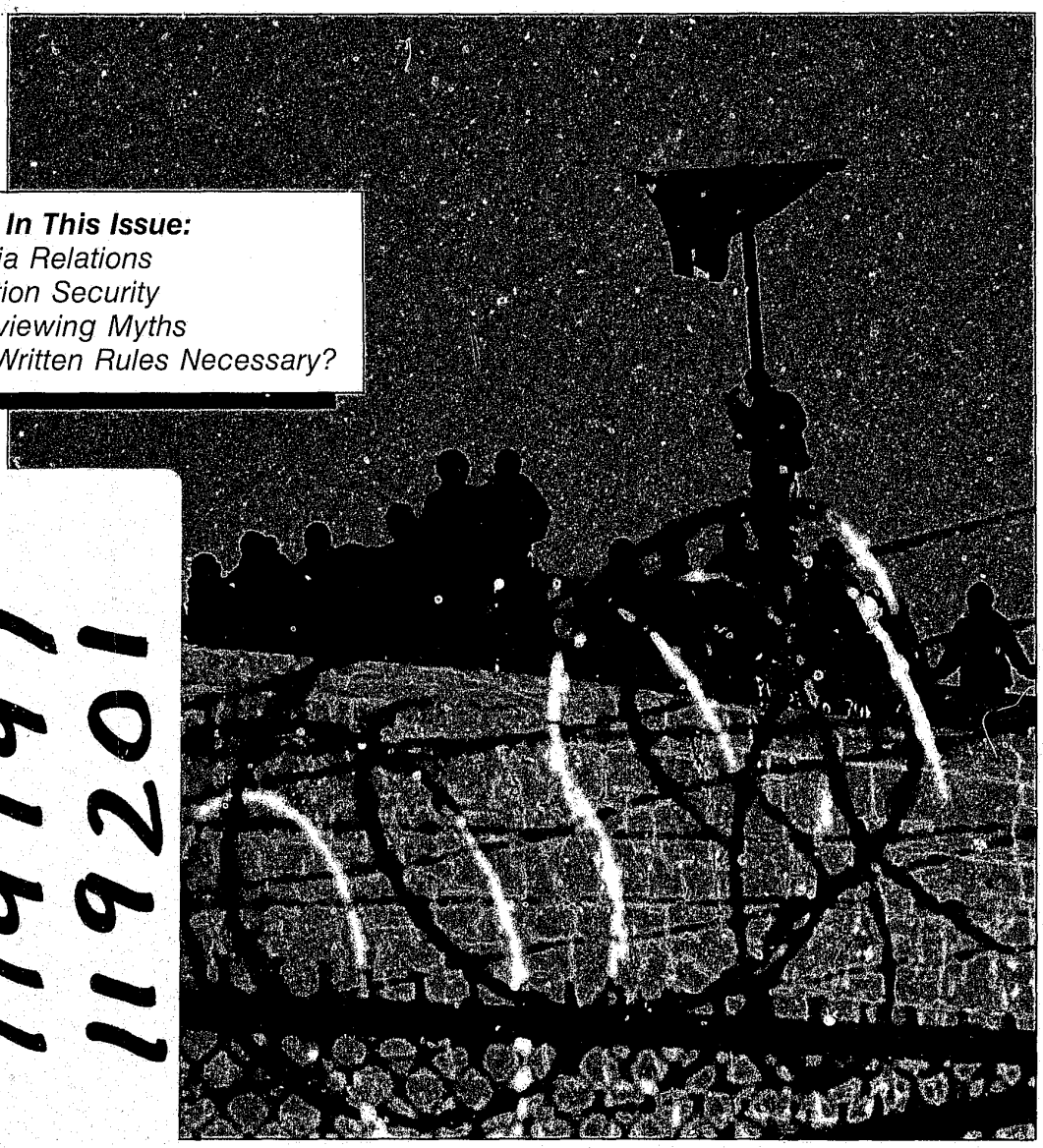
July 1989

FBI Law Enforcement Bulletin



Also In This Issue:
Media Relations
Aviation Security
Interviewing Myths
Are Written Rules Necessary?

