Cracking The Dam: A Guide To Journalists' Right of Equal Access To Information

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. GETTING TO THE SHOW . . . : THE LAW OF ISSUING PRESS PASSES 5

- A. If It Quacks Like A Duck: What Constitutes A Content-Based Regulation When Issuing Press Credentials? 7
- B. Show Me The Money: Must Credentialing Policies Be Articulated? 13
- C. Times They Are A-Changin': Can Reporters Be Denied Access To An Event Because Of The Medium In Which They Publish? 16
- D. One For All: Can A Reporter Be Excluded From A Press Conference Because Other Means Are Available To Gather Information? 20

III. . . . AND THE COLD SHOULDER ONCE YOU'RE THERE: THE LAW OF UNEQUAL AND DISCRIMINATORY ACCESS TO INFORMATION 23

- A. A Newsroom Nightmare: Two Worst-Case Scenarios Of Public Officials Discriminating Against Reporters 25
- B. Straight Up: Does The First Amendment Protect Reporters From Vengeful Public Officials? 29
- C. An Eye For An Eye: Do Constitutional Protections Against Retaliation Bar Discriminatory Policies? 31
- D. Old Faithful: Will The Public Forum Doctrine Save Reporters From Policies Promoting Unequal Access? 35
- E. The Power Of The Pen: What Else Can A Reporter Do To Fight A Discriminatory Policy? 36

IV. CONCLUSION 36

I. INTRODUCTION

It should be no surprise that a class of professionals charged with dramatically sketching and then coloring the day's events would adopt powerful analogies to describe their life's work. Mention the phrase "the fourth estate" and journalists' chins will rise.[1] Celebrate the term "watchdog journalism" and reporters may clutch their press passes with pride.[2] Finally, describe the press as those preserving "the full and free flow of information to the general public" and expect an approving nod from any newsman within earshot.[3] There are three separate elements inherent in the free flow of information analogy: the mouth of this information river, the source, and the current. Each of these parts have an equally important role in informing the public,[4] and yet all three have different levels of legal protection.[5]

The flow's delta is the eyes and ears of news consumers, who under Supreme Court precedent, have a First Amendment "right to *receive* information and ideas."[6] In *Red Lion Broadcasting Co. v. FCC* the Supreme Court held that "[i]t is the right of the public to receive suitable access" to information that "is crucial."[7] Similarly, in *Stanley v. Georgia*, a case decided the same year as *Red Lion*, the Court proclaimed, "It is now well established that the [First Amendment] protects the right to receive information and ideas."[8] Although *Red Lion* and

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[1] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).
[2] *See Tavoulareas v. Piro*, 759 F.2d 90, 121 n.39 (D.C. Cir. 1985) ("Newspapers provide a vital service by acting as watchdog for the public.").
[3] *Houchins v. KQUED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment.").
[4] *In re Mack*, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) ("Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water.").
[5] Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004) (hereinafter "McDonald").
[6] *Id.* at 250 (emphasis added).
[7] 395 U.S. 367, 390 (1969).
[8] 394 U.S. 557, 564 (1969).

Stanley remain good law, some see this interpretation of the First Amendment as somewhat limited by later Supreme Court precedent.[9]

The flow's current is the function of actually publishing information and delivering it to the public. This stage is strongly protected by the First Amendment's prohibition on "prior restraints."[10] A prior restraint is government action that prohibits an individual or organization from publishing information.[11] As far back as 1769, 22 years before the First Amendment was ratified, a commentator stated that the "liberty of the press" depends on "no previous restraints on publication."[12] More modern legal authorities have echoed this understanding. For instance, according to a 1971 Supreme Court decision, a prior restraint bears "a heavy presumption against its constitutional validity."[13]

The least protected segment of the "free flow of information" analogy is access to the river's source, the information itself. Professor Barry McDonald has noted that jurisprudence in regard to access to information is both "erratic and fragmented."[14] For example, in *Branzburg v. Hayes*[15] the Supreme Court held that there is no blanket First Amendment right for a journalist to keep confidential sources. The decision struck a blow to the press's claim that the First Amendment should protect a journalist's ability to gather and access information. However, the Court did offer a consolation when it noted that "without some protection for seeking out the

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[9] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (Thomas, J., concurring); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).
[10] *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).
[11] As one article notes, its often difficult to define what constitutes a prior restraint. *See* Marin Scordato, *Distinction Without A Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).
[12] 4 William Blackstone, Commentaries *151, *152; *see* Report on the Virginia Resolutions, Madison's Works, vol iv, p. 543 ("security of the freedom of the press requires that it should be exempt . . . from previous restraints.").
[13] *New York Times Co. v. United States*, 403 U.S. 713 (1971).
[14] McDonald at 251; *see* Harvard Law Review Association, Developments in the Law – The Law of Media, *IV. Viewpoint Discrimination & Media Access to Government Officials*, 120 HARV. L. REV. 1019 (2007) (hereinafter "*Viewpoint Discrimination & Media Access*").
[15] 408 U.S. 665 (1972).

news, freedom of the press could be eviscerated."[16] Unfortunately, the Court did not define what "some protection" meant. Later cases further muddied the already cloudy water. The Court's holdings in *Pell v. Procunier*,[17] *Saxbe v. Washington Post Co.*,[18] and *Houchins v. KQUED*,[19] taken together, weaken the idea that journalists have "some" legal right to access valuable information.[20] But, in the 1980 *Richmond Newspapers, Inc. v. Virginia* case, the Court seemed to backtrack on the logic used to underpin *Pell*, *Saxbe*, and *Houchins*, holding that there was a First Amendment right to gather information at criminal trials.[21] Finally, just 11 years later, the Court in *Cohen v. Cowles Media Co.* returned to the approach taken prior to the *Richmond Newspapers* case.[22] Professor David A. Anderson said that until *Cohen*, observers could at least make sense of the Court's decisions with respect to access to information, even if they did not agree with it.[23] But after *Cohen*, Anderson said, "If there's a theoretical sense to this area of law, it confuses me."[24]

Whatever the logic banding these cases may be, "at least one proposition seems to be well settled: The First Amendment does not 'guarantee the public a right of access to information generated or controlled by government . . .'"[25] As a corollary to this understanding, Justice Potter Stewart stated, and a recent Court decision appears to affirm,[26] that the

[16] *Id.* at 681.
[17] 417 U.S. 817, 834 (1974).
[18] 417 U.S. 843 (1974).
[19] 438 U.S. 1.
[20] McDonald at 302-03.
[21] 448 U.S. 555 (1980).
[22] 501 U.S. 663 (1991).
[23] Telephone Interview with David A. Anderson, Fred & Emily Marshall Wulff Centennial Chair in Law at The University of Texas at Austin School of Law (July 6, 2010).
[24] *Id.*
[25] *Viewpoint Discrimination & Media Access* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).
[26] *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (Justices Souter, Breyer, Ginsburg, Stevens, O'Connor, and Kennedy all expressly stated that once information is generally available to the public, a government official may not withhold information from some people and offer it to others based on some criteria).

"Constitution does no more than assure the public and the Press equal access [to information] once government has opened its doors."[27] If that is the case,[28] the natural question becomes: When has government opened its doors? When must the government offer all members of the press equal access to information?

The 2010 Pulliam/Kilgore Freedom of Information Report will examine the question of unequal access to government-held information. This Report will proceed in three parts. The first part will examine the law of issuing press passes, a situation that has been a recent problem for many journalists working for blogs and other new media outlets. The second will examine government officials' attempts to discriminate among members of the press by ordering subordinates not to talk to a particular reporter. The final part will summarize the Report's findings and describe how they may be used to aid a reporter in the future.

The goal of this Report is to inform journalists – of all forms – about the scope of their First Amendment right of equal access to information. If a government official were to deny a reporter this right, Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, said the first thing a reporter should do is to arranging a meeting with the official to discuss the legal issues are at stake.[29] This Report aims to supply reporters with the legal precedent and constitutional theory that can be used to convince a public official that denying a reporter equal access to information violates the First Amendment.

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[27] *Houchins*, 438 U.S. at 16 (Stewart, J., concurring).
[28] Most courts have agreed with Justice Stewart's proposition. However, at least one judicial opinion took an opposing view. *See Snyder v. Ringgold*, No. 97-1358, 1998 U.S. App. LEXIS 562, at *8 (4th Cir. Jan. 15, 1998). This Report presumes the existence of a right of equal access in some form and scope given the volume of court holdings supporting the view.
[29] Interview with Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, in Arlington, Va. (June 28, 2010).

