
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 98 **Hearing Date:** March 9, 2021
Author: McGuire
Version: December 22, 2020
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Public peace: media access*

HISTORY

Source: Author

Prior Legislation: SB 629 (McGuire) Vetoed 2020

Support: ACLU of California; California Black Media; California Broadcasters Association; California News Publishers Association; California Public Defenders Association; Ethnic Media Services; First Amendment Coalition; LA Opinión; Media Alliance; Oakland Privacy

Opposition: California Civil Liberties Advocacy; California Narcotic Officers' Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Los Angeles County Sheriff's Department; Peace Officers Research Association of California; Riverside Sheriffs' Association

PURPOSE

The purpose of this bill is to make it clear that reporters may access areas shut off by police for a command post or similar during a protest, march, etc.

Existing law makes it a misdemeanor for any person to remain present at the place of any riot, rout, or unlawful assembly, after being lawfully warned to disperse. (Pen. Code § 409.)

Existing law authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the area where a menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster. (Pen. Code § 409.5 (a).)

Existing law authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating any calamity or any riot or other civil disturbance to any and all unauthorized persons whether or not the field command post or other command post is located near to the actual calamity or riot or other civil disturbance. (Pen. Code § 409.5 (b).)

Existing law makes it a misdemeanor for any person to willfully and knowingly enter an area closed as the result of such a disaster and willfully remain within the area after receiving notice to evacuate. (Pen. Code § 409.5 (c).)

Existing law allows a duly authorized representative of any news service, newspaper, or radio or television station or network to enter areas closed as the result of a disaster. (Pen. Code § 409.5 (d).)

Existing law authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the area where a menace to the public health or safety is created by an avalanche. (Pen. Code § 409.6 (a).)

Existing law authorizes officers of the Department of the California Highway Patrol, police departments, marshal's office or sheriff's office, and other persons designated as peace officers, as specified, to close the immediate area surrounding any emergency field command post or any other command post activated for the purpose of abating hazardous conditions created by an avalanche. (Pen. Code § 409.6 (b).)

Existing law makes it a misdemeanor for any person to willfully and knowingly enter an area closed due to an avalanche and willfully remain within the area after receiving notice to evacuate; and further authorizes the use of reasonable force to remove any unauthorized person from such an area. (Pen. Code § 409.5 (c).)

Existing law allows a duly authorized representative of any news service, newspaper, or radio or television station or network to enter areas closed as the result of an avalanche. (Pen. Code, § 409.5 (d).)

Existing law requires the Commission on Peace Officer Standards and Training (POST) to implement a course or courses of instruction for the training of law enforcement officers in the handling of acts of civil disobedience and adopt guidelines that may be followed by police agencies in responding to acts of civil disobedience. (Pen. Code § 13514.5 (a).)

Existing law requires the POST training course to include adequate consideration of all of the following subjects:

- a) Reasonable use of force;
- b) Dispute resolution;
- c) Nature and extent of civil disobedience, whether it be passive or active resistance;
- d) Media relations;
- e) Public and officer safety;
- f) Documentation, report writing, and evidence collection; and
- g) Crowd control. (Pen. Code § 13514.5 (b).)

Existing law provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. (Pen. Code, § 835a.)

Existing law specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. (Pen. Code § 835a.)

This bill provides that if peace officers close an area surrounding an emergency field post, command post, police line etc. at a demonstration, march, protest or rally pursuant to the First Amendment, the following requirements apply:

- a) A duly authorized representative of any news service, online news service, newspaper or radio or television station or network (reporter) may enter the closed areas described.
- b) A peace officer or other law enforcement officer shall not intentionally assault, interfere with, or obstruct the reporter who is gathering, receiving, or processing information for communication to the public.
- c) A duly authorized representative of any news service, online news service, newspaper, or radio or television station or network that is a closed area described in this section shall not be cited for the failure to disperse, violation of a curfew or resisting arrest. If the reporter is detained by a peace officer the representative shall be permitted to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so.

This bill provides that it does not prevent a law enforcement officer from enforcing other applicable laws if the person is engaged in an activity that is unlawful.

COMMENTS

1. Need for This Bill

According to the author:

When natural disasters such as earthquakes or wildfires occur, state law authorizes peace officers to close certain areas to the public during emergencies, but authorized members of the press are granted unique exemptions from these restrictions, as press provide information to the public on what is going on. Members of the press often need to put themselves in harm's way in order to evaluate the scene of an emergency and report.

Currently, members of the press are not allowed to interfere with, hinder, or obstruct emergency operations. Restrictions on media access may be imposed for only so long and only to such extent as is necessary to prevent actual interference. While California law protects members of the press from being stopped when entering closed areas during emergencies and natural disasters to gather information, these protections don't extend to protest events such as demonstrations, marches, protests, or rallies where individuals largely engage their First Amendment right to speech.