The Oakdale and Atlanta Prison Sieges

Contents

July 1989, Volume 58, Number 7

Features

Departments

FBI
Law Enforcement Bulletin

United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535

William S. Sessions, Director

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

Published by the Office of Public Affairs, Milt Ahlerich, *Assistant Director*

Editor—Stephen D. Gladis
Managing Editor—Kathryn E. Sulewski
Art Director—John E. Ott
Production Manager—Joseph Andrew DiRosa

The Cover: *The Oakdale and Atlanta prison sieges, occurring simultaneously in November 1987, became catalysts for the largest crisis management mobilization in FBI history. See article on page 1.*

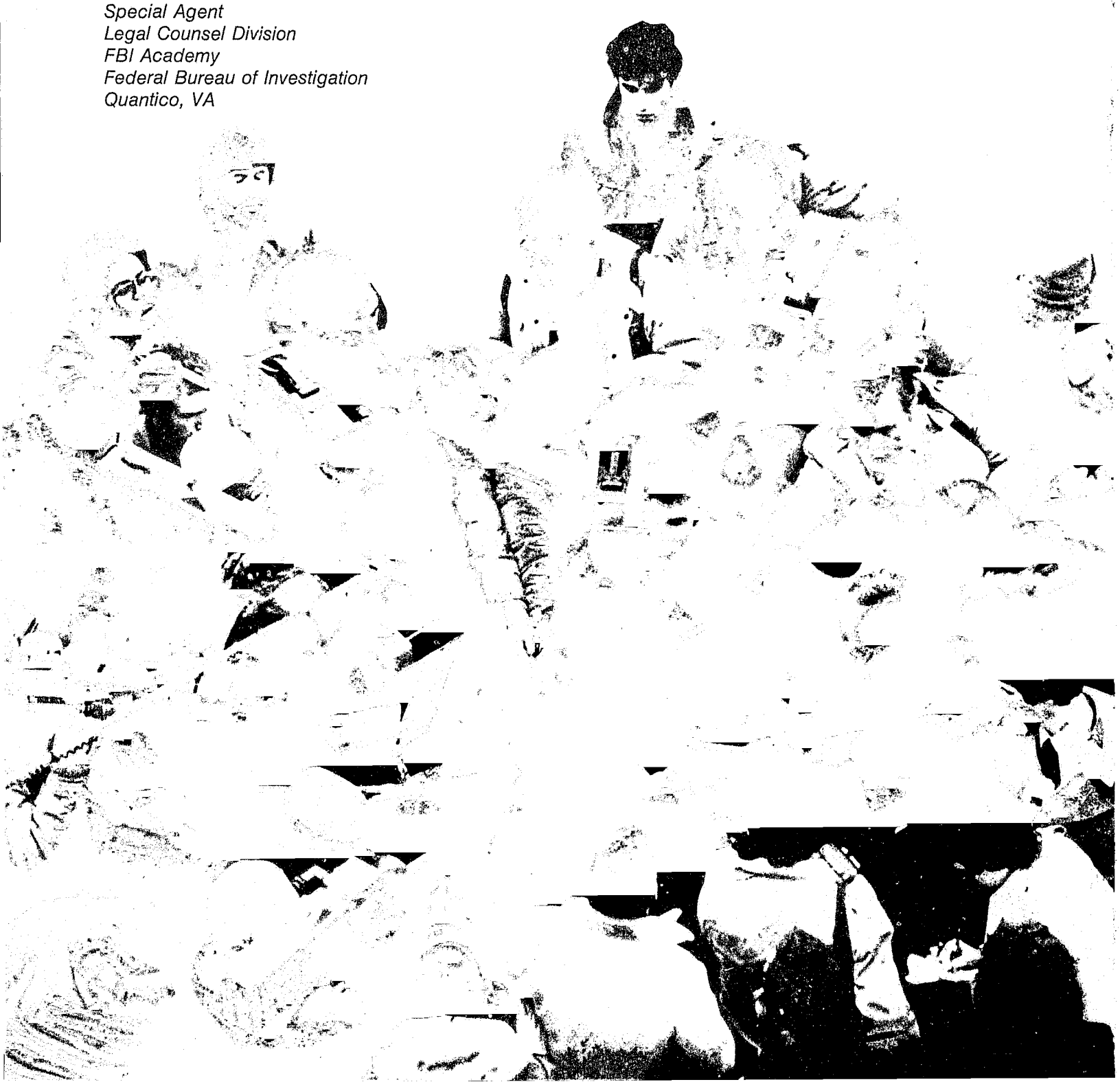
The FBI Law Enforcement Bulletin (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Ave., N.W., Washington, DC 20535. Second-Class postage paid at Washington, DC. Postmaster: Send address changes to Federal Bureau of Investigation, FBI Law Enforcement Bulletin, Washington, DC 20535.

