THE SILHA Bulletin

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Special Series

We devote the first three articles of this issue of the Silha *Bulletin* to the ethics of covering President Donald Trump, President Trump's supporters, and the "alt-right."

We examine the media ethics concerns that arise when news organizations cover a presidency that many individuals, from a variety of viewpoints, consider unconventional.

The Ethics of Covering President Donald Trump

In the winter and spring of 2017 and 2018, media organizations and experts grappled with ethical and legal questions regarding the coverage of President Donald Trump and his administration. In early January 2018, journalists and other observers raised ethical concerns about author Michael Wolff's methodology in his book *Fire and Fury*, which described behind-the-scenes details of President Trump's White House. The Trump administration's cease and desist letter, and the publisher's decision to publish the book anyway, also raised legal concerns. On January 12, President Trump reportedly called Haiti, El Salvador, and African nations "shithole countries," leading media outlets to weigh whether to publish or broadcast the word, again citing both ethical and legal issues.

Book About the Trump Administration's White House Raises Ethical and Legal Questions

On Jan. 3, 2018, *The Guardian* and *New York* magazine published leaked portions of *Fire and Fury: Inside the Trump White House*, a book describing behind-the-scenes details about President Donald Trump's White House and administration. The book raised several ethical concerns about the methodology of the book's author, Michael Wolff. Additionally, the Trump administration's effort to stop the publication of the book in a January 4 cease and desist letter, and the publication of the book by publisher Henry Holt and Company despite the letter on January 5, led to several legal questions, including whether Wolff had defamed President Trump.

On Jan. 3, 2018, *The Guardian* reported that author Michael Wolff, who previously contributed to *USA Today*, *The Hollywood Reporter*, and other outlets, had reportedly conducted more than 200 interviews dating back to mid-2016 with President Trump, his cabinet and inner circle, and several other individuals in and around the administration for his new book *Fire and Fury*. Henry Holt and Company is a subsidiary of Macmillan Publishers, which stated on its website that *Fire and Fury* "reveals what happened behind-the-scenes in the first nine months of the most controversial presidency of our time."

The book covered several topics, including the firing of Federal Bureau of Investigation (FBI) director James Comey and the White House staff's thoughts and comments on President Trump. The book also contained several controversial quotes attributed to Steve Bannon, the former White House Chief Strategist, including that the Special Counsel investigation led by Robert Mueller into possible collusion between President Trump's administration and Russia would "crack [Donald Trump Jr.] like an egg on national TV."

According to *Politico* on January 4, Wolff described himself in the book as a "constant interloper," who was able to "observe the chaos around him" because there was no one imposing order. He added, "Some of my sources spoke to me on so-called deep background, a convention of contemporary political books that allows for a disembodied description of events provided by an unnamed witness to them."

After *The Guardian* and *New York* magazine leaked portions of *Fire and Fury*, and following the publication of the book on January 5, observers raised ethical concerns about Wolff's methodology. First, several news organizations pointed out that Wolff's credibility had been questioned in the past. *Politico* noted on January 4 that Michelle Cottle of *The New Republic*, a liberal magazine, wrote in a 2004 profile of Wolff that "the scenes in his columns aren't recreated so much as created — springing from Wolff's imagination rather than from actual knowledge of events." She added that instead of using conventional reporting, Wolff "absorbs the atmosphere and gossip swirling around him at cocktail parties, on the street, and especially during those long lunches at Michael's."

In a 2008 review of Wolff's biography of Fox News mogul Rupert Murdoch, *The Man Who Owns the News*, the late *New York Times* media columnist David Carr wrote that "historically one of the problems with Wolff's omniscience is that while he may know all, he gets some of it wrong." The full review is

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available online at: https://www.nytimes.com/2008/12/28/books/review/Carr-t.html.

In a January 9 *Slate* book review, staff writer Isaac Chotiner wrote that Wolff "has been known to make lazy mistakes; he tells stories that prompt eye-rolls because something about them just doesn't ring true."

In an author's note, Wolff acknowledged that some of the stories in his book may be inaccurate. "Many of the accounts of what has happened in the Trump White House are in conflict with one another; many, in Trumpian fashion, are baldly untrue," he wrote. "Those conflicts, and that looseness with the truth, if not with reality itself, are an elemental thread of the book. Sometimes I have let the players offer their version, in turn allowing the reader to judge them. In other instances I have, through a consistency in accounts and through sources I have come to trust, settled on a version of events I believe to be true."

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Second, several news outlets alleged that Wolff had used interviews that were conducted "off the record" or that the interviewee did not realize was a formal interview, according to *The Washington Post* on January 7. The *Post* concluded that "the lesson is there for the taking but certain to be ignored again and again: Let the speaker beware."

Jim VandeHei and Mike Allen, the co-founders of the news website Axios, called Wolff's "liberties with off-the-record comments . . . ethically unacceptable to nearly all reporters" in a January 5 story. They continued, "In the past year, we have had many of the same conversations with the same sources Wolff used. We won't betray them, or put on the record what was off." Nevertheless, they conceded that Wolff's alleged tactics "have the effect of exposing Washington's insider jokes and secret languages, which normal Americans find perplexing and detestable."

In a January 4 tweet, *Bloomberg View* columnist Joe Nocera wrote, "I wonder how many [White House] staff told Wolff things off the record that he then used on the record.. . . He's never much cared about burning sources. Can't imagine that many of those quotes were meant for publication." Editor of the *Bloomberg View* opinion columns Jonathan Landman agreed in an interview with the *Post.* "My personal practice is to speak on the record or keep my mouth shut," he said.

However, in an interview on NBC's "Today" show on January 5, Wolff denied using material taken "off the record." "Whether [they] realized it was an interview or not, I don't know, but it certainly was not off the record," he said. But when asked whether he misled anyone while in the West Wing, Wolff asserted, "I said whatever was necessary to get the story."

On January 4 and 5, *Politico* and the *Columbia Journalism Review* (*CJR*) noted that Wolff had previously criticized the media in order to gain access to the White House and gain the favor of President Trump. *CJR* wrote that Wolff "played a nefarious role in discrediting real reporting by hardworking journalists through his self-interested critiques," even though Wolff "never could have written his book without the hard work of journalists over the past year; the fire he catalogs was often fueled by stories from mainstream reporters." *Politico* concluded that Wolff knew that the "greater the criticism from the press . . . the greater likelihood the Trumpies would embrace him." In a February 5 interview on CNN, Wolff admitted that he was "sucking up a bit to get access."

Finally, several observers contended that Wolff was not practicing conventional journalism. On January 5, CNN "New Day" co-host Alisyn Camerota said, "This isn't really journalism. This is a very interesting read but in terms of the way he processed them, he admits in the author's note that he let people tell their own stories and he printed them." She added, "[I]t sounds like Michael Wolff's *modus operandi* was to let the people he interviewed spin yarns.. . . And then he didn't necessarily fact-check them."

