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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: **Bryan Pollard, Editor-in-Chief of the Cherokee Phoenix**

Opinion Number: **2008-CNAG-2**

Date Decided: **November 18, 2008**

To: Bryan Pollard, Editor-in-Chief of the Cherokee Phoenix

From: A. Diane Hammons, Attorney General for the Cherokee Nation

This office has received your request for an official Attorney General Opinion where in you ask the following question:

Under the United States Constitution, or the Cherokee Nation laws and Constitution, do any Cherokee Nation employees and/or elected or appointed officials have the authority to ban the tribal newspaper or its staff from recording, via audio or video, the proceedings of a public forum or meeting?

It is the right and duty of the press to investigate and report upon matters of public interest, and the importance of the press is reflected in the Constitutions of both the Cherokee Nation and the United States of America. However, just as there are limits upon the freedom of speech, there are also limits upon the freedom of the press. It is well settled in this country that members of the press have no special right to access all sources of information that are within the

control of the government. Houchins vs. KQED, Inc., 438 U.S. 1, 9 (1978). While the press does not have a special right to access governmental information, it does have the same right of access as the general public. Id. at 11. Further, the United States Supreme Court has acknowledged that members of the press have a constitutional right to gather news, because "without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg. v. Hayes, 408 U.S. 665, 681 (1972).

Both the United States Constitution[1] and the Cherokee Nation Constitution[2] contain provisions which are designed to protect the right of the press. The question presented here is whether Cherokee Nation officials or employees have the right to prohibit members of the press from making video or audio recordings at a public forum or meeting. The term 'public forum' is not defined in Cherokee Nation law. For purposes of this opinion, a public forum will be considered a meeting organized by Cherokee Nation employees or officials where members of the public are invited to listen, learn and speak about issues of public concern.

In a democratic society the substance of a public forum, organized by members of the government for the benefit of the citizenry, is a legitimate subject of press coverage and is newsworthy. There is a strong public interest in allowing the press or members of the public to make audio or video recordings of such an event. Members of the public may be unable, due to work or family commitments, to attend the forum on the date and time prescribed. Having a recording of the event available to the public allows a larger number of citizens to benefit from

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[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. amend. I.

[2] The Council shall make no law prohibiting the free exercise of religion or abridging the freedom of speech, or the press, or the right of the People to peaceably assemble, or to petition the Nation for a redress of grievances. C.N. Const. art. III, § 4.

the public discourse. Many of the questions asked by members of the public at the forum may be questions that are of interest to all of the citizens of the Cherokee Nation. It also allows individual citizens to evaluate what was said by public officials and their fellow citizens in a very comprehensive and complete way. A video recording allows the citizen not only to hear what was said, but to evaluate *how* it was said by capturing the original tone and inflection in a way that reporting based upon limited notes cannot.

This is particularly relevant considering the intent expressed in the Cherokee Nation Freedom of Information and Rights of Privacy Act of 2001, which is also implicated by the facts described in the question.

> The Council of the Cherokee Nation and the Principal Chief of the Cherokee Nation find that it is vital in a democratic society that public business be performed in an open and public manner. Toward this end, provisions of this chapter must be construed so as to make it possible for Cherokee citizens, or their representatives, to have their public officials and governmental activities at a minimum cost or delay to the persons seeking access to public documents or meetings.

L.A. 25-01.

This same Act defines a public body expansively[3]. The definition would include the tribal council without question, and other inter-governmental groups or teams comprised of Cherokee Nation employees or officials. A meeting is defined as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." *Id.* A quorum, for a regular session of the Council, means two-thirds of the

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[3] Public body is defined as "any Cherokee Nation board, commission, agency, authority, any public or governmental body or political subdivision of the Nation, including any organization corporation, or agency supported in whole or in part by public funds under the authority of the Cherokee Nation or expends public funds under the care of the Nation, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the Nation, the business enterprises of the Nation and its

elected members: for other meetings, it is a simple majority of the membership of the public body unless quorum is otherwise defined by law. *Id.*

Under the Freedom of Information and Right of Privacy Act of 2001, any person in attendance of a public meeting held by public body, including the media, may record the meeting with a tape recorder or any other means of sonic reproduction, provided that the body doesn't go into executive session pursuant to the law, and there is no active interference with the conduct of the meeting. *Id.* at 11(A). The Merriam Webster Dictionary defines "sonic" as "of or relating to sound waves or involving sound". Merriam Webster's Collegiate Dictionary 1120 (10th ed. 1996).