ISSN 0014-5688 USPS 383-310

119201

Legal Issues in Media Relations

By
JEFFREY HIGGINBOTHAM, J.D.
Special Agent
Legal Counsel Division
FBI Academy
Federal Bureau of Investigation
Quantico, VA



In the infancy of the United States, James Madison wrote:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who would mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

It was with that counsel in mind that the first amendment was written, guaranteeing that the freedom of speech and of the press would contribute to an informed electorate and competent government. "[S]ince informed public opinion is the most potent of all restraints upon misgovernment,"[2] courts examine any abridgement of the publicity afforded by a free press with great scrutiny.

Madison's admonitions against restricting the freedom of the press have influenced the development of the law regulating and protecting media activity. Law enforcement administrators must carefully consider these legal issues when developing media relations policies or philosophies. A successful media relations policy must balance legitimate law enforcement interests and the public's desire for information concerning the effectiveness of law enforcement agencies and personnel.

Various legal issues must be considered when developing a media relations policy because the public's interest in receiving information through the media sometimes directly conflicts with the public interest in effective law enforcement. This article addresses the legal issues arising from the control of a crime scene or disaster area in the face of demands by the press for access, the response to media requests for access to law enforcement facilities or records, and restraints on publication of information acquired by the press.

This article also discusses the development in the Supreme Court of the media's first amendment right to access news, defines the press' limited right of access to law enforcement activities, and examines the legal problems inherent in attempts to restrict the publication of news. It concludes with suggestions for planning that balance law enforcement interests with media rights.

Historical Development of the Media's First Amendment Right to Access News

The origins of the media's constitutional right to access news began in the 1972 Supreme Court case of *Branzburg* v. *Hayes*.[3] In that case, the Court observed that "news gathering is not without its First Amendment protections,"[4] and that the press has the right to gather news "from any source by means within the law."[5] However, the Court clearly rejected the argument that the press has a constitutional right under the first amendment to demand the news be provided or made available to them:

> "... the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[6]

Of particular significance for law enforcement, the Court also ruled, "[N]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."[7]

In 1977, the Court decided a second case which more directly involved the scope of the media's constitutional right of access to the news. In *Houchins* v. *KQED*,[8] a television station, upon report of an inmate suicide blamed by some on the living conditions inside the jail facilities, requested permission to inspect and film the interior of the jail. The sheriff denied the request. KQED filed suit charging the sheriff violated KQED's and the public's first amendment rights by failing to provide any effective means by which the public could become informed of jail conditions. Shortly thereafter, the sheriff, completing earlier plans, announced he would permit monthly public tours of certain portions of the jail. The tours were open to

> ***"A successful media relations policy must balance legitimate law enforcement interests and the public's desire for information...."***

Special Agent Higginbotham

> ***"Law enforcement administrators must carefully consider ... legal issues when developing media relations policies and philosophies."***

the general public on a first-come, first-served basis, and were limited to 25 persons per tour; cameras and tape recorders were excluded, as was contact or communication with inmates.

KQED continued its lawsuit despite commencement of the tours, since it was denied preferential placement in the first tour and because KQED believed the prohibition of cameras and recorders, the exclusion of portions of the jail, and the isolation of inmates from the view of the tour substantially reduced the usefulness of the tours. The sheriff defended his position by arguing that unregulated access by the media would be disruptive and generate internal and security problems. In addition, the sheriff noted that various other means existed by which information concerning jail conditions could reach the public.

The Supreme Court accepted the case to decide "... whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television."[9]

The Court recognized the crucial role of the media as a safeguard against misgovernment and that "conditions in jails and prisons are clearly matters 'of great public importance,' [where the press] acting as the 'eyes and ears' of the public... can be a powerful and constructive force, contributing to remedial action in the conduct of public business."[10] However, the Court stated, "[L]ike all other components of our society media representatives are subject to limits."[11]

In ruling for the sheriff, the Court held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[12] The Court believed resolution of the issue of access to news to be political, not constitutional, in nature:

> "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> "The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society."[13]