I. GETTING TO THE SHOW . . . : THE LAW OF ISSUING PRESS PASSES

To an established reporter, obtaining a press pass is normally nothing more than a formality. But to a blogger or less well-known journalist, receiving a press pass is a badge of legitimacy, a way to display credibility, and a means to earn respect among peers in the media and public. Despite their desire to achieve this level of recognition, bloggers and new media journalists have had a tough time acquiring press credentials.

One such blogger was Rafael Martínez Alequin, who writes for the blog Your Free Press.[30] A few years ago, Alequin and two other bloggers had their New York City Police Department (NYPD) press credentials revoked.[31] Alequin had held a NYPD press pass for the previous 15 years. At the time, a press pass – also known as a Working Press Card – permitted journalists to cross police lines in certain situations and to attend New York City Mayor Michael Bloomberg's press conferences. According to one news report, Alequin believed that he and his associates were unfairly denied their press passes because they worked for "online or nontraditional news outlets."[32] Alequin appealed the NYPD's revocation, but nearly a year after his appeal the department still had not made a final judgment. It was then that Alequin and Norman Siegel, a New York City civil rights lawyer, sued. According to Siegel, shortly after filing suit the NYPD issued Alequin and the two other bloggers press passes.[33]

Even after receiving his credentials, Alequin and Siegel continued to press the NYPD demanding that the department "address the systemic issues" inherent in the press pass policy.[34] Over the course of the following year, Siegel met with NYPD officials and successfully worked

[30] YOUR FREE PRESS, http://yourfreepress.blogspot.com (last visited July, 14, 2010).
[31] Sewell Chan, *N.Y.P.D. Is Sued Over Denial of Press Credentials*, CITYROOM (Nov. 12, 2008, 5:38 P.M.), http://cityrom.blogs.nytimes.com/2008/11/12/nypd-is-sued-over-denial-of-press-credentials.
[32] *Id.*
[33] Telephone Interview with Norman H. Siegel, Esq. (July 7, 2010).
[34] *Id.*

to change the department's credentialing policy. "Bloggers are now recognized as journalists," Siegel said. "City officials came to realize that by giving bloggers equal rights, they could be on the forefront of the 21st Century of journalism."[35] Bloggers and online journalists in Maryland,[36] New Jersey,[37] and Oregon[38] have reported similar problems in recent years.

To understand the law concerning press passes, it is vital to understand a fundamental doctrine within First Amendment jurisprudence. When the government establishes a press conference or some other meeting generally open to the news media,[39] many courts agree[40] that it has created a "designated public forum."[41] These forums are government-controlled places or events that have been voluntarily opened to the general public (or media) for a specific type of expressive activity.[42] Once government officials create these forums, they may not deny a particular reporter access to them because of something the journalist published – known as a content-based regulation – without first satisfying the most rigid mode of judicial analysis called

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[35] *Id.*
[36] Danny Jacobs, *Lawyer/Blogger granted press pass*, THE DAILY RECORD (May 09, 2010), http://mddailyrecord.com/2010/05/09/lawyerblogger-granted-press-pass.
[37] *New Jersey Blogger Gets Press Pass Yanked*, BELTWAY BLOG ROLL (July 03, 2007), http://beltwayblogroll.nationaljournal.com/archives/2007/07/new_jersey_blog.php.
[38] Telephone Interview with Mark Bunster, publisher of the Loaded Orygun blog (July 8, 2010); *see* LOADED ORYGUN, http://www.loadedorygun.net (last visited July 14, 2010).
[39] *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977).
[40] *See ABC, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (access to post election activities at political candidates' headquarters requires public forum analysis); *Telemundo of L.A. v. Los Angeles*, 283 F. Supp. 2d 1095, 1102-03 (C.D. Cal. 2003) (media event on government property is a public forum); *Nation Magazine v. Dep't of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (invoking the public forum doctrine); *Westinghouse Broad. Co. v. Dukakis*, 409 F.Supp. 895 (D. Mass. 1976) (council meetings are a public forum); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974) ("If [a public official] chooses to hold a general news conference in his inner office, for that purpose and to that extent his inner office becomes a public gathering place.").
[41] *Int'l Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992).
[42] *See Telemundo of L.A.*, 283 F. Supp. 2d at 1102-03.

"strict scrutiny."[43] Courts have noted that holding a law to this high judicial bar is often a way of signaling that the regulation is presumptively unconstitutional.[44]

A. If It Quacks Like A Duck: What Constitutes A Content-Based Regulation When Issuing Press Credentials?

Determining what constitutes a content-based restriction is often difficult. Public officials who deny a reporter a press credential are unlikely to state bluntly that there are doing so because of something the journalist has aired or written.[45] Instead, officials are likely to give an alternate justification for the denial, one that makes no reference to a particular news story, in an attempt to mask their true motive. By doing so, officials could circumvent strict scrutiny analysis, making the denial more likely to pass constitutional muster if the matter found its way before a judge. For instance, in May 2010, Associated Press photographer Erik Schelzig was ejected from the Tennessee Statehouse after taking pictures of House Speaker Kent Williams, who had collapsed on the House floor.[46] After the incident, some legislators attempted to strip Schelzig of his press credentials claiming that the reporter had interfered with medical personnel.[47] On its face, the legislators' reasoning make no reference to Schelzig's reporting and is facially content-neutral. However, in a letter written to Williams, Laura Leslie, president of the Association of Capitol Reporters and Editors (known as Capitolbeat),[48] argued that stripping

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[43] *Times-Picayune Publ'g Corp. v. Lee*, Civ. A. No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *26-27 (E.D. La. Apr. 18, 1988) ("The selective denial of access to a governmental forum based on content is unconstitutional regardless of whether a public forum is involved unless the government can show a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose") (citing *Perry Edu. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983)).
[44] *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000), *vacated sub nom. Ashcroft v. ACLU*, 535 U.S. 564, (2002); *see Adarand Constructors v. Pena*, 515 U.S. 200, 237 (O'Connor, J., concurring) (when government officials are forced to show that a law must meet strict scrutiny, the analysis is "strict in theory, but fatal in fact").
[45] *But see Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 681 (N.D. Ohio 2004).
[46] A video of the incident can be found at: http://www.wsmv.com/video/23546129/index.html.
[47] Joe Strupp, *Statehouse Reporter Protests Colleague's Credential Fight*, MEDIA MATTERS (May 17, 2010, 2:34 PM), http://mediamatters.org/strupp/201005170042.
[48] CAPITOLBEAT, http://capitolbeat.wordpress.com/ (last visited July 14, 2010).

Schelzig's press pass "looks like an attempt to punish a reporter for covering something a lawmaker didn't want him to cover," which could qualify as a content-based regulation.[49]

Schelzig's story is not the only time that reporters have had their livelihoods threatened by facially content-neutral policies. The legal analysis provided below describes a few instances where facially content-neutral rules, cited in the denial or revocation of a press credential, were in fact held to be impermissible facades for content-based regulations. Using this precedent, a reporter may be able to convince a public official that withholding a press pass because of something a journalist has published – even if the explanation is dressed in the form of a content-neutral reaction – likely violates the First Amendment.