In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons, and fists. In many cases there are strong indications that the officers injuring

journalists knew their targets were members of the press. Members of the press risk their personal safety and wellbeing each time they attend protest events to get the public the information they need, but rubber bullets, teargas, and even arrest cannot be the norm for an essential pillar of our democracy. We must take steps to ensure that the right of the press and the First Amendment are protected here in the Golden State.

SB 98 will ensure that journalists' ability to perform their critical role of documenting history and informing the public is protected as they attend demonstrations, marches, protests, and rallies. SB 98 will prohibit law enforcement officers from obstructing, detaining, assaulting or otherwise preventing the press from fulfilling their constitutional mandate in relaying information regarding these events.

2. Law Enforcement and Crowd Control

The basic course of training for law enforcement officers includes training in handling disputes and crowd control (POST website, <https://post.ca.gov/regular-basic-course-training-specifications>, [as of Jul. 27, 2020].) The training topic is broken down into crowd management, crowd control, and riot control. In addition, under Penal Code Section 13514.5, POST is required to provide a supplemental course of training for officers in civil disobedience situations. This training includes instruction on the use of force as well as media relations in organized protest situations. (See *POST Guidelines Crowd Management, Intervention, and Control*, California Commission on Peace Officer Standards and Training, Mar. 2012, available at: https://post.ca.gov/Portals/0/post_docs/publications/Crowd_Management.pdf, [as of Jul. 27, 2020].) The POST guidelines “are not meant to constitute policy, nor are they intended to establish a statewide standard” instead they are “a resource for law enforcement leaders to provide foundational guidance for the facilitation of First Amendment rights while allowing discretion and flexibility in the development of individual agency policies.” (*Id.* at vii.)

The rules for when and what type of force law enforcement can use in crowd control situations is defined by case law and local policy. In general, when courts are evaluating whether or not a specific use of force was lawful or not, they will attempt to balance the “nature and quality of the intrusion on the individual” against the “countervailing governmental interests at stake” and make a determination about whether the use of force was reasonable under the circumstances. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) The decision about whether or not the use of force is “reasonable,” and therefore lawful, must take into account “the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving.” (*Id.* at 396-97.)

For example, in *Deorle v. Rutherford* (9th Cir. 2000) 272 F.3d 1272, 1286 the court found that an officer shooting a beanbag round into the face of a mentally disturbed person without warning was unreasonable. The officer arrived on the scene and was able to observe the individual from a distance prior to firing the less-lethal beanbag round, which weighed against the notion that the officer had to make a split second decision to use less-lethal force. (*Ibid.*) By contrast, in *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, the court held the use of “pain compliance” techniques to be reasonable to disperse a group of protestors. Prior to applying the pain compliance techniques, the officers warned the demonstrators that they would be subject to pain compliance measures if they did not move, that such measures would hurt, and that they

could reduce the pain by standing up, eliminating the tension on their wrists and arms. (*Id.* at 806.)

3. Police Confrontations with the Media

This bill is in response to the use of force against journalists covering protests, marches etc.

Numerous Black Lives Matter Protests have occurred following the killing of George Floyd, and other African Americans by police officers. United States Press Freedom tracker indicates that in 2020 there were over 800 aggressive acts against the press during the protests and at least two reporters were detained during the Capitol riots on January 6, 2021. (U.S. Press Freedom Tracker website, available at: <https://pressfreedomtracker.us/>, [as of Jul. 27, 2020].) The website contains links to various incidents in the state of California, including one protest in Los Angeles where police allegedly used force against at least four journalists in separate instances. (*Multiple journalists covering protests in Los Angeles assaulted*, U.S. Press Freedom Tracker, available at: <https://pressfreedomtracker.us/all-incidents/multiple-journalists-covering-protests-los-angeles-assaulted/>, [as of Jul. 27, 2020].)

This bill would add several protections for journalists into State Law. First, it would clarify that “duly authorized members of the press” have access to areas that have been closed by the police due to a protest, march or other type of demonstration. It further instructs that journalists are not to be assaulted, interfered with, or obstructed during their coverage of such demonstrations. In addition, this bill provides journalists with immunity from specified violations such as remaining after an order to disperse, curfew violations, and resisting arrest offenses. Lastly, this bill allows a member of the press who has been detained to immediately contact a law enforcement supervisor for purposes of challenging the detention.

4. Argument in Support

In Support the California News Publisher’s Association, California Black Media, ImpreMedia, Ethnic Media Services, the California Broadcasters Association, ACLU of California, and the First Amendment Coalition state:

In order to protect members of the media who are often responsible for the first draft of history, SB 98 would: ensure an authorized member of the media may enter areas closed off by first responders during a demonstration, march, protest or rally; prohibit an officer from assaulting a journalist or obstructing their ability to gather or process news; and create an accelerated process for a journalist to challenge being detained by an officer.

Recent actions taken against journalists by law enforcement officers demonstrate that additional statutory protections are necessary to allow reporters and photographers to gather and process information and report on the significant events that are transforming and reshaping our world.