On January 9, *PolitiFact* reported that it had found seven errors in Wolff's book, such as its claim that then-Speaker of the House John Boehner resigned in 2011 when it was actually 2015. However, *PolitiFact* argued that the "bigger problem with *Fire and Fury* . . . is that by any standard of sound journalism it has big problems with transparency and sourcing" and that it "hardly seems a move in the right direction for well-sourced, evidence-based journalism. Instead it's a stew of mysteriously sourced dramatic scenes." For example, *PolitiFact* noted that it was unclear whether Wolff interviewed Jared Kushner and Ivanka Trump, and whether he was actually the witness to certain events, such as an alleged confrontation between Ivanka Trump and Bannon.

On January 4, *Politico* contended that Wolff "appear[ed] to have mastered a journalistic skill that allows him to suck up one moment and then, when seated at the keyboard, to spit out." The following day, *CJR* differentiated Wolff's methodology from reporting by traditional outlets. According to *CJR*, Wolff practiced "access journalism," which "does not replace other forms of journalism—it augments it," but requires "prioritizing access over accountability." Conversely, traditional outlets "[play] a different game. Yes, they occasionally produce gossipy accounts of the president's diet, both media and culinary, and they work to maintain relationships that will allow for sit-downs with principals. But they also probe beyond the surface of backstabbing and palace intrigue to unearth scoops."

In a March 26, 2018 interview with Vassar College's *The Vassar Political Review*, Wolff conceded, "I'm not a political journalist. I'm not, frankly, all that much interested in politics." He added, "I'm a writer. I'm barely a journalist, actually. I am a writer.. . . All I do is look and write what I see and what I hear, and my job — which has nothing to do with truth — is to take what I see and what I hear and write that in a way that readers can come [as close] as possible — as close as I came — to the experience of doing this."

Despite the ethical concerns raised regarding Wolff's methodology, several journalists defended him. In a January 4 tweet, *Hollywood Reporter* co-president Janice Min wrote that "every word [she'd] seen from the book . . . [was] absolutely accurate" regarding a discussion of a dinner party hosted by Bannon and the late Roger Ailes, who was previously CEO of Fox News and Fox Television Stations Group. Jonathan Weber, the global technology editor at Reuters, posted a tweet in which he explained that he "once had the pleasure of editing [Wolff's] columns at the *Industry Standard*" and that "[n]othing ever led me to doubt his reporting."

Fire and Fury also raised several legal concerns. On Jan. 4, 2018, an attorney for President Trump sent a cease-and-desist letter to Steve Rubin, the president of Henry Holt and Company, as well as to Wolff, "demand[ing] that [the publisher] immediately cease and desist from any further publication, release or dissemination of the Book, the Article, or any excerpts or summaries of either of them, to any person or entity, and that [it] issue a full and complete retraction and apology to [President Trump] as to all statements made about him in the Book and Article that lack competent evidentiary support."

The letter contended that the false statements made about President Trump in the book, as well as excerpts in an article

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in *New York* magazine written by Wolff (article), gave rise to several legal claims. First, the letter contended that Wolff and the publisher were liable for libel and libel *per se*. The letter explained that New York law defines libel "as a written statement of fact regarding the plaintiff published by the defendant that is false and causes injury to the plaintiff." Libel *per se* "involves a false allegation that a person is engaged in a crime, or that otherwise tends to injure a person in his or her trade, business, or profession" and means the statement is defamatory "on its face."

Second, the letter argued that the statements in the book and article constituted false light invasion of privacy, meaning they were "public statement[s] about a person that either is false or places the person in a false light, is highly offensive to a reasonable person, and is made in reckless disregard of whether the information is false or would place the person in a false light." The letter explained that false light invasion of privacy includes "embellishment," the addition of false material to an otherwise true story, and "distortion," the arranging of truthful information in a way that creates a false impression about the subject.

Third, the letter asserted that President Trump and his counsel could prove actual malice, a standard established by the U.S. Supreme Court in *New York Times v. Sullivan* that public officials have to show that an individual or organization had knowingly published false information or acted with reckless disregard for the truth. 376 U.S. 254 (1964). The letter cited Wolff's author's note in which he admitted that the book contained untrue statements. Additionally, the letter contended that the book "appear[ed] to cite to **no sources** for many of its most damaging statements about Mr. Trump" (emphasis in original) and that many of Wolff's alleged sources had denied speaking to him or making the statements attributed to them.

Finally, the letter alleged that Wolff and Henry Holt and Company were liable for "inducement of breach of Mr. Bannon's written agreement" with President Trump that prevented Bannon from "[d]isclosing any confidential information to anyone of or about Mr. Trump," among other provisions. The letter contended that because Wolff and the publisher were now aware of the agreement, the publication of the book would "give[] rise to claims of tortious interference with the [a]greement, and inducement of Mr. Bannon to breach of the Agreement."

The letter provided a series of instructions in order to comply with the demand that Wolff and the publisher "preserve, and not delete, destroy, hide or misplace, all documents, communications and materials of all types, in both physical and electronic form, that refer to or relate to in any way to [*Fire and Fury*] . . . the [a]rticle, . . . Mr. Trump, any/all of his family members, and/all of their businesses, and/or the Donald J. Trump for President campaign."

The letter was signed by Charles Harder of Harder, Mirell, and Abrams LLP, who is best known for his victorious lawsuit against media gossip website *Gawker* on behalf of former professional wrestler Hulk Hogan, as well as his more recent legal attacks on technology news website *TechDirt* and women's website *Jezebel*. (For more information on Harder and his lawsuits against media outlets, see "Attorney Charles Harder Continues Attacks on News Websites by Filing Defamation Suits" in the Fall 2017 issue of the Silha *Bulletin*, "*Gawker* Shuts Down After Losing Its Initial Appeal of $140 Million Judgment in Privacy Case" in the Summer 2016 issue, and "*Gawker* Faces $140 Million Judgment after Losing Privacy Case to Hulk Hogan" in the Winter/Spring 2016 issue.) The full letter is available online at: https://www.politico.com/f/?id=00000160-c1d4-dcd4-a96b-f5fd89f70001.

In response to the letter, Elizabeth A. McNamara, a partner at Davis Write Tremaine representing Henry Holt and Company, first addressed Harder's claims of libel and libel *per se*. She wrote that the cease-and-desist letter did not identify "a single statement in the book that is factually false or defamatory." McNamara contended that the letter instead appeared "to be designed to silence legitimate criticism. This is the antithesis of an actionable libel claim." She continued, "We have no reason to doubt — and your letter provides no reason to change this conclusion — that Mr. Wolff's book is an accurate report on events of vital public importance." Furthermore, McNamara explained that Wolff's author's note did not admit that the book contained untrue statements, but instead that he had probably been told falsehoods, and, as a result, did not necessarily report them as true.