There may be some question as to whether a statutory right to make a sonic recording excludes any other manner of documenting what happened at a public meeting, though it seems unlikely that anyone would argue that pencils and notepads are not allowed because they do not reproduce the meeting in a 'sonic' way. Two different factors weigh in favor of a construction that guarantees the right to make a sonic recording without prohibiting video recordings. First, video cameras do create a sonic reproduction of the event, so a video recording falls within the type of recording allowed under the statute. Secondly, the Act itself indicates that "it is the public policy of the Cherokee Nation that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity." L.A. 25-01. Since video of the event and transmission of that video to the public is consistent with the public policy as stated in the Act itself, it is also consistent with the letter and the spirit of the law to allow sonic recordings that may also contain video images. This has already become the practice of the tribal

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political subdivisions, including, without limitation, bodies such as the Public Service Authority, the Port Authority, and any corporation for profit or non-profit." Id.

council, who stream council meetings and subcommittee meetings live on the Cherokee Nation webpage and archive them for future use.

These issues are not unique to the Cherokee Nation, and have come before various state and federal courts in the United States. The constitutionality of rules prohibiting the video recording of public meetings has been called into question many times and in many states. First Amendment challenges are among the most common, and the restriction on speech raised by the newspaper's question necessarily invokes the First Amendment.

An analysis of the type of speech restricted and where individuals wish to express that restricted speech are required determinations that impact what type of scrutiny such restrictions will face in the courts. The Supreme Court has identified traditional public forums as places that "by long tradition or by government fiat have been devoted to assembly or debate." Cornelius vs. NAACP, 473 U.S. 788, 802 (1985) (citing Perry Edu. v. Perry Local, 406 U.S. 37, 40 (1983). This type of forum would include public squares or parks that have traditionally been used for discourse and public debate. A designated public forum is a non-traditional public forum that has been specifically opened by the government to discuss a particular topic or for use by a certain speaker. Id. A nonpublic forum is a place where the government did not intend to create a public forum and the property's use is not consistent with expression and discourse. Restrictions on a nonpublic forum must be reasonable and not an effort to suppress speech or ideas that public officials oppose. Cornelius, 473 U.S. at 800. Determining the forum in which the speech is restricted is important because the type of forum dictates the types of restrictions that might be reasonable in those circumstances.

Restrictions upon video recording are generally content-neutral types of restrictions which exclude all individuals who wish to record. If the state excluded individuals who wished to make video recordings based upon the topic under discussion, then the more strict standards

would be applied. Laws which restrict speech based upon its content are reviewed with much more scrutiny than laws which are content neutral, since laws restricting expression of viewpoints is particularly repugnant to the First Amendment.

When the state seeks to suppress content-related speech the restriction must serve a compelling state interest and be narrowly tailored to achieve that end. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Content neutral speech and other time, place and manner restrictions must be narrowly tailored to serve a substantial state interest and must leave open alternative channels of communication. Id.

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark, 468 U.S. at 293 (1984).

The law is not completely settled on how videotaping falls into the first amendment analysis. Whether prohibitions on recordings of public proceedings should be considered similar to those applied to time, place, and manner restrictions on speech in a public forum has been considered by the Eleventh Circuit Court of Appeals. Whiteland Woods, LP v. Township of West Whiteland, 193 F.3d 177, 182 (C.A.3 1999). See also Blackston v. State of Alabama, 30 F.3d 117, 120 (11th Cir. 1994). Under the rule established in the Eleventh Circuit, a restriction upon free speech that does not implicate the content of the speech is acceptable under the First Amendment if a "substantial government interest" is involved and if it does not place unreasonable limitations on alternative forms of communication. *Id.* Other Circuits have considered recording prohibitions constitutional if they are content-neutral and reasonable,

standards that typically apply in nonpublic fora. See United States v. Kerley, 753 F.2d 617, 620-21 (7th Cir. 1985); United States v. Yonkers Bd. Of Educ., 747 F.2d 111, 114 (2d Cir. 1984).

There are certainly some circumstances where the government may be able to legitimately prevent individuals from recording a public meeting in a way that is consistent with the First Amendment, but any restriction on First Amendment freedoms will be reviewed by the Courts with the scrutiny that such restrictions deserve in a free and democratic society.

The Cherokee Nation Freedom of Information and Right of Privacy Act of 2001 provides members of the public and the press with a statutory right to make sonic recordings at open meetings. The Cherokee and United States Constitutions and a public policy of openness that is consistent with a government run by the people all weigh in favor of lifting restrictions upon the press and citizens of the Nation whenever such accommodation is possible. Government employees and officials do not have the authority to restrict the tribal newspaper staff from making a video recording of a public meeting or forum unless the restriction is reasonable, narrowly tailored, advances a substantial government interest, and does not obstruct other alternative forms of communication.

Respectfully Submitted by:

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