Not long ago, reporter Annette Katz was banned from attending press conferences hosted by the school board in Miami-Dade County, Florida. For more than 20 years Katz had served as an editor and reporter for UTD Today, a monthly newspaper published by the United Teachers of Dade, a local teachers union. In 2002, Merrett Stierheim, then the Superintendent of Miami-Dade Public Schools, enacted a policy regulating the school district's press room, where press conferences often took place. These "Press Room Procedures" restricted access to the press room to "working media representatives," which were defined as "individuals employed by a newspaper or broadcast organization intended for general circulation."[50] Stierheim contended that UTD Today, which had a circulation of 19,000, was not part of the "general-circulation media" because the newspaper's intended audience was "members of a particular profession or occupation."[51]

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[49] Tom Humphrey, *Taking Pictures of Collapsed Speaker 'Despicable' or 'Distasteful*,' KNOXNEWS.COM, (May 13, 2010, 4:58 PM), http://blogs.knoxnews.com/humphrey/2010/05/taking-pictures-of-collapsed-s.html.
[50] *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1371 (S.D. Fla. 2002).
[51] *Id.*

Katz sued the school board and requested a preliminary injunction that would prohibit Stierheim from enforcing the Press Room Procedures until a court could fully adjudicate the issue.[52] Stierheim defended the procedures by claiming that they were enacted "because of the overcrowding and disruption" in the press room.[53] Katz rebutted this facially content-neutral explanation by asserting that the proceedures were promulgated to discriminate against UTD Today because of its "opposition to the [s]chool [b]oard administration," a content-based restriction.[54] Despite Katz's argument, there was no direct proof that the Press Room Procedures were enacted because of UTD Today's content. Instead of attempting to decipher Stierheim's true motive for enacting the Press Room Procedures, which would require a judge to conduct a subjective inquiry into her state of mind, the court embarked on a novel line of reasoning:

> Defendants purport to rely on the scope of a publication's circulation to make their classification. It follows that a publication's circulation results from its subscriber's interest in the content of the newspaper. Thus, in order classify *UTD Today* as a [newspaper of general circulation] Defendants necessarily are considering "content-based criteria" in excluding the veteran reporter.[55]

The court thus held that a regulation could be construed as content-based even if there was no direct proof that Stierheim enacted the Press Room Procedures with animus toward Katz's reporting or UTD Today's content. By enacting a policy focused on the popularity of the publication, the court held, school board officials attempted to "distort public debate" similar to any other content-based regulation.[56] As a result, the procedures were examined through the lens

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[52] In order for a plaintiff to succeed on a preliminary injunction claim, the plaintiff must show that there is a "substantial likelihood" that he or she would win their case in addition to meeting other criteria. Thus, the court's holding in *United Teachers of Dade* does not state whether a First Amendment violation took place. Rather, it holds that there was a "substantial likelihood" of a First Amendment infringement. *Id.* at 1375.
[53] *Id.* at 1371.
[54] *Id.* at 1372.
[55] *Id.* at 1373.
[56] *NLRB v. Glendale Assoc., Ltd*., 347 F.3d, 1145, 1155 (9th Cir. 2003).

of strict scrutiny and the court thus interpreted the regulation to be presumptively unconstitutional.[57]

A similar situation occurred 15 years earlier when Gene Stevens, publisher and photographer for the Post Time USA,[58] a newspaper focused on thoroughbred horse racing, was banned from bring his camera into the paddocks of New York Racing Association (NYRA) race tracks. The paddock is the section of a race track where the jockey, horse owner, and trainer all meet to discuss the upcoming race.[59] When Stevens inquired as to why the NYRA had restricted his ability to take photographs in the paddocks, association officials stated that the publisher had a habit of "collaring" people into taking pictures.[60] By "collaring," officials meant that Stevens was simply too pushy when it came to taking photographs. On its face, the NYRA's decision to restrict Stevens appeared content-neutral because it centered on Stevens' behavior, not the material he published. A judge, however, found that the NYRA's justifications for the restriction were unsubstantiated and contradictory. As a result, the court concluded that Stevens' denial must have been motivated by some undisclosed (likely content-based) reason disguised by the NYRA's facially content-neutral explanation.[61] Thus, as in *Katz*, the court concluded that the NYRA's policy was a thinly veiled content-based regulation and therefore likely violated the First Amendment.[62]

Yet another egregious case of content-based discrimination came in 1971 when the police department in Davenport, Iowa denied CHALLENGE, a bi-weekly newspaper, media

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[57] *United Teachers of Dade*, 213 F. Supp. 2d at 1373.
[58] POST TIME USA, http://www.posttimeusa.com (last visited July 14, 2010).
[59] *Stevens v. New York Racing Ass'n*, 665 F. Supp. 164, 166 (E.D.N.Y. 1987).
[60] *Stevens*, 665 F. Supp. at 166-67.
[61] *Id.* at 176.
[62] *Stevens*, 665 F. Supp. at 175.

credentials.[63] At the time, investigative police reports were kept in a file known as the "Miscellaneous Reports," which was not accessible to the general public.[64] Police officials did, however, permit reporters with department-issued credentials to access the file because doing so "alleviate[d] the necessity of calling periodic press conferences."[65] In order to obtain a press pass, police officials required that a reporter work for a "legitimate" or "established" media outlet, which the police department said CHALLENGE was not.[66] Since the newspaper was unable to acquire credentials, its reporters were banned from accessing the Miscellaneous Reports and were therefore unable to cover the Davenport Police Department in the same way that other media outlets could. The department had no written regulations, guidelines or standards defining what constituted a "legitimate" and "established" newspaper.[67] It was also unclear whether the police department applied the rules governing access to the Miscellaneous Reports to any publication other than CHALLENGE.

When the newspaper's publishing company, the Quad-City Community News Service, sued the police department, a judge found that other reporters covering the department "had never been asked to present" a press pass before accessing the police file.[68] Quad-City argued that this evidence showed CHALLENGE's reporters were denied access to the Miscellaneous Reports because of their combative reporting style as opposed to any content-neutral justifications the public officials could conjure.

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[63] *Quad-City Cmty. News Serv., Inc., v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971).
[64] *Id.* at 12.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*

In holding that the Davenport Police Department's media credentialing policy likely violated the First Amendment,[69] the federal court stated that public officials cannot "impede the free exercise of speech or press simply because the content is insulting, disturbing or critical."[70] The court also noted that the police department may not "funnel[] information to the public through only certain representatives who are considered more responsible because they 'cooperate' in presenting [ideas that] the Department believes to be appropriate."[71] The court concluded that the policy's "interpretation and application" violated the First Amendment even though it made no reference to CHALLENGE's content.[72]

Not all courts, however, have been willing to accept the idea that facially content-neutral laws can be so easily interpreted as content-based regulations. For example, in *JB Pictures v. Department of Defense*, media organizations challenged the DOD's policy of prohibiting reporters from covering the arrival of the caskets of soldiers killed overseas during Operation Desert Storm.[73] JB Pictures, along with other media and veterans' organizations, argued that "precluding access to the war dead at Dover while permitting access to other activities – ones allegedly placing Desert Storm in a more positive light – constituted impermissible 'viewpoint discrimination.'"[74] The court dismissed the media's claim, holding that "if the plaintiffs' theory of 'viewpoint discrimination' were accepted, virtually any restriction on access to government

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[69] *See supra* note 44, at 7.
[70] *Quad-City Cmty. News Serv., Inc.,* 334 F. Supp. at 13 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1969)).
[71] *Id.* at 14.
[72] *Id.* at 13.
[73] *JB Pictures, Inc. v. Dep't of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996). The bodies of these veterans arrived at Dover Air force Base in Dover, Delaware. The blanket ban on media access to Dover was lifted in 2009, giving reporters limited access to certain ceremonies at the base. *See Obama Administration Lift Blanket Ban on Media Coverage of the Return of Fallen Solders*, NATIONAL SECURITY ARCHIVE (Feb. 26, 2009), http://www.gwu.edu/~nsarchiv/news/20090226/index.htm.
[74] *JB Pictures, Inc. v. Dep't of Def.*, 86 F.3d at 238.

facilities . . . would be vulnerable to a challenge."[75] *JB Pictures* demonstrates some courts' reluctance to impute more meaning into a credentialing regulation than apparent on its face.

When a government official denies a reporter a press pass because of something he or she has published, the denial is presumptively unconstitutional.[76] However, government officials are unlikely to expressly state that they are withholding a credential for this reason. Instead, some officials have cited other, content-neutral explanations to mask their intentions. The *UTD Today*, *Stevens*, and *Quad-City* cases show that even in the face of credentialing policies that, for a variety of reasons, appear to be content-neutral, courts have devised ways to expose public officials' invidious motives. In *UTD Today*, the size or popularity of a publication could not be used to deny a press pass. In *Stevens*, the court did not permit phony or over-exaggerated rationale to mask a content-based restriction. Finally, in *Quad-City*, the selective enforcement of an apparently neutral press pass policy was held to be presumptively unconstitutional government action. If reporters believe that they have been denied press passes or equal access to information because of something they have published, the cases mentioned above show that public officials may have a difficult time hiding such presumptively unconstitutional actions beneath facially content-neutral policies.

B. Show Me The Money: Must Credentialing Policies Be Articulated?

One of the most high-profile cases involving a reporter who was denied a press pass came in the 1970s when Robert Sherrill, who had served as a Washington correspondent for *The Nation* magazine, was left standing at the wrong side of the White House gate. After a year with *The Nation*, Sherrill, who had already obtained credentials to the U.S. House and Senate press galleries, applied for a White House press pass. The Secret Service denied Sherrill's application

[75] *Id.* at 240.
[76] *See supra* note 44, at 7.