In California and across the country police have arrested, detained, and have physically assaulted journalists with rubber bullets, pepper spray, tear gas, batons,

and fists. In many cases there are strong indications that the officers injuring journalists knew their targets were members of the press.

The following incidents show the blatant disregard for the safety of journalists engaged in constitutionally protected activities by law enforcement during protest activities in the state:

- San Diego Union-Tribune reporter Andrew Dyer was shot with pepper balls while he was documenting protests in La Mesa, California, on May 31, 2020.
- Barbara Davidson, a Pulitzer Prize-winning photojournalist, was covering a protest in Los Angeles when a police officer told her to move. She showed him her credentials, he responded he did not care, she again identified herself as press, and, as she began to walk away, the officer shoved her causing her to trip and hit her head on a fire hydrant;
- Cerise Castle, a reporter for National Public Radio's Santa Monica affiliate, KCRW, was shot with a rubber bullet while holding her press badge above her head. She said she was shot by an LAPD officer with whom she had just locked eyes;
- Katie Nielsen, a reporter with KPIX 5 News, was detained by officers in Oakland, while repeatedly identifying herself as press and with visible credentials. The detention was brief but interrupted her reporting on a peaceful protest organized by Oakland Tech High School students;
- Leonardo Castañeda, a reporter with the San Jose Mercury News, was zip-tied and detained by police in San Francisco;
- Jintak Han, a photographer and reporter with the University of California at Los Angeles's student newspaper, the Daily Bruin, was shot at with rubber bullets as he tried to return to his car after covering protests. He was wearing his press pass, a white helmet, a vest emblazoned with "PRESS" and was carrying three cameras;
- Adolfo Guzman-Lopez, a clearly identifiable radio journalist with KPCC in Los Angeles, was shot in the throat with a rubber bullet while covering protests in Long Beach, leaving a bloody red welt. "I felt it was a direct hit to my throat," the radio reporter said.
- In Minneapolis, Molly Hennessy-Fiske, a Los Angeles Times reporter, and Carolyn Cole, a Los Angeles Times photographer (also with a "press" flak jacket), had to escape over a wall after being gassed and shot with rubber bullets at point blank range.
- In Santa Monica, BuzzFeed News reporter Brianna Sacks was detained by Santa Monica police while documenting protests on May 31, 2020.

The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. News reporting on police conduct serves the crucial First Amendment interest in promoting the “free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Further, the ability journalists to cover people exercising their First Amendment to petition the government and assemble is crucial to continuing a dialog on the difficult issues our society faces.

In a turbulent and troubled time and with an abundance of misinformation flooding information channels, journalists need to be able to gather and report facts without having to fear that they will be shot at or arrested by law enforcement officers simply because they are trying to provide context and help us all understand the significance of these events.

Police attacks on journalists are what we expect from third world countries. SB 98 would make clear that it is the policy of this state that assaults and obstructions designed to prevent the constitutionally protected free flow of information to Californians will not be tolerated.

5. Veto Message for SB 629

I am returning Senate Bill 629 without my signature.

This bill would allow authorized representatives of any news service, online news service, newspaper, or radio or television station or network to enter areas that have been closed by law enforcement due to a demonstration, march, protest or rally, including the immediate area surrounding any emergency field command post or any other command post. This bill would, additionally, prohibit a peace officer from intentionally assaulting, interfering with or obstructing these duly authorized representatives who are gathering, receiving or processing information for communication to the public.

Media access to public gatherings - especially protests - is essential for a functioning democracy, and law enforcement should not be able to interfere with those efforts. But I am concerned that this legislation too broadly defines a "duly authorized representative of a news service, online news service, newspaper, or radio or television station or network." As written, this bill would allow any person who appears to be engaged in gathering, receiving or processing information, who produces a business card, press badge, other similar credential, or who is carrying professional broadcasting or recording equipment, to have access to a restricted law enforcement area. This could include those individuals who may pose a security risk - such as white nationalists, extreme anarchists or other fringe groups with an online presence.

Law enforcement agencies should be required to ensure journalists and legal observers have the ability to exercise their right to record and observe police activities during protests and demonstrations. But doing so shouldn't inadvertently provide unfettered access to a law enforcement command center. In fact, the police reform advisors that I appointed in the wake of the nationwide protests this summer to advise me on what more California can do to protect and facilitate the right to engage in peaceful protests and demonstrations made concrete recommendations on protecting journalists and legal

observers exercising their right to record and observe police activities during protests and demonstrations. I plan to implement these recommendations at the state level and am encouraging every California law enforcement agency to do the same. I also plan to work with the Legislature on providing access to journalists in a way that addresses the security concerns and accomplishes the intent of this bill.

Should the author address the concern about unfettered access to a command center? Will law enforcement be able to easily identify members of the press? Is it possible there could be too many press who want to enter the command center? The author may wish to address these concerns as the bill moves through the process.

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