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Supreme Court Strikes Down Stolen Valor Act

Congress already working on new bills to outlaw lying about military medals

In a June 28, 2012 ruling that struck down a federal law known as the "Stolen Valor Act," U.S. Supreme Court Justice Anthony Kennedy wrote that "the remedy for speech that is false is speech that is true," not government suppression, even when the speech "can disparage, or attempt to steal, honor that belongs to those who fought for this nation in battle."

United States v. Alvarez was a case challenging 18 U.S.C. §§704 (b)(c), a federal statute passed in 2006 which made lying about receiving military awards or medals, especially the Congressional Medal of Honor, a crime punishable by a fine and up to a year in jail. Kennedy, writing for a plurality of the court, wrote that the government failed to meet its burden under the First Amendment to show "a direct causal link between the restriction imposed and the injury to be prevented." In a concurrence, Justice Stephen Breyer argued that the court should have applied a less stringent level of scrutiny because false statements are less likely to make a valuable contribution to society than truthful ones, and suggested that a more narrowly drawn statute might be considered constitutional. Justice Samuel Alito dissented, arguing that the ruling broke with "a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." The vote was 6 to 3 in favor of striking down the law.

The case arose in 2007 after defendant Xavier Alvarez was charged under the law for falsely introducing himself at a Claremont, Calif. water district board meeting as a recipient of the Medal of Honor as a Marine in 1987. "Lying," Kennedy wrote, "was his habit." Alvarez had also claimed to have been a member of the Detroit Red Wings hockey team and to have been married to a Mexican movie star. Kennedy described Alvarez's statements as part of "a pathetic attempt to gain respect that eluded him." But Alvarez's false statement claiming a military decoration led to charges under the Stolen Valor Act, to which Alvarez later pled guilty in federal district court, reserving the right to challenge the law's constitutionality. In 2010, a panel of the 9th Circuit U.S. Court of Appeals ruled 2 to 1 that the law was unconstitutional; the 9th Circuit subsequently denied the government's request for a rehearing by the panel or by the full court.

In an 18-page opinion joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, Kennedy wrote that because the Stolen Valor Act restricted speech based on its content, it was "presumed invalid" and therefore the government bore the burden of proving its constitutionality. Content-based restrictions on speech have historically only been permitted when they fall into a few categories, including that which advocates and is likely to incite "imminent lawless action," obscenity, libel, "fighting words," fraud, "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent," Kennedy explained. "Absent from those few categories," Kennedy wrote, "is any general exception to the First Amendment for false statements." *United States v. Alvarez*, 132 S. Ct. 2537 (June 28, 2012)

In defense of the statute, the government cited several landmark Supreme Court cases to support the proposition that false statements are not constitutionally protected. For example, in the 1979 case *Herbert v. Lando*, 441 U.S. 153 (1979), the court stated that "spreading false information in and of itself carries no First Amendment credentials," and in 1964 in *Garrison v. Louisiana*, 379 U.S. 64 (1964), that "the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." But Kennedy responded that the government's argument took "the quoted language far from its proper context." The cited statements "derive from cases discussing [a] legally cognizable harm associated with a false statement," Kennedy wrote; although the falsity of the speech was relevant to the analysis in those cases, it was not "determinative." Kennedy concluded, "the Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection."

Because the statute restricted speech based on its content, the plurality applied a standard described in *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994) as the "most exacting scrutiny," under which the government must assert a "compelling interest" advanced by the statute and show that the restriction of speech that results from the statute is "actually necessary" to achieve its interest. Kennedy quoted a passage from the 2011 case *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, to boil down the standard: "There must be a direct causal link between the restriction imposed and the injury to be prevented." (For more on that case, see "U.S. Supreme Court Strikes Down Ban on

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Silha Center Staff

Scandals, Inquiries, and Reform Might Leave U.K. Press Freedom Worse for the Wear

An inquiry fueled by outrage over press misconduct could have unintended consequences

July 24, 2012 was a watershed day for journalists in the United Kingdom. Lord Justice Brian Leveson, chair of the public inquiry into the conduct of the British press that began in November 2011, declared that the fact-gathering phase of "the task" was complete, with a promise that he and his team would complete a report and recommendations on future regulation of the print media sometime before the end of the year.

The 97 days of hearings and thousands of pages of written testimony collected by the Leveson Inquiry exposed disturbing details about too-cozy relationships between the press, politicians, and police, as well as unethical newsgathering practices, including computer hacking, bribery, and intercepting the voicemails of more than 600 individuals including murdered teenager Milly Dowler. It prompted calls for legislation that would mandate the creation of a new regulator to dictate journalistic standards, adjudicate complaints, and — perhaps — impose fines.

DIRECTOR'S NOTE

But the conclusion of this phase of the Leveson Inquiry was knocked off the front pages of London newspapers by the startling announcement that eight suspects, including former editors, reporters, and a private investigator, had been formally charged with phone hacking and perverting the course of justice. The London *Evening Standard* suggested that the complexity of the evidence, coupled with the large number of alleged victims, will turn the prosecutions into a nightmare, requiring restraining orders to prevent prejudicial publicity that would undermine the defendants' rights to a fair trial. Trials are not expected to begin for a year or more. (For more on the charges, see "Update: Charges Filed in British Phone Hacking Case on page 25 of this issue of the *Bulletin*.)

The fact that the charges have been filed at all is itself remarkable, and may well have been encouraged by the Leveson Inquiry. Media analyst and journalism professor Roy Greenslade observed that "until the Milly Dowler story broke, there has been almost no interest in the hacking scandal." But ironically, now that it appears that prosecutions will go forward, it is unclear what impact, if any, the Leveson report will have.

Demand for creation of a new independent regulator arose because the newspapers' self-regulatory body, the Press Complaints Commission (PCC), is widely regarded as an ineffectual toothless tiger in thrall to the publishers who underwrite its operations and indifferent to complaints from the public. During the course of the Inquiry, Leveson heard testimony from Lord David Hunt, the current head of the PCC, as well as many others, about ways to beef up its authority to provide some form of alternative dispute resolution, perhaps along the lines of Ofcom, the statutory body that regulates the electronic media and is roughly comparable to the Federal Communications Commission. Yet even Leveson himself mused that "One would want to encourage everybody to have their own complaints-handling system and to deal with them efficiently," and some newspapers, such as the *Guardian* and the *Observer*, already have their own ethics codes and readers' editors to handle these matters. *Guardian* editor Alan Rusbridger told Leveson that he doubted a new regulatory body would have much impact on his operations at all. But draconian regulations could also undermine investigatory and watchdog journalism in general. The devil is in the details.

From a First Amendment-based perspective, the Leveson Inquiry seems bizarre. Prosecution of journalists — just like anyone else — for violation of laws of general applicability like those prohibiting phone-hacking, makes sense. But launching a government inquiry into improper relationships between the press and those in power with the intention of defining what constitutes journalism "in the public interest" seems risky. A July 2012 report by Index, a London-based non-profit organization that advocates for free expression around the world, noted that "Any government power or role in regulating the press risks abuses of that power including through chilling effects and potentially through more direct interference." The fact that the Prime Minister — whose own former spokesperson Andy Coulson is one of those charged in the phone-hacking cases — will make the final determination about what will be done with the Leveson recommendations simply underscores that danger.

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The rise of digital news providers, who would, in the words of Paul Staines, founder of the Guido Fawkes blog, "cheerfully ignore" any new regulations, suggests that the Leveson report has come too late to have any significant impact on journalism in the United Kingdom. But it could do real harm abroad. Although supporters of a new regulatory regime believe that enforcement in the United Kingdom will be measured and circumspect, in a July 17, 2012 letter, the World Press Freedom Committee reminded Leveson that "whatever recommendations come from your inquiry, worst case usage by repressive governments seems inevitable."

In fact, the best case scenario might well be that Lord Justice Leveson issue no report at all.

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Violent Video Game Sales to Minors" in the Summer 2011 issue of the Silha *Bulletin*.)

Kennedy wrote that the military medals program has a history stretching back to the American Revolutionary War and that the government offered ample evidence of the program's importance as a means of encouraging public recognition and gratitude and boosting troop morale and "*esprit de corps*." However, the government did not offer any evidence that Alvarez's lie — or any other such lie — has harmed the public's perception of military awards. Moreover, Kennedy wrote, "the government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." Kennedy wrote that once it became public that Alvarez's claim about being a recipient of the Congressional Medal was false, he was ridiculed online and his resignation from the water board was demanded. Kennedy added that an *amicus* brief from the Reporters Committee for Freedom of the Press had listed numerous examples of false claimants of military medals who had been publicly exposed and shamed. "Indeed," Kennedy wrote, "the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."

COVER STORY

The statute was also not the "least restrictive means among available, effective alternatives," Kennedy wrote, which the First Amendment requires when a government regulation extends to protected speech. The government could create a publicly available database of award recipients, for example, making it "easy to verify and expose false claims." Kennedy noted that a private group, the Congressional Medal of Honor Society, maintains such a list. A government feasibility report ruled out an award list in 2008.

In sum, Kennedy wrote for the court's plurality that the Stolen Valor Act, particularly because it lacked a requirement that the government prove specific harm that arose from a lie, must be struck down. If upheld, the law "would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition" and "would endorse government authority to compile a list of subjects about which false statements are punishable. … The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."

Breyer, joined by Justice Elena Kagan, concurred in the case's outcome and agreed that the Stolen Valor Act was unconstitutional, but reached that conclusion by a different analysis. Breyer wrote that because "false statements about easily verifiable facts" do not make a valuable contribution to public discourse, the court should have applied a lower standard of analysis — "intermediate scrutiny" — under which the statute could be considered constitutional if the government interest in protecting the military awards program outweighed the First Amendment harm it caused.

In contrast to the plurality opinion, Breyer gave greater weight to the government's contention "that this Court has frequently said or implied that false factual statements enjoy little First Amendment protection," but, he added, "these judicial statements cannot be read to mean 'no protection at all.'" Breyer noted that "many statutes and common law doctrines make the utterance of certain kinds of false statements unlawful," such as those prohibiting fraud, defamation, perjury, and trademark infringement, but all of these legal prohibitions include limitations that "narrow [them] … to a subset of lies where specific harm is more likely to occur." The Stolen Valor Act carries no such limitations, Breyer wrote, which might otherwise have allowed it to survive constitutional scrutiny. He suggested that a more narrowly tailored statute, such as one that applied only to particularly prestigious medals or to "lies most likely to be harmful" could be considered constitutional under intermediate scrutiny.

In a dissent joined by Justices Antonin Scalia and Clarence Thomas, Alito argued that the law should be considered a constitutional means to stem "an epidemic of false claims about military decorations" which "were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families." Alito called the Stolen Valor Act a "narrow statute that presents no threat to the freedom of speech."

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>
> **— Justice Anthony Kennedy**
> **U.S. Supreme Court**

Alito wrote that the statute was Congress' response to "a proliferation of false claims," noting that, for example, according to *The Philadelphia Inquirer* in 2004, more than 600 Virginia residents falsely claimed to have won the Medal of Honor in a single year, and according to *Marine Corps Times* in 2007, 24 of 49 people interviewed for a Library of Congress oral history project about veterans falsely claimed to have received the award. False claimants reportedly lied in order to receive "lucrative contracts and government benefits," Alito wrote.

Alito disputed the assertion by Kennedy and Breyer that a government database could thwart false claims, citing the military's conclusion that a comprehensive database could not be compiled. The absence of proof for or against peoples' claims about military awards would only create more uncertainty about them, Alito wrote, undermining Kennedy's contention that "counterspeech" offers a better solution than a criminal statute. "In addition, a steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent," Alito wrote.

Alito also rejected the suggestions by the plurality and concurrence that a similar statute might be upheld if it required a showing of actual harm, such as a financial loss. "Unless even a small financial loss — say, a dollar given to a homeless man falsely claiming to be a decorated veteran — is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the

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Federal Court Rulings Differ on *Branzburg* Interpretation, Reporter's Privilege

Questions over online media continue to challenge state courts

JOURNALIST'S PRIVILEGE

The question of whether journalists or other information gatherers may refuse to reveal confidential sources of information remains a controversial and unsettled legal issue. In summer 2012, two federal court rulings offered differing interpretations of the U.S. Supreme Court's only case to directly consider the question: 1972's *Branzburg v. Hayes*. Meanwhile, news publishers of various types — professional and amateur, traditional and digital — confronted subpoenas for confidential or unpublished information.

First Circuit Rejects Academics' Claim of Privilege for Confidential IRA Interviews

On July 6, 2012, the 1st Circuit U.S. Court of Appeals in Boston rejected two scholars' attempts to block a subpoena for audio recordings held in a Boston College archive that Northern Irish police are seeking as part of an investigation into a 1972 abduction and death. In the opinion of the unanimous three-judge panel, Judge Sandra Lynch wrote, "the choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."

The court ruled that the researchers' appeal failed for three reasons: because they could not assert any private rights under a "mutual legal assistance treaty" between the United States and the United Kingdom; because federal courts are unable to review the actions of the U.S. Attorney General under the terms of the treaty; and because, according to the U.S. Supreme Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the researchers could not claim a First Amendment-based privilege to refuse to hand over the recordings. *United States v. Moloney*, No. 11-2511 (1st Cir. July 6, 2012) and *Moloney v. Holder*, No. 12-1159 (1st Cir. July 6, 2012)

The recordings at issue are part of The Belfast Project, an oral history project that includes interviews with dozens of participants in the Irish political, ethnic, and religious conflict that began in the late 1960s, commonly known as "The Troubles." Between 2001 and 2006, Boston College researchers led by Irish journalist and author Ed Moloney and historian and former Provisional Irish Republican Army (IRA) paramilitary member Anthony McIntyre interviewed members of rival paramilitary groups involved in the conflict, including the Ulster Volunteer Force (UVF) and the Provisional IRA. As described by Lynch, "the purpose [of the project] was to gather and preserve the stories of individual participants and provide insight into those who become personally engaged in violent conflict."

The Belfast Project's archives, including recordings of the interviews, are held at Boston College's John J. Burns Library of Rare Books and Special Collections, and are subject to what the court described as "extremely limited access." According to the court, Moloney and Boston College struck an agreement that required interview subjects to be given contracts that guaranteed the confidentiality of the records "to the extent American law allows." Many of the 41 interviewees agreed to speak with researchers with the guarantee that the recordings would be made public only after their death, or with their permission. Lynch's July 6 opinion noted that unlike the agreement between Moloney and Boston College, the contracts the interviewees signed guaranteed secrecy but not "confidentiality," and made no mention of the terms being subject to "American law."

In 2010, Moloney published a book titled *Voices from the Grave*, which was based on interviews with two key participants in rival factions who had

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alternative statutes that the plurality and concurrence appear willing to sustain," Alito wrote.

Alito contended that "time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value," and called the plurality opinion "a dramatic — and entirely unjustified — departure from the sound approach taken in past cases." He cited a long list of U.S. Supreme Court statements, common law principles, and federal statutes that have either been ruled constitutional or never faced a constitutional challenge, examples which he argued "amply demonstrate that false statements of fact merit no First Amendment protection in their own right."

Alito also rejected the concerns raised by Kennedy and Breyer that the law could chill speech that had social value. "The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect," Alito wrote. "Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent's counsel conceded that the answer is none."

Opponents of the ruling may not have to wait long for the passage of a more narrowly drawn law. In May 2011, Congressman Joe Heck (R-Nev.) introduced H.R. 1775, titled "The Stolen Valor Act of 2011" which punishes false claims of military awards made "with intent to obtain anything of value." In a June 28, 2012 press release, Heck said, "now that the Supreme Court has laid down this marker, I will be pushing for a vote on a version of the Stolen Valor Act that will pass constitutional scrutiny." The press release said the new "Stolen Valor" bill has 52 bipartisan co-sponsors, and its companion bill, S. 1782, has been introduced in the Senate by Sen. Scott Brown (R-Mass.).

The Associated Press reported July 11 that the Defense Department is now working on creating a searchable digital database of award recipients, despite their argument in *Alvarez* that doing so would not be feasible. Pentagon Press Secretary George Little said no final decisions have been made about the details of the database. "There are some complexities involved in looking back into history," Little said. "We would obviously hope to be able to go as far back as possible, but we also want there to be integrity in the data."