The Court counseled that the appropriate method by which the public may be informed of jail conditions "... is a policy decision to be resolved by legislative decision," and care must be taken "not to confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."[14]

The issue was revisited by the U.S. Supreme Court in a slightly different context in *Press-Enterprise Co.* v. *Superior Court of California.*[15] There, by order of the trial court, the preliminary hearing in a murder case was closed to both the public and the press, and the transcripts put under seal. In a suit to force release of the transcripts, the issue before the

Court was whether the first amendment guaranteed access to news, i.e., the transcripts of the preliminary hearing. This time, the Court ruled that under certain conditions and in certain contexts, a constitutional right to acquire news does exist. The Court described those conditions as: 1) "[W]hether the place and process has historically been open to the press and public,"[16] and 2) "... whether public access plays a significant positive role in the functioning of the particular process in question."[17]

In *Press-Enterprise*, the Supreme Court concluded that because preliminary hearing proceedings had historically been open to the public and because public access would benefit the functioning of the process, a "... qualified right of access attaches to preliminary hearings"[18] and ordered the release of the preliminary hearing transcripts to the press. More importantly, the Court noted that the first amendment right of access is not absolute, and that the qualified right must give way if the government can prove by a "substantial probability"[19] that prejudice or harm would result from public access.

The *Branzburg, KQED*, and *Press-Enterprise* trilogy which carved the first amendment right of media access to news is important because it recognizes the important societal role served by the media. By keeping the public informed of events and the workings of the government, democratic society is advanced. Law enforcement administrators must bear this in mind when developing a media relations policy or philosophy.

The Media's Limited Right of Access to Law Enforcement Activities

The first amendment right of the media to access the news is not absolute and "... like all other components of our society ... subject to limits."[20] That point is particularly important to law enforcement officers and agencies faced with a demand by the media for access to a newsworthy event, police records, facilities, or functions.

Courts consider two questions in determining the scope of the media's first amendment right to access news about a particular law enforcement activity: 1) Is the access predicated on a historical tradition of openness and will media access play a positive role in the functioning of the criminal justice process? and 2) Is the particular law enforcement function or activity so important to the effective functioning of society that it may on balance be shielded from both the press and the public? Each of these factors is discussed below.

Certain law enforcement activities have traditionally been open to the public and press. For example, police arrest records and blotters, as well as court documents, have historically been accessible to anyone on request. However, other law enforcement activities do not have a tradition of openness and are beyond the scope of the media's first amendment right of access. For example, the conduct of criminal investigations has never been a public venture. While individual pieces of the investigation may be conducted publicly (e.g., interview with a witness at a crime scene), the information gathered and the investigative strategy employed has been traditionally protected from public examination or dissemination. Confidentiality is necessary to safeguard the integrity of the investigation and to avoid prejudicing the right of a defendant to receive a fair trial.

Moreover, public and media access to an on-going investigation would not contribute positively to the functioning of the criminal justice process. Unbridled press access to a pending investigation could thwart the investigation and denigrate the ability of an accused to receive a fair trial.

> ***"... the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."***

Finally, police records or facilities that do not have a historical tradition of openness are beyond the reach of the media's first amendment right to gather news. The media's "... right of access is not a license to force disclosure of confidential information or to invade the decisionmaking process of government officials."[21] Where such records or facilities have not historically been made public or where access would negatively affect law enforcement, there is no constitutional right to access those records[22] or facilities.

> *"'[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.'"*

Other law enforcement activities or functions are also beyond the scope of the media's first amendment right to access the news because the particular function or activity is so important to the effective functioning of society that exclusion of the press and public is justified. For example, the press may be excluded, along with the general public, from crime scenes, public disasters, or other police functions where the media's presence would hinder, interfere, or jeopardize the safe and effective accomplishment of mission. Police may lawfully cordon such areas, restricting all persons (press and public) from entering until such time as the police operation is completed or access poses no risk to law enforcement interests. In such cases, the interests of society as represented by law enforcement are paramount to the press' first amendment right of access.

Restraints on Publication of the News

Thus far, this article has addressed a narrow issue — the existence and scope of a constitutional right to access news. However, instead of restricting access, occasionally law enforcement may desire to restrain the media from publicly disclosing law enforcement information that the media has already accessed. As an example, in December 1986, law enforcement officers converged on the parking lot of a convenience store where two narcotics fugitives were believed to be. En route, the officers exchanged radio communications which identified the location to local news reporters who were monitoring police radios.