"for reasons relating to the security of the President and/or the members of his immediate family."[77] Prior to applying for the pass, Sherrill had been convicted of assaulting the press secretary to a Florida Governor and faced another assault charge in Texas.[78]

Sherrill sued the Secret Service claiming that the denial violated his First Amendment rights. The case made its way to the federal Court of Appeals for the District of Columbia where a judge noted that the White House had no "written procedures" governing the issuance of press passes.[79] Instead, the White House Press Office had established unwritten criteria that required, among other things, a reporter to be cleared by the Secret Service after a security check.[80] The appeals court acknowledged that the Secret Service had a "compelling" if "even an overwhelming" interest in denying Sherrill a press pass in order to protect the safety of the President.[81] The problem with the White House's policy, however, was that it was not "publish[ed] or otherwise ma[d]e publicly known."[82] The court clarified its holding by stating that a published credentialing policy "is necessary in order to assure that the agency has neither taken additional, undisclosed information into account, nor responded irrationally to matters put forward by way of rebuttal or explanation."[83] The court further held that the White House need not articulate "narrow and specific standards or precise identification of all the factors which

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[77] *Sherrill*, 569 F.2d at 126. "Security issues" have often been cited as a reason to deny a particular reporter a press pass.
[78] *Id.* at 128 n.13. In *Quad-City Cmty. News Serv. Inc.*, 334 F. Supp. at 12, the Davenport Police Department similarly stated that it denied a reporter a press credentials because "some of the members of the [publishing company] had been convicted of a felony." The court found that justification to be a "classic example of post-factor rationalization."
[79] *Sherrill*, 569 F.2d. at 126.
[80] *Id.*
[81] *Id.* at 130.
[82] *Id.*
[83] *Id.* at 131.

may be taken into account" when issuing press pass so long as the policy is accessible to reporters before they apply for credentials.[84]

A District of Columbia federal court later came to a similar conclusion in a different context. In 2002, Getty Images News Service sued the Department of Defense (DOD) after the news service was denied access the Guantánamo Bay military base. Like the White House's policy in *Sherrill*, the DOD did not have a written regulation governing access to the base. Getty Images claimed that the lack of a written policy violated the First Amendment.[85] The court agreed and held that since the DOD's criteria were not "written or published or in any way made known to the media organization seeking access," there was no way to ensure the agency was not using improper means to select who received credentials.[86] Quoting from an earlier case, the court noted that "where public officials . . . employ criteria that are either vague or completely unknown, the party affected has no way of knowing how to achieve compliance with the criteria nor even of challenging them as being improper."[87]

The *Sherrill* and *Getty Images* decisions hinged on the fundamental constitutional rule that government actors may not enact arbitrary policies. As a way to protect against subjective government action, the courts mentioned above required *written* press pass regulations. Other courts, however, have gone even further. In *Quad-City*, the court stated that not only must a press pass policy be written, but also must be "guided by narrow and specific standards."[88] This

[84] *Id.*
[85] *Getty Images News Serv, Corp.*, 193 F. Supp. 2d 112, 115-116 (D.D.C. 2002) (the policy considered: 1) "a mix of media types"; 2) offered some preference to media organizations "that consistently reach large audiences"; 3) whether the media outlet broadcasted internationally; and 4) offered "regional news media" preferred selection).
[86] *Id.* at 120.
[87] *Id.* at 121 (citing *Quad-City Cmty. News Serv, Inc.*, 334 F. Supp. at 17).
[88] *Quad-City Cmty. News Serv.*, 344 F. Supp. at 17; *see also Housing Works, Inc. v. Safir*, 98 Civ. 4994 (HB), 1998 U.S. Dist. LEXIS 18515, at *18 (S.D.N.Y. Nov. 25, 1998) (use of the New York City Hall steps required a narrowly articulated policy governing who may use them for expressive activity).

understanding directly conflicts with the requirements articulated in *Sherrill* and *Getty Images*, which stated that a credentialing policy does not have to articulate narrow criteria.

If a reporter is denied a press pass pursuant to an unwritten credentialing policy, the denial may very well violate the Constitution. However, even when a policy is on paper, it may still be challenged on the basis that it is so vague, inaccessible, or overbroad that it does not give reporters adequate notice of the policy's requirements or permits government officials to issue credentials in an arbitrary or subjective manner.

C. Times They Are A-Changin': Can Reporters Be Denied Access To An Event Because Of The Medium In Which They Publish?

Of course, government officials must establish some limits on who may attend media events. If the government were forced to accommodate every person who wanted to attend a press conference,[89] the forums would lose much of the give-and-take atmosphere that is cultivated.[90] The problem, however, is determining which justifications offered to exclude a reporter from a press conference comport with the First Amendment. The case law is currently unsettled whether a public official may deny a reporter access to a media event because of medium in which that reporter publishes. For instance, where bloggers have been denied credentials because of their non-traditional medium, many complained that the denial violated their First Amendment right of equal access to information.[91] According to Mark Bunster, who publishes the Loaded Orygun blog and was recently excluded from a government meeting because, he claimed, he publishes in a non-traditional medium, "If you publish on the Internet

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[89] In terms of legal standing, the press is no different than any other citizen. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).
[90] Luke M. Milligan, *First Amendment Discussion Group: Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103, 1106-07 (2008) ("The relationship between public officials and the press is market, to a large degree, by its transactional nature.").
[91] *See supra* notes 30-38, at 5-6.

and not for a big newspaper, [government officials] are instantly more suspicious [of you]."[92] The analysis below will look at two cases where courts held that journalists may not be excluded from a media event because of the medium in which they publish.

During the Reagan administration, as is the case today, some newsworthy events occurred in places where "space limitations or other considerations require limiting the number of media representatives who may cover a given event."[93] These proceedings were aptly named "limited coverage" events. In *CNN v. ABC*, the White House Press Office instituted a new policy to govern which television media representatives would attend "limited coverage" events.[94] Instead of selecting the television journalists that could attend, the White House required that "television media representatives themselves determine who will occupy the available spaces."[95] But when these journalists were unable to decide who should attend, the White House banned them all.[96]

The television media sued, claiming that the White House had violated their First Amendment rights by entirely banning a single type of journalist – television journalists.[97] After initially determining that there was a First Amendment right for television journalists to attend "limited coverage" events, the court attempted to "balance the interests to be served by the sought-for newsgathering activity against the interest served by the governmental restraint."[98]

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[92] Telephone Interview with Mark Bunster, publisher of the Loaded Orygun blog (July 8, 2010); *see* LOADED ORYGUN, http://www.loadedorygun.net (last visited July 14, 2010).
[93] *Cable News Network v. ABC, Inc.*, 518 F. Supp. 1238, 1239 (N.D. Ga. 1981). CNN originally sued the White House Press Office, ABC, CBS, and NBC claiming that the "big three" were given preferential treatment to cover "limited coverage" events. Upon CNN's suit, the White House Press Office amended its "limited coverage" policy to the one described above. The above-described case does not involve CNN's original claim against the other media outlets. Rather, the case is only concerned with CNN's challenge of the above-described White House policy.
[94] *Id.* at 1240.
[95] *Id*.
[96] *Id*.
[97] *See id*. at 1245.
[98] *Id.*

The court's balancing test, while still being speech protective, was not as strong as a strict scrutiny analysis.[99] The court held that "television news coverage plays an increasingly prominent part in informing the public at large of the workings of government." Therefore, the court held, television reporters could not as a class of journalists be completely excluded from an event open to other types of media.[100]

A District of Columbia federal court made a similar finding eight years earlier in *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*.[101] At issue was access to the House and Senate press galleries, which are administered by correspondents' associations comprised of credentialed journalists.[102] One of these associations, the Periodical Correspondents' Association (PCA), was in charge of administering press passes to the Periodical Press Gallery for both the Senate and the House.[103] Once the PCA issued a credential, a reporter was not only entitled to access space in the House and Senate chambers set aside from the general public, but was also permitted to enter exclusive areas where reporters could "seek or arrange interviews with Senators and Congressmen."[104] Additionally, a congressional press pass granted the reporter "exclusive permission" to attend daily press conferences.[105]

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[99] *Id.* at 1244 (citing *Richmond Newspapers, Inc.*, 448 U.S. at 588 (the "enduring and vital tradition of public entree to particular proceedings or information" and "value" of information gathered at an event balanced against the government's need for a regulation that denied a reporter equal access to information)).
[100] *Id.*
[101] *Consumers Union of United States, Inc. v. Periodical Correspondents Ass'n*, 365 F. Supp. 18 (D.D.C. 1973), *rev'd* on other grounds, 515 F.2d 1341 (D.C. Cir. 1975) (reversing because the CPA's actions "did not breach the limits of legislative immunity").
[102] UNITED STATES HOUSE OF REPRESENTATIVES PERIODICAL PRESS GALLERY, http://periodical.house.gov/index.asp (last visited June 14, 2010).
[103] *Consumers Union of United States, Inc.*, 365 F. Supp. at 21.
[104] *Id.* at 21-22.
[105] *Id.* at 22.