– Patrick File
Silha *Bulletin* Editor

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recently died, Brendan Hughes of the Provisional IRA and David Ervine of the UVF. An award-winning documentary with the same name as the book was also released. In his interview, Hughes claimed that prominent Northern Irish politician Gerry Adams was a leading figure in the Provisional IRA and in 1972 commanded a group to abduct and kill Jean McConville, a single mother of 10 children who was alleged to be a British informant. Adams has denied ever being a member of the IRA.

In May and August of 2011, a commissioner appointed by the U.S. Attorney General under the "U.S.-U.K. Mutual Legal Assistance Treaty" and 18 U.S.C. § 3512, a federal statute which governs "foreign requests for assistance in criminal investigations and prosecutions," issued two separate subpoenas for recordings held in the Belfast Project collection. The subpoenas were a response to a Northern Irish police request for American assistance in its investigation into the McConville abduction and death. The first subpoena did not specifically name McConville, demanding "recordings, written documents, written notes, and computer records of interviews" made with Hughes and former Provisional IRA member Dolours Price, who is still living. The second subpoena demanded "recordings of 'any and all interviews containing information about the abduction and death of Mrs. Jean McConville,' along with related transcripts, records, and other materials."

Boston College complied with the request for the Hughes documents because it no longer considered them confidential after his death, but filed a motion asking the U.S. District Court for the District of Massachusetts to quash the subpoenas for the other materials or, in the alternative, allow for a review of the materials in order to limit the amount of information released. After an *in camera* review of the materials on Dec. 27, 2011, the district court ordered the remaining materials subject to the May subpoena released, and on Jan. 20, 2012, ordered the release of some of the materials subject to the August subpoena. Order, *In re: Request from the U.K.*, No. 11-91078 (D. Mass. Dec. 27, 2011) and Findings and Order, *In re: Request from the U.K.*, No. 11-91078 (D. Mass. Jan. 20, 2012)

Boston College did not appeal the district court's order on the subpoena for the Price interview materials, but on Feb. 2, 2012, appealed the ruling on the August 2011 subpoena. The 1st Circuit held a hearing April 4, 2012 on that appeal but has not yet released its decision.

The subpoenas have drawn criticism from both sides of the Atlantic. According to The Associated Press (AP) on July 9, Sens. John Kerry (D-Mass.) and Charles Schumer (D-N.Y.), among other American politicians, have urged Secretary of State Hillary Clinton and U.S. Attorney General Eric Holder to withdraw the requests, citing concerns about the tenuousness of the peace agreement struck in 1998 known as the "Good Friday Agreement." The AP also reported that Moloney and McIntyre have expressed concerns that they and other Belfast Project researchers could be branded as informants and face "the real risk of physical harm" if the interviews are turned over to police. On July 4, 2011, *The Guardian* of London reported that an independent Northern Irish commission investigating the cases of other "disappeared" alleged collaborators expressed concerns that the subpoenas could stall their efforts by making other former IRA members reluctant to speak out.

> "The choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."
>
> **— Judge Sandra Lynch**
> **1st Circuit U.S. Court of Appeals**

The subject of the July 6, 2012 ruling by the 1st Circuit was Moloney and McIntyre's attempt to intervene on the subpoenas against Boston College. In initially denying Boston College's motion to quash the subpoenas on Dec. 16, 2011, the U.S. District Court for the District of Massachusetts also denied the two researchers' request to intervene in the case. Moloney and McIntyre appealed the district court ruling to the 1st Circuit and also filed a separate civil suit against Attorney General Holder, claiming that Holder violated the Mutual Legal Assistance Treaty because he did not consider the public policy ramifications of assisting with a British investigation that could undermine the peace agreement or he improperly discounted those ramifications. Further, the suit alleged that the subpoenas "violated the Plaintiffs' constitutional right to freedom of speech, and in particular their freedom to impart historically important information for the benefit of the American public, without the threat of adverse government reaction." The district court granted the government's motion to dismiss the civil suit on Jan. 24, 2012.

The 1st Circuit's July 6 ruling affirmed both the district court's denial of the researchers' request to intervene on the subpoena to Boston College as well as its dismissal of their civil suit. The court ruled that Moloney and McIntyre could not intervene in the university's attempt to quash the subpoenas or bring a civil suit against Holder for two central reasons. First, Lynch wrote that the mutual legal assistance agreement between the United States and Britain forecloses the researchers' claims because it states that its "provisions … shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request." The court also observed that a report by the Senate Committee on Foreign Relations accompanying the treaty "confirms" the court's interpretation: "a person from whom records are sought may not oppose the execution of the request by claiming that it does not comply with the Treaty's formal requirements." Moreover, the court ruled that, under the terms of the treaty, federal courts do not have jurisdiction to review the decisions of the attorney general in complying with requests for legal assistance.

The court also ruled that Moloney and McIntyre had no right under the First Amendment to keep the interview materials confidential. "We affirm the dismissal, as we are required to do by *Branzburg v. Hayes*, 408 U.S. 665 (1972)," Lynch wrote. In *Branzburg*, a divided U.S. Supreme Court ruled that requiring "newsmen" to appear and testify before grand juries about confidential sources or information did not violate the First Amendment's guarantees of freedoms of speech and press. In the decades since, federal appeals courts have varied in their applications of the *Branzburg* decision.

Lynch wrote that the 1st Circuit recognized the "possibility" that "a reporter's privilege of constitutional or common law dimensions" could exist in *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) and ruled in *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) that "academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists." However, the 1st Circuit has not recognized a privilege in the context of a criminal case; the *Cusumano* case "dealt with claims of a nondisclosure privilege in civil cases, in which private parties both sought and opposed disclosure; as a result, the government and public's strong interest in investigation of crime was not an issue." Lynch wrote that *Branzburg* was "closer … than any of our circuit precedent," in which the Supreme Court "held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury."

Lynch wrote that the fact that the Belfast Project case did not involve a grand jury request like *Branzburg* made no difference in the analysis. "The law enforcement interest here —a criminal investigation by a foreign sovereign advanced through treaty obligations — is arguably even stronger than the government's interest in *Branzburg*." Lynch quoted Justice Byron White's majority opinion in *Branzburg* that "the preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." White added, "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."

Lynch also dismissed the plaintiffs' concerns about their personal safety, the safety of the interviewees, the political ramifications of the premature release of the interview materials, and the risk of a harmful chilling effect on future Belfast Project interviewees or similar research projects, writing that *Branzburg* also addressed each of those problems. In that case, "the interests in confidentiality of … informants did not give rise to a First Amendment interest in the reporters to whom they had given the information under a promise of confidentiality. These insufficient interests included the fear, as here, that disclosure might 'threaten their job security or personal safety or that it will simply result in dishonor or embarrassment,'" Lynch wrote. "If the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here." Lynch wrote that the researchers' "chilling effect" concerns "amount to an argument that unless confidentiality could be promised and that promise upheld by the courts in defense to criminal subpoenas, the research project will be less effective," a risk that *Branzburg* took into account and also dismissed.

> "Law enforcement agencies, which cannot escape culpability for Northern Ireland's 'dirty war,' are now trying to shape society's knowledge of that war by seeking to monopolize control over what unfolds from the past while simultaneously relegating the role of academic and journalistic researchers ."
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> **— Anthony McIntyre**
> **Historian and former Provisional IRA member**

Lynch wrote that "this situation was clearly avoidable" because the researchers wrongly gave the interviewees the impression that their interviews could not be subject to a subpoena or other court order. "Even if participants had been made aware of the limits of any representation about non-disclosure, Moloney and McIntyre had no First Amendment basis to challenge the subpoenas," Lynch wrote, because, as White wrote in *Branzburg*, "the mere fact that a communication was made in express confidence … does not create a privilege. … No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice."

In a concurrence, Judge Juan Torruella wrote that the 1st Circuit's decision should be viewed narrowly. "While the effect of *Branzburg* and its progeny is to forestall the result that the Appellants wish to see occur, none of those cases supports the very different proposition, apparently espoused by the majority, that the First Amendment does not provide some degree of protection to the fruits of the Appellants' investigative labors," Torruella wrote, citing an oft-repeated qualifying statement in White's *Branzburg* opinion: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."

Torruella wrote, "it is one thing to say that the high court has considered competing interests and determined that information gatherers (here, academic researchers) may not refuse to turn over material they acquired upon a premise of confidentiality when these are requested via government subpoena in criminal proceedings. It is entirely another to eagerly fail to recognize that the First Amendment affords the Appellants a measure of protection … in order not to undermine their ability to gather and disseminate information."

According to the BBC on July 9, the McConville family "welcome[d]" the court's ruling. In a television interview, Jean McConville's son Michael said the people involved in the murder of his mother should be "named and shamed," adding, "if something happens to them that will be good enough for our family."

In a July 10 commentary in *The Guardian*, McIntyre called the subpoenas part of "a fishing expedition through the US justice department that aimed at plundering the fruits of that research stored in the Boston College archive" and questioned why British authorities had not been equally zealous in allowing private investigations into unsolved murders of alleged IRA members. "Ultimately, law enforcement agencies, which cannot escape culpability for Northern Ireland's 'dirty war,' are now trying to shape society's knowledge of that war by seeking to monopolize control over what unfolds from the past while simultaneously relegating the role of academic and journalistic researchers," McIntyre wrote.

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Minnesota District Court Recognizes Constitutional Reporter's Privilege

On May 25, 2012, the U.S. District Court for the District of Minnesota quashed a subpoena demanding the testimony of a Minneapolis *Star Tribune* reporter as part of a civil lawsuit, citing a qualified privilege rooted in the U.S. Supreme Court's ruling in *Branzburg v. Hayes*.

The subpoena arose in the context of a dispute between Minneapolis police officer Michael Patrick Keefe and the city of Minneapolis. Keefe sued the city and its police chief, Timothy Dolan, claiming he was the victim of "a tacit agreement and conspiracy resulting in adverse employment actions and harassment in violation of his statutory, civil, and constitutional rights" when he was suspended, demoted, and removed from a joint police department/FBI task force. Keefe's claims in the federal lawsuit included common law and statutory whistleblower claims, reprisal, invasion of privacy, and intentional infliction of emotional distress.

As part of the discovery process for his lawsuit, Keefe subpoenaed *Star Tribune* reporter David Chanen, demanding that Chanen reveal sources for two articles about him: one published in January 2008 citing a letter from the city attorney's office "recently made public" which accused Keefe of professional misconduct, and one published in May 2009 that referenced an internal investigation resulting in Keefe's suspension and relying on unnamed "sources." In his complaint, Keefe alleged that Dolan and other members of the police force, worried about his testimony at an upcoming trial and seeking to discredit him, "leaked" information to Chanen for the articles. In his May 25 order, Federal Magistrate Judge Steven Rau quashed the subpoena, finding that "Chanen's qualified reporter's privilege under the First Amendment outweighs Keefe's curiosity."

In stark contrast to the rulings in the Belfast Project cases, which considered *Branzburg* to be a broad rejection of a reporter's privilege, Rau stated that *Branzburg* "confronted the narrow issue of whether reporters may be subpoenaed to testify in criminal grand jury proceedings." Moreover, although the U.S. Supreme Court found that the First Amendment was not the source of such a privilege, Rau wrote, the concurrence of Justice Lewis Powell in that case "recognized that a qualified reporter's privilege may be proper in some circumstances" and "advocated balancing the freedom of the press against the obligation of citizens to provide testimony." Relying on that concurrence, Rau wrote, "most federal courts grant a qualified privilege for journalists against compelled disclosure of information gathered in the news-making process." *Keefe v. City of Minneapolis v. Star Tribune*, 0:09-cv-02941-DSD/SER (D. Minn. May 25, 2012)

Although "the existence of a qualified reporter's privilege is an open question" in the 8th Circuit, Rau wrote, the District of Minnesota recognized a privilege in *J.J.C. v. Fridell*, 165 F.R.D. 513 (D. Minn. 1995), establishing a "a three-pronged test" for determining whether a reporter's testimony must be compelled. According to the test, "a requesting party may overcome the privilege if he or she can demonstrate that the information sought is: (1) 'critical to the maintenance or the heart of the claim,' (2) 'highly material and relevant,' and (3) 'unobtainable from other sources.'"

Rau ruled that Keefe failed to meet any of the three prongs. The sources of Chanen's two articles were not "critical" to the claims, Rau wrote, because "by Keefe's own admission, these 'leaks' were 'part of a wider pattern of retaliation and reprisal.'" Therefore the lack of information about them "will not critically harm" his case. Secondly, Rau found that Keefe's demand for the information was based on "conjecture" and "speculation" and therefore could not be considered "highly material and relevant." Rau wrote that Keefe assumed that Chanen's source was "at least one of the five officers he suspects" and had already deposed. Further, Keefe presupposed that Chanen would remember which officers told him specific pieces of information. Keefe also argued that he would use the information provided by Chanen to "verify" information contained in the depositions, but Rau countered that claim: "it is plain that [Keefe] seeks this information to obtain potential impeachment evidence" that could undermine the credibility of the officers' depositions. Rau cited several federal district court decisions for the proposition that "the mere possibility of impeachment evidence is an insufficient reason to vitiate the qualified privilege."

Lastly, Rau wrote that the information Keefe subpoenaed may be available from other sources. "In his efforts to uncover Chanen's sources, Keefe deposed only the five MPD officers he alleges 'leaked' information," Rau wrote. "The officers either denied involvement or could not recall whether they discussed Keefe with Chanen. Simply because Keefe is dissatisfied with those answers does not demonstrate an exhaustion of all reasonable alternative means for establishing the identity of Chanen's sources."

Georgia Court Quashes Subpoena for Anonymous Commenters' Identities

State courts in Georgia and Idaho considered whether newspapers could refuse to disclose the identities of commenters on their websites when government officials demanded they do so as part of libel suits. In Newton County, Ga., a Superior Court judge ruled on June 28, 2012 that the state's "shield law" protected a newspaper from a libel plaintiff's subpoena for the identities of eight commenters on the newspaper's website. In April 2012, Alcovy High School Principal LaQuanda Carpenter demanded that the *Rockdale Citizen* newspaper turn over the identifying information as part of a libel suit she was preparing against the commenters, who had posted disparaging remarks about her job performance on the newspaper website in January 2011. Carpenter demanded that the newspaper surrender the names, addresses, and telephone numbers associated with the pseudonymous commenters; documents reproducing all of the comments they had posted since Jan. 1, 2011; and all server logs, IP address logs, account information, account access records and application or registration forms related to those eight commenters.

Judge Eugene Benton quashed the subpoena in a June 28, 2012 order, relying on the Georgia journalists' shield law as well as a common law test for deciding when anonymous online speakers should be unmasked. Georgia's shield law, O.C.G.A. § 24-9-30, extends a qualified privilege to "any person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast," allowing that person to refuse to disclose "any information, document, or item obtained or prepared in the gathering or dissemination of news." In order to overcome the privilege, the party demanding the information must show that it "(1) is material and relevant; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case

of a party seeking the information, document, or item."

Carpenter argued that the state shield law did not apply because the information she sought was not the identities of confidential sources, but Benton disagreed, ruling that Georgia case law supports a broad interpretation of the phrase "information … obtained or prepared in the gathering or dissemination of news," including the identities of anonymous commenters on the *Rockdale Citizen* site. Benton ruled that the subpoena must be quashed because Carpenter had failed to prove that the identities "cannot be reasonably obtained by alternative means" under the second qualifying element of the shield law. *Carpenter v. Does*, CV-2012-895-5 (Super. Ct. Ga. June 28, 2012)

Benton also addressed the newspaper's argument that even if the shield law did not apply, standards developed in recent case law around the country on anonymous online speech would require Carpenter to notify the anonymous speakers that their identities were sought and give them reasonable time to respond to the subpoena. Benton ruled that a standard devised by the Arizona Court of Appeals in *Mobilisa, Inc. v. John Doe 1 and The Suggestion Box, Inc.* 170 P.3d 712 (Ct. App. Ariz. 2007) was most suited to the *Rockdale Citizen* case. Under the *Mobilisa* standard, "In order to compel discovery of an anonymous internet speaker's identity, the requesting party must show (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request; (2) the requesting party's cause of action could survive a motion for summary judgment on elements not dependent on the speaker's identity; and (3) a balance of the parties' competing interests favors disclosure." (For more on the developing judicial standards for revealing anonymous online speakers, see "Online Anonymity Continues to Challenge Courts, Plaintiffs" in the Summer 2010 issue of the Silha *Bulletin*, and "Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts" in the 2009 issue.)