Based on the fast-breaking events, several undercover officers involved in the investigation, one of whom was the target of a murder contract placed by the suspects, arrived at the scene and assisted in the successful arrest of both fugitives. As the arrests were made, video and still photographs were taken by news reporters who had also arrived at the scene. When the arresting officers realized the pictures taken would likely disclose the identities of the undercover officers, they requested and demanded that the filming stop. As added protection of the undercover officers' identities, the cameras and film were temporarily seized until arrangements were made for a joint law enforcement/media review of the film to protect against broadcast of pictures which might compromise the officers' identities and jeopardize their safety. A lawsuit was subsequently filed challenging the lawfulness of the seizure of the film and cameras and alleging constitutional, statutory and common law violations.[23]

Few would deny that the capture of two dangerous fugitives is a newsworthy event or that law enforcement had valid concerns about the compromise and safety of the undercover officers involved. One might even argue that such a situation is one where the qualified right to access news must give way to the competing interests of law enforcement. However, that argument is flawed because the issue was not access, but restraint on the publication of news and pictures already acquired. "Although both [the right of access and the right of publication] have their roots in the First Amendment, these principles are doctrinally discrete, and precedents in one may not be indiscriminately applied to the other. In general, the right of publication is

the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may be denied."[24]

The courts are extremely reluctant to engage in the prior restraint of speech. In fact, any attempt to do so comes to the court "... bearing a heavy presumption against its constitutional validity."[25] The right to publish or disseminate information is so important because it is the foundation upon which our Nation was created:

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."[26]

While a full discussion of the doctrine of prior restraint is beyond the scope of this article, it is sufficient, for law enforcement purposes, to realize that the press' right of expression exceeds its right of access. If legitimate law enforcement concerns conflict with media interests or demands, resolution is more likely to be found in restricting access, not restraining publication.

The press' cherished first amendment right of publication is also supported by Federal legislation. In 1980 Congress enacted the Privacy Protection Act,[27] providing special protection to certain information in the possession of the media against government search and seizure. Basically, this law prohibits the government from searching for or seizing a person's workproduct or other documentary materials which are possessed in connection with the intention to disseminate the information to the public in a newspaper, book, broadcast or similar public communication, except in narrowly defined situations.[28] It was this statutory restriction that became the central issue in the lawsuit mentioned earlier, which arose from the media coverage of the arrests of the narcotics fugitives. Ultimately, the court ruled in favor of the media in that case, finding a breach of the Privacy Protection Act's prohibition on the seizure of the media's workproduct intended for public dissemination.[29]

> ***"... the first amendment right of access ... must give way if the government can prove by a 'substantial probability' that prejudice or harm would result from public access."***

No further discussion of the Privacy Protection Act is necessary here. The lesson to be derived is parallel to the prior restraint discussion. The media's crucial role in society carries protections, both constitutional and statutory, commensurate with its importance. Once news is obtained, law enforcement, and the government as a whole, is constrained in its ability to seize it or to interfere with the press' right to publish.

Conclusion

The right of the press to access news is not absolute. It is tempered by the public interest in safe and effective law enforcement. Where the public may not go, the press has no constitutional right to go. Where historical tradition has not opened law enforcement functions to the public and press or where public openness would not contribute to the functioning of the government process, no constitutional right to access news exists.

However, the media's interest in law enforcement activities must be expected. The press, like law enforcement, serves a vital societal role. If conflicts arise, they can be successfully managed and resolved if law enforcement and the press respect the important purposes served by the other.

Law enforcement officials would be well-served to plan operations with the media's potential interest and presence in mind. Thus, it might be possible to establish perimeters around the operation which exclude both public and press, if their presence would harm or risk the successful accomplishment of mission. Similarly, prior planning for emergency operations and incidents should include planning for

media inquiries and demands. Public information officers can be used to bridge the competing interests when media demands threaten law enforcement interests.

Advance planning will also assist in forestalling the more difficult issues in restraining publication or dissemination of already-acquired information. Planning should presume that prior restraint, condemned by both the Constitution and statute, cannot be effectively achieved. Thus, the alternative is to restrict access where publication would endanger law enforcement efforts.