The Consumers Union, a non-profit organization, published a monthly magazine titled Consumer Reports, which had a circulation of nearly 2.25 million readers.[106] In 1972, the CPA denied Consumer Reports' press pass application. The CPA justified its denial by citing a policy that prohibited them from credentialing a periodical that was published by "an association or institution" such as the Consumers Union. The policy only affected journalists working for periodicals and did not apply to any other type of journalists.[107] Consumers Union claimed that the PCA's denial violated the First Amendment and sued. A federal court agreed and rejected the PCA's press credentialing policy, stating that "all types of news compete and all types of publications are entitled to an equal freedom to hear and publish the official business of Congress."[108] The court thus held that establishing different rules to govern different types of journalists bordered on arbitrary, and therefore likely unconstitutional, action.[109]

The *CNN* and *Consumers Union* cases demonstrate that when government officials or their representatives restrict access to a particular event because of the medium in which a reporter publishes, the regulation may violate the First Amendment. The court in *CNN* held that since television "plays an increasingly prominent part in informing the public at large of the workings of government," television journalists could not be excluded from a media event wholesale.[110] Today, the Internet occupies a similar position. Ric Cantrell, Chief Deputy of the Utah State Senate, said that in the 21st Century, more and more people are receiving their information about government affairs on the Internet.[111] The *CNN* case can thus be analogized with bloggers' attempts to obtain press passes today. Similarly, any press pass regulation that

[106] *Id.*
[107] *Id.*
[108] *Consumers Union of United States, Inc.*, 365 F. Supp. at 26.
[109] *Id.*
[110] *CNN*, 518 F. Supp. at 1245.
[111] Telephone interview with Ric Cantrell, Chief Deputy of the Utah Senate (July 12, 2010).

restricts bloggers' or other new media journalists' access to press events differently than other types of reporters may run afoul of the court's reasoning in *Consumers Union.* In short, if a public official denies a journalist access to a media event because that reporter publishes in a particular medium, the reasoning described above can be used to show that the restriction may violate the First Amendment.

D. One For All: Can A Reporter Be Excluded From A Press Conference Because Other Means Are Available To Gather Information?

As a technical matter, reporters do not need access to a media event in order to report on public affairs. A reporter who is denied access to an official proceeding could obtain information in other ways, such as by conducting independent interviews or reading the news reports written by credentialed journalists. Practically, however, being denied a press pass restricts how well, and at what pace, reporters can do their jobs. For example, when journalists were not permitted to access public areas in connection with this year's Deepwater Horizon oil spill in the Gulf of Mexico, many reporters cried "foul."[112] Surely these journalists could have found other means to report on the oil spill without actually stepping foot on a beach. But as any reporter knows, first-hand accounts often produce more compelling and true-to-life journalism than anything that could be achieved through phone conversations and carefully edited press releases.[113]

Yet when a reporter has been denied a press pass, public officials often support their denial by arguing that the lack of a credential does not impede the journalist's ability to report

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[112] *Obstructions Continue to Hinder Media Access to Oil Spill*, OMB WATCH (July 13, 2010), http://www.ombwatch.org/node/11132.

[113] This Report does not squarely address the controversy surrounding journalists' access to the BP oil spill. In order to properly analyze this issue, the Report would have to address the "state action doctrine." *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 168 (1978).

the news.[114] That argument was evident in *Quad-City*, where the newspaper was not permitted to access certain police records.[115] There, the Davenport Police Department argued that notwithstanding a credential, the reporters was still able to access newsworthy information in other ways.[116] Similarly, in a later case in Illinois, public officials argued that denying a reporter access to particular events posed no First Amendment concern because "alternate information sources" were always available.[117] This part of the Report will conclude by analyzing one argument journalists have used to counter public officials' contention that no First Amendment violation attaches to the denial of a press pass because other avenues of obtaining information exist.

On March 8, 1998, reporter Tori Marlan published an article in The Chicago Reader regarding a class action lawsuit against the Cook County Department of Corrections (DOC).[118] The story pertained to the DOC's practice of strip-searching female, but not male, inmates.[119] After the article was published, Marlan started working on another story involving the DOC's Chicago Legal Aid for Incarcerated Mothers (CLAIM) program.[120] According to CLAIM's website, the program "provides legal and educational services to maintain the bond between imprisoned mothers and their children."[121] Although the DOC was willing to answer Marlan's questions about CLAIM, it prohibited her from attending the program's in-class sessions.[122]

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[114] *See*, *e.g.*, *Smith v. Plati*, 258 F.3d 1167, 1177-78 (10th Cir. 2001) ("Plati's actions may have made it more difficult to obtain some information . . . but alternative avenues to information remained open.").
[115] *See supra* notes 63-68, at 11.
[116] *Quad-City Cmty. News Serv., Inc.*, 334 F. Supp. at 16-17.
[117] *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142, 1143 (N.D. Ill. 2001).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] CLAIM, Chicago Legal Advocacy for Incarcerated Mothers, http://www.claim-il.org (last visited July 14, 2010).
[122] *Chicago Reader*, 141 F. Supp. 2d at 1143.

Marlan and The Chicago Reader sued the DOC claiming that the denial violated the First Amendment.

In defense of its decision, the DOC argued that the First Amendment did not prohibit it from excluding Marlan from the CLAIM sessions because the reporter could have gathered information about CLAIM in other ways, such as through interviews. A judge, however, rejected that argument and held that the "alternative sources defendants offered are not adequate substitutes for first-hand observations. Reporters frequently do resort to alternative sources when first-hand observations are not possible, but that in no way negates that actually being there is optimal."[123] In coming to its conclusion, the court echoed the opinion issued 27 years earlier in *Quad-City*:

> Without the access provided by passes, the press will be limited in these events to information gleaned from official records, assuming that the press is subsequently granted access to those records. And even when such records are available, they may be no way for the press to fulfill its historic function of providing an independent and perhaps alternative view to the official interpretation.[124]

Despite these strong holdings, courts are not unanimous when deciding whether alternate avenues of newsgathering mitigate journalists' right of equal access to information. In *Smith v. Plati*, for example, the plaintiff published a non-profit website, NetBuffs, focused on athletics at the University of Colorado at Boulder.[125] After the school determined that NetBuffs was "in some way in competition with the website still operated by the university's Office of Media Relations," school officials excluded Smith from attending university football practices and prohibited him from speaking with athletic coaches.[126] The blogger challenged the regulation, but in contrast to the *Quad-City* and *The Chicago Reader* cases, lost his battle. According to the

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[123] *Id.* at 1146.
[124] *Quad-City Cmty. News Serv., Inc.,* 334 F. Supp. at 17.
[125] *Smith*, 258 F.3d at 1172; NETBUFFS, http://netbuffs.com (last visited July 14, 2010).
[126] *Smith*, 258 F.3d at 1172.

court, the university's "actions may have made it more difficult to obtain some information regarding the [u]niversity's varsity athletic programs, but alternative avenues to information remain open."[127] Additionally, the court said that university officials "did nothing to affect an ordinary person's ability to actually maintain a website."[128] The court noted that at all times during the ban, "Smith retained . . . the ability to speak freely about any political, social or other concern related to the University of Colorado athletic programs."[129]

If a reporter is denied a press pass and challenges the policy, a public official would likely claim that the First Amendment is not at issue since other means are available to gather information. To riposte, a journalist may argue that while there may not be a First Amendment right to gather news,[130] denying a reporter a press pass prevents him from offering "an independent and perhaps alternative view" of the days events, thus stifling his ability to publish newsworthy information.