Second, McNamara contended that the false light invasion of privacy claim was "meritless" and "non-existent" because "New York does not recognize such a cause of action." Even if it did, according to McNamara, a "claim that the privacy of the *President of the United States* [had] been violated by a book reporting on his campaign and actions in office" (emphasis in original) was "patently ridiculous."

Finally, McNamara argued that Bannon "had already communicated with Mr. Wolff freely and voluntarily well before the 'notice'" provided by Harder's letter regarding Bannon's agreement with President Trump. She claimed that it was Bannon's responsibility, not Wolff's or the publisher's, "to honor any contractual obligations." Such a use of private contracts to "act as a blanket restriction on members of the government speaking to the press" is a "gross violation of the First Amendment," according to McNamara.

The New York Times reported on January 4 that *Fire and Fury* would officially go on sale the following day due to high demand, and despite the cease and desist letter. In a January 8 email to employees, Macmillan CEO John Sargent defended the publication of the book, calling President Trump's attempt to block it "unconstitutional," according to *Time* magazine the same day. He wrote, "[A] demand to cease and desist publication — a clear effort by the President of the United States to intimidate a publisher into halting publication of an important book on the workings of the government — is an attempt to achieve what is called prior restraint. That is something that no American court would order as it is flagrantly unconstitutional." Sargent continued, "We need to respond strongly for Michael Wolff and his book, but also for all authors and all their books, now and in the future. And as citizens we must demand that President Trump understand and abide by the First Amendment of our Constitution."

As the *Bulletin* went to press, no legal action had been announced against Wolff, Henry Holt and Company, or Macmillan.

Media Organizations Face Ethical and Legal Questions Following President Donald Trump's Use of Profanity

In a January 2018 meeting with several lawmakers regarding immigration, President Donald Trump reportedly asked "Why do we want all these people from shithole countries coming here?" in reference to Haiti, El Salvador, and African countries. The comment raised ethical and legal concerns for media organizations about whether to publish or broadcast the word "shithole."

On Jan. 11, 2018, *The Washington Post* reported that President Trump, while

discussing protecting immigrants from Haiti, El Salvador, and African countries as part of a bipartisan immigration deal, "grew frustrated" and asked, "Why are we having all these people from shithole countries come here," according to several people briefed on the meeting, including Sen. Dick Durbin (D-Ill.). President Trump then suggested that the United States should bring more immigrants from countries like Norway, while immigrants from Haiti should be left out of the new immigration plan, which included four immigration bills, each of which ultimately failed in the Senate, according to *Vox* on February 15.

President Trump denied using the language in a January 12 tweet, which read, "The language used by me at the DACA meeting was tough, but this was not the language used." He added in a second tweet, "Never said anything derogatory about Haitians other than Haiti is, obviously, a very poor and troubled country." In an interview on ABC's "This Week," Sen. David Perdue (R-Ga.) said the president did not use the word, calling it a "gross misrepresentation." However, Sen. Durbin maintained that President Trump had used the word. Additionally, Sen. Tim Scott (R-S.C.) told the *Post and Courier* on January 12 that Sen. Lindsey Graham (R-S.C.) had told him the media reports were "basically accurate."

The remarks drew significant criticism, including from Rep. Mia Love (R-Utah), whose family is from Haiti. She said in a statement that President Trump's remarks were "unkind, divisive, elitist, and fly in the face of our nation's values. This behavior is unacceptable from the leader of our nation," according to the *Post*. In a statement condemning President Trump's remarks, Haiti's ambassador to the United States, Paul G. Altidor, said that "the president was either misinformed or miseducated about Haiti and its people."

White House spokesman Raj Shah defended President Trump's position in a January 12 statement. "Certain Washington politicians choose to fight for foreign countries, but President Trump will always fight for the American people," he said. "Like other nations that have merit-based immigration, President Trump is fighting for permanent solutions that make our country stronger by welcoming those who can contribute to our society, grow our economy and assimilate into our great nation."

Amidst the backlash from President Trump's comments, media outlets grappled with ethical and legal questions about using the word "shithole." *Washingtonian*, a Washington, D.C. magazine, tracked how different media outlets covered President's Trump's comments in their headlines. Numerous print and online media outlets published "shithole" in their headlines, including *Time* magazine, *BuzzFeed*, the *Los Angeles Times*, the *Huffington Post*, and *The Washington Post*.

Other print outlets chose to use asterisks or other means of editing the word, such as "s---hole," including *The Hill* and the *Daily Beast*, among others. According to the Poynter Institute (Poynter) on January 12, some outlets chose to keep the word in their story, but not in the headline. *The New York Times* used "Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa" in its headlines, but kept the word in its story. The Pittsburgh *Post-Gazette* tweeted on January 11 that its publisher had requested that the paper "remove [President Trump's] 'vulgar language' from the lede in [its Associated Press] story about his vulgar language," with which the paper complied.

Broadcast radio and television outlets not only faced ethical questions about reporting on President Trump's comments, but also faced legal questions, such as whether they could be penalized by the Federal Communications Commission (FCC) for profanity or indecency. According to *The Washington Post* on January 12, CNN and MSNBC used the word in capital letters in their headlines appearing on the lower part of the television screen. Conversely, Fox News edited the word with asterisks. Lester Holt on "NBC Nightly News" warned viewers that the story would not be appropriate for younger viewers, while "ABC World News Tonight" anchor David Muir said the president used "a profanity we won't repeat." In a January 12 opinion piece, National Public Radio (NPR) ombudsman Elizabeth Jansen explained that NPR initially did not use the word, but later changed its guidance to using the word on the air and spelling it out online following the January 12 *Morning Edition*, providing a brief warning to listeners about the language.

The FCC defines profane content as "grossly offensive language that is considered a public nuisance." Indecent content is that "portray[ing] sexual or excretory organs or activities in a way that does not meet the three-prong test for obscenity." Neither profanity nor indecency rules apply to cable or satellite television channels, such as CNN, MSNBC, or Fox News, so long as the content does not constitute obscenity, as defined by a three pronged test established by the U.S. Supreme Court in *Miller v. California*: Such content must appeal to an average person's prurient interest; depict or describe sexual conduct in a "patently offensive" way; and, taken as a whole, lack serious literary, artistic, political or scientific value. 413 U.S. 15 (1973). Broadcast stations are prohibited from broadcasting profane or indecent material between the hours of 6 a.m. and 10 p.m., with the remaining time referred to as "safe harbor." In order for the FCC to take action against a radio or television station, it must first receive a complaint from a member of the public.

Prohibition of such material first appeared in the 1927 Radio Act, which provided that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years or both." The prohibition is now found under 18 U.S.C. § 1464.