Benton ruled that Carpenter had not met the first prong of the test requiring that she give the commenters adequate notice and an opportunity to respond to the subpoena. However, he left the possibility open that the identities could be disclosed: "Assuming that Plaintiff is unable to obtain the identity of the anonymous speakers by reasonable methods as required by the Georgia Shield Law, and assuming that Plaintiff gives proper notice as required by *Mobilisa*, the Court will then move to the second step of *Mobilisa* to determine whether Plaintiff's cause of action could survive a motion for summary judgment." Benton quashed the subpoena "without prejudice to Plaintiff's right to reissue a subpoena."

Idaho Court: No Privilege for Anonymous Commenters

On July 10, Idaho First Judicial District Judge John Luster ruled that the Spokane, Wash. *Spokesman-Review* must hand over information identifying one website commenter, but quashed the subpoena for information about two others. In "a matter of first impression for Idaho state courts," Luster ruled that Kootenai County Republican Chairwoman Tina Jacobson's demand for the identity of commenter "almostinnocentbystander" met the three requirements of a test for deciding whether such subpoenas should be upheld that was similar to the *Mobilisa* standard applied in the *Rockdale Citizen* case. *Jacobson v. Doe*, CV-2012-0003098 (1st Jud. Dist. Idaho July 10)

Jacobson sought the identities of the three commenters in order to sue them for defamation for comments posted Feb. 14, 2012, which speculated about whether she had stolen money from the Kootenai County Republican Central Committee.

The *Spokesman-Review* argued that the commenters' identities were subject to a privilege under the First Amendment as well as Article 1, Section 9 of the Idaho Constitution. Although Idaho has no shield law, the state supreme court recognized a qualified privilege in *In Re Contempt of Wright*, 700 P.2d 40 (Idaho 1985) for "the identities of confidential sources that provide the reporters with information and assist in the task of gathering and reporting news."

Luster ruled that "while there is some discussion amongst federal appellate courts that the *Branzburg* decision was limited only to that case … the Ninth Circuit has recognized that *Branzburg* limits the ability of federal circuit courts to recognize even a qualified reporter's privilege. … Thus, the First Amendment does not provide for a reporter's privilege." Luster cited *In Re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993), a case in which the 9th Circuit rejected a Ph.D. student's claim of a "scholar's privilege" coextensive with a reporter's privilege, and *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), a case in which the 7th Circuit ruled that a proper interpretation of the *Branzburg* decision finds no reporter's privilege under the First Amendment and that courts had "rather surprisingly" relied on the Powell concurrence for recognizing a qualified privilege. (See "Reporters' Privilege Update" in the Fall 2003 issue of the Silha *Bulletin* for more on *McKevitt v. Pallasch*.)

Luster further ruled that the state level privilege did not apply in the *Spokesman-Review* case because Dave Oliveria, the reporter and columnist who wrote the blog post where the comments were posted, "was not acting as a reporter when the statements were made, but instead was acting as a facilitator of commentary and administrator of the Blog."

The *Spokesman Review* argued that, failing the recognition of a reporter's privilege, the subpoena should be quashed because Jacobson failed to meet the test for forcing the disclosure of the identity of anonymous online speakers that was outlined in the cases *Dendrite International, Inc. v. Doe Number 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Instead, Luster applied a test devised by the Federal District Court for the District of Idaho, which he wrote "accounts for all the elements of the *Cahill* or *Dendrite* tests." In *SI03 v. Bodybuilding.com*, CV-07-6311 (D. Idaho 2008) the court ruled that "a court may order the disclosure of an anonymous poster's identity if a plaintiff: (1) makes reasonable efforts to notify the defendant of a subpoenas or application for an order of disclosure; … (2) demonstrates that it would survive a summary judgment motion … and (3) the court must balance the anonymous poster's First Amendment right of anonymous free speech against the strength of the plaintiff's case and the necessity of the disclosure to allow plaintiff to proceed." In his analysis, Luster found that because the *Spokesman Review* had written about Jacobson's subpoena and the newspaper's motion to quash and because Jacobson had posted a notice on the *Spokesman Review* website about the lawsuit, she had satisfied the first part of the test.

As to the summary judgment part of the test, Luster ruled that Jacobson had shown that she was likely to succeed on a claim of libel *per se* against the commenter "almostinnocentbystander," who "specifically used the word 'embezzlement' and specifically noted the

Privilege, *continued on page 10*

Privilege, *continued from page 9*

Plaintiff's profession as a 'bookkeeper,' thereby subjecting the Plaintiff to professional disgrace and negatively affecting her reputation in her personal business."

Moreover, because Jacobson would qualify as a public figure because of her role with "a large political organization," Luster wrote that she would need to show that "almostinnocentbystander" defamed her with "actual malice," a standard established in the landmark U.S. Supreme Court case *New York Times v. Sullivan* 376 U.S. 254 (1964), which requires a "clear and convincing" showing that the commenter knew the statement was false or recklessly disregarded whether it was true or false. Luster ruled that Jacobson had met the "actual malice standard" because an independent investigation of the Kootenai County Republican Central Committee's finances had shown that it was missing no money, thus showing that the statement was false, and because the commenter recanted the accusation in a later comment on the same blog, supporting the claim that the commenter acted recklessly, "engag[ing] in a purposeful avoidance of the truth."

On the other hand, Luster ruled that because Jacobson sought the two other commenters' identities in order to call them as witnesses rather than to make them defendants in her libel suit, summary judgment analysis could not apply, and therefore the subpoena for their identities must be quashed.

In balancing the commenters' First Amendment rights of anonymous free speech against Jacobson's case, the last prong of the test, Luster observed that the libel case could not proceed without the identity of the plaintiff. Moreover, although the right of anonymous speech is "a sacred and inviolate right enjoyed by all three individuals … this Court notes that the United States Supreme Court, since 1942 [in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)], has stated that the First Amendment does not protect defamatory speech." The Idaho State Constitution also states that "persons who write, publish, and speak are 'responsible for the abuse of that privilege,'" Luster wrote. "Thus while the individuals are entitled to the right of anonymous free speech, this right is clearly limited when abused."

On July 24, the AP reported that the *Spokesman-Review* decided to comply with the subpoena on July 23. That same day, former Republican campaign worker Linda Cook of Rathdrum, Idaho told the *Coeur d'Alene Press* that she was the commenter "almostinnocentbystander." According to the AP, *Spokesman-Review* editor Gary Graham said the decision to comply was not a result of Cook's revelation. "The decision not to appeal didn't really have anything to do with whether the commenter planned to go public," Graham said. "Our attorneys advised us that we were extremely unlikely to succeed with an appeal."

Online Publisher Cannot Claim Texas Shield

On May 15, 2012, a District Court Judge in Weatherford, Texas ruled that the publisher of an environmental website could not claim the protection of the state's shield law because she "failed to prove that she is a journalist or that her employer … is a news medium."

Sharon Wilson publishes a blog called "TXSharon Blue Daze Drilling Reform" on which she posts information and links related to oil and gas drilling that is generally critical of the corporate interests of the oil and gas industry. As part of a discovery request in a civil lawsuit between Range Resources Corporation and Steven Lipsky, a homeowner Range had accused of attempting to harm its reputation, Range subpoenaed Wilson demanding information that included her correspondence with Lipsky as well as with government agencies including the Environmental Protection Agency (EPA), Department of Justice, and Government Accountability Office (GAO).

In January 2011, Lipsky sent Wilson a video clip via a submission form on her website. The video purported to show flames pouring out of a garden hose attached to a well on Lipsky's property, which he claimed was the result of Range's 2009 hydraulic fracturing operations there. Wilson posted the video to her YouTube channel "TXSharon" with the title "Hydraulic Fracturing turns gardenhose to flamethrower."

Lipsky also sued Range, alleging the company had introduced methane into his water supply, and Range in turn sued Lipsky, accusing him and environmental consultant Alisa Rich of defamation. According to Judge Trey Loftin of Texas' 43 Judicial District, "Wilson is a central character in the Lipskys' and Rich's conspiracy to defame and disparage Range." Range's subpoena demanded that Wilson turn over copies of emails between her, Lipsky, Rich, and government officials. Wilson requested that the subpoena be quashed under the Texas journalist's shield law, codified at Texas Civil Practices & Remedies Code §22.021-22.027.

Loftin denied Wilson's request, finding that Wilson could not claim the qualified privilege because she did meet the definition of "journalist" under the shield law. Moreover, even if she could be considered a journalist, Loftin ruled, Range had satisfied the standard set out by the law to make a "clear and specific showing" that the subpoena was not unreasonable and that the information could not be obtained from other sources. *Lipsky v. Range*, CV11-0798 (Tex. Dist. Ct. Parker Co. May 15, 2012)

The Texas shield law defines "journalist" as "a person … who for a substantial portion of the person's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider." According to Loftin's order, Wilson does not make a substantial livelihood from her blog; she "did not create [it] for the purpose of making money," and although she works part time as an organizer and advocate for an environmental accountability group called Earthworks, "there is no evidence that a substantial portion of Wilson's salary is attributable to her activity regarding her blog." Moreover, Loftin wrote, "Wilson has no background as a journalist," she "does not have any education or training in the field of journalism. … Instead, Wilson claims that she is an activist." Loftin added that "Wilson displays none of the characteristics of the journalism profession" as defined by the Society of Professional Journalists and the Project for Excellence in Journalism. Earthworks, Wilson's part time employer, "is not engaged in journalism [and] is not a news media organization" and therefore "is not a 'news medium' as defined by Section 22.021(3)."

Loftin further ruled that, even if Wilson did qualify as a journalist under the shield law, Range had satisfied the law's requirement that it "make[] a clear and convincing showing" that it has exhausted "reasonable efforts … to obtain the information" elsewhere; that "the subpoena is not overbroad, unreasonable, or oppressive;" that "reasonable and timely notice" was provided to Wilson; that Range's interest "outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist;" that the subpoena was not aimed at

Privilege, *continued on page 11*

Leaks: New Policies Emerge; Congress Gets Involved

Although the Obama administration did not add to the list of six prosecutions it is pursuing against leakers of government secrets in the summer of 2012, the White House continued to defend the unprecedented crackdown amid claims that some leaks have been politically motivated. Military and intelligence officials announced new policies to discourage and punish leaks, and members of Congress weighed in with legislative proposals and political rhetoric, all while three ongoing prosecutions inched forward.

GOVERNMENT LEAKS

New Policies for Intelligence Agencies, Military

On June 25, 2012, the Office of the Director of National Intelligence (ODNI) announced in a press release that it was taking new steps to "help deter and detect potential leakers within the Intelligence Community," and on July 19 a Department of Defense press release announced the U.S. military was adding a "top down" approach for monitoring and investigating unauthorized leaks to its existing approach, which "requires that individuals report potential violations up the chain of command."

The new ODNI directive will add a question to a routine polygraph examination that intelligence workers in seven federal intelligence agencies must take, asking about "unauthorized disclosure of classified information." The seven agencies that administer the lie detector tests are the Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), Department of Energy (DOE), Federal Bureau of Investigation (FBI), National Geospatial-Intelligence Agency (NGA), National Reconnaissance Office (NRO) and National Security Agency (NSA). CBS News reported June 26 that polygraph tests are given when new employees join the agencies and when security clearances are renewed. The press release stated that Director of National Intelligence James Clapper will also ask the specially assigned Intelligence Community Inspector General to investigate "selected unauthorized disclosure cases" even when Attorney General Eric Holder decides not to prosecute the alleged leakers. The independent investigations will "ensure that selected unauthorized disclosure cases suitable for administrative investigations are not closed prematurely," the ODNI said.

The Defense Department initiative, announced July 19, includes a plan to monitor news media for unauthorized disclosures. According to a Defense Department press release, "the Undersecretary of Defense for Intelligence, in consultation with the Assistant Secretary for Public Affairs, will monitor all major, national level media reporting for unauthorized disclosures of defense department classified information." The new "top down" monitoring, the Pentagon said, will complement existing "bottom up" practices that require leaks to be reported to security officers for preliminary review and to the Under Secretary of Defense for Intelligence, "who in coordination with the General Counsel, may refer matters to the Department of Justice for potential prosecution."

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"peripheral, nonessential, or speculative information;" and that the information is "relevant," "material," and "essential" to the maintenance of Range's claim against Lipsky and Rich.

Loftin concluded that because the EPA had stated that it would treat Range's information requests as Freedom of Information Act (FOIA) requests, "it will probably take an excessive amount of time for Range to obtain the requested documents and communications between EPA and Wilson" that way, making "Wilson … the only reasonably available source of recovery." Loftin ruled that the same standard applied for requested communications between Wilson and the U.S. Department of Justice and the GAO. As for communications Range requested between Wilson and other individuals, Loftin ruled that the subpoena was reasonable because "it is not reasonable to require Range to incur the time and expense of pursuing the discovery of requested documents and communications with Wilson from persons residing or having their principal place of business outside the 150-mile subpoena range of this court." Loftin also concluded that the subpoena was "reasonably tailored" to the relevant facts, parties, and claims in the case.

As to balancing between the "fair administration of justice" and "the free flow of information [and] a free and active press," Loftin ruled that Wilson "does not observe rules of ethics applicable to those who engage in journalism as a profession … does not claim to be objective in her blogging … and considers herself to be in a kind of war against the oil and gas industry," adding "given Wilson's lack of independence, Wilson is not a member of a 'free' press." The judge concluded that "even if it were assumed that Wilson disseminated 'news,' Range's, and the public's, interests in discovering the truth in the fair administration of justice are substantial and outweigh any interest in the gathering and dissemination of news."

Wilson's attorney J. Scott McLain told the *Bulletin* July 18 that she later complied with a narrowed discovery request, which asked for "any communications between Sharon and a list of specific 3rd parties pertaining to the claims in the litigation and the litigants," as opposed to the original subpoena, which "also included communications between Sharon and anyone else in the world pertaining to those same issues," McLain said. Wilson also will be deposed on August 6, McLain said; "the deposition, in theory, will be limited to what Sharon knows about the lawsuit which, ironically, is precious little."

In late May 2012, Loftin was criticized for campaign mailers he released suggesting that his rulings in landowners' suits against Range had caused "Obama's EPA" to "back down" against the corporation. According to May 25 Bloomberg News story, the fliers could violate Texas' campaign rules for judicial races by commenting on a pending case. On June 8, Bloomberg reported that Loftin recused himself from the civil case. Loftin wrote to an administrative judge, "while I know that I have been a fair and impartial jurist, I am concerned that appearances in this case have become its own story [sic]."

– Patrick File
Silha *Bulletin* Editor

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The Pentagon said the media monitoring initiative joins other measures adopted over recent months to safeguard classified information, including new training and credentialing for people authorized to handle classified information, a near ban on the use of "removable storage like DVDs, CDs, and memory sticks" to copy or transfer classified information, and easier monitoring and reporting of classified information releases through Defense Department computer networks.

News media, in reporting on the new Pentagon initiative, noted that it was announced following several high-profile news reports that relied on leaks of classified information including *New York Times* reports about President Barack Obama's use of drones, a "secret kill list" of al-Qaida members, and American intelligence agencies' cyber attacks against Iranian nuclear enrichment facilities; and an Associated Press (AP) report that a foiled Yemeni suicide bombing aboard a passenger plane involved a CIA double agent. According to Reuters on July 19, the Pentagon announced its new initiative hours after the conclusion of a closed-door hearing held by the House of Representatives Armed Services Committee that included Defense Secretary Leon Panetta, Army General Martin Dempsey, and Pentagon General Counsel Jeh Johnson. Committee Chair Rep. Buck McKeon (R-Calif.) said the committee was "concerned about the leaks that have come out over the years and accelerated, it seems, over the last few months," Reuters reported.

The Wall Street Journal reported June 5 that the FBI had opened an investigation into the *Times*' Iran cyber attack story, "according to two people familiar with the probe." FBI Director Robert Mueller told the Senate Judiciary Committee May 16 that an investigation into the Yemeni double agent leak had begun. On June 8, *The New York Times* reported that Attorney General Holder assigned two United States attorneys to take over the FBI's investigations. The *Times* reported that Ronald Machen of the District of Columbia and Rod Rosenstein of Maryland were assigned to the investigations, "elevating the stature of the cases but not giving [the attorneys] any special powers."