II. . . . AND THE COLD SHOULDER ONCE YOU'RE THERE: THE LAW OF UNEQUAL AND DISCRIMINATORY ACCESS TO INFORMATION

Members of the press are, and should be, proud of their watchdog function. However, the press and government are not completely antagonistic. Reporters covering state capitols, local cops-and-court beats, and spot-news rely on constant contact with government actors. Whether it is for a quick quote or an off-the-record conservation, reporters need to secure information from public officials in order to ensure an informed electorate.

[127] *Id.* at 1177.
[128] *Id*.
[129] *Id*.
[130] *Supra* notes 14-24, at 2-3.

As previously noted, there is little First Amendment right to access non-public information.[131] That does not mean, however, that the press has no protection against public officials who offer information to some reporters while denying it to others.[132] The legal problem here is defining the scope of this right. If a government official were to offer a particular reporter an exclusive interview or leak a document to a single news outlet, few reporters would claim a First Amendment violation had taken place. To most reporters, this type of unequal access to information may appear palpable or even desirable. The ability to land a "scoop" or book an exclusive interview is often what puts some reporters on the fast-track to stardom. According to Mark Segraves, a veteran investigative reporter with WTOP Radio in Washington, D.C., unequal access to information is vital to reporting on public affairs. "Exclusive sources or leaked information is as important as information obtained through the front door, and sometimes even more so," Segraves said.[133]

Not all forms of unequal access to government-held information, however, are as benign as an exclusive interview or leaked document. Unequal discrimination can take a more ominous tone when a public official issues an "edict" banning all subordinates from speaking with a particular reporter or news agency.[134] This form of discrimination smacks of a government official's attempt to control the press. The difficulty here is finding a legal tool that permits journalists to obtain exclusive interviews and information in one instance while at the same time prohibiting more invidious forms of discriminatory access to information. This Report will continue by offering two examples of government officials instituting policies that effectively

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[131] *Supra* notes 14-24, at 2-3. *See L.A. Police Dep't.*, 528 U.S. at 40; *Capital Cities Media, Inc. v. Pa. Dep't of Envtl. Res.*, 797 F.2d 1164, 1168 (3d Cir. 1986) ("It simply does not seem reasonable to suppose that the free speech clause would speak, as it does, solely to government interference if the drafters had thereby intended to create a right to know and a concomitant governmental duty to disclose.").
[132] *Viewpoint Discrimination & Media Access* at 1021-22.
[133] Telephone interview with Mark Segraves, Reporter with WTOP Radio (July 6, 2010).
[134] *Raycom Nat'l, Inc.*, 361 F. Supp. 2d at 681.

ban specific reporters from covering public affairs. Next, it will detail several ways that news organizations have challenged these policies.[135] Consistent with the previous part, if journalists were to fall victim to one of these bans, they may be able to convince public officials to rethink their decisions by offering the analysis offered in this Report.

A. A Newsroom Nightmare: Two Worst-Case Scenarios Of Public Officials Discriminating Against Reporters.

The most recent headline-catching event involving a public official discriminating against a reporter came in 2004 when journalist David Nitkin of The Baltimore Sun wrote a series of articles concerning the sale of Maryland state land to an unidentified "benefactor." Among the state officials driving the Maryland sale was former Maryland Governor Robert Ehrlich, Jr.[136] The plan was to sell the state land to the benefactor on the understanding that after the unidentified benefactor bought the land, he or she would then donate 150 of the 836 acre tract to St. Mary's County for public schools.[137] The benefactor would then, according to the plan, hold the remaining 686 acres for one year before selling it to a conservation organization, netting a $7 million tax break.[138] In October 2004, Nitkin identified the benefactor as Willard Hackerman,

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[135] This Report is focused on the First Amendment arguments put forward in regard to discriminatory access to public information. In addition to the claims described here, some media outlets have challenged the policies described below based on equal protection grounds as well. *Raycom Nat'l, Inc*, 361 F. Supp. 2d at 686-87 (journalists' equal protection challenge to a policy that banned public officials from speaking to a news outlet was unlikely to survive as the court employed rational basis review); *Quad-City Cmty. News Serv., Inc*, 334 F. Supp. at 24-26 (equal protection claim raised when a particular news outlet was excluded from inspecting police records invoked strict scrutiny); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) (offering records to one news outlet and not another "constitutes a denial of equal protection of the laws"). Additionally, this Report does not discuss the possible "overbreadth" challenge that a reporter may bring as a result of a discriminatory policy. *See* Stephanie L. Hogan, Amy S. Smushahwar and Charles D. Tobin, *Litigating Retaliation Claims After Baltimore Sun v. Ehrlich*, 23 COMM. LAWYER 7, 11 (2006).

[136] Ehrlich lost his reelection bid in the 2006 gubernatorial election to then-Baltimore Mayor Martin O'Malley. Ehrlich has recently decided to run for Maryland governor in the 2010 election.

[137] St. Mary's County is Maryland's southern most county on the western side of the Chesapeake Bay.

[138] Joseph S. Johnston, *Comment: A Poisoned Arrow in His Quiver: Why Forbidding An Entire Branch Of Government From Communicating With A Reporter Violates The First Amendment*, 36 U. BALT. L. REV. 135, 138-39 (2006) (hereinafter "Johnson").

the owner of a contracting company who was rumored to be politically connected to many Maryland public officials. The next month, Nitkin reported that Hackerman had actually intended to use the land to "build houses with a water view on preserved land in St. Mary's County that he secretly negotiated to buy from the State."[139] Nitkin then published a story that said Governor Ehrlich had "collected $100,000 for his re-election campaign at a private fundraiser held by a business partner" of Hackerman, making the estate deal appear to be a political kick-back.[140]

Governor Ehrlich quickly criticized Nitkin's articles. After one report was published in late October that year, the former Governor was quoted as saying that he had "a big problem with the way this story has been portrayed. . . . It is so inappropriate to characterize this as some sort of negotiation, some backroom deal, when there was no backroom."[141] Nitkin continued to report on the story and Hackerman eventually withdrew his bid to buy the land.

Nitkin was not the only Sun employee on Ehrlich's bad side. On November 16, 2004, Sun columnist Michael Olesker erroneously quoted a Maryland public official working for Ehrlich. The columnist wrote that one of Ehrlich's top aides, Paul Schurick, was present at a meeting regarding a state tourism advertising campaign.[142] The column implied that Olesker was there to witness Schurick's presence and hinted that the campaign was being created for Ehrlich's personal political gain. Ehrlich challenged the column, claiming that Olesker was never at any such meeting. Eight days after the column was published, Olesker wrote an apology

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[139] David Nitkin, *Ehrlich: Probe of Land Deal Unneeded*, BALT. SUN, Nov. 12, 2004 at 1B, 5B.
[140] David Nitkin & Andrew A. Green, *Hackerman's Partner Held Fund-Raiser for Governor*, BALT. SUN, Nov. 16, 2004, at 1A.
[141] David Nitkin, *Ehrlich Neutral on Sale of Land*, BALT. SUN, Oct. 26, 2004, at 4B.
[142] Johnson at 141.

to Sun readers admitting his mistake.[143] As a result of Nitkin and Olesker's stories, Governor Ehrlich issued a sweeping directive on November 18, 2004:

> Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads.[144]

Ehrlich later said that he issued the directive as a last resort to combat Nitkin and Olesker's poor reporting, calling it "the only arrow in [his] quiver."[145]

A similar situation came to a head in 2005, more than 300 miles northeast of Annapolis, Maryland.[146] In that case, The Business Journal, a bi-monthly newspaper published in Youngstown, Ohio, regularly published articles about the Youngstown City government and former Mayor George M. McKelvey.[147] In February 2003, The Business Journal took a particularly critical stance against McKelvey's support for the construction of a new city convocation center. As a direct result of The Business Journal's critical stories, McKelvey issued an oral directive to various city officials instructing them not to speak with reporters from The Business Journal. The newspaper filed multiple public records requests in an attempt to circumvent McKelvey's orders and obtain information about the Youngstown government. Those requests were initially denied by McKelvey's administration but were later fulfilled. Two years later, as to clarify the 2003 prohibition, McKelvey wrote a letter to Andrea Wood, the publisher of The Business Journal. In that letter, McKelvey confirmed that there was a "No-

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[143] *Id.*; Michael Olesker, *It's All About the Job-Not the Political Parties*, BALT. SUN, Nov. 24, 2004, at 4B.
[144] *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 413 (4th Cir. 2006) (alterations omitted).
[145] Complaint at p. 17, *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577 (D. Md. 2004).
[146] *Youngstown Publ'g Co. v. McKelvey*, Case No. 4:05 CV 00625, 2005 U.S. Dist. LEXIS 9476 (N.D. Ohio May 16, 2005).
[147] *Id.* at *2.

