New York Attorney General
Public Hearings on
Police and Public Interactions During Protests

Testimony of NPPA General Counsel Mickey H. Osterreicher
June 15, 2020

My name is Mickey Osterreicher¹ and I am the general counsel for the National Press Photographers Association (NPPA). I appreciate the opportunity to provide testimony at today’s hearing.

Since its founding in 1946, in New York, NPPA has been the Voice of Visual Journalists. We are a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. We vigorously advocate for and protect the Constitutional rights of journalists as well as freedom of the press and speech in all its forms, especially as it relates to visual journalism. Our members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism community.

For the past 10 years, NPPA has worked with the NYPD and other police agencies to improve police-press relations, especially on behalf of visual journalists. The NYPD Patrol Guide contains several well-articulated sections dealing with these issues. In law enforcement, as in other professions, there is no substitute for proper ongoing training. Reports during the recent protests have shown a disconnect between the Patrol Guide’s policies and the behavior of some members of the NYPD, indicating better training is needed to improve police-press interactions. In May of this year we issued a statement urging accountability for police who violate journalists’ rights.²

In my position I deal with many incidents nationwide of visual journalists being interfered with, detained, and arrested for doing nothing more than photographing or recording in public. Unfortunately, there have been a disproportionate number of such incidents involving our members and other journalists in New York City in recent weeks.

The U.S. Department of Justice expressed concern “that discretionary charges, such as disorderly

¹ I have been a photojournalist in print and broadcast for over forty years. Since 1976 I have also been a uniformed reserve sheriff’s deputy with the Erie County Sheriff’s Office and continue to serve in that capacity. I was a member of the International Association of Chiefs of Police (IACP) Public Recording of Police advisory committee and helped draft the manuals and provide training on the right to record police performing their official duties in public. I have also written numerous articles and instructed police agencies and organizations throughout the country on this issue.

conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights.”

NPPA believes the abuse of such “catch and release” type charges to prevent journalists from exercising those rights is exactly what happened in New York. Of greater concern is the reports from our members that officers disregarded NYPD issued press credentials as well as other forms of press identification (such as vests and helmets with “PRESS” written in large letters and clearly visible) when dealing with journalists. Despite executive orders classifying members of the media as being “essential” businesses or personnel exempt from curfew orders, NYPD officers challenged photographers and reporters as to their presence and location while covering the protests and used unjustifiable arrest as well as excessive physical force against journalists which restricted their newsgathering activities.

These incidents occurred in spite of the fact that the NYPD Patrol Guide states in pertinent part, “Members of the service will not interfere with the videotaping or the photographing of incidents in public places. Intentional interference such as blocking or obstructing cameras or harassing the photographer constitutes censorship.”

After the arrest of 26 journalists covering police activity in and around Zuccotti Park during the Occupy Wall Street demonstrations in 2011, I helped draft a letter to the NYPD signed by almost every major media organization in NY objecting to such police conduct. I was also a part of a small group of media attorneys who met with then Commissioner Kelly two days later. As a result of that meeting, the commissioner issued a FINEST message directing members to cooperate with the press. The very next day there were two separate incidents of press interference.

In another incident one of our members, a New York Times photographer, was arrested and charged with obstruction of governmental administration while covering a story about stop and frisk in the Bronx in clear violation of the language found in Section 208-03 of the NYPD Patrol Guide. As I wrote in the New York Times in 2012, “It is unfortunate that the rights of the press and the public to record and photograph matters of public concern on city streets are frequently disregarded by both patrol and supervisory officers. To improve the situation, we urge the New York Police Department to work with us to improve training and supervision for its members starting from the top down.”

No matter how many times the NYPD Commissioner issues a FINEST Message related to these issues (and there have been many over the years), it cannot be stressed strongly enough that these messages and Patrol Guide directives are merely pieces of paper and will continue to fall on deaf ears without proper training accompanied by commensurate disciplinary consequences for officers who violate these rights.

New York is far from the only place where abridgement of constitutional rights by police officers occurs. I was in Ferguson, MO dealing with these very same issues as officers, threatened,

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4 NYPD Patrol Guide, 212-49 Incidents Involving Media Representatives, Effective Date 01-01-00
6 FINEST Messages are read citywide during multiple police rollcalls See: http://therighttophotographinpublic.com/general_orders/NYPD_multiple_documents.pdf
intimidated, detained and arrested journalists and citizens who were doing nothing more than exercising their rights.

Ever since 911 there has been a heightened awareness of anyone taking pictures or recording events in public. This issue has only been exacerbated by the widespread proliferation of cellphone cameras and the ability of everyone to post photos and recordings on the Internet where they may be viewed and shared, in many cases going "viral" with millions of views. Many in law enforcement still have the erroneous belief that they can order people to stop taking pictures or recording in public. Interference, and in some cases arrests, stemming from those actions have led to numerous court cases resulting in settlements that have cost taxpayers hundreds of thousands of dollars.

Having provided journalists training regarding their rights for almost 20 years, I always note that it does not matter if journalists know their rights if police do not know or care what those right are. To that end I have helped develop guidelines and policies for police departments throughout the country. I have also done presentations and training sessions for the International Association of Chiefs of Police (IACP), the National Sheriffs Association and NY State Sheriffs Association to name a few and was part of the IACP Public Recording of Police advisory committee that developed a training toolkit addressing the public’s right to record police officers.

In any free country the balance between providing police protection with integrity versus over-zealous enforcement is delicate. It is one thing for officers to act when there is reasonable suspicion or probable cause; it is quite another to abuse that discretion by chilling free speech and creating a climate of fear and distrust under the pretext of safety and security. The denigration of these rights undermines public confidence in our police departments, lessens the accountability of our governmental officers, and runs counter to the very constitutional freedoms that are the foundation of our nation.

NPPA offers its assistance to work with your office, the NYPD, and other agencies to create successful training programs in order to remedy these situations and foster better relations between the police, the public and the press. We also urge your office to work with us to develop and enforce policies to help bring about meaningful change for policing in New York, especially as it relates to the First Amendment rights of journalists.

Thank you very much for your time and attention in allowing me to submit my testimony today.

Respectfully submitted,

Mickey H. Osterreicher

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General Counsel
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7 See: https://www.theiACP.org/prop