Since Obama took office in early 2009, the federal government has filed criminal charges against six people for the unauthorized disclosure of classified national security information. The six cases have involved leaks to the media from the CIA, U.S. military, U.S. State Department, and NSA, and, as Politico.com reporter Josh Gerstein has written, is double the number of government leak prosecutions during the entire 40 years prior to the present administration. The most recent charges came against former CIA officer John Kiriakou on Jan. 23, 2012. Kiriakou was charged with repeated leaks of classified information to journalists, including the name of a covert CIA officer and information revealing the role of another CIA employee in classified activities. (For more on the Kiriakou prosecution, as well as others, see "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue of the Silha *Bulletin*, as well as "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue.)

> "Espionage today is a lot different from espionage during the first world war."
>
> **— Rep. Jim Sensenbrenner (R-Wis.)**
> **House Judiciary Committee**

Congress Considers Legislative Options

Federal legislators have taken a larger role in considering how leaks should be punished, including whether reporters should be prosecuted for publishing them. On July 24, 2012, the Senate Intelligence Committee approved a bill that would restrict leaks from intelligence agencies. In a July 25 press release, Sen. Saxby Chambliss (R-Ga.), vice chairman of the committee, said the bill is "a strong step toward stemming the torrent of leaks" and "provide[s] the intelligence community with the tools and resources necessary to help keep the country safe." But critics noted that the new rules would not extend to the White House — which has been accused of providing the most recent high profile leaks — or to members of Congress or their staff, top Pentagon officials, or the National Security Council.

The new limits passed the intelligence committee by a vote of 14 to 1 as part of the Intelligence Authorization Act for Fiscal Year 2013, H.R. 5743. The bill would require intelligence agency officials to notify congressional intelligence committees of authorized disclosures of classified or declassified information and to keep records of those disclosures, and would require the Director of National Intelligence to provide Congress with a detailed plan for investigating unauthorized disclosures. They would also prohibit current and recently retired intelligence agency officials from consulting with the media on intelligence matters and would authorize only top agency officials or public affairs officers to give "background" or "off-the-record" briefings to the media. Under the bill, individuals found to have made unauthorized disclosures of classified information could be stripped of their security clearances as well as their federal government pensions.

Critics said the bill was harsh and ineffective. In a July 31 Politico.com article, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said, "the fact [Congress would] be targeting lower-level people for this kind of really draconian control is not only disappointing but ultimately ineffectual. Maybe the purpose of all this is to put fear of God in people who are potential sources for the media. … Just the fact that a congressional committee is contemplating it is enough to send shivers down career civil servants' backs."

Republican members of Congress accused the Obama administration of orchestrating recent leaks as a calculated attempt to place the president in a positive light during the 2012 election campaign.

The AP reported June 8 that White House Press Secretary Jay Carney responded to the claims, saying "any suggestion that the White House has leaked sensitive information for political purposes has no basis in fact," and Obama called them "offensive" and "wrong."

According to a July 11, 2012 report by the Reporters Committee for Freedom of the Press (RCFP), a July 11 judiciary committee hearing raised questions about whether the Espionage Act of 1917, 18 U.S.C. § 793, a World War I-era law which criminalizes the unauthorized retention or disclosure of "national defense information," could be used to target journalists who publish leaked classified information. No American journalist has ever been

prosecuted under the Espionage Act for receiving classified information without authorization. Rep. Jim Sensenbrenner (R-Wis.) said members of Congress "have to update" the law, adding "espionage today is a lot different from espionage during the first world war," the RCFP reported.

Manning Trial Judge Refuse to Release Documents

The most high profile leak case may be the one involving U.S. Army Pvt. Bradley Manning, who has been accused of leaking thousands of U.S. military and diplomatic documents to the website WikiLeaks, which then worked with U.S. and European news organizations to publish them. (For more on the release, see "WikiLeaks' Document Dump Sparks Debate" in the Summer 2010 Silha *Bulletin*. Silha Center Director Jane Kirtley discussed "The WikiLeaks Quandary" in the Fall 2010 issue.)

According to a July 6, 2012 First Amendment Center report, on June 21, 2012 the U.S. Army Court of Criminal Appeals denied a request by journalists and rights groups to release documents related to the ongoing Manning case, including motions, orders, and transcripts. The order was one sentence long: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and Mandamus, the petition is DENIED." The order was the response to a petition filed on May 24 by the Center for Constitutional Rights, *The Nation* magazine, Amy Goodman of "Democracy Now!," and WikiLeaks' Julian Assange, among others. The June 21 denial followed a June 8 denial of the group's petition for access, saying it had failed to meet "an 'extremely heavy burden' to justify the granting of a writ" and that the Freedom of Information Act would eventually provide for the release of the information, the First Amendment Center reported.

Shayana Kadidal, attorney for the Center for Constitutional Rights, told the RCFP for a June 27 story that the group planned to appeal the case to the U.S. Court of Appeals for the Armed Forces, a court staffed by civilian judges. "The Supreme Court said one major reason we mandate public access to trials is to protect legitimacy and to protect accuracy in fact finding," Kadidal said. "It's very clear in federal courts that the First Amendment governs access to documents."

On July 19, 2012, Army Col. Denise Lind, the presiding judge in the Manning case, ruled that Manning could not

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WikiLeaks Founder Assange Seeks Asylum in Ecuador

WikiLeaks Founder Julian Assange entered the Ecuadorian Embassy in London on June 19, 2012 to request asylum, refusing to leave until his request was processed.

According to *The New York Times* on June 20, British police said Assange — who had been under house arrest since December 2010 while fighting extradition to Sweden to face accusations of sexual abuse — violated his bail by not returning to his home in London between 10 p.m. and 8 a.m., making him subject to arrest if he were to leave the embassy premises. On June 14, the British Supreme Court rejected Assange's final appeal, ruling that unless the European Court of Human Rights agreed to hear a further appeal, Assange should be extradited to Sweden by midnight on July 7, the *Times* reported.

Assange is accused of raping one woman and sexually molesting and coercing another in Stockholm in August 2010 while visiting to give a lecture. He has denied the accusations and claims that if he is extradited to Sweden, he could more easily be transferred to the United States to face charges related to the publication of thousands of classified diplomatic and military documents. U.S. Army Pvt. Bradley Manning is currently facing charges for leaking those documents to WikiLeaks. News media have reported that a grand jury has been convened to investigate the possibility of charging Assange or WikiLeaks for the leaks. *The Sydney Morning Herald* reported on Feb. 29, 2012 that a confidential email obtained from the private U.S. intelligence company Stratfor stated that U.S. prosecutors have a sealed indictment against Assange. (For more on the Manning case, see "Leaks: New Policies Emerge, Congress Gets Involved" on page 11 of this issue of the Silha *Bulletin*. For more on the possible Assange indictment, see "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue.)

Ecuador offered Assange residency in November 2010, as controversy ramped up following the publication of the American military and diplomatic documents, according to a June 21, 2012 story in *The Telegraph* of London. *The Telegraph* story added, "It has been reported the country became the only one to officially expel a US ambassador in the wake of the furore caused by the leaks. It has been speculated that Ecuadorean President Rafael Correa may offer Mr. Assange asylum to try to redeem his record on free speech." The diplomatic cables implicated Correa in corruption and were denounced as completely untrue in state-run Ecuadorian media. In February 2012, Correa successfully championed a criminal libel conviction against *El Universo*, Ecuador's second best-selling newspaper, including fines that are likely to force the paper into bankruptcy. (For more on the libel case, see "International Journalists Face Censorship in Confronting Governments" in the Winter/Spring 2012 Silha *Bulletin*.)

CNN reported July 10 that Correa told a local television station that the United States allows capital punishment for a "political crime," a fact that could provide sufficient grounds to grant asylum. "We have to see whether everything that's being done in the case of Julian Assange is compatible with ... the constitution and our view of human rights, political rights and due process," Correa said. On June 26, *The Wall Street Journal* reported that Ecuador Foreign Minister Ricardo Patino said a decision on the asylum request would not be announced until after the conclusion of the Olympic Games on August 12. *The Guardian* reported July 26 that officials at the Ecuadorean embassy had asked for assurances from the U.K. and Sweden that Assange would not be sent to the United States.

On July 24, Reuters reported that Assange had hired Baltasar Garzon, a well-known international human rights lawyer, as his attorney and legal adviser. Patino said he welcomed Garzon's involvement in the Assange case because the lawyer had "a very good relationship" with the Ecuadorian government. (Former Assange lawyer Mark Stephens discussed the Assange case in the 2011 Silha Lecture. See "Silha Lecture Highlights Free Speech in the Digital Age" in the Fall 2011 Silha *Bulletin* for more on that event.)

– Patrick File
Silha *Bulletin* Editor

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present evidence attempting to show that the information releases caused little harm to U.S. national security, and the court would not hear the testimony of a United Nations (U.N.) torture expert on the question of whether Manning's pretrial detention amounted to illegal punishment. According to a July 20 AP report, prosecutors argued they are not required to prove the leaks caused harm in order to secure a conviction, and Lind agreed, saying jurors "will be confused by the focus of the trial shifting" if she allowed such evidence. Meanwhile, U.N. torture investigator Juan Mendez, who accused the United States of violating U.N. rules when he was refused unfettered access to Manning during his nine-month detention at a Marine Corps brig in Quantico, Va., will not be allowed to testify. Lind ruled that Mendez's testimony was irrelevant to whether Manning's detention was punitive in nature, which would be a violation of his rights because he has not been convicted of a crime, the AP reported. For more on Manning's detention, see "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 Silha *Bulletin*. According to the July 20 AP report, Lind said Manning's trial could be pushed back to February 2013.

Fourth Circuit Panel Hears Appeal on Risen Subpoena

The U.S. Government argued in a May 18, 2012 hearing before a three-judge panel of the 4th Circuit U.S. Court of Appeals that *New York Times* reporter James Risen should be forced to testify about his confidential sources in the Espionage Act prosecution of former CIA analyst Jeffrey Sterling. On July 29, 2011, Federal District Court Judge Leonie Brinkema granted Risen's motion to quash the subpoena.

In the lower court ruling, Brinkema found that the 4th Circuit recognizes a qualified privilege for journalists to refuse to testify about confidential sources, and that the government failed to satisfy two parts of a three-part balancing test, established in *LaRouche v. National Broadcasting Corp.*, 780 F.2d 1184 (4th Cir. 1986) and used to determine whether a subpoena against a reporter should be upheld. Under that test, Brinkema wrote, the court must consider 1) whether the information sought is "relevant" to the case, 2) whether that information "can be obtained by alternative means," and 3) whether there is a "compelling interest" in the information. Although neither party disputed the information's relevance to the leak prosecution, Brinkema ruled that the government failed to prove that it could not be obtained by means other than Risen's testimony, or that there was a compelling interest in its disclosure. *United States v. Sterling*, 818 F. Supp. 2d 945 (E. D. Va. 2011)

According to May 18, 2012 *New York Times* story, government prosecutors argued that the 4th Circuit panel, made up of Chief Judge William Byrd Traxler Jr. and Judges Roger Gregory and Albert Diaz, should recognize no journalist's privilege, which would be consistent with the U.S. Supreme Court's divided ruling in *Branzburg v. Hayes* 408 U.S. 665 (1972). In *Branzburg*, the court ruled that requiring reporters to testify before grand juries about confidential sources or information did not violate the First Amendment's guarantees of freedoms of speech and press. But a concurrence by Justice Lewis Powell in that case appeared to narrow the scope of the ruling, allowing federal courts around the country to recognize a qualified privilege. The *Times* reported that Risen's attorney Joel Kurtzberg argued that no federal appeals court has adopted the narrow view prosecutors presented, and urged the judges "not to accept the government's invitation to be the first."

Risen has fought two previous subpoenas as part of the government's attempts to prosecute Sterling. Prosecutors claim Sterling leaked information about "Operation Merlin," a failed plan to pass flawed blueprints to Iran via a former Russian scientist, to Risen for his 2006 book "State of War: The Secret History of the C.I.A. and the Bush Administration." The first two subpoenas were issued by grand juries investigating the leak. Once Sterling was identified and charged, prosecutors issued a trial subpoena against Risen. (For more on the Sterling case, see "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue of the Silha *Bulletin*. For more on reporter's privilege, see "Federal Court Rulings Differ on *Branzburg* Interpretation, Reporter's Privilege" on page 6 of this issue of the Silha *Bulletin*.)

Kiriakou Calls Leak Prosecution 'Selective;' Government Says Journalists Will Not be Called

John Kiriakou, the former CIA officer charged Jan. 23, 2012 with repeatedly giving journalists classified information, including the name of a covert CIA officer and information revealing the role of another CIA employee in classified activities, filed two motions to dismiss the charges against him on June 12, 2012.

In the two motions, filed in the U.S. District Court for the Eastern District of Virginia, Kiriakou argued that his prosecution was unconstitutional because it was "selective" and "vindictive," and because the statutes under which he was charged, the Espionage Act, 18 U.S.C. § 793, and the Intelligence Identities Protection Act, 50 U.S.C. §§ 421–426, are unconstitutionally overbroad and void for vagueness.

Kiriakou argued that his prosecution satisfies the doctrine of selective prosecution, under which a prosecution violates the due process clause of the Fifth Amendment if "similarly situated individuals are not prosecuted and the decision to prosecute is invidious or made in bad faith." Kiriakou listed numerous other instances in the years since the investigation of his disclosures of information began when others released similar information, as demonstrated by an article in *The New Yorker* giving details about the 2011 killing of Osama bin Laden, the AP article about the Yemeni double agent, and *New York Times* report of cyber attacks against Iran. None of these leaks has led to prosecutions, Kiriakou argued, and "the one common element in these unprosecuted leaks is that they portray the government in an excellent light."

Kiriakou argued that is his stance on waterboarding — voiced in interviews he gave in 2007 and 2009 — and not the alleged release of classified information has provoked the government's prosecution of him. Kiriakou was a consistent and outspoken critic of the practice of waterboarding, he explained, first contradicting government claims that it was not done, and later arguing that it was not an effective means of extracting information from suspected terrorists. "The government's decision to bring this case, while not prosecuting others who leaked classified information in support of the government's actions, demonstrates that the government is motivated by its dislike of the *contents* of Mr. Kiriakou's statements," which violates both his due process rights under the Fifth Amendment and his free speech rights under the First Amendment, the motion argued.

Kiriakou also argued that the Espionage Act and Intelligence Identities Protection Act "are void for vagueness under the Due Process Clause of the

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First Amendment Challenges to Government Surveillance and Detention Programs Will Proceed

Supreme Court will address questions over plaintiffs' right to sue

Two federal court rulings in May 2012 allowed journalists and First Amendment advocates to proceed with challenges to U.S. government surveillance and detention policies used in the fight against terrorism. On May 21, 2012, the U.S. Supreme Court agreed to hear a case that could challenge a law that allows warrantless surveillance of international communications. One day later, a Senate panel voted to extend that law to 2017. Meanwhile, a federal judge enjoined a "vague" law that allows the government to indefinitely detain anyone who provides "support" to terrorists. The Supreme Court's decision could affect the ability of both cases to proceed.

GOVERNMENT SURVEILLANCE

Supreme Court to Hear Warrantless Wiretap Case

On May 21, 2012, the U.S. Supreme Court agreed to hear *Amnesty International USA v. Clapper*, No. 11-1025, a case that could challenge the constitutionality of a statute that allows the government to monitor the international communications of American citizens without a warrant.

In *Clapper*, a group of 13 attorneys, journalists, and labor, media, legal, and human rights organizations sued Director of National Intelligence James Clapper, challenging the FISA Amendments Act of 2008 (FAA), 50 U.S.C. § 1881(a), a provision of the Foreign Intelligence Surveillance Act of 1978 (FISA) which authorizes the warrantless wiretaps. The section that the plaintiffs are challenging amended FISA to eliminate requirements that intelligence officials identify the specific individual they intend to target for surveillance or present probable cause supporting the belief that the target is a "foreign power or an agent of a foreign power" who may be monitored.