In 1978, the U.S. Supreme Court established the FCC's authority to regulate indecency over airwaves. *FCC v. Pacifica*, 438 U.S. 726 (1978). The Court upheld the FCC's decision that George Carlin's famous "seven dirty words" monologue was indecent when carried on the radio during times when children could hear it.

However, the case left open the question of whether the FCC could regulate the occasional swear word, rather than the more systemic indecency in Carlin's case. During the 2003 Golden Globe Awards, U2 singer Bono said after receiving an award, "this is really, really, fucking brilliant. Really, really great." In response to complaints, the FCC said for the first time that a "single, nonliteral use of an expletive . . . could be actionably indecent." On April 28, 2009, the Supreme Court upheld the new "fleeting expletives" standard, finding that the order was not "arbitrary and capricious." But on remand, the U.S. Court of Appeals for the Second Circuit ruled that the standard was unconstitutional, with which the Supreme Court agreed in 2012, finding that the FCC retained its authority from *Pacifica* to regulate indecency, but that the current regulatory implementation was invalid.

In April 2013, the FCC proposed a new enforcement approach for "egregious situations." The FCC issued a Public Notice seeking comment on whether the full Commission "should make changes to its current broadcast indecency policies

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Trump, *continued from page 5*

or maintain them as they are." As the *Bulletin* went to press, the FCC had not finalized the rulemaking process. (For more information about the *Pacifica* decision, the fleeting expletive standard, and the egregiousness standard, see *FCC Reviews Policy on Indecent Speech* in "Busy FCC Reviews Indecency Policy, Rules on Mobile Data Privacy" in the Summer 2013 issue of the Silha *Bulletin* and *Supreme Court to Hear Arguments in FCC "Fleeting Expletives" Case* in "FCC Defends Regulatory Regimes in Court; U.K. Explores Cross-Ownership Regulations" in the Fall 2011 issue.)

CBS News reported on April 4, 2018 that it had filed a Freedom of Information Act (FOIA) request that revealed media coverage of President Trump's remark had prompted 162 FCC complaints. 5 U.S.C. § 552. Tom Hollihan, a professor at the University of Southern California who studies political communication, called the number of complaints "extraordinarily high" in an interview with CBS News. The majority of the complaints targeted CNN, though NPR, NBC, and CBS were also named. As the *Bulletin* went to press, the FCC had not announced whether any broadcast station would be fined or other action would be taken.

In a January 12 interview with Minnesota Public Radio (MPR), Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said she would be "shocked if the FCC did anything [in this case]" for several reasons, including that the FCC "looks at the context" of the use of the word, such as whether it is newsworthy. Kirtley contended that "[i]n the context of this huge immigration discussion, . . . the newsworthiness is absolutely clear . . . and is informing the public." She continued, "[C]learly the use of this term would have political value because it tells us something about what the president is saying." However, Kirtley cautioned that because there was no evidence beyond first-hand accounts about the actual words used by President Trump during the meeting, the media still took a risk by publishing or broadcasting the word. She also warned against "gratuitous repetition" of the word beyond basic newsgathering and journalistic purposes.

On January 12, *The Washington Post* explained that many newspapers and television stations were not editing President Trump's comments because, although news editors "often err on the side of decorum, cleaning up obscene language that could be off-putting or offensive to readers," the consideration changes "when that language comes from the president of the United States." *Post* executive editor Marty Baron said, "When the president says it, we'll use it verbatim. That's our policy. We discussed it, quickly, but there was no debate."

> "In the context of this huge immigration discussion . . . the newsworthiness is absolutely clear . . . and is informing the public.. . . [C]learly the use of this term would have political value because it tells us something about what the president is saying."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

The *Post* also quoted Ben Zimmer, a linguist and lexicographer who writes a language column in *The Wall Street Journal*, who said, "It was incumbent on media outlets to present what he said without expurgation or euphemization." He added, "Certainly over the last 50 years, profanity or taboo terms have gained more mainstream acceptance than actually seen or printed in places, where they previously wouldn't be considered allowed."

In an emailed statement published by the *Post*, its associate managing editor for standards explained that the "specific, vulgar language the president was reported to have used was really central to the news here." He continued, "So it seemed pretty clear to all of us that we should quote the language directly. We wanted to be sure readers would fully understand what the story was about."

On January 12, Poynter republished a 2017 step-by-step guide for journalists to help determine whether they should publish a "dirty word." Roy Peter Clark, who has taught writing at Poynter since 1979, wrote that he had adapted "The Potter Box," a four-quadrant model developed by Ralph B. Potter of Harvard Divinity School to help communications professionals make ethical decisions in a systematic way.

The first quadrant of Clark's box recommends that organizations first determine how objectionable the word is. The second quadrant asks the organization to consider the news value of the word, such as by determining "why does the public need to know the unveiled truth of what was said." The third quadrant takes into account the "social and political contexts that will influence the reception of the message." Clark continues, "The traditional phrase to describe the context of social acceptability was 'good taste.' If some photo, image, or language was in 'bad taste,' it meant that whatever good came from publication would be neutralized by the violation of community standards. That's why many editors are guided by what to publish — or not publish — in the context of a 'family newspaper.'" The final quadrant takes into account the traditional "standards and practices" of the news outlet, which should "not be ignored." However, Clark contends that "in the news crunch of dramatic deviation from cultural, social and political norms, a news organization is wise to re-examine its traditional values, being attentive to those rare moments and cases when those values fail to serve what the public needs."

In a January 16 story, *Vox* argued that the media should continue to adapt to the public's shifting ideas about profanity and language norms. The article, by John McWhorter, an associate professor of English and comparative literature at Columbia University, suggested that President Trump's comments were a "teaching moment" in which the media could "come to understand that some people's conception of what profanity is has become disconnected from the reality of our times." He suggested the media should be less concerned about President Trump's comments than uses of the "n-word" or "f-word."

Scott Memmel
Silha *Bulletin* Editor

The Ethics of Covering President Trump's Supporters

Media coverage of President Donald Trump's supporters has prompted several ethical dilemmas in the year since his election, including criticism that the coverage "normalizes" the ideas promoted by the president's most ardent supporters. On Jan. 17, 2018, *The New York Times* devoted its opinion section exclusively to letters from individuals who had voted for and continued to support President Trump. Several observers criticized the content of the letters, as well as the newspaper's decision to reserve the space for only President Trump's supporters. Meanwhile, beginning with a column on June 7, 2017, Gary Abernathy, the publisher and editor of Ohio's *Hillsboro Times-Gazette*, was hired as a contributing columnist for *The Washington Post* in order to represent and provide a voice to the roughly 46 percent of Americans who voted for President Trump, drawing criticism from some readers and observers.

SPECIAL SERIES

The New York Times Publishes Full Page of Letters from President Trump's Supporters

On Jan. 17, 2018, *The New York Times* dedicated its editorial page to 14 letters submitted by President Donald Trump's supporters. The series of letters, titled "'Vision, Chutzpah and Some Testosterone,'" raised several ethical questions as well as criticism from observers. However, James Bennet, the editorial page editor at the *Times*, defended the decision to publish the letters, arguing that "invit[ing] outside voices — often ones our readers disagree with . . . is what we do."

