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149705

News Media Participation in Law Enforcement Activities

By
KIMBERLY A. CRAWFORD, J.D.

*"Unbidden guests are often
welcomest when they are
gone."*

—William Shakespeare
Henry VI, Act 2, Scene 2

Historically, the relationship between law enforcement and the news media has been fraught with conflict. Law enforcement agencies, in their efforts to safely and effectively investigate and prosecute violations of criminal laws, often have sought to preclude the news media from interfering in their endeavors. On the other hand, the news media, performing the valuable function of keeping the public informed, has waived the first amendment banner, claiming a news-gathering privilege.

This conflict culminated in a series of three Supreme Court decisions that defined the parameters of the first amendment's newsgathering privilege.¹ Essentially, the Supreme Court held that the constitutional right of the media to access the news is no greater than that of the general public and that law enforcement can prevent the media from obtaining access to information or areas generally not available to the public.² However, once the



media acquires the information, the constitutional right to publish is virtually insurmountable,³ and any attempt by law enforcement to prevent dissemination will be presumed invalid.⁴

The practical result of these Supreme Court decisions is that they have created a strong incentive

for law enforcement and the news media to resolve their conflicts and to work together in a spirit of cooperation. The media depend on law enforcement for access to news that is unavailable to the general public, and law enforcement relies on the media to responsibly report the news in a manner that

will not jeopardize law enforcement activities.

The new, cooperative relationship that has developed between law enforcement and the media is epitomized in the very popular "docudramas" that appear almost nightly on prime-time television. Camera crews accompanying law enforcement officers on assignments bring raids, searches, seizures, and arrests into viewers' homes. Although beneficial from a public relations standpoint, the cooperative effort required to produce this type of program is not without constitutional impediment.

The constitutional issues that arise when the news media participate in law enforcement activities were the focus of a Federal district court's opinion in the case of *United States v. Sanusi*.⁵ This article examines these issues as they relate to law enforcement and makes policy recommendations to accommodate the resulting constitutional concerns.

UNITED STATES v. SANUSI

In *Sanusi*, nine defendants, including Babatunde Ayeni, were charged with credit card fraud. In preparation of his defense, Ayeni subpoenaed a CBS News videotape taken during the search of his apartment. The search, which was conducted pursuant to a warrant, was filmed by a CBS crew on the scene at the invitation of the U.S. Secret Service.

Contending a newsgathering privilege, CBS refused to turn over the videotape and moved to quash the subpoena. After careful consideration, the court denied CBS's motion and held that an edited version of the tape, which obscured the

identity of a confidential source, had to be turned over to the defense.

In reaching its conclusion, the court identified and analyzed both first and fourth amendment issues. While the fourth amendment issues are of primary concern to law enforcement, the practical impact of the first amendment issues are of sufficient importance to warrant discussion.

FIRST AMENDMENT ISSUES

CBS's motion to quash the subpoena was based on the argument that the first amendment newsgathering privilege protects the media from the type of compelled disclosure sought by the defense. When considering this argument, the court reviewed the previously mentioned Supreme Court decisions and recognized the existence of a qualified newsgathering privilege. However, because this privilege is not absolute, the court found that it can be overcome by a showing that the information sought is 1) highly material and relevant, 2) necessary or critical to the maintenance

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law enforcement...
”**



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of a claim, and 3) not obtainable from other sources. Furthermore, the court pointed out that the newsgathering privilege does not shield the media from ordinary legal constraints and that members of the media could be liable for criminal or tortious trespass committed while in pursuit of the news. Finding that the defense met the three-part test establishing its interest in acquiring the videotape as superior to that of CBS News, and that the camera crew trespassed on defendant's property, the court held that CBS was required to comply with the subpoena.

The first amendment analysis by the court in *Sanusi* is of obvious importance to the media. However, the practical result of that analysis is of particular importance to law enforcement.

Following its determination that the newsgathering privilege did not protect CBS from compelled disclosure, the court reviewed the videotape in question and determined nothing on that tape would support the defendant's motion for suppression. However, the court

ruled that the tape could be critical to the defendant's case at trial because it demonstrated that an exhaustive search of defendant's apartment failed to reveal any evidence of credit card fraud.

Although the defendant could easily make this point to a jury without the tape, the court reasoned that the video depicting defendant's wife and child cowering during the search was extraordinary evidence and that the defendant could not be denied the opportunity to use its impact on the jury to his benefit. Observing that the average citizen may find the government's conduct unacceptable, the court noted that "by inviting CBS to accompany it on its search, the Secret Service may well have provided a basis for a finding of not guilty."⁶

The court's prediction of a jury's reaction to the videotaped search of defendant's apartment is a clear example of the impact that the qualified newsgathering privilege will have on law enforcement. Because the privilege is not absolute, law enforcement must realize that the material acquired by the media while participating in enforcement activities may be turned over to the defense and ultimately viewed by a jury.

