

Press Pools Protect 1st Amendment During Pandemic

By **Anne Champion and Lee Crain** (April 7, 2020, 5:53 PM EDT)

In the days of the coronavirus pandemic, social distancing has become our national mantra, and sheltering in place our current occupation. And at the same time that the demand for information from government sources has increased, governments have been forced to restrict public access severely in the name of public health.

Ended (at least temporarily) are the days where reporters were free to roam government buildings, to develop sources in close, personal contact, and to sit in packed briefing rooms questioning officials on the news of the day. Even the White House press corps has had to adjust — with social distancing rules being enforced in the normally crowded James S. Brady Press Briefing Room after one of the press corps' members tested positive for COVID-19.[1]

Although governments — federal, state and local — may be justified today in limiting the number of journalists who can cover government activities in person, it is imperative that this justification not be used as a means to silence probing, critical coverage.

Fortunately, there is a longstanding, widely used journalistic institution that can both ensure public safety and effective reporting in these times: the press pool. Press pools are protected by the First Amendment, ensuring that the government cannot use restricted access to manipulate the media.

From Air Force One to the battlefield, there are numerous circumstances in which governments restrict the number of reporters who can report firsthand on government activities. In such cases, a press pool is a means of utilizing a smaller number of journalists and news outlets to cover an event first hand, with the pool members sharing their reporting with other journalists and news outlets. Press pools are generally constituted informally.

But even though informal, the press pool carries with it numerous First Amendment protections. Specifically, a government-authorized press pool is a species of limited public forum — a forum that may not generally be open to the public for expressive activity, but one which the government intentionally opens up for specific First Amendment activities.



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In the seminal case *Sherrill v. Knight*, for instance, the U.S. District Court for the D.C. Circuit held that by voluntarily “establish[ing] press facilities for correspondents” in the White House — otherwise the private residence and workplace of the president and his staff — the government had created a limited public forum in which those correspondents were entitled to certain due process and First Amendment protections with respect to their rights of access.

As with all limited public forums, although the White House could close the building to all reporters, because it opened the building up to specific categories of First Amendment expression, the White House had to permit access to its press facilities in a manner consistent with the First and Fifth Amendments.

A press pool is no different: The government opens a limited number of seats in a building, battlefield or plane to journalists to engage in a certain type of expressive activity — journalism. As one district court has expressly noted, creating a press pool “open[s] the door, albeit in a limited matter ... for expressive activity” and establishes a “limited public forum.”[2]

That court was right. Opening up facilities to a press pool creates a mini-public forum, triggering limitations on the government’s ability to regulate who can take advantage of the forum and how they can do so.

So what are those restrictions? Most importantly, in a limited public forum, governmental restrictions “based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”[3] In short, then, the government cannot exclude reporters from a press pool based on the content or viewpoint (actual or perceived) of their reporting.

Conservative officials cannot exclude liberal outlets just for being liberal; and liberal outlets cannot exclude conservative outlets just for being conservative. Nor can reporters be retaliated against for the content and viewpoint of their coverage or questioning.

Rules for constituting a press pool have rarely been codified into statute or regulation, and only a smattering of courts have considered challenges to press pool makeup. Alongside longstanding practices where press pools are commonly used, such as in covering the White House, especially in space-restricted situations such as Air Force One,[4] at least one federal agency has codified a press pool system that could serve as a model to governments across the country looking to deal with pandemic-specific restrictions on press access.

Specifically, Federal Bureau of Prisons, or BOP, regulations authorize a prison warden to establish press pools — creating a limited public forum — when she “determines that the frequency of requests for interviews and visits reaches a volume that warrants limitations.”[5] The BOP regulations state that the press pool must be:

selected by their peers and consist of not more than one representative from ... (1) The national and international news services; (2) The national and radio networks and outlets; (3) The news magazines and newspapers; and (4) All media in the local community where the institution is made.[6]

Notably, the BOP regulations remove the selection of the members from government hands, and empower the press itself to perform this function. Self-selection of the pool has also been the longstanding practice of the White House press corps.

The BOP regulations as well as longstanding practice also support ensuring that print, radio and television media are included, along with journalists from the local, national and international media, ensuring a diversity of viewpoints in the pool.[7] Likewise, in *CNN v. ABC*,[8] a district court granted a preliminary injunction to several broadcasting networks, holding that television media could not be constitutionally excluded from a “tight pool” of 13 journalists covering “limited coverage” White House events.

In addressing the First Amendment implications of excluding television broadcasters specifically from the pool, the court noted that “visual impressions can and sometimes do add a material dimension to one’s impression of particular news events,” and held that “the public has a significant interest in continued television participation in White House pool coverage,” while it was “at a loss to find any direct governmental interest served by” a policy of excluding television media wholesale.

While federal, state and local governments act to limit in-person press access to government facilities due to the current pandemic, it is more essential than ever that governments comply with the First Amendment — and that media organizations defend their rights and the right of the public to robust media coverage of government. Governments should consider following the basic practices of delegating to the professional news media the ability to determine which journalists and media organizations serve as rotating members of a pool, and ensuring that any press pools include journalists from a variety of outlets and media.

Deploying press pools, and ensuring that journalists are empowered to decide who among them is seated in a given pool, respects the First Amendment and ensures that no government official can use restricted access as a means of picking and choosing the prisms through which citizens learn about official actions and responses to the current pandemic. Now is a time at which First Amendment protections limiting government control over reporters must be at their zenith.

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[1] Scott Detrow, NPR, Suspected Coronavirus Case Will Thin White House Press at Briefings (March 23, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/23/820323840/suspected-coronavirus-case-will-thin-white-house-press-at-briefings>.

[2] *Nation Magazine v. U.S. Dep’t of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991).

[3] *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1887 (2018).

[4] See, e.g., Alexandria Simonds, *New York Times*, When the President Travels, Who’s Allowed to Join Him? (July 17, 2017), <https://www.nytimes.com/2017/07/17/insider/presidential-travel-protective-press-pool.html> (noting that only 13 members of the news media can travel at a time on Air Force One, “so the print and television poolers must represent the entirety of their disciplines and send out a series of short, to-the-point reports throughout the trip to those not on it”).

[5] 28 C.F.R. §540.64(a).

[6] 28 C.F.R. 540.64.

[7] CNN v. ABC, 518 F. Supp. 1238 (N.D. Ga. 1981).

[8] *Id.* at 1245.