In a note at the beginning of the opinion page, the editorial board wrote that it had previously been "sharply critical of the Trump presidency, on grounds of policy and personal conduct" and intended to use the full-page spread "[i]n the spirit of open debate" to "let Mr. Trump's supporters make their best case for him as the first year of his presidency approaches its close."

In the titular letter, Steven Sanabria, a reader in Oakdale, Calif., contended that President Trump "has succeeded where [President] Barack Obama failed." He continued, "The economy is up, foreign tyrants are afraid, ISIS has lost most of its territory, our embassy will be moved to Jerusalem and tax reform is accomplished." Sanabria's sentiments were largely shared by the other contributors to the opinion page, including those regarding President Trump's actions and policies related to ISIS, Israel, and tax reform, among other topics.

Several letters were also critical of President Trump's opponent during the 2016 presidential campaign, Hillary Clinton. Jason Peck from Holtsville, N.Y. wrote that he "voted against Hillary Clinton more than [he] voted for Donald Trump," but also added that "President Trump ha[d] exceeded [his] wildest expectations." David MacNeil from Chatham, N.J. wrote, "I voted for Donald Trump and, considering the alternative, I would do so again. Newsflash: Not all Trump voters are Hillary Clinton's 'deplorables.'" The full series of letters is available online at: https://www.nytimes.com/2018/01/17/opinion/trump-voters-supporters.html.

On January 18, the *Times* ran a series of letters from Trump voters who expressed regret and disillusionment after the first year of Trump's presidency. The series of letters, titled "The Furor Over a Forum for Trump Fans," included a letter to the editor by Sydney Cohan from Westwood, N.J. who said she "vote[d] for Donald Trump, and I regret it." Lawrence Rosencrantz of Portland, Ore., addressed a segment of the editor's note accompanying the letters. "As to 'helping readers who agree with us better understand the views of those who don't,' we need you to focus on solving the threats to our democracy rather than focus ad nauseam on the supporters of the threats," he wrote.

On the same day, the *Times* published several letters from readers both supporting and criticizing the *Times*' decision to publish the letters from President Trump's supporters. One reader wrote, "I wanted to express my appreciation for these letters, and in particular to the people who came forward to express their views. I hope that these thoughtful voices can be the seed for real dialogue in what has too often become a vicious shouting match in which both sides fling invectives at each other." Conversely, a different reader wrote, "Dear New York Times, Please don't ever do that again."

The New York Times' decision to run the letters raised several ethical questions from observers. Jon Allsop, a *Columbia Journalism Review* (*CJR*) Delacorte Fellow, questioned the decision to isolate pro-Trump sentiments from the rest of the opinion section. "Partisans for the president shouldn't be given a special platform with a chosen few perfectly composed, black and white — and 100% white — portraits alongside," Allsop wrote. "Instead, they should be treated just like any other reader who writes in to the Times editorial page, paired with Greens, never-Trump conservatives, and everyone in between."

In a January 17 tweet, Amanda Litman, the author of *Run For Something: A Real-Talk Guide to Fixing the System Yourself*, a book encouraging young progressive individuals to run for office, wrote, "When's the page full of letters from Dreamers? Or letters from young women of color thinking about running for office, or from kids who are standing up to bullying, or Muslims who are enduring the rampant Islamophobia?" In a tweet on the same day, Jamelle Bouie, *Slate* magazine's chief political correspondent, wrote, "[I]n the interest of fairness the new york times [*sic*] gave its editorial page over to republican partisans, a few racists, and people you can fairly describe as delusional."

In a January 18 piece, *Salon* writer Gabriel Bell asserted the *Times* "has a Trump-voter fetish. Invested deeply in sharp, considered resistance to his policies and behavior, the broadsheet has devoted much ink to attempting to capture and understand the mindset of the people on the other side of that particular coin, in the useless pursuit of equal time." Bell categorized the editorial board's move not as a means to give voice to Trump's supporters, but rather to "turn over" the page to them entirely. She also called the compilation of letters a "poor replacement for serious commentary and valuable analysis of why people actually support Trump, why they believe he's a worthy leader, what brought them to this place"

In response to the criticism, Bennet told *CJR* on January 18 that the paper "consciously solicited input from Trump supporters, in part to address a shortage of ready pro-Trump sentiment in its inbox." Bennet added the editorial board was seeking Trump supporters to regularly write for the opinion section, but said "there's a short supply of writers who would live up to the rigorous standards the section demands."

In a January 18 interview with *The Daily Beast*, Bennet explained that the 14 letters published by the *Times* were selected from nearly 100 responses to the paper's solicitation of President Trump's voters asking whether they still supported him. He also defended the decision to publish the letters. "I thought what we got back was a really interesting group of letters from people who still support Trump, making in some cases complicated and nuanced arguments about why," Bennet told *The Daily Beast*. "A lot of our readers

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Supporters, *continued from page 7*

are baffled that anybody could still be supporting this guy. And our readers tell us that they are interested in encountering challenging opposing views. We were presented with this opportunity to give them unmediated, clear access to what these still-loyal Trump supporters think of the guy. It seemed interesting to me."

Bennet continued, "Look, I don't for a moment dismiss the real sense of anxiety that a lot of people have during this period," he said. "There are people out there who feel understandably scared. But I think it's because people don't understand where the support [for Trump] is coming from, and part of our job is to inform them and help explain it. And we invited outside voices — often ones our readers disagree with.. . . This is what we do."

Outlets in Conservative Regions Respond to Demand for Conservative Viewpoints

In 2017, *The Washington Post* tapped Gary Abernathy, the publisher and editor of Ohio's *Hillsboro Times-Gazette*, as a contributing columnist providing a voice to the Americans who had voted for, and continued to support, President Donald Trump. The move prompted criticism from some observers, who particularly took issue with Abernathy's characterization of the mainstream media as being biased against President Trump, among other claims.

Following the election of President Trump, newspapers in areas of predominantly Trump supporters and voters recognized a gap in their opinion pages, according to the *Columbia Journalism Review* (*CJR*) on April 10, 2018. One such paper was the *Tulsa World*. In an interview with *CJR*, Wayne Greene, the editorial editor for the Oklahoma newspaper, explained that the newspaper wanted to provide an avenue for discourse amongst Trump supporters following his election win. "We were struggling, he said. "We were getting negative feedback from readers who didn't feel represented on our op-ed page."

On June 7, 2017, *The Washington Post* published Abernathy's first column, which contended that the *Times-Gazette*'s endorsement of Donald Trump for president "seemed innocuous enough" but was "being reported – and often ridiculed – far and wide" by other media outlets. Abernathy also promised that the "negativity that permeates Trump coverage [would be] a frequent subject of conversation" of his ensuing columns for the *Post*.

