at 177 ("In such places, the government's ability to permissibly restrict expressive conduct is extremely limited."); *Perry Educ. Ass'n*, 460 U.S. at 45 ("[T]he rights of the state to limit expressive activity [in public forums] are sharply circumscribed.").

<sup>4</sup> C. Thomas Dienes, Lee Levine & Robert C. Lind, *Newsgathering and the Law* § 8-3 (2d ed. 1999) ("Generally, the public and the press both enjoy a right of access . . . to traditional public fora (e.g., parks, streets, sidewalks).").

<sup>5</sup> *Porat v. Lincoln Towers Cmty. Ass'n*, No. 04Civ.3199, 2005 WL 646093, at \*5 (S.D.N.Y. March 21, 2005) (stating that "filming intended for broadcast" is "protected expressive conduct"); *Lambert v. Polk County, Iowa*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[N]ews organizations . . . have First Amendment rights to make and display videotapes. . . ."); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) ("[T]he news media [has] a right to be in public places and on public property to gather information, photographically or otherwise.").

<sup>6</sup> Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 935 (1992) ("[T]he Court's current approach to issues of press access equates the public's constitutionally secured right of access with the press's.").

been a forum for free expression.<sup>7</sup> Questions often arise about whether traditional public forums such as sidewalks and streets continue to be “public forums” when they surround or are adjacent to these types of properties.

In general, courts have adopted a fact-specific approach to these questions, which makes it difficult to predict how a given court would rule. That said, there are steps that media personnel can take to maximize their rights. First, the more that a sidewalk or street resembles other sidewalks or streets, the more likely it is that courts will consider it a protected public forum. For instance, the Supreme Court found that the sidewalk surrounding the Supreme Court building itself was a public forum because it was indistinguishable from other sidewalks in Washington, D.C.<sup>8</sup> On the other hand, the more that a sidewalk or structure is distinct from other public thoroughfares (such as an internal enclave or passageway, especially when surrounded by a fence or perimeter), the less likely it is that courts will classify it as a public forum.<sup>9</sup>

Thus, to maximize First Amendment protections, the media should (when possible) photograph from areas that are used by the public and that are generally indistinguishable from other streets and sidewalks. For instance, instead of filming on the courthouse stairs or in an enclave or courtyard of a federal courthouse, the media would enjoy stronger protections by filming from the sidewalk. In filming other facilities such as prisons or military bases, the media will enjoy stronger protections if it could film from a public thoroughfare as opposed to, for example, a field outside the perimeter of a fence.

#### ***Government Authority to Restrict Media Operations Within a Public Forum***

Within a public forum, the scope of the media’s right to film is at least as broad as that of the general public.<sup>10</sup> For instance, the government could not single out news cameras for removal (while continuing to allow the public to use cameras) as such action would likely be a

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<sup>7</sup> *Perry Educ. Ass’n*, 460 U.S. at 46 (“Public property which is not by tradition or designation a forum for public communication is governed by different standards.”); *Wilkinson v. Frost*, 832 F.2d 1330, 1339 (2d Cir. 1987) (distinguishing “traditional public forums” from “prisons, military installations, airports and courthouses”).

<sup>8</sup> *Grace*, 461 U.S. at 179 (“The sidewalks comprising the outer boundaries . . . are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently.”).

<sup>9</sup> *See, e.g., United States v. Kokinda*, 497 U.S. 720, 727-28 (holding that sidewalk outside post office was not a public forum because it “was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city”) (plurality opinion); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding sidewalk at military base over which military retained control was not a public forum).

<sup>10</sup> In some instances, it may be broader. For instance, film and photography intended for an audience enjoys broader protections than that recorded solely for personal reasons. *Porat*, at \*4-5.

content-based restriction that is almost never justified under the First Amendment.<sup>11</sup> Thus, when a government official attempts to remove media personnel from a public sidewalk, the media personnel should (politely) inquire whether the ban extends to general public as well. If not, the government's actions very likely violate the First Amendment.