Law enforcement should not perceive the press as an adversary. All law enforcement officials and officers must realize and appreciate the complementary and conflicting roles served by both. The press and law enforcement are part of our societal balance and "[a]lthough the press cannot command access wherever, whenever it pleases, neither can government arbitrarily shroud genuinely newsworthy events in secrecy . . . [T]he state's rulemaking power is not absolute: if the first amendment is to retain a reasonable degree of vitality, the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or less-restricted) access."[30] FBI

Footnotes

[1]9 Writings of James Madison 103 (G. Hunt ed. 1910).

[2]*Grossjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[3]408 U.S. 665 (1972).

[4]*Id.* at 707.

[5]*Id.* at 681-682.

[6]*Id.* at 684.

[7]*Id.* at 684-685.

[8]438 U.S. 1 (1977).

[9]*Id.* at 3.

[10]*Id.* at 8.

[11]*Id.*

[12]*Id.* at 15.

[13]*Id.* at 14-15, citing Stewart, "Or of the Press," 26 Hastings L.J. 631, 636 (1975).

[14]438 U.S. at 13. *See also, Capital Cities Media, Inc.* v. *Chester*, 797 F.2d 1164, 1167 (3d Cir. 1986) ("The founding fathers intended affirmative rights of access to government-held information, other than those expressly conferred by the Constitution, to depend on political decisions made by the people and their elected representatives."); *Herald Co.* v. *McNeal*, 511 F.Supp. 269 (E.D. Mo. 1981).

> ***"Law enforcement officials would be well-served to plan operations with the media's potential interest and presence in mind."***

[15]106 S.Ct. 2735 (1986).

[16]*Id.* at 2740.

[17]*Id.* One case has questioned whether the two-prong standard of *Press-Enterprise* is applicable to situations other than courtroom proceedings. *See, Capital Cities Media, Inc.* v. *Chester, supra,* note 14 at 1174. However, even that case ultimately applied the dual standard. Other courts have done likewise. *See, e.g., Combined Communications Corp. of Oklahoma* v. *Boger*, 689 F.Supp. 1065 (W.D. Oklahoma 1988); *First Amendment Coalition* v. *Judiciary Inquiry and Review Board*, 784 F.2d 467 (3d Cir. 1986); *Society of Professional Journalists* v. *Secretary of Labor*, 616 F.Supp. 569 (D. Utah 1985).

[18]106 S.Ct. at 2743.

[19]*Id.*

[20]*Houchins* v. *KQED*, 438 U.S. 1, 8 (1977).

[21]*Society of Professional Journalists* v. *Secretary of Labor, supra,* note 17 at 577. *See also, Legi-Tech Inc.* v. *Keiper*, 601 F.Supp. 371 (N.D.N.Y. 1984); *Bartel* v. *F.A.A.*, 617 F.Supp. 190 (D.D.C. 1985).

[22]The scope of this article does not extend to State legislation, which might grant broader access to government records and activities than does the Constitution. *See, e.g., Freedom Newspapers, Inc.* v. *Superior Court*, 227 Cal. Rptr. 518 (Cal. App. 4 Dist. 1986). The reader is advised to seek a legal opinion from local counsel to determine what, if any, more liberal standard exists in his/her jurisdiction.

[23]*See, Minneapolis Star Tribune Company* v. *United States*, Civil Action No. 3-87-36 (D. Minnesota). The claims included alleged violation of the first amendment guarantee of freedom of the press and of the Privacy Protection Act, 42 U.S.C. §2000aa.

[24]*First Amendment Coalition* v. *Judicial Inquiry and Review Board*, 784 F.2d 467, 471-472 (3d Cir. 1986) (citation omitted).

[25]*Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). *See also, New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

[26]*New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (Justice Black, concurring).

[27]42 U.S.C. §2000aa, *et seq.*

[28]42 U.S.C. §§2000aa(a) and 2000aa(b). For a complete discussion of the provisions of the Privacy Protection Act, *see*, Rissler, "The Privacy Protection Act of 1980," *FBI Law Enforcement Bulletin*, February 1981.

[29]*Minneapolis Star Tribune Company* v. *United States*, civil action No. 3-87-36 (D. Minn.) Order August 1, 1988. This article should not be read as a criticism or condemnation of the actions of the law enforcement officers involved in that situation. Quickly developing events offered few, if any, alternatives.

[30]*D'Amario* v. *Providence Civic Center*, 639 F.Supp. 1538, 1543 (D.R.I. 1986).

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.