Typically, juries are comprised of average, law-abiding citizens who are unfamiliar with the sometimes harsh realities of law enforcement. Consequently, the recording of law enforcement activities by the media may result in uninitiated juries scrutinizing the lawful actions of law enforcement rather than the alleged unlawful actions of defendants.

FOURTH AMENDMENT ISSUES

Although defendant's motion to compel production of the videotape was resolved on first amendment grounds and did not require a review of the government's actions, the court in *Sanusi* took the opportunity to expose what it believed to be a clear violation of defendant's fourth amendment rights. In doing so, the court initially noted that the fourth amendment does not control the

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conduct of private actors, such as CBS.⁷ However, the Secret Service agents, executing the warrant that authorized the search of defendant's apartment, were unquestionably government actors and, therefore, bound by the proscriptions of the fourth amendment.⁸

Warrant Execution

Reviewing the historical development, the court recognized that preserving the sanctity of the home is an essential function of the fourth amendment.⁹ Consequently, the court noted that there are a number of fourth amendment restrictions on the government's ability to enter a home.

Specifically, the fourth amendment requires that unless an exception exists,¹⁰ the government must obtain a warrant based on probable cause before entering private premises, and that the warrant must particularly describe the place to be searched and any item to be seized.¹¹ These restrictions prompted the court to conclude that "only for limited and necessary purposes does the ordinary inviolability of the home temporarily give way"¹² when a search warrant is obtained.

Because the "execution of a search warrant is a serious matter,"¹³ the court expressed its opinion that the government, when executing a warrant, has a fiduciary obligation to ensure that the principles embodied in the fourth amendment are followed and that the privacy of individuals is not invaded any more than what is reasonably necessary. Accordingly, the court made the following statement:

"Charged as they are with the delicate and sensitive responsibility of executing a judicially sanctioned violation of a person's privacy, government agents have a duty to see that as little harm is done as is necessary to the task. Wantonly exceeding the scope of the warrant would represent a failure to perform that duty. Inviting private citizens whose presence is not necessary to the execution of the warrant to join the search party is a failure of public trust—one that indicates a disregard of the important values at stake when the government enters a person's home."¹⁴

Assessing the government's behavior, the court held that inviting CBS to take part in the search of defendant's home contravened fourth amendment principles and was a clear violation of the government's fiduciary duty. Although finding that the government's actions did not rise to the level of misconduct requiring dismissal of defendant's indictment, the court strongly criticized the agents' behavior and ordered that its opinion be brought to the attention of the highest authority in the Secret Service.¹⁵

Exceptions to the Warrant Requirement

The rationale advanced by the court in *Sanusi* to support the conclusion that law enforcement violates the fourth amendment when it invites the media to participate in searches authorized by warrants would apply with equal or greater force when the searches at issue are conducted pursuant to exceptions to the warrant requirement. When law enforcement officers search private premises under an exception to the warrant requirement, there is a legal presumption that the search is unlawful.¹⁶ The government bears the burden of proving that a valid exception to the warrant requirement existed and that law enforcement officers stayed within the scope of that exception.¹⁷ Because the scope of each exception is narrowly defined, it is inconceivable that the government could successfully meet its burden of proof when the media are invited to participate in warrantless searches of private premises.

If, for example, law enforcement officers make a warrantless

entry of premises pursuant to the emergency exception to the warrant requirement, the officers' ability to search is prescribed by the emergency itself. Officers are only permitted to do what is reasonably necessary to resolve the emergency.¹⁸ It is unlikely that the presence of the media would be necessary to resolve the emergency.



Similarly, law enforcement officers entering premises under a valid consent to search are required to stay within the bounds established by the party giving consent.¹⁹ Unless specifically authorized, extending an invitation to the media to participate in the search would exceed the scope of the consent and would result in a violation of the fourth amendment.

Civil Liability

As demonstrated in *Sanusi*, fourth amendment violations do not necessarily result in suppression of evidence or dismissal of charges. However, civil liability for the officers involved or their employing governmental entities is a risk that must be considered prior to inviting the media to participate in law enforcement activities.

