
When police target newsgathering, do journalists have a path to accountability?

Press Freedoms in the United States 2021

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By Legal Fellow Grayson Clary

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It would be difficult to miss one stark lesson from the U.S. Press Freedom Tracker's 2021 reporting: Protests remained one of the most dangerous places for a journalist in the United States to be, in large part because of violence directed at the press by members of law enforcement.

As we reported in the [first installment of this newsletter series](#), while 2020 marked an "[all-time high](#)" in arrests of and assaults on reporters in the years since the Tracker has been collecting data, 2021's tally — at more than 140 assaults — still far outstripped a typical year. And while journalists' lawsuits seeking justice for those First Amendment violations have continued to move through the courts, 2021 also cast into relief the obstacles that still exist to holding officers accountable.

As the Tracker's Stephanie Sugars [reported last year](#), more than 60 journalists have sued law enforcement over protest-related incidents since the Tracker launched in 2017. Some of those efforts have produced important reforms.

In Portland in 2020, journalists represented by the American Civil Liberties Union of Oregon [won a ruling](#) from the U.S. Court of Appeals for the Ninth Circuit that federal marshals had violated the First Amendment by failing to

tailor their dispersal orders to exclude reporters engaged in lawful newsgathering.

In Minneapolis, journalists represented by that state's chapter of the ACLU won [a similar injunction](#) against the Minnesota State Patrol — a victory since memorialized, alongside other safeguards for First Amendment rights, in [a settlement agreement](#). Some other suits, as Sugars noted, have earned monetary damages if not durable policy changes.

Alongside those efforts, the U.S. Department of Justice is also investigating whether several municipal police departments have a practice of violating First Amendment rights — including the rights of the news media, an issue the Reporters Committee and a press coalition [had urged](#) it to examine. Those inquiries could help set federal protocols for reporters' rights at protests.

But 2021 also saw backsliding on First Amendment questions vital to the right to gather the news.

Despite the spotlight that recordings of George Floyd's murder threw on the importance of the right to document police, for instance, that right remains unrecognized in a number of jurisdictions and under assault in others. In [a closely watched case](#) last year, the U.S. Court of Appeals for the Tenth Circuit [concluded](#) that the right wasn't "clearly established" enough to justify holding an officer personally liable for violating it — and declined to establish it any more clearly going forward. While the plaintiff asked the U.S. Supreme Court to review that judgment — in a bid [backed by the Reporters Committee and more than 40 news organizations](#), along with a broad cross-section of other groups — the justices declined to hear the case.

In the same vein, while some states have reacted to police attacks on journalists with legislation to protect the press — as California did with [a bill](#) shoring up media access rights at protests, which the Reporters Committee [backed](#) — others have moved to shield law enforcement from critical coverage instead. The Arizona House advanced a [widely-condemned](#) bill that would require an officer's permission to film them from within eight feet; Oklahoma adopted an ["anti-doxxing" bill](#) vague enough that it may reach individuals who share an officer's photo; and Florida's much-discussed "anti-riot" bill likewise

created a new criminal offense, “cyberintimidation by publication,” that critics [allege](#) risks chilling speech “critical of law enforcement officials.” In too many states and cities, the right to document what the public’s officials do in public remains precarious in 2022.

The outlook for accountability when federal officials violate journalists’ rights — as when the U.S. Park Police [assaulted](#) an Australian news crew outside the White House — may be even more daunting. Last year, the Supreme Court agreed to hear [a case](#) that asks it to hold that individuals who suffer retaliation for exercising their First Amendment rights can never obtain damages from the federal official responsible. As Reporters Committee attorneys explained in a [friend-of-the-court brief](#), we think that suggestion is wrong and dangerous; it would give the government a green light to punish the press for performing its constitutional function. But if the justices disagree, the decision, expected by the end of June, could create a grave new obstacle to holding federal officers accountable for First Amendment violations.

Assessing all of those developments together, it takes more lawyering than you might hope to make the rights journalists have on paper meaningful in practice — to ensure redress is available when reporting draws the hostile attention of local, state or federal officers. But we plan to continue advancing those rights in the face of each of these challenges, both this year and into the future.

In next week’s newsletter, we’ll explore subpoena threats and their impact on local journalists trying to protect confidential sources.

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Grayson Clary is the Stanton Foundation National Security/Free Press Fellow at the Reporters Committee for Freedom of the Press and a member of the advisory board for the U.S. Press Freedom Tracker. Black and white police and journalists photo by Michael Guerrero, via Pexels.

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