In an Aug. 1, 2017 column, Abernathy explained that his columns would also "keep trying to represent . . . the people and regions whose continued support for the president seems such a mystery to so many, and from time to time touch on other subjects that might help explain the people, influences and issues from Trump country." He added, "Many of us will never agree on politics. But if we try harder to understand each other, we might realize that we are on the same page more often than we think, and that our commonalities are greater than our differences — even among those who enthusiastically support, and those who aggressively resist, the presidency of Donald J. Trump."

In several of his other columns for the *Post*, Abernathy regularly called on "big media," his term for national news organizations he alleges are biased against President Trump, to heed warnings and invitations from his columns. Abernathy's March 12 column "Journalists should look less at Trump and more in a mirror" addressed Sunshine Week – created by the American Society of News Editors (ASNE) to remind the public of the press' crucial role in ensuring open government – by criticizing other outlets for their categorization of Trump's presidency as a threat to such an ideal. "This [Sunshine] week, for the second straight year, the presidency of Donald Trump is being used as a bogeyman to suggest that the media's efforts are more endangered than ever," Abernathy wrote.

Additional columns by Abernathy explained "[w]hy [he] supported Donald Trump . . . and still do," and why he will not "abandon" President Trump, among other topics. A full list is available online at: https://www.washingtonpost.com/people/gary-abernathy/?utm_term=.3b831d6b9dfc.

Ruth Marcus, deputy editorial page editor for the *Post*, explained in an April 10 interview with *CJR* that Abernathy's inclusion was one step in the paper's effort to diversify the offerings of the opinion section. "He's not just a pro-Trumpish voice," Marcus said. "He's more of a Trump voter voice. He's a different kind of voice than we've had on our pages. We are, as other news organizations, other op-ed pages, really wanting to find the diverse viewpoints expressed in the election." According to *CJR*, Abernathy's columns are distributed to approximately 600 local newspapers through *The Washington Post* News Service, though not all of them run his columns.

Marcus added that readers have generally reacted well to Abernathy's columns. "It was our intention to find people—not just somebody inside the Beltway—who can write with some intellectual rigor and insight in a pro-Trump way, but also to reflect the part of the country that's not very well represented in our pages," she said.

Abernathy's columns in the *Post* have drawn criticism from some readers and observers. Two letters to the editor published by the *Post* on Oct. 31, 2017 criticized Abernathy's suggestion that leading media outlets "require a significant internal overhaul" to "restore the majority of Americans' faith in them." One letter contended that "Abernathy tied himself in knots noting a few platitudes on the importance of the administration deserving close scrutiny from the press, while claiming the media has devolved into an opposition party that is simply too tough on the White House." The second letter defended the press and argued that "the mainstream media has a duty to call it as they see it" and stated the author was "grateful that they fulfill their obligation to keep the public informed of the unfortunate state of our nation."

On Dec. 31, 2017, the *Post* published another series of letters to the editor criticizing several of Abernathy's other viewpoints, such as his attribution of gun violence to Western films and video games, as well as his defense of President Trump calling African countries "shithole countries," which also raised several legal and ethical questions. (For more information on President Trump's comment, see "The Ethics of Covering President Donald Trump" in this issue of the Silha *Bulletin*.)

A separate letter to the editor on April 20, 2018 called into question the *Post*'s handling of Abernathy's political background. "Citing Abernathy merely as the editor and publisher of a small-circulation newspaper is inadequate and misleading," the letter read. "The Post should regularly note that Abernathy had served as communications director of the Ohio Republican Party, as executive director of the West Virginia Republican Party and on the staff of several Republican congressmen. Full disclosure demands that such background be revealed so that readers can judge his opinions appropriately."

In an interview with *CJR*, Abernathy contended that he is not "just another conservative writer," but was "representing rural America" by writing from the perspective of a Trump voter. As the *Bulletin* went to press, Abernathy remained a contributing columnist for the *Post*.

Brittany Robb
Silha Research Assistant

The Ethics of Covering the "Alt-Right"

On Nov. 25, 2017, *New York Times* reporter Richard Fausset wrote a profile of Tony Hovater, a white nationalist and Nazi sympathizer, after violence erupted during an August 2017 march by white nationalists and other far-right individuals in Charlottesville, Va., bringing the "alt-right" to the national forefront. The story drew significant criticism contending it had normalized neo-Nazi views and behavior. The *Times* defended its reporting while other media outlets and experts provided solutions or advice for covering white supremacists.

SPECIAL SERIES

The "Alternative Right," or "alt-right," is defined by the Southern Poverty Law Center as a "set of far-right ideologies, groups and individuals whose core belief is that 'white identity' is under attack by multicultural forces using 'political correctness' and 'social justice' to undermine white people and 'their' civilization." The term has drawn criticism from some observers, including *The Associated Press* (*AP*) *Stylebook*, which cautions that the term is a "public relations device to make its supporters' actual beliefs less clear and more acceptable to a broader audience." Nevertheless, coverage of the numerous far-right groups generally falling under the "alt-right" label raises several ethical questions for media organizations.

On Aug. 11, 2017, multiple media outlets reported that about 250 white supremacists, white nationalists, neo-Confederates, Klansmen, neo-Nazis, and various militias gathered on the University of Virginia (UVA) campus, carrying tiki torches and most wearing khaki pants and white polo shirts. The purpose of the "Unite the Right" rally was to protest plans to remove a Confederate statue and to unify the white nationalist movement in the United States, according to *Time* magazine on August 12. The marchers made their way towards a statute of Thomas Jefferson, yelling slogans such as "Blood and soil!" "You will not replace us!" and "Jews will not replace us!" The marchers were met by a group of about 30 UVA students who locked arms around the base of the statute, leading to violence, including several thrown punches and the use of chemical irritants.

As reported by *The Washington Post* on August 14, the following day "would be much worse." As the alt-right protesters arrived with nationalist banners, shields, clubs, and guns, so too did counterprotesters, many of whom were members of anti-fascist groups, local church groups, and civil rights organizations. According to the *Post*, a "self-styled militia" of about 40 members also arrived at the rally, carrying semiautomatic rifles and pistols. There were generally only small skirmishes and yelling until two dozen counterprotesters blocked the path of the marchers, who charged forward swinging sticks and spraying chemicals.

Several media outlets circulated a video on the afternoon of August 12 showing a car speed down a Charlottesville street and hit a group of protesters, killing 32-year-old Heather Heyer and injuring several more. CNN reported that the crash was committed by James Alex Fields Jr., who was depicted in some photographs marching alongside the alt-right marchers the previous day. In total, the clashes between the opposing groups and the car attack injured 35 people.