Comment Policy" in place forbidding city officials from "communicating with *Business Journal* reporters and representatives about City business" outside of open-records requests.[148]

The *Ehrlich* and *Business Journal* cases are some of the most overt instances of public officials discriminating against a particular reporter or news outlet,[149] but other forms of unequal treatment exist. For example, in a 1998 case, Samuel Ringgold, a Baltimore City Police Department official, forced Terrie Snyder, a reporter formerly with WBAL-TV, to "submit all requests for information" to the Police Department in writing.[150] Snyder was the only reporter that had to comply with this requirement. Ringgold claimed that the television reporter was singled out because she had developed a habit of publishing "off-the-record" information and regularly abused the "Department's public information system by paging officers unnecessarily on weekends."[151] Snyder argued that she was being discriminated against because the Department was displeased with the content of her reporting.[152] In another case, Texas public officials required the Southwestern Newspapers Corporation, which published the Amarillo Daily News, Amarillo Globe-Times, and Amarillo Sunday News-Globe, to make an appointment before gathering any information regarding a Texas district attorney.[153] In yet another case, Louisiana officials simply stopped notifying The Times-Picayune when press conferences were taking place. The policy was the result of a story that rubbed one public official the wrong

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[148] *Id*. The relevant part of the letter written to Wood read: "As Mayor of Youngstown, I do not dispute that I have instructed members of my administration not to make statements to the *Business Journal except to fulfill the city's obligations regarding public records requests*. . . I have mad the determination the City administrators and employees may not comment to *the Plaintiffs* [The Business Journal] on behalf of the City." *Youngstown Publ'g Co. v. McKelvey*, Nos: 05-3842, 2006 U.S. App. LEXIS 16586, at *6 (6th Cir. June 27, 2006).
[149] *See Raycom Nat'l, Inc.*, 361 F. Supp. 2d at 684-85; *Borreca*, 369 F. Supp. 906.
[150] *Snyder*, No. 97-1358, 1998 U.S. App. LEXIS 562, at *4.
[151] *Id.* at *4.
[152] *Id.*
[153] *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 363-64 (Tex. Civ. App. 1979).

way.[154] The remaining sections of this Report describe some of the ways reporters have challenged these types of discriminatory policies.

B. Straight Up: Does The First Amendment Protect Reporters From Vengeful Public Officials?

The first thought that might cross a reporter's mind after learning of cases where public officials have enacted discriminatory policies is that the First Amendment *must* protect against such behavior. And, to a certain extent, courts have agreed. For example, in the *Times-Picayune* case, not only did the public official stop notifying reporters when press conferences were being held, but the newspaper was forced to submit all questions to the Jefferson Parish Sheriff's Office in writing.[155] When the sheriff's office replied to an inquiry by the Times-Picayune, it did so only in writing and the answers had to be picked-up at the sheriff's office. The newspaper sued claiming that the written requests significantly impaired reporters' ability to gather and report the news in a "timely, comprehensive and informative manner."[156] The court, siding with the newspaper, stated: "Discriminatory governmental action aimed at the communicative impact of expression is presumptively at odds with the *First Amendment*. Above all else, the *First Amendment* means that the government cannot restrict freedom of expression on the basis of its ideas, message or content."[157] The court went on to state that the First Amendment protects, "at a minimum, a [particular reporter's] right of access to information made available to the public or made available generally to the press."[158]

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[154] *Times-Picayune Publ'g Co.*, Civ. A. No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *4.
[155] *Id.* at *6-*7.
[156] *Id.* at *19.
[157] *Id.* at *21.
[158] *Id.* at *24.

Other courts have made similar findings. In *Southwestern Newspapers*,[159] the court said that the First Amendment likely[160] prohibited a public official from denying a media outlet "access to news sources made available to other news media personnel."[161] Then, in a later case, another court noted that:

> The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information. The district court erred in granting access to one media entity and not the other.[162]

Not all courts, however, agree that the First Amendment protects a reporter from policies that discriminate among members of the media. In the *Snyder* case, like the *Times-Picayune* case, a single reporter was forced to submit all requests for information to a police department in writing.[163] Unlike the Louisiana case, however, the *Snyder* court upheld the policy. In doing so, it noted a problem with interpreting the First Amendment to proscribe unequal access to information. According to the court, such an understanding would prohibit "the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter"[164] and "preclude the equally widespread practice of public officials declining to speak to reporters they view as untrustworthy."[165] The decision in *Raycom National Inc. v. Campbell* echoes this point, stating that if the First Amendment were to prevent public officials from

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[159] *Supra* note 153, at 28.
[160] *Supra* note 52, at 9.
[161] *Sw. Newspapers Corp.*, 584 S.W.2d at 366-67.
[162] *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) (*The Globe Newspaper* sued a public official after being prohibited from accessing discovery materials while other members of the public were not so barred).
[163] *Snyder*, No. 97-1358, 1998 U.S. App. LEXIS 562, at *4.
[164] *Id.* at *10.
[165] *Id.*

discriminating against a particular reporter, it "would have the effect of conferring preferential status" on the media over the general public.[166]

These two lines of cases demonstrate that there is a disagreement as to whether the First Amendment broadly protects against discriminatory policies.[167] This Report continues by offering other arguments a media outlet may make to combat policies that treat one reporter differently than another.

C. An Eye For An Eye: Do Constitutional Protections Against Retaliation Bar Discriminatory Policies?

As discussed, a broad First Amendment claim has been successful in changing policies that discriminate among reporters. In addition, other objections to such practices may be effective as well. One of these is known as a "retaliation" claim.[168] As the *Ehrlich* court put it, since "government retaliation tends to chill an individual's exercise of his *First Amendment* rights, public officials may not, as a general rule, respond to an individual's protected activity with conduct or speech even though that conduct or speech would be otherwise be a lawful exercise of public authority."[169] In order to successfully argue that a discriminatory policy is an unconstitutional "retaliation," a reporter generally must show that: 1) the reporter or media outlet engaged in constitutionally-protected speech; 2) the government action was motivated by

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[166] *Raycom Nat'l, Inc.*, 361 F. Supp. 2d at 684.
[167] *Compare Snyder*, No. 97-1358, 1998 U.S. App. LEXIS 562, at *8 ("No Supreme Court or Fourth Circuit case has held that reporters have a constitutional right of equal or nondiscriminatory access to government information") *with Anderson*, 805 F.2d at 9 (discriminatory access "is unquestionably at odds with the *first amendment*").
[168] *Balt. Sun. Co.*, 437 F.3d at 415.
[169] *Id.* (citing *Bd. of Cnty. Comm'rs. v. Umbehr*, 518 U.S. 668, 674 (1996)); s*ee Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("If the government could deny a benefit to a person because of his constitutional protected speech . . ., his exercise of those freedoms would in effect be penalized and inhibited.").

the exercise of that speech; and 3) the government action is likely to stop or slow a person from exercising such speech in the future.[170]

In most cases, the claim's third requirement is the hardest to meet.[171] For example, in *The Chicago Reader* case, the reporter was denied access to a motherhood training class inside of a prison because of a story she published about the jail earlier that year. The court held that denying the reporter access constituted an impermissible chilling of the press, effectivly slowing the reporter from exercising protected speech.[172] However, in *Smith v. Plati*, officials at the University of Colorado at Boulder, a state-run university, denied a blogger access to football practices because, the blogger claimed, his blog directly competed with the university's own athletics website.[173] The court held, similar to the *Ehrlich* case, that the ban did not chill, stop, or slow protected speech and was therefore constitutionally permissible.