The group challenging the law, which includes Amnesty International USA, Human Rights Watch, and *The Nation* magazine, argues in its complaint that the FAA gives the executive branch "virtually unregulated authority" to monitor American citizens in violation of the Fourth Amendment, the First Amendment, Article III of the U.S. Constitution, and the principle of the separation of powers. The plaintiffs are specifically challenging the warrantless surveillance of American citizens who engage in no criminal activity but frequently participate in international communications as a result of their work, such as journalists and human rights workers.

The issue before the Supreme Court will not be plaintiffs' constitutional challenge to the law, but whether they have legal standing to challenge the law at all. In a motion for summary judgment, the Department of Justice has argued that the plaintiffs lack legal standing to sue because they have failed to show that they have suffered an "injury-in-fact" as a result of the FAA. The government contends that to have standing in the case, the plaintiffs must cite a specific instance in which they have been subject to surveillance under the law. The plaintiffs maintain that the fear of having communications intercepted and financial hardship stemming from precautions taken to protect their confidentiality are sufficient injuries in fact to sustain their lawsuit. The journalists and human rights groups presented evidence showing their work often requires them to engage in

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Fifth Amendment and impermissibly overbroad in violation of the First Amendment." The Intelligence Identities Protection Act, which Kiriakou said has never been subjected to constitutional analysis in a court, is vague because it requires a person to know the government is taking "affirmative measures" to conceal the identity of a "covert agent" without defining the term "affirmative measures." The statute is overbroad, Kiriakou argued, because it "does not require the government to prove that the defendant intended to injure the United States or had reason to believe that his disclosures would harm the United States or assist an enemy," which "penalizes speech well beyond those instances where the government needs to maintain secrecy in order to prevent actual harm to national security."

In a consolidated response to Kiriakou's motions, the government disputed his selective prosecution claim, arguing that the presentation of "newspaper stories authored by journalists to whom improper disclosures may have been made … falls far short of identifying similarly situated subjects; if true, it proves only a crime problem that would counsel in favor of bringing prosecutions when, as here, the evidence is available and compelling." As to his First Amendment protection, the government argued that "it is well-settled that 'the Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to effective operation of our foreign intelligence service,'" citing *Snepp v. United States*, 444 U.S. 507 (1980). The Snepp case involved the CIA's lawsuit against Frank W. Snepp III, a former agent who failed to submit a book he published about CIA activities in Vietnam to the agency for review. The U.S. Supreme Court ruled that the agency could sue and demand any royalties he earned.

The government also noted in its response that "the government does not intend to seek the testimony of either journalist to whom Kiriakou made the charged disclosures," instead relying on his correspondence with the CIA Publications Review Board and other statements and emails to show he lied to the board "in a failed effort to trick [its members] into permitting the defendant to write about a classified investigative technique in his memoirs." According to Politico.com reporter Josh Gerstein on July 5, 2012, the two journalists in question — identified in court documents only as "Journalist A" and "Journalist B" — are Matthew Cole, a former ABC News producer working as a freelance writer at the time the alleged leaks occurred, and *New York Times* reporter Scott Shane.

– Patrick File
Silha *Bulletin* Editor

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sensitive communications with people located outside of the United States and argued it was reasonable to expect the possibility that the government would listen to those conversations. As a result, the plaintiffs claim they have stopped certain communications, which compromised their work, and have undertaken costly travel to conduct other conversations in person.

In August 2009, the U.S. District Court for the Southern District of New York ruled in favor of the government, but in March 2011, the U.S. Court of Appeals for the 2nd Circuit reversed, holding that the suit could go forward. Judge Gerard Lynch, writing for a unanimous three-judge panel, wrote that standing may be based on the reasonable fear of future injury and determined that the plaintiffs' apprehension in this case was reasonable. Lynch wrote, "The plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct." *Amnesty International USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011)

On Sept. 21, 2011, the 2nd Circuit declined to rehear the case, with Lynch writing, "It is the glory of our system that even our elected leaders must defend the legality of their conduct when challenged." The Supreme Court will hear oral arguments on Oct. 29, 2012.

Obama Administration Urges Renewal

One day after the Supreme Court agreed to review the challenge to the FAA, on May 22, the Senate Intelligence Committee voted to extend the amendment through June 2017. The law is set to expire at the end of 2012, and the Obama administration has urged Congress to renew it. In a Feb. 8, 2012 letter to Congressional leaders, Clapper and Attorney General Eric Holder called reauthorization of the FAA "this year's top legislative priority for the intelligence community," and said that the surveillance the measure authorizes "has produced and continues to produce significant intelligence that is vital to protect the nation against international terrorism and other threats."

The Washington Post reported May 22 that senators on the Intelligence Committee have said they hope to receive more information about the FAA's effects prior to the Senate's vote on whether to renew it. "Before the Senate passes any long-term extension, we need to know how many law-abiding Americans are having their communications reviewed with these authorities," said Jennifer Hoelzer, a spokeswoman for Sen. Ron Wyden (D-Ore.). In July 2011, Senators Wyden and Mark Udall (D-Colo.), both members of the intelligence committee, asked Clapper for details about how the law is used. Kathleen Turner, director of legislative affairs for the Office of the Director of National Intelligence, stated in a July 26, 2011 response to the senators that it is not "reasonably possible" to identify each person who has been reviewed under the FAA, and that the government was still defining its "view of the full contours of this authority and will get back to you." Hoelzer said in the May 22, 2012 *Washington Post* story that no clearer answer had yet been provided.

In a Senate Intelligence Committee report dated June 7, 2012, Wyden and Udall expressed concerns about a loophole in the law that would allow the government to monitor American citizens without any judicial authority. The FAA only authorizes warrantless wiretaps of foreigners outside of the United States, and therefore still requires a court order to target an American citizen. However, because communications are collected under the FAA without individual warrants, there is nothing prohibiting the government from searching through the collected information for phone calls or emails from a particular American, according to the senators. Wyden and Udall argued in the report that "protections against warrantless searches for Americans' communications should be added to the law immediately." However, supporters of the act, including Intelligence Committee Chair Sen. Dianne Feinstein (D-Calif.), deny the existence of the loophole, asserting the provision requires a court order before targeting an American for surveillance.

On May 31, 2012, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the warrantless wiretap program. American Civil Liberties Union deputy legal director Jameel Jaffer testified at the hearing, urging Congress to restrict the circumstances under which the government can acquire Americans' conversations and to require disclosure of information regarding how the law is used. In his written testimony submitted to the subcommittee, Jaffer argued "the secrecy surrounding the Act extends far beyond the executive's legitimate interest in protecting sources and methods."

Kenneth Wainstein, former Homeland Security Advisor to President George W. Bush, also testified at the hearing, emphasizing the importance of enhanced intelligence capabilities, including the FAA, in protecting national security. In his written testimony, Wainstein contended "electronic surveillance can be a tremendous source of intelligence about the inner workings of a conspiracy. That is particularly true in relation to foreign terrorist groups, where leaders and foot soldiers in different parts of the world have to rely on electronic communication for operational coordination."

Federal Judge Enjoins Law Authorizing Indefinite Detentions

On May 16, 2012, a federal judge cited First Amendment concerns in issuing a preliminary injunction halting the enforcement of another controversial national security initiative, this one contained in the National Defense Authorization Act (NDAA), Pub. L. 112–81, 125 Stat. 1298.

In *Hedges v. Obama*, a group of writers and activists have challenged the constitutionality of the NDAA, arguing that section 1021 of the law, which gives the president the power to indefinitely detain anyone who has "substantially supported" terrorist organizations, violates their free speech and associational rights guaranteed by the First Amendment and their Fifth Amendment rights to due process. The plaintiffs include Chris Hedges, an author, columnist for the website Truthdig, and Pulitzer prize-winning international correspondent; Alexa O'Brien, founder of the protest U.S. Day of Rage and contributor and editor for the international news website WL Central; Kai Wargalla, an activist and founder of Occupy London, and Brigitta Jonsdottir, an activist and member of parliament in Iceland. (Hedges was a featured speaker at the 2010 Silha Center Spring Ethics Forum. See "Silha Center Hosts Variety of Speakers in Spring 2010" in the Winter/Spring 2010 issue of the Silha *Bulletin*.)

Hedges v. Obama is similar to *Amnesty International USA v. Clapper* in that the Justice Department argued the plaintiffs lack standing to challenge the law because none of them have actually been detained under the authority of the NDAA. The plaintiffs each claim they have reason to believe their conduct may be covered by the Act,

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Courts, Federal Government Clarify First Amendment Protection for Recording in Public

Law enforcement actions continue to draw lawsuits, criticism

FREEDOM OF SPEECH

Although federal courts and the U.S. Department of Justice have clarified the basic principle that the First Amendment protects the making of audiovisual recordings in public places, cases challenging police conduct toward camera-carrying citizens and journalists are proceeding in Maryland and New York and law enforcement officials continue to face criticism for arrests and harassment.

7th Circuit Holds Recording is Protected by First Amendment

On May 8, 2012, the 7th Circuit U.S. Court of Appeals in Chicago held that the act of making an audio or audiovisual recording is included in the First Amendment's guarantee of free speech and press rights. The court enjoined the enforcement of an Illinois eavesdropping statute that forbids the recording of police officers in public.

The case arose out of the ACLU's plan to implement a "police accountability program" in Chicago, during which members would openly record police officers in public places. The organization became concerned that its videographers would be arrested for violating Illinois' eavesdropping statute, 720 Ill. Comp. Stat. 5/14-2, which prohibits recording conversations without the consent of all parties who are recorded. The ACLU sued Cook County Ill. State's Attorney Anita Alvarez, challenging the constitutionality of the statute and requesting a preliminary injunction barring Alvarez from enforcing the law, arguing that making audiovisual recordings is an activity protected by the First Amendment. On Jan. 10, 2011, the district court dismissed the case, holding that the First Amendment does not protect a "right to audio record." The ACLU appealed.

Alvarez argued that the ACLU did not have legal standing to challenge the law because it had not cited a "credible threat of prosecution," and that the First Amendment does not protect the open recording of police when officers do not give their consent to be recorded. Alvarez's contention that the recording was unprotected by the First Amendment was based on the "willing speaker" principle, which requires speaker consent. According to the doctrine, all parties in the conversation, including police and bystanders, must consent to be recorded by the ACLU. Without permission, Alvarez argued, the ACLU has no First Amendment right to record.

In a 2 to 1 ruling, the 7th Circuit rejected both of Alvarez's arguments. Judge Diane Sykes wrote for the majority that the ACLU had sufficient standing to challenge the statute because it "flatly prohibits the ACLU's planned recording, exposing the organization and its employees to arrest and criminal punishment." Further, Sykes wrote, Alvarez's contention "that openly recording what police officers say while performing their duties in traditional public fora — streets, sidewalks, plazas, and parks — is *wholly unprotected* by the First Amendment … is an extraordinary argument," resting on a "misreading" of precedent and a "misapplication" of the "willing speaker" principle. *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012)

Instead of the "willing speaker" doctrine, Sykes wrote that "the ACLU's challenge to the statute implicates

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and therefore cited fear of detention and changes in their professional activities as injuries that support standing. The complaint states that, as a journalist and war correspondent, Hedges "publishes and conveys the opinions, programs and ideas of al-Qaida, the Taliban, or associated forces.'" The plaintiffs suggest that these activities could be considered "substantially supporting" the organizations and therefore could subject Hedges to indefinite detention. The government has declined to say whether the detention power could affect any of the plaintiffs.

On May 16, 2012, Judge Katherine Forrest of the U.S. District Court for the Southern District of New York ruled for the plaintiffs, holding that the "actual fear that their expressive and associational activities are covered by section 1021" and "uncontroverted evidence of concrete — not hypothetical — ways in which the presence of the legislation has already impacted those expressive and associational activities" were sufficient injury for standing in the case. Forrest's ruling went further, however, finding that the plaintiffs had shown a likelihood of succeeding on their First Amendment challenge to the NDAA, warranting a preliminary injunction on the enforcement of the law. Forrest wrote, "There is no doubt that the type of speech in which Hedges, O'Brien, Wargalla, and Jonsdottir engage is political in nature. It is also likely that some of their views may be extreme and unpopular as measured against views of an average individual. That, however, is precisely what the First Amendment protects." *Hedges v. Obama* No. 12 Civ. 331, 2012 U.S. Dist. LEXIS 68683, 2012 WL 1721124 (S.D.N.Y. May 16, 2012)

In addition, Forrest found the plaintiffs were likely to succeed on a vagueness challenge under the Fifth Amendment. Forrest wrote that according to the amendment's Due Process Clause, "Individuals are entitled to understand the scope and nature of statutes which might subject them to criminal penalties." Forrest held that section 1021 should be treated as "analogous to a criminal statute," and therefore should define the offense in a way that "ordinary people" can understand the "prohibited conduct." Without a knowledge requirement, "an individual could fall within the definition of 'covered person' under section 1021 without having either intentionally or recklessly known that he or she was doing so." Forrest wrote that the terms "substantially," "direct," and "support" lack sufficient definition in the text of the Act and the government was unable to explain the meaning of the words, providing a strong argument for the plaintiffs' vagueness challenge.

Hedges called the ruling "a tremendous step forward for the restoration of due process and the rule of law." Given the similarity of the cases, the U.S. Supreme Court's decision on standing in *Amnesty International USA v. Clapper* could affect standing for the plaintiffs in *Hedges v. Obama*.

– Emily Mawer
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a different set of First Amendment principles," drawn from the U.S. Supreme Court's ruling in *Citizens United v. FEC*, 558 U.S. 50 (2010), that "laws enacted to control or suppress speech may operate at different points in the speech process." Sykes wrote that by regulating "the use of a medium of expression," the Illinois statute "inevitably affects communication itself." In other words, by regulating the creation of recordings, the statute also affects the communication of those recordings. The First Amendment protects the right to publish or broadcast an audio or audiovisual recording, Sykes wrote, but without any protection for the creation of that recording, the right would be compromised. "Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast … and thus burdens First Amendment rights," Sykes wrote. (For background on *Citizens United v. FEC*, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations," in the Winter/Spring 2010 issue of the Silha *Bulletin*.)

The court also found that the ACLU's challenge is likely to succeed regardless of the standard of review used in the analysis. The least rigorous standard the statute could face is intermediate scrutiny, which requires the law to advance a "substantial government interest" and be "drawn to achieve that interest." Alvarez argued the law protects privacy interests. However, the court noted that the ACLU plans to openly record police officers in public, where "reasonable expectations of privacy" do not exist. Therefore, the court found the statute was not sufficiently narrow to protect the interest of privacy. "Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties — including audio recording that implicates *no* privacy interests at all." The 7th Circuit reversed the district court's ruling, ordering it to grant the preliminary injunction barring Alvarez from prosecuting the ACLU under the statute.

In a dissent, Judge Richard Posner wrote that the majority's interpretation of the First Amendment was at odds with the intent of its original authors, who only meant the amendment to provide freedom from censorship. "Judges asked to affirm novel 'interpretations' of the First Amendment should be mindful that the constitutional right of free speech, as construed nowadays, is nowhere to be found in the Constitution," Posner wrote.

Posner argued that allowing the ACLU to publicly record police officers will prevent the officers from communicating with suspects, witnesses, and bystanders and will therefore impair officers' abilities to perform their duties. Posner considered the privacy rights of the citizens who speak with the police, expressing concern that they might be afraid to do so if they are being recorded. The majority asserted that anyone who wants to speak with a police officer in private will have the opportunity to do so and that important security issues are not discussed in public places. Posner responded, "Forget national security; the people who most need police assistance and who most want their conversations kept private are often the people least able to delay their conversation until they reach a private place." Posner concluded that the social value of protecting privacy outweighs any value promoted by allowing public recordings of the police.

The *Alvarez* ruling follows a similar ruling by the 1st Circuit U.S. Court of Appeals in June 2011. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) the court ruled unanimously that the recording of government officials in public "is a basic and well-established liberty safeguarded by the First Amendment." The case arose from plaintiff Simon Glik's claim that the Boston police violated his civil rights when they arrested him for recording an arrest he encountered in Boston Common. In striking down the City of Boston's qualified immunity argument, the court held that the right to record is clearly established law and thus the police had "fair warning" that the arrest was unconstitutional. (See "Cops and Citizens Clash over Recordings of Law Enforcement Activity," in the Fall 2011 issue of the Silha *Bulletin*.)