The Charlottesville protests brought alt-right organizations, ideologies, and protests to the forefront of national attention, and prompted *The New York Times* to attempt to uncover "Who are these people?" On November 25, the *Times* published a story titled "A Voice of Hate in America's Heartland" in which 29-year-old Ohio native Hovater was profiled. He was labeled "the Nazi sympathizer next door, polite and low-key at a time the old boundaries of accepted political activity can seem alarmingly in flux." According to the *Times*, Hovater helped found the Traditionalist Worker Party, which aimed to "fight for the interests of White Americans" and was one of the extreme right-wing groups that marched in Charlottesville. The story attempted to explain the background and pretext for Hovater's ideology as a "white nationalist," including that "the federal government is too big, the news media is biased, and that affirmative action programs for minorities are fundamentally unfair."

The story also talked about several more mundane aspects of his life, including going to dinner at Applebee's with his wife, Maria Hovater, his love of the show "Seinfeld," and his job as a welder, among other details. The full story is available online at: https://www.nytimes.com/2017/11/25/us/ohio-hovater-white-nationalist.html.

The publication of the *Times* story was met with immediate criticism. According to the *Huffington Post* on November 25, some readers felt Fausset's profile was not critical enough of Hovater's views on race, namely that different races should be separated and that the Holocaust's death total estimates were "overblown." The *Huffington Post* article, written by reporter Carla Herreria, also noted that critics felt the profile was "an attempt to normalize Hovater's white nationalist views, fascism and the neo-Nazi movement," rather than the story's supposed purpose of discussing how an average American could "adopt such radical and hateful views." Herreria contended that "[t]here is a problem with making a man who believes that races should be separated seem likable. It suggests that Hovater's politeness and all-American love for 'Seinfeld' can make his hateful views more tolerable."

In a November 25 tweet, Bess Kalb, a writer for "Jimmy Kimmel Live," took particular issue with Fausset's insistence that Hovater is polite. In her tweet, Kalb quotes a line from the story, "In person, his Midwestern manners would please anyone's mother," but also adds, "Quick reminder: It's about a . . . Nazi. A Nazi. Nazi. It's a sentence about a Nazi."

In a November 26 post on *The Washington Post*'s "Erik Wemple" blog, Wemple argued that a problem with the story was that *The New York Times* did not use additional sources. He wrote, "Perhaps Hovater himself wasn't the best authority on his own radicalization. Perhaps family members would have been more forthcoming on the matter, or former classmates, neighbors — someone else."

Also on November 26, *BuzzFeed News* reporter Charlie Warzel argued that the story was missing a discussion of the internet. "[W]hile there's journalistic value in illustrating the banality of hate, the Times' profile falls short in that it largely fails to adequately address a crucial element in the rise of the far right: the internet," he wrote. "[T]he Times piece does little to describe the online ecosystem that has helped white nationalists, neo-Nazis, and the alt-right organize, amplify its message, and thrive in recent years. And, simply put, any attempt to answer what exactly led Hovater to 'gravitate toward the furthest extremes of American political discourse' is incomplete without it."

In response to the criticism, Fausset published a story titled "I Interviewed a White Nationalist and Fascist. What Was I Left With?" in which he acknowledged that there was "a hole at the heart" of his profile of Hovater. Fausset explained that the purpose of the article was to answer "Why did this man — intelligent, socially adroit and raised middle class amid the relatively

"Alt-Right," *continued on page 10*

"Alt-Right," *continued from page 9*

well-integrated environments of United States military bases — gravitate toward the furthest extremes of American political discourse?"

However, he explained that very little from his conversations with Hovater actually explained his "radical turn," with which an editor at *The New York Times* agreed and suggested Fausset speak with Hovater again. Fausset conceded that even after speaking with Hovater again, he "still [didn't] think [he] had really found [the answers]." He added, "But even if I had called Mr. Hovater yet again . . . I'm not sure it would have answered the question. What makes a man start fires?"

Wemple pointed out in his November 26 blog post that although Fausset felt he did not find "answers," even after calling Hovater after their discussions in Ohio, the *Times* "published the story anyhow." Wemple added, "That makes little sense: This is a newspaper, after all, that prides itself on giving its reporters the time and resources to place fully realized pieces of journalism into print.. . . In this case, however, Fausset & Co. decided they'd done their best."

The New York Times national editor Marc Lacey also responded to the criticism of the Hovater profile in a separate article on November 26. Lacey first explained that the *Times* had chosen Hovater because he "was a few years older than another Ohio man, James Alex Fields Jr." Second, Lacey asserted that Fausset and his editors had "agonized over the tone and content of the article." Finally, he defended much of the reporting. "The point of the story was not to normalize anything but to describe the degree to which hate and extremism have become far more normal in American life than many of us want to think," he wrote. "We described Mr. Hovater as a bigot, a Nazi sympathizer who posted images on Facebook of a Nazi-like America full of happy white people and swastikas everywhere." He added, "We understand that some readers wanted more pushback, and we hear that loud and clear.. . . We regret the degree to which the piece offended so many readers."

The Poynter Institute (Poynter), the *Columbia Journalism Review* (*CJR*), and several media experts proposed solutions or advice to news outlets covering white nationalist or supremacist individuals and organizations. In an Aug. 12, 2017 article, Al Tompkins, senior faculty at Poynter, and Kelly McBride, the vice president of the journalism think tank, offered several recommendations to reporters because "[t]he events in Charlottesville are likely to repeat." First, they recommended using precise language as there are differences, for example, between white nationalists and white supremacists. Second, Tompkins and McBride suggested reporters "[b]ring context to the video and still photos [they] select" and to choose only images "that accurately reflect the events as they unfolded." Finally, they urged reporters to "put the events in context," such as explaining that the "Unite the Right" rallies began over the removal of confederate statutes across the nation.

On Aug. 21, 2017, *CJR* contended that white supremacy should be covered similarly to the way news outlets cover ISIS and other foreign terrorist organizations. *CJR* argued that "[t]he topic is important enough to merit dedicated beat reporting, with the level of rigor and scrutiny that entails." The article further contended that in the aftermath of the events in Charlottesville, many Americans were "either grossly misinformed or in denial about America's racial history." Covering "white supremacy with the intensity it deserves," *CJR* contended, would have meant "fewer white people might have been surprised by the events in Charlottesville."

> "A lot of journalists are facing this huge dilemma right now around how to cover this resurgent white nationalist movement without normalizing it or giving it a broader audience.. . .Journalists don't want to have their own ideology shape how they portray [issues], but most do believe there are values we can agree on in a democracy."
>
> **— Sophie Bjork-James, Vanderbilt University anthropologist**

Finally, the *Christian Science Monitor* on Dec. 28, 2017 contended that it is especially important for journalists to practice fact-checking when researching and writing stories related to "the pathology of hate." The article quoted Bill Morlin, a Washington state-based reporter who is known for chronicling the crimes of extremists, including white supremacists. Morlin asserted that the problem with covering such individuals and organizations is that journalists "sometimes . . . let people involved in the extremist movement define what it is that they are talking about without fact-checking them."