The key to understanding why the court in *Smith* held that a discriminatory policy did not chill constitutionally protected speech while the court in *The Chicago Reader* held that a similar policy did is to examine what *type* of speech those courts sought to protect. In *Smith*, the blogger was still able to write about the school's athletic teams after he was blackballed.[174] Similarly, in *Ehrlich*, both Nitkin and Olesker continued to write about the former governor notwithstanding the ban.[175] The court in *The Chicago Reader*, however, did not look at whether the discriminatory policy stopped a reporter from publishing *any* type of constitutionally-protected

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[170] *Chicago Reader*, 141 F. Supp. 2d at 1144; *Smith*, 258 F.3d at 1176; *see Balt. Sun. Co.*, 437 F.3d at 416.
[171] There is a significant disagreement among courts as to whether the "person of ordinary firmness" should be interpreted to be as a journalist of ordinary firmness or a typical member of the public of ordinary firmness. *See* Stephanie L. Hogan, Amy S. Smushahwar and Charles D. Tobin, *Litigating Retaliations Claims After Baltimore Sun v. Ehrlich*, 23 COMM. LAWYER 7, 8-9 (2006).
[172] *Id.*
[173] *Smith*, 258 F.3d at 1172.
[174] *Smith*, 258 F.3d at 1178.
[175] *Balt. Sun Co.*, 437 F.3d at 419.

speech. Instead, the court looked at whether the discriminatory policy chilled a reporter from engaging in the same type of speech that he or she had published prior to being singled out for unequal treatment – that is, hard-hitting reporting. "A reporter might well tone down a critical article if she feared that jail officials might terminate, or even restrict, her future access," *The Chicago Reader* court said. "That is exactly the type of chilling effect the *First Amendment* guards against."[176]

Yet another wrench has been thrown into this labyrinth of legal analysis. In response to retaliation lawsuits, public officials often argue that forcing them to offer equal access to information would infringe on *their own* First Amendment right not to speak or to speak only to individuals whom they choose. According to Jerome Barron, a professor at The George Washington University Law School, "[t]he compelled speech aspect here is substantial."[177] Take, for instance, the case of Rafael Martínez Alequin, the blogger who was denied NYPD press credentials.[178] Although the blogger may now attend New York City Mayor Michael Bloomberg's press conferences, that does not mean the mayor must speak with Alequin. "He just ignores me like I'm invisible," Alequin said. "He never answers my questions."

Courts have noted this problem as well. For example, in *Raycom National Inc.*,[179] Jane Campbell, the former Mayor of Cleveland, issued an "edict" prohibiting city officials from speaking with reporters at WOIO-TV, a local television news station.[180] The "edict" was precipitated by a truthful news report aired by WOIO that stated Cleveland police officers earned

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[176] *Chicago Reader*, 141 F. Supp. 2d at 1146. *See New York Times Co.*, 403 U.S. at 723-24 (Douglass, J., concurring) ("The dominant purpose of the *First Amendment* was to prohibit the widespread practice of governmental suppression of embarrassing information.").
[177] Interview with Jerome A. Barron, Harold H. Greene Professor at Law, in Washington, D.C. (July 6, 2010).
[178] *Supra* notes 30-35, at 5-6.
[179] *Raycom Nat'l, Inc.*, 361 F. Supp. 2d at 679.
[180] *Id.* at 681.

thousands of dollars in overtime pay while driving Mayor Campbell's family around the city and on out-of-state trips. Despite the obvious retribution implicit in Campbell's "edict," a court stated that WOIO was unlikely to prove that a First Amendment retaliation claim existed.[181] The court noted that when Campbell chose not to speak to WOIO reporters, thus slowing their ability to report on the news, she was effectively exercising here right "not to speak with a media organization [she] view[ed] as irresponsible."[182] As another court put it, "The proper exercise by the [government official] of their own free speech rights cannot serve as the basis for imposition of liability upon those individuals."[183]

In order to rebut this "compelled speech" claim, reporters could make one of two arguments. First, they could state that discriminatory policies, those written commands or "edicts" issued by the heads of government offices, do not constitute communicative speech and therefore are not encompassed within the First Amendment. For example, in *The Chicago Reader*, the court stated that a policy excluding a particular reporter from observing a motherhood class "did not involve speech" protected by the First Amendment.[184] Second, a reporter or news outlet may argue that a discriminatory policy that prompts a government official to stay tight-lipped toward a particular reporter is itself a type of threat, harassment, or form of intimidation that is not constitutionally protected.[185] By using the rationale and the precedent

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[181] *Id.* at 686.
[182] *Id.*; *see McBride v. Vill. of Michiana*, Case No. 4:92-CV-155, 1998 U.S. Dist. LEXIS 6082, at *27-31 (W.D. Mich. April 2, 1998) (Instruction to village employees not to speak with a reporter upheld because it was "protected counterspeech" by public officials). This Report does not detail the tests for what constitutes constitutionally protected "speech." For such a discussion, *see* R. George Wright, *Article: What Counts as 'Speech' in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).
[183] *McBride v. Vill. of Michiana*, 100 F.3d 457, 462 (6th Cir. 1996).
[184] *Chicago Reader*, 141 F. Supp. 2d at 1145. The court's discussion on this topic is non-existent, bordering on *ipse dixit*.
[185] *See Chicago Reader*, 141 F. Supp. 2d at 1145; *McBride*, 100 F.3d at 461; *Raycom Nat'l, Inc.,* 361 F. Supp. 2d at 686; *Balt. Sun Co.*, 437 F.3d at 420.

cited above, a reporter, blogger, or media organization may be able to convince a public official who has issued a discriminatory "edict" to stop the policy.

D. Old Faithful: Will The Public Forum Doctrine Save Reporters From Policies Promoting Unequal Access?

The public forum doctrine, as discussed in Part II of this Report, is an effective tool to challenge a public official in the context of media credentialing. These forums are government-controlled places or events that have been voluntarily opened to the general public (or media) for a specific type of expressive activity.[186] Once public officials have created a public forum, they may not exclude a reporter from that forum because of something that journalist had published – a content-based restriction – without overcoming a high judicial bar.[187]

The public forum doctrine offers little assistance, however, when public officials enact policies that bar subordinates from speaking to the press.[188] A public forum is an area of a government-controlled facility that has been generally opened to the news media. According to Professor Barron, when a reporter calls a public official and asks for information, no such forum exists because that phone call is not *generally* open to other reporters.[189] This, coupled with a public official's right to not speak to a particular reporter,[190] weakens any public forum argument that a reporter might make to challenge a discriminatory policy. In sum, the public forum doctrine may be a weak tool when attempting to combat policies that discriminate against a single reporter.

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[186] *See Telemundo of L.A.*, 283 F. Supp. 2d at 1102-03.
[187] *Supra* note 44, at 7.
[188] *See supra* notes 136-54, at 25-29.
[189] Interview with Jerome A. Barron, Harold H. Greene Professor at Law, in Washington, D.C. (July 6, 2010).
[190] *Supra* notes 177-183, at 33-34.

E. The Power Of The Pen: What Else Can A Reporter Do To Fight A Discriminatory Policy?

Despite the persuasiveness of a reporter's argument, some public officials may simply be unwilling to listen to reason and determined to instill discriminatory policies regardless of the legal implications. In such a scenario, a journalist may have to resort to what could be the most effective weapon of all – the front page. "If this is happening," Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, said, "report it to me."[191] Dalglish noted that when all else fails, the political pressures associated with cutting out a critical newspaper reporter will eventually force politicians to rescind discriminatory policies.

Additionally, using newsprint may serve as a viable alternative to fighting discriminatory policies given of the amount of time needed to adjudicate an issue in the court system. Legal cases often go on for years. Excluding a particular journalists from government-held information for that length of time could make particularly good copy, especially if other media outlets chose to report on the story as well. As the press continued to report on a government official's "edict" or "no-comment policy," pressure would undoubtedly build as constituents read headline after headline detailing what could be an official's attempt to control the press.

III. CONCLUSION

This Report lays out the legal arguments any journalist or news outlet could use to combat policies that treat one reporter differently than another. The analysis outlined in this Report would also serve a litigating attorney well, but is primarily intended to be used *before* entering into a courtroom. If a reporter were to be subjected to a discriminatory regulation, whether it concern press passes or a "no-comment policy,"[192] he or she should attempt to

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[191] Interview with Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, in Arlington, Va. (June 28, 2010).
[192] *Times-Picayune Publ'g Co.*, Civ. A. No. 88-1325, 1988 U.S. Dist. LEXIS 3506, at *4.

convince a public official to revise or voluntarily eliminate the regulation by pointing to the numerous legal arguments and theory contained in this Report. Through a thoughtful and non-threatening discussion of the press' rights and First Amendment jurisprudence, a reporter may be able to convince a public official that discriminatory regulations hampering a reporter's ability to do his or her job are not just bad policy, but are unconstitutional as well.