Ongoing First Amendment Challenges to Police Policies

Several ongoing cases have raised similar First Amendment issues to those in the *Alvarez* case. In May 2012, the U.S. Department of Justice took the unusual step of intervening in a complaint against the Baltimore City Police Department for a policy restricting the use of devices to record police activity in public. The case arose in August 2011 after Christopher Sharp filed a complaint over the seizure of his phone when he used it to record police arresting his friend on May 15, 2010. Sharp's phone was eventually returned, but all video, including the arrest and some personal videos, had been deleted. *Sharp v. Baltimore City Police Dep't*, 11 Civ. 02888 (Dist. Md. Oct. 11, 2011)

On May 14, 2012, the U.S. Department of Justice endorsed the right to record in a letter to the Baltimore Police Department regarding Sharp's complaint. The letter followed a Jan. 10, 2012 statement of interest in the case in which the DOJ argued that Sharp was protected by the First and Fourth Amendments. In the letter, the DOJ offered guidance on policy and training requirements for the police that are consistent with the First, Fourth, and Fourteenth Amendment and urged the department to provide practical guidance on how officers can perform their duties without violating constitutional rights. The Baltimore Police Department released a general order on recording police activity in November 2011. However, the DOJ found that the order did not adequately guide officer conduct in some areas. For example, the letter suggested that the policy should include a specific recitation of the First Amendment, rather than referring to general "Constitutional rights," and should define terms such as the "public domain," where the public has the right to record, to provide further clarity. "Comprehensive policies and effective training are critical to ensuring that individuals' First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties," wrote Jonathan M. Smith, chief of the Special Litigation Section of the Civil Rights Division at the DOJ. The letter is available online at www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf

In an interview with CBS Baltimore, Meredith Curtis of the ACLU of Maryland said the letter was the first time the DOJ has taken an official position on the right to record. Kim Zetter, blogger on the *Wired* magazine blog Threat Level, wrote in a May 16, 2012 blog post that the letter was a "strong statement" not only to the Baltimore Police Department, but to every police department in the country, that interference in public recordings is unconstitutional.

In another pending case, *Rodriguez v. Winski*, New York elected officials, journalists, and Occupy Wall Street activists filed a complaint against the

City of New York on April 30, 2012, alleging that actions by the New York Police Department violated the First Amendment. The complaint cited clashes between the plaintiffs and the New York police, including one incident on Nov. 15, 2011, when police prevented the public, press, and elected officials from observing the eviction of Occupy Wall Street protesters from Zuccotti Park — which protesters dubbed Liberty Square — in New York City. According to the complaint, Ydanis Rodriguez, lead plaintiff and a member of New York City Council, complied with police orders to remain where he was, but "nevertheless was attacked and arrested by police officers in the absence of probable cause." Several of the other plaintiffs in the case were arrested in connection with the same protest. *Rodriguez v. Winski*, 12 Civ. 3389, 2012 WL 1470305 (S.D.N.Y. Apr. 30, 2012)

The complaint asks the federal district court to issue an injunction enjoining the police from preventing lawful entry into public spaces, from barring press access to police activities related to public assembly, and from keeping photographs and fingerprints from individuals who are found innocent in their criminal cases. In addition, the plaintiffs are seeking the appointment of an "independent monitor" to oversee the New York Police Department. Wylie Stecklow, an attorney involved in the case, told the *Bulletin* that the plaintiffs are expecting either an answer or a motion to dismiss from each of the defendants by mid-September 2012.

More Arrests for Recording in Public

Officers and citizens continue to clash over the recording of police activity. The spike in arrests has gained the attention of the international press freedom organization "Reporters Sans Frontières" (RSF or "Reporters Without Borders") which compiles an annual ranking of countries called the "Press Freedom Index" — an assessment of countries' press freedom records. The United States' 2011/2012 ranking dropped 27 places from its 2010 ranking, from 20th to 47th, a slide which RSF attributed to "the many arrests of journalists covering Occupy Wall Street protests." The Press Freedom Index, which was released in January 2012, is available online at http://en.rsf.org/press-freedom-index-2011-2012,1043.html.

But Occupy protests were not the only settings for conflicts between police and journalists. The June 18, 2012, arrest of a photo editor for the *Reno* (Nev.) *Gazette-Journal* at the site of a wildfire drew condemnation from media organizations. The *Gazette-Journal* reported June 19 that photographer Tim Dunn was pushed to the ground, forcing his face into gravel, and detained for more than half an hour after he took photos of a brush fire that destroyed two homes in Sun Valley, Nev. The incident left Dunn with scrapes on his face and hands. The police cited Dunn for obstructing a public officer and Dunn told the *Gazette-Journal* that police also accused him of impersonating a firefighter at the scene. Dunn was wearing the protective gear fire officials recommend for media covering wildfires, the *Gazette-Journal* reported. Barry Smith, executive director of the Nevada Press Association, called the accusation "absolutely preposterous," in an interview with the *Gazette-Journal*. "Nevada journalists are trained how to respond to wildfires," Smith said. "It sounds to me like the fire officials and deputies need to be trained on how to respond to the media."

According to the *Gazette-Journal* article, Beryl Love, the newspaper's executive editor, said in a statement that "the brutal nature in which Tim, a veteran photographer with more than 20 years experience, was treated by sheriff's deputies is beyond comprehension. Their use of excessive force on a fellow professional who also has an important job to do is shocking. His rights were clearly violated."

According to a June 25, 2012 press release from the Society of Professional Journalists (SPJ), the group's president John Ensslin sent a letter to Washoe County Sheriff Michael Haley in which he wrote, "I understand the need of public safety personnel to control access to the scene of a chaotic situation so they can do their job. But it's also important to remember that Mr. Dunn had a job to do as well, one that is backed by his First Amendment right to cover a breaking news story."

On June 23, the *Gazette-Journal* reported that Dunn submitted a formal complaint to the Washoe County Sheriff's Office citing excessive force.

Meanwhile, a veteran freelance photojournalist has filed a lawsuit against police in Montgomery County, Md. for an arrest that resulted in him being unable to renew his White House press credentials. *News Photographer* magazine, a publication of the National Press Photographers Association (NPPA), reported Jan. 10, 2012 that Mannie Garcia, an award-winning photographer whose photos have appeared in *The New York Times*, *Newsweek*, *Der Spiegel*, *USA Today*, and on Bloomberg, Reuters, and Getty Images wire services, was arrested and charged with disorderly conduct on June 16, 2011 while filming an arrest outside of a restaurant. Garcia claimed the officers assaulted him and took the memory chip from his camera before handcuffing him and placing him under arrest. At trial for the disorderly conduct charge, the officers involved claimed Garcia's injuries from the incident were self-inflicted, but a Montgomery County Associate Judge found the police complaint was not credible and acquitted Garcia, *News Photographer* reported.

Nevertheless, Garcia was unable to renew his White House press credential during the time the criminal charge was pending, resulting in what *News Photographer* described as the loss of a "sizable portion" of his income. On June 12, 2012 Garcia filed a lawsuit against the police officers involved in the incident, alleging civil rights violations under the United States and Maryland Constitutions, as well as other state claims, according to a June 14 report by the NPPA. The NPPA reported that Garcia's case is one of several civil suits that the organization is involved in regarding police mistreatment of journalists. "Mr. Garcia is just one of too many visual journalists whose rights have been egregiously infringed upon of late," NPPA President Sean Elliot said. "It is time for the NPPA to contribute to the efforts to hold these public servants accountable for their assault upon the First Amendment."

Donald Winslow, editor of *News Photographer* magazine wrote in the January 10 article that without civil suits, there are usually no serious consequences for the arrests of photographers. "Police who practice this 'catch and release' method of getting photographers out of their hair know, for the most part, that the journalists will likely never actually face a day in court or be convicted, because prosecutors or higher ranking police usually dismiss the charges and offer up some lame public apology, saying it won't happen again," Winslow wrote. "In the aftermath the photographer walks away with no arrest record, usually without running up huge legal fees," Winslow wrote. "And the police have what they wanted: they stopped a journalist from taking pictures of them doing whatever it was they didn't want the public to see."

– Emily Mawer
Silha Research Assistant

Supreme Court Fleeting Expletives Ruling Leaves Constitutional Questions Unanswered

FCC punishments overturned but indecency policy left intact

In a narrow holding addressing three instances of "fleeting" expletives or nudity broadcast on television, the U.S. Supreme Court ruled June 21, 2012 that the Federal Communications Commission (FCC) failed to give "fair notice" to Fox or ABC television in finding the networks had violated the commission's indecency standards. However, the court declined to address the constitutionality of those standards.

FCC

By an 8 to 0 vote, the U.S. Supreme Court ruled that the FCC violated the Fifth Amendment's "due process" clause because it failed to provide sufficient notice to the networks that they would be in violation of its revised indecency policy when the broadcasts occurred in 2002 and 2003. However, in a majority opinion by Justice Anthony Kennedy, the court also said that because it decided the case on due process grounds, "it need not address the First Amendment implications of the Commission's indecency policy" or "reconsider *Pacifica*," the court's landmark 1978 ruling on broadcast indecency. *FCC v. Fox Television Stations*, *Inc.*, 132 S. Ct. 2307 (June 21, 2012)

Justice Ruth Bader Ginsburg voted with the majority in the ruling, but wrote a two-sentence concurrence stating that, "In my view," *Pacifica* "was wrong when it issued. Time, technological advances, and the commission's untenable rulings in the cases now before the court show why *Pacifica* bears reconsideration." Justice Sotomayor did not take part in the consideration or the ruling.

The June 21 ruling arose out of three now-infamous broadcasts in 2002 and 2003 which have been the subject of extensive federal court consideration, including one other U.S. Supreme Court ruling, in the intervening years. In the Fox broadcast of the Billboard Music Awards in 2002, singer Cher accepted an award saying, "people have been telling me I'm on the way out every year, right? So fuck 'em." In the 2003 broadcast of the Billboard awards, also on Fox, presenter Nicole Richie made reference to her popular television show, saying, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The FCC received complaints after both broadcasts, and in 2006 ruled that they violated the commission's rules against indecency. However, citing the fact that the FCC's interpretation of its broadcast indecency rules — and specifically its rules against one-time "fleeting" expletives — had generated confusion among broadcasters before being clarified in a ruling against NBC in 2004, the commission declined to impose a fine against Fox for the Cher and Richie comments.

Meanwhile, ABC was fined for a 2003 episode of "NYPD Blue" that included a scene in which a female character prepared to take a shower. The woman's nude buttocks could be seen for less than ten seconds and the side of her breast for about one second. In 2008, the FCC ruled that the scene was "actionably indecent" and fined each of the 45 ABC affiliates that aired the episode $27,500. The Supreme Court consolidated the separate appeals of Fox and ABC in its June 21 ruling.

The FCC is authorized to fine "whoever utters any obscene, indecent, or profane language by means of radio communication" under 18 U.S.C. § 1464. The FCC applies the law between the hours of 6 a.m. and 10 p.m. local time to radio and television broadcasters alike. In 1978, the U.S. Supreme Court upheld the commission's authority to regulate indecency in *FCC v. Pacifica*, 438 U.S. 726 (1978), ruling that a broadcast of George Carlin's "seven dirty words" monologue was indecent because it contained "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." The court ruled that because broadcast radio and television have "a uniquely pervasive presence in the lives of all Americans," it was appropriate to extend "the most limited First Amendment protection" to them. *Pacifica* did not address the question of whether the FCC could regulate isolated or occasional expletives, as opposed to their repetition in the Carlin monologue which Justice Lewis Powell, in a concurrence, called "verbal shock treatment."

In 2001, the commission issued "Industry Guidance" on its indecency regulations, explaining that it would consider three factors in deciding whether material was indecent: (1) its "explicitness or graphic nature;" (2) "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;" and (3) "whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." When it fined NBC in 2004 for an awards show broadcast which featured the singer Bono uttering the words "fucking brilliant," the FCC addressed the isolated and fleeting nature of the utterance, stating that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004)

The major broadcast television networks challenged the FCC's new interpretation of the indecency rules, arguing in federal court that they were not given proper notice of the change in enforcement, rendering it "arbitrary and capricious" under the Administrative Procedure Act (APA), 5 U.S.C. 706, because the commission failed to give a reasoned basis for a significant change in policy. In 2007, the 2nd Circuit U.S. Court of Appeals ruled in favor of the networks, but in 2009 the U.S. Supreme Court overturned the 2nd Circuit ruling on a 5 to 4 vote finding that the rule change met the requirements of the APA and was "entirely rational." *FCC v. Fox Television Stations*, *Inc.*, 556 U.S. 502 (2009) On remand, the 2nd Circuit relied on the First Amendment to find that the rules were "unconstitutionally vague, creating a chilling effect." *Fox Television Stations*, *Inc. v. FCC*, 613 F.3d 317 (2d. Cir. 2010)

On June 21, 2012, the U.S. Supreme Court vacated and remanded the July 2010 2nd Circuit ruling. Justice Kennedy wrote that the "void for vagueness" doctrine in American law has created a "requirement of clarity in regulation [which] is essential to the protections provided by the Due Process Clause of the Fifth Amendment [and] … requires the invalidation of laws that are impermissibly vague." Boiled down, the law requires "first, that regulated parties should know what is required

of them so they may act accordingly; second, precision and guidance … so that those enforcing the law do not act in an arbitrary or discriminatory way." Kennedy added, "when speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

The Supreme Court's ruling ultimately pivoted on the timing of the sanctions against Fox and ABC. The FCC's 2001 "Industry Guidance" did not explain that fleeting expletives or nudity would be considered in violation of FCC guidelines, Kennedy wrote. The FCC did not explain its new policy until 2004 in the ruling against NBC, which came after the broadcasts of the Billboard Music Awards and "NYPD Blue." "The Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation," Kennedy wrote. "This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon sensitive areas of basic First Amendment freedoms."

The FCC argued that its rule could not be considered unconstitutionally vague as applied to Fox because it did not impose a fine against the network for the fleeting expletives. Kennedy rejected this argument because the FCC has statutory authority to consider the rules violation in future sanctions regardless of whether or not a fine was imposed; "the government's assurance it will elect not to do so is insufficient to remedy the constitutional violation." Moreover, Kennedy wrote, Fox had sustained "reputational injury" as a result of the finding that it violated FCC rules, even if that finding did not carry a fine, harming its relationship with viewers or advertisers.

In the case of "NYPD Blue," the government argued that ABC had notice that it would be in violation, citing a 1960 FCC ruling that stated that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. §1464." Kennedy responded in his opinion, "an isolated and ambiguous statement from a 1960 Commission decision does not suffice for the fair notice required when the Government intends to impose over a $1 million fine for allegedly impermissible speech." Kennedy also noted that in 1978 the commission had declined to find broadcasts containing nudity to be indecent and in 2000, ruled that full frontal nudity in a broadcast of the film *Schindler's List* was not indecent.

Kennedy concluded by explaining the limited scope of the decision. Because the court had resolved the case on Fifth Amendment grounds, Kennedy wrote, it did not need to address arguments made by Fox and ABC that *Pacifica*'s rationale — that the unique pervasiveness of broadcast television and radio justifies FCC regulation — "has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers." Moreover, because the court's consideration of FCC policy was limited to 2002 and 2003 broadcasts, which occurred before the commission issued its ruling on indecency in 2004, it did not need to consider whether those 2004 rules were constitutional. "The Court adheres to its normal practice of declining to decide cases not before it," Kennedy wrote. Kennedy added that the limited scope of the opinion "leaves the commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements ... [a]nd leaves the courts free to review the current policy or any modified policy in light of its content and application."

Indeed, the FCC and American courts may continue to grapple with the legal definitions and implications of broadcast indecency. On June 29, 2012, the U.S. Supreme Court denied the FCC's petition for writ of *certiorari* in the "wardrobe malfunction" case involving a halftime show performance by Janet Jackson and Justin Timberlake at the 2004 Super Bowl. The appeal had come after the 3rd Circuit U.S. Court of Appeals ruled in *CBS v. FCC*, 663 F. 3d 122 (3d Cir. 2011) that the FCC's $550,000 fine for showing the incident was "arbitrary and capricious." The 2011 3rd Circuit decision was that court's second ruling on the matter; it came to the same conclusion in 2008, but the U.S. Supreme Court vacated that decision in 2009 following its first ruling in *FCC v. Fox Television Stations, Inc.*

In an opinion concurring in the Supreme Court's denial of writ of *certiorari*, Chief Justice John Roberts wrote that "even if the Third Circuit is wrong" in its 2011 decision, "that error has been rendered moot going forward [because] it is now clear that the brevity of an indecent broadcast — be it word or image — cannot immunize it from FCC censure."