The government may, however, restrict speech *within* public forums provided that the restriction does not specifically target the media.<sup>12</sup> For example, although the government may not single out news cameras for removal, it could conceivably restrict all filming or photography if -- and only if -- it could show that the restriction was narrowly tailored to a significant state interest. The most commonly cited state interest is public safety,<sup>13</sup> although other state interests include ensuring the flow of traffic,<sup>14</sup> maintaining the orderly movement of pedestrians,<sup>15</sup> and preventing interference with an investigation of physical evidence.<sup>16</sup> Generally, though, when government officials seek to remove media cameras from a public forum, they will most likely be relying on the "public safety" justification.

Whether a restriction qualifies as a valid exercise in the name of public safety depends upon the individual circumstances, but the burden remains with the government to justify these restrictions. For instance, courts have found that the government cannot restrict protected First Amendment activity by merely invoking "public safety" without any supporting evidence.<sup>17</sup>

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<sup>11</sup> Dienes, *supra* note 4 ("Discrimination against the media . . . could not be reasonably explained as a neutral regulation. . . .") (in context of access to executions); *see also Perry Educ. Ass'n*, 460 U.S. at 45 (stating that content-based regulations within public forums trigger strict scrutiny).

<sup>12</sup> *Grace*, 461 U.S. at 177 ("[T]he government may enforce reasonable time, place, and manner regulations [if they] are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

<sup>13</sup> *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) ("[I]t is clear that a State's interest in protecting the 'safety of convenience' of persons using a public forum is a valid government objective."); *Warren*, 196 F.3d at 190 ("The designation of an area as a traditional public forum does not prevent localities from addressing such significant concerns as public safety.").

<sup>14</sup> *Id.* ("movement of traffic").

<sup>15</sup> *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369 (9th Cir. 1997).

<sup>16</sup> *Channel 10, Inc.*, 337 F. Supp. at 638.

<sup>17</sup> *Gannett Satellite Info. Network, Inc. v. Township of Pennsauken*, 709 F. Supp. 530, 536-37 (D.N.J. 1989) ("Although safety is undoubtedly a significant government interest, broad assertions of a safety interest, without evidence to substantiate them, cannot survive when the First Amendment is implicated.").

In light of September 11 and the ongoing fears of terrorist attacks, it is possible that courts may become more deferential to government restrictions on photographing courthouses, or strategically important sites such as military bases or nuclear facilities. For instance, courts have cited national security to justify restrictions on the right of assembly outside the United Nations building<sup>18</sup> and the 2004 Democratic Convention in Boston.<sup>19</sup> As of now, though, the case law does not reflect any narrowing of media rights within public forums in the name of national security. Moreover, no specific post-September 11 federal law grants the government any additional rights to restrict visual newsgathering, photojournalism or photography generally. Still, national security is certainly a factor to consider when filming militarily sensitive sites (especially from non-public forums). We will continue to monitor the courts' treatment of this issue and update you about any new developments.

### ***Other Recommendations***

The Reporters' Committee has published other recommendations to help ensure maximum access for the media in its "First Amendment Handbook."<sup>20</sup> In some circumstances, media organizations can work out a mutually acceptable arrangement for routine filming by contacting the appropriate security personnel within the government facility. This step would avoid the need for confrontation. In some jurisdictions, law enforcement departments have even offered their own media guidelines and policies to clarify questions relating to press access.<sup>21</sup>

In addition, when reporters and film crews are denied access by government authorities, they should be cautious about resisting or disobeying because of the potential for arrest and temporary detention.<sup>22</sup> Where feasible, though, media personnel should obtain as much information as possible (scope of ban; reason for removal; etc.) before removal. News organizations may subsequently seek relief either from the officials' superiors, or if necessary, through a court order.<sup>23</sup>

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<sup>18</sup> *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 24-25 (S.D.N.Y. 2003).

<sup>19</sup> *Black Tea Soc. v. City of Boston*, 378 F.3d 8, 10 (1st Cir. 2004).

<sup>20</sup> Reporters' Committee for Freedom of the Press, *First Amendment Handbook*, available at <http://www.rcfp.org/handbook/index.html>.

<sup>21</sup> *Id.* at Chapter 8 -- "Access to Places: Police press guidelines."

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at Chapter 8 -- "Access to Places: Civil remedy for denied access."