Not surprisingly, the wife and young son of Babatunde Ayeni filed a civil action against CBS, the camera crew, and the law enforcement officers who took part in the search of their home. The suit alleged that both mother and child suffered serious psychic harm as a result of the actions of the government and the broadcaster. A Federal district court resolved one aspect of this civil action that has critical implications for law enforcement decisionmaking regarding media participation.

Following the initiation of the civil suit, the government and CBS claimed that the actions of the individuals involved did not violate any clearly established law and moved for dismissal on the basis of qualified immunity.²⁰ Finding the defense of qualified immunity inapplicable to private parties, the court quickly denied the motion of CBS and concentrated on the claims of the government.

Recognizing that law enforcement officers are immune from suit unless at the time of their actions it is objectively clear that their conduct violates a statutory or constitutional right, the court looked at the state of the law as it existed at the time of the search in question. Although unable to find any case law specifically prohibiting officers from permitting the media to take part in the execution of search warrants,²¹ the court found that the alleged actions were "so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert [officers] to the fact that the execution of a warrant for the benefit of private persons violated the Constitution."²² Accordingly, the court concluded that a "prima facie gross

violation of plaintiffs' clear constitutional rights ha[d] been pleaded"²³ and denied the government's motion to dismiss on the basis of qualified immunity.

CONCLUSION

As a result of the *Sanusi* decision and the subsequently filed civil action, media participation in law enforcement activities can result in predictable and legally significant consequences. First, films obtained by the media are subject to discovery and may be used by the defense to cloud issues at trial. Second, if law enforcement activities take place in an area where an individual has a fourth amendment right of privacy, media participation at the invitation of law enforcement is a violation of that constitutional right. Finally, the individual law enforcement officers responsible for inviting the media into areas protected by the fourth amendment are subject to civil liability for having violated a clearly established law.

Accordingly, law enforcement agencies contemplating cooperative efforts with the media should carefully craft a policy that balances the benefits of good public and media relations against the possible disadvantages of having media information made available to the defense. More importantly, the policy should ensure compliance with fourth amendment principles by distinguishing between law enforcement activities that take place in public as opposed to private areas.

Media participation in enforcement activities that occur in private areas should be specifically prohibited, unless the media obtains consent from individuals occupying

those areas. A well-crafted policy, if followed, will serve the dual purposes of safeguarding fourth amendment rights and protecting individual law enforcement officers and employing entities from civil liability. Above all, a competent legal advisor should review and approve a department's media participation policy prior to its implementation. ♦

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Endnotes

¹ See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Houchins v. KQED*, 438 U.S. 1 (1977); and *Press-Enterprise Co. v. Superior Court of California*, 106 S.Ct. 2735 (1986).

² Some State laws may provide the media a greater right of access than that of the general public.

³ In *New York Times Co. v. United States*, 403 U.S. 713 (1971) (The Pentagon Papers Case) Justice Douglas, in his concurring opinion, defined the standard for governmental prior restraint on the media's right to publish as follows:

“...only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.” *Id.* at 726-27.

⁴ For a discussion of the conflict between law enforcement and media, see Higginbotham, “Legal Issues in Media Relations,” *FBI Law Enforcement Bulletin*, 59, No. 7, July 1989.

⁵ 813 F. Supp. 149 (E.D.N.Y. 1992).

⁶ *Id.* at 160.

⁷ *United States v. Jacobsen*, 466 U.S. 109 (1984).

⁸ *Katz v. United States*, 389 U.S. 347 (1967).

⁹ The court quoted with approval the following words of Lord Chatham:

“The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!”

¹⁰ 389 U.S. 347 (1967).

¹¹ U.S. Const. Amend. IV provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the things to be seized.”

¹² 813 F. Supp. at 158.

¹³ *Id.*

¹⁴ *Id.* at 160-61.

¹⁵ The court was particularly disturbed by the fact that the U.S. attorney had explicitly directed the Secret Service not to permit CBS to take part in the search but “agents disregarded him and, apparently at the direction of ‘higher authority’ within the Secret Service, invited CBS to come along.” *Id.* at 161.

¹⁶ 389 U.S. 347 (1967).

¹⁷ See, e.g., *Mincey v. Arizona*, 437 U.S. 385 (1978).

¹⁸ *Id.*

¹⁹ *Florida v. Jimeno*, 111 S.Ct. 1801 (1991).

²⁰ *Ayeni v. CBS*, 848 F.Supp. 362 (E.D.N.Y. 1994).

²¹ The court noted, however, that a Federal statute addresses the issue. Specifically, the court quoted 18 U.S.C. §3105 as follows:

“A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer of his requiring it, he being present and acting in its execution.”

²² 848 F. Supp. 368.

²³ *Id.* at 364.

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