Meanwhile, the FCC may already be considering its next censure for a Super Bowl halftime show incident. During a performance by popular music artists Madonna, Nicki Minaj, and M.I.A. during halftime of the 2012 Super Bowl on Feb. 5, 2012, singer and rapper M.I.A. gave the middle finger to the camera and appeared to mouth an expletive. NBC failed to catch either on its delay, blurring the picture shortly after they occurred. According to a March 15 report from ESPN, a Freedom of Information Act request found that 222 complaints had been filed over the Super Bowl broadcast, most of which were in response to M.I.A.'s performance.

ABC News reported February 6 that the Parents Television Council issued a statement the day after the broadcast, criticizing NBC and the NFL for selecting "a lineup full of performers who have based their careers on shock, profanity and titillation. … Instead of preventing indecent material, they enabled it."

ABC News reported that Drexel University law professor Lisa McElroy said "there is reasonable potential for an FCC fine," in the M.I.A. incident, but that the commission might wait until after the Supreme Court's ruling in *FCC v. Fox Television Stations, Inc.* to decide how to respond. McElroy said that after the Jackson incident in 2004, the FCC increased the fine for broadcast indecency to $325,000, which means that M.I.A.'s combined expletive and middle finger could cost NBC as much as $650,000.

– Patrick File
Silha *Bulletin* Editor

The Silha *Bulletin* has provided extensive coverage of the indecency cases and the FCC rule changes that precipitated them. For more, see "FCC Defends Regulatory Regimes in Court; U.K. Explores Cross-Ownership Regulations" in the Fall 2011 issue, "U.S. Supreme Court Ruling Leaves FCC's Ban on Fleeting Expletives in Place" in the Spring 2009 issue, "Second Circuit Strikes Down FCC's 'Fleeting Expletives' Rule as 'Arbitrary and Capricious'" in the Summer 2007 issue, "Broadcasters Challenge Indecency Standards" in the Winter 2007 issue, "FCC Backtracks on Some Indecency Rulings, Continues to Pursue Others in Court" in the Fall 2006 issue, "Bush Signs Broadcast Decency Enforcement Act; May Increase Fines for Indecent Programming" in the Summer 2006 issue, and "FCC Crackdown on Indecency Leads to Historic Fines" in the Winter 2004 issue.

Minnesota Supreme Court Sides with University on Punishment for Facebook Posts

Standard: Universities may punish off-campus speech that violates professional rules

The Minnesota Supreme Court held on June 20, 2012 that the University of Minnesota did not violate a student's First Amendment rights when it punished her for Facebook posts about her mortuary science lab. A three-judge panel of the court unanimously upheld the university's disciplinary actions, but declined to accept the university's position that it had broad power to regulate student speech off campus.

STUDENT FREE SPEECH

The student in the case, Amanda Tatro, died suddenly on June 26, 2012, less than one week after the ruling. She was 31. As of press time, details about Tatro's death had not come to light. The Minneapolis *Star Tribune* reported June 26 that police did not consider the death suspicious. Tatro's attorney Jordan Kushner told the *Star Tribune* that Tatro suffered from a condition that affected her nervous system and caused pain and immobility. Kushner said that Tatro wanted to appeal the case to the U.S. Supreme Court, but following her death he was no longer considering doing so.

Tatro sued the University of Minnesota in 2010, alleging it violated her First Amendment rights when it disciplined her for comments she made on her Facebook page over a period of four weeks in fall 2009. Tatro was a mortuary science student enrolled in three laboratory classes involving anatomy, embalming, and restorative art. She posted status updates about her cadaver, whom she called "Bernie," a reference to the 1989 comedy film, "Weekend at Bernie's." The film portrays two employees who, following the death of their boss, try to convince people that he is still alive. Tatro commented that she "gets to play" with her cadaver, discussed taking out her "aggression" on the body, and mentioned keeping a "lock of hair" in her pocket, a reference to a Black Crowes song. Tatro also posted that she wanted "to stab a certain someone in the throat" with an embalming tool, and mentioned her "Death List #5." Tatro later said "Death List #5" is a reference to the movie *Kill Bill* and "a certain someone" referred to her ex-boyfriend, according to the court's opinion.

After another mortuary science student brought the posts to the program director's attention, Tatro was suspended from class. When University of Minnesota police determined no crime had been committed, she was allowed to return to class, but the university's Office for Student Conduct and Academic Integrity filed a complaint against Tatro on Dec. 29, 2009, alleging violations of the university's student-conduct code. The Campus Committee on Student Behavior at the university conducted a hearing on the matter and on April 2, 2010, issued a written decision finding that Tatro violated the rules of the Mortuary Science Program. As a result, Tatro received a failing grade in her mortuary science lab, and was required to attend a course in clinical ethics, write a letter to a faculty member of the Mortuary Science program addressing professional respect, submit to a psychiatric evaluation at the student health service clinic, and remain on probation for the remainder of her undergraduate career.

> "Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards."
>
> **— Justice Helen Meyer**
> **Minnesota Supreme Court**

On August 19, 2010, Tatro appealed the punishment to the Minnesota Court of Appeals, claiming that the university's disciplinary actions violated her right to free speech guaranteed by the federal and state constitutions. On July 11, 2011, the court of appeals affirmed the university's sanctions, holding that the school did not violate Tatro's rights. *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. Ct. App. 2011) (For more background on the case and the appeals court ruling, see "Student Speech: Off-Campus, Online, and in Trouble," in the Summer 2011 issue of the Silha *Bulletin*.)

Tatro appealed to the Minnesota Supreme Court. A three-judge panel heard the case, as four of the seven justices recused themselves due to connections to the university. Like the Court of Appeals, the Minnesota Supreme Court held that the university did not violate Tatro's First Amendment rights; however, the Supreme Court used a different legal standard than the lower court to reach that conclusion. It also rejected the standards proposed by Tatro as well as the university.

In the court of appeals decision, the court applied a standard developed in the U.S. Supreme Court case *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that a K-12 school may regulate student speech if it reasonably anticipates a "substantial disruption of or a material interference with school activities." However, the Minnesota Supreme Court found that not only was a university regulating speech in this case, rather than a K-12 school, but the university's actions were not meant to punish for creating a "substantial disruption." Instead, the discipline was for violating academic program rules, and thus the supreme court determined that the *Tinker* standard was inappropriate in this case. *Tatro v. University of Minnesota*, A10-1440, 2012 WL 2328002, 2012 Minn. LEXIS 246 (June 20, 2012)

The university argued that the supreme court should apply a standard used by the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which held that educators in K-12 schools may regulate the "content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." However, again this rule applied only to K-12 schools. Additionally, the Minnesota Supreme Court emphasized that the standard applies to speech that the public would reasonably believe to carry the imprimatur of the school. In this case, the speech was not "school-sponsored," because the public would not consider Tatro's Facebook posts to have the

support of the university. In addition, the court noted that the concept of "legitimate pedagogical concerns" has been broadly construed, and therefore its application in this context would give universities "wide-ranging authority" over student Internet activity. The court declined to extend this broad power to the university and rejected the *Hazelwood* standard in the *Tatro* case.

Tatro, meanwhile, argued that students at public universities are protected by the same right to free speech as the general public, but conceded that the university could regulate off-campus speech that "violate[s] specific professional obligations." Specifically, Tatro acknowledged that the university could prohibit her from identifying a human donor, but argued that it could not impose a broader rule regulating her online activity. Therefore, Tatro argued for a narrow rule preventing the university from regulating "a student's personal expression at any time, at any place, for any claimed curriculum-based reason." The court acknowledged Tatro's concern, but noted that the parties agreed that a university may regulate Facebook activity that violates established professional standards. Thus, the court adopted a legal standard based on professional rules, requiring restrictions on students' Facebook posts to be "narrowly tailored and directly related to established professional conduct standards." Discussing the reach of the standard, Justice Helen Meyer wrote, "Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards." Meyer added that the standard will limit the ability of the university to "impermissibly reach into a university student's personal life outside of and unrelated to the program."

The court looked to the Minnesota statute governing the professional conduct of mortuary scientists and interns, Minn. Stat. § 149A.70 subdiv. 7(3), and found that unprofessional conduct includes "failure to treat with dignity and respect the body of the deceased." The court then determined that the university's academic program standard was consistent with the statute's professional conduct requirement of respect and dignity for the deceased. "Significantly, the academic program rules do not require respectful and discreet behavior on Facebook generally, but explicitly pertain to statements about cadaver dissection and the anatomy lab," wrote Meyer. In addition, the court held that the school rules were narrowly tailored, and not overly broad, to achieve the objective of respectful and dignified treatment. Specifically, the court noted that the university's rules only pertained to widely dispersed Facebook posts that could be viewed by thousands. Regulation of private conversations would be too broad to promote the interest, but the court found controlling public speech on Facebook to be permissible. Finally, the court also noted that Tatro's behavior was disrespectful. "Giving the human cadaver a name derived from a comedy film about a corpse and posting commentary about 'playing' with the human cadaver, taking her 'aggression' out on the human cadaver, and keeping a '[l]ock of hair' in her pocket are incompatible with the notions of respect and dignity for the individual who chose to donate his body to support the research and education missions of the Anatomy Bequest Program," wrote Meyer.

> "It's a sad reality that in today's climate, a narrow defeat is going to feel like it's a victory. We're essentially celebrating the fact that schools didn't do as much damage to First Amendment rights as they wanted to, and that's unfortunate."
>
> **— Frank LoMonte**
> **Executive Director,**
> **Student Press Law Center**

The court emphasized that its decision was based on the unique circumstances of the case, specifically the academic program with professional conduct standards. Although Tatro signed an agreement with the university promising to abide by certain rules, it was the established professional standards that factored into the decision, not this academic agreement. Meyer rejected the idea that the contract between the student and the university created the conduct standards, writing that "a university cannot impose a course requirement that forces a student to agree to otherwise invalid restrictions on her free speech rights."

Tatro's attorney Kushner expressed disappointment that the court upheld the punishment, but told the *Minnesota Daily* in a June 27, 2012 article, that the decision was a "substantial improvement" from the holding of the court of appeals, which would have given the university broader power to regulate off-campus speech.

Frank LoMonte, executive director of the Student Press Law Center (SPLC), said in a June 20, 2012, SPLC article that the decision was "definitely a narrow carve-out that seems only to impact a small subset of students." Because of the narrow ruling, LoMonte called the decision a "mixed result." "The First Amendment dodged a bullet today," LoMonte said. "The University of Minnesota was out to essentially wipe the First Amendment off the books for college students, and the Minnesota Supreme Court stopped them in their tracks."

The *Tatro* decision was the first to apply any standard to the regulation of off-campus student speech in colleges, LoMonte said, and although it is binding only on Minnesota state courts, it could be influential for other courts across the country. However, LoMonte said, by emphasizing the unique circumstances of the mortuary science program, the court avoided the question of what standard applies generally to off-campus student speech, an issue that has yet to be addressed.

Some experts found the decision to be positive for students' First Amendment rights. Raleigh Levine, a professor at the William Mitchell College of Law who filed an *amicus* brief in the case on behalf of the American Civil Liberties Union of Minnesota, said the court rejected the opportunity to extend the limits of free speech in high schools to university students. "The facts of this case were so unusual and so particular. In many ways, the University won this particular battle, but it lost the war," Levine said in a June 20, 2012, *Pioneer Press* article.

However, in the SPLC article, LoMonte said the decision would have been considered negative a few decades ago. "It's a sad reality that in today's climate, a narrow defeat is going to feel like it's a victory," LoMonte said. "We're essentially celebrating the fact that schools didn't do as much damage to First Amendment rights as they wanted to, and that's unfortunate."

– Emily Mawer
Silha Research Assistant

More States Pass Anti-Bullying Legislation

New laws may raise new questions over student speech rights

Bullying in American schools remains a concern for legislators across the country. As more states have passed legislation limiting permissible communications for public school students, however, courts and legal advocates have begun to address questions over whether such measures infringe students' rights to freedom of expression.

STUDENT FREE SPEECH

New York

A New York law signed by Gov. Andrew Cuomo on July 9, 2012, gives public elementary and secondary schools the authority to regulate students' off-campus Internet posts. The bill, N.Y. Educ. Law § 10, requires teachers to report speech, made off school property and not at a school-sponsored activity or event, to administrators if "it is foreseeable that the conduct, threats, intimidation or abuse might reach school property." After the principal or designee receives a report from a teacher, he or she must oversee an investigation to verify the incident and determine if the conduct constitutes bullying. The statute defines bullying as the "creation of a hostile environment by conduct or by threats, intimidation or abuse" that has or could have one of several effects including "unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being." If the investigation determines that the conduct was bullying, the law requires the school to take "prompt actions" to end the harassment. Schools also must instruct students on "safe, responsible use of the Internet and electronic communications." The bill does not create a specific criminal charge for cyberbullying, instead relying on the school to establish the protocol for punishing offenders.

New York Sen. Steve Saland (R-Poughkeepsie), a sponsor of the bill, called the legislation "a critically needed step" toward safe schools. "Students today live in a cyber-world, it's how most choose to communicate," Saland said in a June 19, 2012 press release. "It's also how many are cyberbullied — whether through messaging, emails or social networking sites, it's difficult for victims to escape the 24/7 exposure to threats, bullying or discrimination. With this new law, when cyberbullying impedes a student's ability to learn, victims and their parents will now have the ability to report the incidents to school districts to investigate."

Adam Goldstein, attorney advocate at the Student Press Law Center (SPLC), said in a June 19, 2012 SPLC article that the text of the law is constitutional on its face, but if it is construed broadly, could pose a threat to free speech. Specifically, Goldstein said the definition of bullying in the law, which includes conduct that "reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student," could be interpreted to include actions that emotionally harm a 12 year old. "If causing emotional harm to a student is cyberbullying, then every set of parents in New York has cyberbullied their kid," Goldstein said.

Maine

Maine Gov. Paul LePage signed a law May 21, 2012 requiring K-12 school districts to adopt a bullying prevention policy based on the state Commissioner of Education's model plan.

The Maine law, Me. Rev. Stat. tit. 20-A, § 1001, defines bullying as "a written, oral or electronic expression or a physical act" that "has, or a reasonable person would expect it to have, the effect of: physically harming a student," "placing a student in reasonable fear of harm," "creating an intimidating or hostile educational environment for the student," or "interfering with the student's academic performance." Like the New York law, the statute gives schools the power to regulate off-campus bullying if it "also infringes on the rights of the student at school."

The American Civil Liberties Union (ACLU) of Maine said it considered the law constitutional in a May 17, 2012 press release. In the release, Alysia Melnick, public policy counsel for the ACLU of Maine, said the law "struck an appropriate balance that protects student safety and freedom of speech." "We can reduce bullying in school without undermining our fundamental civil liberties," Melnick said.

Louisiana

On May 30, 2012, the Louisiana House of Representatives unanimously passed the Tesa Middlebrook Anti-bullying Act, named after a Louisiana high school student who killed herself just over a month earlier. Middlebrook's uncle, Michael Derson, told *The* (Baton Rouge) *Advocate* that Middlebrook had been the victim of bullying for a year prior to her death. The bill now awaits final approval from the Louisiana Senate and, according to a May 29, 2012 SPLC article, has the support of Gov. Bobby Jindal.

The bill defines bullying as "a pattern of … gestures," "written, electronic, or verbal communications," "physical acts," or "shunning or excluding from activities" that has the effect of "physically harming a student, placing the student in reasonable fear of physical harm, damaging a student's property, placing the student in reasonable fear of damage to the student's property," creating "an intimidating or threatening educational environment," "substantially interfering with a student's performance in school," or "substantially disrupting orderly operation of the school." The bill sets out guidelines for reporting and investigating incidents of bullying in public K-12 schools and for disciplining the students involved.

SPLC Executive Director Frank LoMonte said he believes the bill is unconstitutional in a May 29, 2012 SPLC article. Under the bill, bullying conduct would be punishable if it "substantially interfer[es] with" the victim's school work, even if the victim is unusually emotionally fragile. However, LoMonte said that standard violates the First Amendment. The standard for K-12 schools regulating non-school sponsored speech is from a U.S. Supreme Court case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that a school may regulate student speech only if it reasonably anticipates a "substantial disruption of or a material interference with school activities." However, based on this statute, LoMonte said that the school could punish a student for speech based on its effect on one student, rather than the entire school.

LoMonte said that the legislators' response to the Middlebrook's suicide is understandable, but lawmakers should think carefully about limiting free speech. "Grief is a powerful motivator," LoMonte said in the May 29 SPLC article. "But grief can also be blinding." LoMonte said that infringing upon students' First Amendment rights is not an appropriate way to remember Middlebrook or other victims of bullying. (For more background on bullying legislation, see "Courts Continue to Grapple with Online Student Speech Cases; Supreme Court Chose Not to Weigh In," in the Spring 2012 issue of the Silha *Bulletin*; "Social Media Laws Aim to Curb Bullying and Abuse of Children Online," in the Fall 2011 issue; "Student Speech: Off-Campus, Online, and in Trouble," in the Summer 2011 issue.)

Bullying, *continued on page 25*

Update: Charges Filed in British Phone Hacking Case

On July 24, 2012, the British Crown Prosecution Service announced that it would file criminal charges against eight people in connection with the "phone hacking" scandal rocking the British media. The announcement followed more than a year's worth of revelations, investigations, and inquiries, sparked by one of the most wide-reaching ethics scandals in modern media history.

MEDIA ETHICS

The group facing charges includes some of what website The Daily Beast called "Fleet Street's most prominent tabloid journalists:" Rebekah Brooks, former chief executive of Rupert Murdoch's News International and before that, editor of *News of the World*, a newspaper Murdoch closed as the scandal unfolded around it in spring and summer 2011, and Andy Coulson, *News of the World* editor after Brooks who resigned amid an earlier phase of the phone hacking controversy in 2007. Coulson subsequently served as British Prime Minister David Cameron's Director of Communications. Stuart Kuttner was *News of the World* managing editor for 22 years; Greg Miskiw, Ian Edmondson, and James Weatherup were senior reporters and assistant editors. Neville Thurlbeck was a chief reporter. Glenn Mulcaire, a private investigator who worked for the newspaper, was convicted in 2006 of illegally listening to voice mail messages of the royal family. He now faces new charges. (For more on the phone hacking scandal, see "Not Just a 'Rogue Reporter': 'Phone Hacking' Scandal Spreads Far and Wide" in the Summer 2011 issue of the Silha *Bulletin*, and "Murdoch-owned British Paper Embroiled in Phone Scandal" in the Fall 2009 issue.)

A statement by Alison Levitt QC, principal legal advisor to the Director of Public Prosecutions, said that among the total of 19 charges, all but Mulcaire were to be charged with "conspiring to intercept communications without lawful authority, from 3rd October 2000 to 9th August 2006. The communications in question are the voicemail messages of well-known people and/or those associated with them. There is a schedule containing the names of over 600 people whom the prosecution will say are the victims of this offence." Each individual will face additional charges related to specific victims whose phones they allegedly hacked. *The New York Times* reported July 24 that the charges could carry prison sentences of up to two years.

Brooks and Coulson were already facing charges related to phone hacking investigations before the July 24 charges. On May 15, *The New York Times* reported that Brooks was charged along with five other people for "perverting the course of justice" by trying to hide or destroy evidence. On May 30, Coulson was charged with perjury for lying under oath while discussing phone hacking at *News of the World*.

Although the practice of phone hacking — illegally accessing the voicemail of famous or prominent subjects of news coverage — had been known about since before the 2006 case involving Mulcaire, the problem sparked increasing public and political outrage when an investigation by *The Guardian* revealed that the *News of the World* accessed the voice mail of Milly Dowler, a 13-year-old girl who went missing in 2002 and was later found murdered. *News of the World* investigators and reporters allegedly listened to the voice mail messages of worried family members as police searched for her.

The New York Times' John F. Burns wrote on July 24, 2012 that the scandal's effects are far-reaching. British reporters and editors say it has led to a "chilling effect" on the press, as the notorious "red top" tabloids are less eager to appear sensational or unethical. The scandal has also uncovered a culture of corruption and bribery, "checkbook journalism that is alleged to have included payments rising into the tens of thousands of dollars to public officials, including police and prison officers." In addition to the harm done to Murdoch's News Corp. in the public eye, the scandal has led to "hundreds of millions of dollars in legal costs, out-of-court settlements and payoffs to employees who have been laid off," including a settlement with Milly Dowler's family reported to be several million dollars. "Together, prosecutors say, it is a tally of wrongdoing that is likely to yield many more criminal cases in the months ahead," Burns wrote.

(For more on the phone hacking scandal, see "Director's Note: Scandals, Inquiries, and Reform Might Leave U.K. Press Freedom Worse for the Wear" on page 3 of this issue of the *Bulletin*.)

– Patrick File
Silha *Bulletin* Editor

Bullying, *continued from page 24*

Indiana: Expulsion for Facebook Posts Draws Lawsuit

Meanwhile, one school's efforts to prevent bullying drew a lawsuit claiming a First Amendment violation. On April 25, 2012, the American Civil Liberties Union (ACLU) of Indiana filed a complaint against Griffith Public Schools in Griffith, Ind., alleging that middle school administrators violated three female students' free speech rights when they expelled them based on a Facebook conversation made on the students' personal electronic devices.

According to an April 26, 2012, *Chicago Tribune* story, the ACLU's complaint states that the posts began with a discussion of shaving and then the girls' friendships, but turned into a debate about which of their classmates they would kill if they could. The students were suspended shortly after a parent brought the Jan. 24, 2012 conversation to the principal's attention. Griffith Middle School expelled the girls in February, after a hearing determined that the students violated the school's bullying, harassment, and intimidation policy. According to the *Tribune*, the complaint states that the expulsions will end in August 2012, and The Associated Press (AP) reported on April 25 that the girls will be permitted to attend high school in the district in Fall 2012.

However, the ACLU hopes to overturn the expulsion. The group argues that the school went beyond ensuring a safe school environment and instead infringed upon protected speech. "The fact of the matter is that no reasonable person looking at this conversation would think that these girls were going to go out and inflict harm on anyone," Gavin Rose, attorney for the ACLU, told the AP. "If you make a legitimate threat against someone ... you don't follow it up with an emoticon."

Director of the Religious Freedom Education Project, Charles Haynes, said schools should foster conversations of diverse viewpoints, rather than preventing speech, to teach students how to interact with people of differing opinions. "Censorship doesn't make schools safer," Haynes wrote in a June 1, 2012 First Amendment Center article. "On the contrary, suppressing speech only deepens divisions and fuels intolerance. To prepare students for citizenship in a pluralistic democracy that values the First Amendment, schools must be places that are both safe and free."

– Emily Mawer
Silha Research Assistant

Mexico Amends Constitution to Protect Journalists and Free Expression Amid Violence

Implementing the new measure will require more legislation and reform

On June 6, 2012, Mexican lawmakers approved an amendment to the nation's constitution that made attacks on journalists a federal crime in an effort to protect reporters covering the violent struggle with drug cartels and drug-related crime.

The amendment, Article 73, Section XXI of the Mexican Constitution, makes crimes against journalists a federal offense and gives federal authorities the power to investigate and try crimes committed against journalists even when they are committed in areas that normally would fall under local or state jurisdiction. The newly-revised Mexican Constitution is available online in Spanish at http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf.

INTERNATIONAL

The Mexican Senate approved the measure on March 6, 2012, sending it on to the 31 state legislatures, 16 of which had to pass it in order for it to be ratified. The majority of 16 was met on June 6, 2012. According to a June 14, 2012 article by Article 19, an advocacy group for freedom of expression worldwide, the amendment empowers the federal government to investigate and prosecute crimes committed against journalists, persons, or places which affect, limit or undermine the right to freedom of expression and information, or freedom of the press.

A March 9, 2012 article by the Committee to Protect Journalists (CPJ) reported that more than 40 Mexican journalists have died or disappeared in Mexico since 2006. Crimes against journalists have remained largely unsolved due to negligence and corruption among law enforcement officials, particularly those at the state level, CPJ reported, which has led Mexican journalists to avoid controversial topics such as violence, corruption, and drug trafficking, and left citizens without access to information. (For more on the challenges Mexican journalists face, see "Journalism Suffers Amid Drug Wars in Mexico" in the Fall 2010 issue of the Silha *Bulletin*.)

According to a March 30, 2012 article in the English-language newspaper *Guadalajara Reporter*, the amendment will give federal authorities the power to handle cases such as the murder or kidnapping of journalists, removing such cases from the hands of local police enforcement officials and judges who allegedly are often negligent or corrupt.

> Crimes against journalists have remained largely unsolved due to negligence and corruption among law enforcement officials, particularly those at the state level, which has led Mexican journalists to avoid controversial topics.
>
> **— Committee to Protect Journalists**

Making murders of journalists a federal crime also increases the punishment if the alleged perpetrators are found guilty, the *Guadalajara Reporter* said.

Press freedom advocates have said that the broad mandate of the amendment will probably create the need for legislation in order to enforce it. Article 19 outlined several ways in which Mexican federal law could be rewritten to accommodate the new constitutional language in its June 14 article. The law will need to specify the circumstances in which the federal government can claim jurisdiction over an investigation or prosecution, for example, and the federal criminal code and code of criminal procedure may also need to be revised to implement the new amendment.

In addition to the revised legislation, Article 19 stated that the Special Attorney's Office for Crimes against Freedom of Expression (in Spanish, Fiscalía Especial para la Atención de Delitos Cometidos contra la Libertad de Expresión, or FEADLE), which investigates crimes against freedom of expression that are classified as federal offenses, needs to be incorporated into the Mexican Attorney General's office. According to CPJ's March 9, 2012 article, FEADLE has never solved a case and suffers from a lack of resources. Additional legislation would also provide FEADLE with the necessary human and financial resources to carry out its mission, Article 19 said.

Eugenio Herrera, general counsel for Grupo Reforma, Mexico's largest newspaper publisher, told the *Guadalajara Reporter* that he doubted that the amendment and any accompanying laws would make the country safer for journalists. "We have higher prison punishments for kidnapping, for drug trafficking and that doesn't seem to deter criminals from committing those crimes," Herrera said. Meanwhile, Carlos Lauría, senior program coordinator for the Americas for CPJ, commended the passage of the legislation, calling it "the first step to stop impunity in the killings of Mexican journalists."

Article 19 noted that because of the amendment's broad language pertaining to crimes that limit freedom of expression and information, it could apply not only to those working with established media organizations but to citizen journalists and users of social media as well. This is important because regular citizens have turned to the Internet to report criminal activities carried out by the drug cartels after traditional media outlets were silenced. But now even the people who write about these crimes are facing violent retribution from the drug cartels, "endangering the constitutional rights of all Mexicans to freedom of expression and access to information," Lauría stated in a September 26, 2011 CPJ article. For more on the threats to social media users in Mexico, see "Dangers Faced by Journalists Extend to Social Media Users" in the Fall 2011 issue of the Silha *Bulletin*.

Passage of the amendment did not immediately seem to quell violence against journalists in the summer of 2012. On June 14, Victor Manuel Báez Chino, a crime editor for the national newspaper *Milenio* and an editor of the news website Reporteros Policiacos, was found murdered in Xalapa, Veracruz. According to CPJ on June 14, 2012, state spokeswoman Gina Domínguez said Chino may have been the victim of organized crime, and National Attorney General Marisela Morales stated that it

Amendment, *continued on page 27*

Silha Lecture to Feature Famous Food Critics and Mystery Guest

Food criticism's ethical conundrums will be on the table

On October 25, 2012, four food critics will discuss the ethical challenges of food and restaurant criticism at the 27th Annual Silha Lecture: "A Question of Taste: The Ethics and Craft of Restaurant Reviewing." The 2012 lecture will feature Lynne Rossetto Kasper, co-creator and host of American Public Media's national radio show, "The Splendid Table," and Jane and Michael Stern, who are weekly guests on "The Splendid Table." The panel will also include a fourth mystery guest — an award-winning veteran local food critic whose identity will be concealed in the interest of maintaining anonymity.

SILHA CENTER EVENTS

The panel discussion will center on traditional ethical issues that arise from food and restaurant reviews as well as newer questions presented by interactive Internet culture and online review websites. The panel will consider problems such as how professional restaurant critics can relate to diners with a range of experiences and tastes and the challenges of remaining balanced and fair in the face of close friendships in the food industry, the demands of employers who are eager to please advertisers, and the tendency for restaurants to provide preferential service to critics even when they strive to keep their identities secret.

The panel will also discuss newer problems related to the craft of criticism as traditional professional critics are increasingly joined by thousands of amateur critics writing online, posting critiques on blogs, social networks, and web sites like Yelp and Urbanspoon. Are these reviewers the ordinary "real people" they claim to be, or might they have an agenda to promote or an ax to grind? Should the new amateur online critics be expected to follow fundamental principles of media ethics like avoiding conflicts of interest, refusing special treatment, or correcting mistakes? Kasper, the Sterns, and the mystery guest will discuss these problems and more, as well as take questions from the audience.

Kasper's radio program, "The Splendid Table" has won James Beard Foundation Awards for Best National Radio Show on Food in 1998 and 2008, a Gracie Allen Award in 2000 for Best Syndicated Talk Show, and Clarion Awards from Women in Communication in 2007, 2008, 2009 and 2010. According to "The Splendid Table" website, Kasper says she created the program as a means to explore everything she loved about food: the culture, the science, the history, the back stories and deeper meanings that come together every time people sit down to enjoy a meal. "The Splendid Table" became "the radio program for people who love to eat."

Besides being weekly guests on "The Splendid Table," Jane and Michael Stern's Roadfood.com website covers informal and inexpensive regional eateries along highways, in small towns, and in city neighborhoods. Their collaboration has yielded more than 40 books, including *Roadfood*, *Square Meals*, and *American Gourmet*. The Sterns have won three James Beard Foundation journalism awards for their monthly column in *Gourmet* magazine, and are contributing editors of *Saveur* magazine and the Sunday supplement *Parade*.

The event's mystery guest is a James Beard Foundation award-winning Twin Cities food critic who has written for a local publication for about 15 years and whose work has appeared in several editions of the *Best Food Writing* book series.

This year's Silha Lecture will begin at 7:00 pm in Cowles Auditorium on the University of Minnesota Twin Cities West Bank campus. A book signing will follow the lecture. The event is free and open to the public, and no reservations or tickets will be required. Parking is available at the 19th and 21st Avenue parking ramps on the University of Minnesota's West Bank campus. More information about directions and parking is available online at www.umn.edu/pts.

The Silha Center for the Study of Media Ethics and Law is based at the School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities, including the annual Lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen. For further information, please contact the Silha Center at 612-625-3421 or silha@umn.edu or visit www.silha.umn.edu.

– Elaine Hargrove
Silha Center Staff

Amendment, *continued from page 26*

was possible state officials were also involved in the murder. CPJ reported that Chino was the fourth journalist in two months to be killed in the state of Veracruz.

On July 11, 2012, CPJ reported that three separate news outlets were attacked on July 10, causing property damage but no injuries. Two of the attacks were against weekly supplements of the daily *El Norte*, located in different areas of the city of Monterrey. One of the supplements, *La Silla*, was hit by an explosive device which damaged the front of the building, and the other, *Linda Vista*, was attacked by a group of people who fired on the building. One member of the group also threw a grenade at the building, damaging its façade and some windows. The third outlet, *El Mañana*, located in Nuevo Loredo, was hit by an explosive device which damaged the façade of the building. *El Mañana* was one of the first news organizations to stop covering conflicts between crime groups, and to also publicly acknowledge that it was doing so, CPJ reported.

– Elaine Hargrove
Silha Center Staff

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& MASS COMMUNICATION

TWENTY-SEVENTH ANNUAL SILHA LECTURE

Lynne Rossetto Kasper

Jane and Michael Stern

Mystery Guest

A Question of Taste:

The Ethics and Craft of Restaurant Reviewing

October 25, 2012 • 7:00 p.m. – 9:00 p.m.
Cowles Auditorium
University of Minnesota West Bank

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Contact the Silha Center at silha@umn.edu or 612-625-3421 for additional information.