The *Christian Science Monitor* also contended that the ethical questions around covering far-right groups would remain a dilemma for journalists. The article cited Sophie Bjork-James, a Vanderbilt University anthropologist, who said, "A lot of journalists are facing this huge dilemma right now around how to cover this resurgent white nationalist movement without normalizing it or giving it a broader audience.. . . Journalists don't want to have their own ideology shape how they portray [issues], but most do believe there are values we can agree on in a democracy."

Frank LoMonte, the director of the Brechner Center for Freedom of Information at the University of Florida and former executive director of the Student Press Law Center (SPLC) in Washington, D.C., agreed in an interview with the *Christian Science Monitor*. "The question [of how to cover the rise of white nationalism in the US] really is . . . an existential dilemma for journalism," he said. "Do you treat certain issues as being settled beyond the point of litigating? Is the full respect, regard, and recognition for the rights of minorities really such a settled proposition in America? It feels like it should be, but we know that there is some segment of the population that is still prepared to litigate that question."

On August 15, *Wired* magazine explained the "conundrum" faced by reporters: "Ignore these groups and risk allowing a potential public threat to go unreported; shine too bright a light on them and risk amplifying their message — or worse, attracting new acolytes to the cause."

Nevertheless, the *Christian Science Monitor* maintained that it was still necessary to cover the alt-right and it would be "more dangerous to ignore them." Lacey agreed. "[*The New York Times*] recognize[s] that people can disagree on how best to tell a disagreeable story," he wrote. "What we think is indisputable, though, is the need to shed more light, not less, on the most extreme corners of American life and the people who inhabit them. That's what the story, however imperfectly, tried to do."

Scott Memmel
Silha *Bulletin* Editor

Federal Government Targets a Leaker and Backpage.com

In the spring of 2018, the federal government took separate actions against a former federal special agent and Backpage.com (Backpage). In late March 2018, Minnesota Public Radio (MPR) and the Minneapolis *Star Tribune* reported that the U.S. Department of Justice (DOJ) had filed charges under the Espionage Act against a former Minneapolis Federal Bureau of Investigation (FBI) agent, marking the second such criminal leak prosecution under President Donald Trump's administration. 18 U.S.C. § 793 *et seq*. On April 6, the FBI seized and shut down Backpage, an online classified advertising website that previously faced several legal battles over claims it facilitated online sex trafficking and prostitution.

FEDERAL PROSECUTIONS

DOJ Charges Former Minneapolis FBI Agent under Espionage Act; Second Such Action by the Trump Administration

On March 28 and March 29, 2018, Minnesota Public Radio (MPR) and the Minneapolis *Star Tribune* reported that prosecutors for the U.S. Department of Justice (DOJ) National Security Division had filed charges under the Espionage Act against Terry James Albury, a former Minneapolis Federal Bureau of Investigation (FBI) agent. 18 U.S.C. § 793 *et seq*. The charges against Albury mark the second prosecution of an alleged leaker of government documents by President Donald Trump's administration.

According to MPR and the *Star Tribune*, Albury was charged with one count of "knowingly and willfully" disclosing information related to national security and one count of retaining national defense information. The charges were not outlined in a complaint, but instead in a two-page felony information, a charging document that generally signals an imminent guilty plea, according to MPR. On April 17, several news outlets reported that Albury had pled guilty in the case. The AP reported that Albury faced a sentence of between 37 and 57 months in prison, but the decision would be up to U.S. District Court Judge Wilhelmina Wright. As the *Bulletin* went to press, Wright had not set a sentencing date.

In an August 2017 affidavit in support of an application for a search warrant, FBI Special Agent Matthew Pietropola outlined the DOJ's case against Albury. The affidavit, which was filed in the United States District Court for the District of Minnesota, stated that Albury was hired in August 2001 as a full-time FBI employee "conducting surveillance operations." In April 2005, he became an FBI Special Agent and was assigned to the Minneapolis Field Office. As part of his work, Albury had access to "various systems that contain[ed] classified information." In 2000 and 2001, he signed a "Classified Information Nondisclosure Agreement" and an "Employment Agreement," according to the affidavit.

Pietropola alleged that in late March 2016, an individual representing "an online media outlet" filed two separate Freedom of Information Act (FOIA) requests for specific FBI documents. 5 U.S.C. § 552. Between April 2016 and February 2017, the FBI identified "approximately 27 FBI and U.S. Government documents published online" by the unnamed news outlet, 16 of which were marked "classified." The FBI determined that the classified documents had been leaked by "someone with direct access to them," which included Albury, who had electronically accessed over two-thirds of the 27 documents through FBI information systems. Pietropola provided a detailed timeline showing when Albury had accessed each of the documents, including those published by the news outlet, and that Albury had either copied and pasted them to a separate document, or had downloaded, printed, or photographed the documents before sharing them with the news outlet.

Second, Pietropola cited the DOJ's statutory authority in executing the search warrant, including Section 793(e) of the Espionage Act, which provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted" shall be fined or imprisoned not more than 10 years.

Third, Pietropola asked that the search warrant cover Albury's home, his vehicle, his office at the Minneapolis-St. Paul International Airport, and Albury's person. Finally, Pietropola concluded that he had a "probable cause for a warrant" based on the evidence provided.

In the application for a search warrant, Pietropola stated that the federal government would seize "[a]ll documents and records related to violations of [the Espionage Act]," including "[n]otebooks or documents, records, or papers containing information related to the national defense and/or other classified information," as well as "[c]omputer hardware, computer software, passwords and data security devices, cameras[,] telephones, handheld devices, [and] computer related documentation," among other information and materials. The application and affidavit were signed by U.S. Magistrate Judge David Schultz on Aug. 28, 2017. The full affidavit and application for the search warrant are available online at: https://www.mprnews.org/story/2018/03/29/document-search-warrant-application-for-minneapolis-fbi-agent-records.

On March 29, the *Star Tribune* reported that the unnamed media outlet in the application and affidavit was *The Intercept*, which had published a series of stories based on FBI internal guidelines during the same time period that Albury had possessed and shared the information. *The Intercept* also published several FBI internal documents, including the "Confidential Human Source Policy Guide," which detailed how the agency handles informants, and the "Domestic Investigations and Operations Guide," a rulebook governing FBI agents' activities. *The Washington Post* reported on April 9 that the document outlined how the FBI could access journalists' phone records without search warrants or subpoenas approved by a judge, among other FBI rules. According to the *Star Tribun*e, another document leaked to *The Intercept* was "relat[ed] to threats posed by certain individuals from a particular Middle Eastern country." The fill list of documents and news stories is available online at: https://theintercept.com/series/the-fbis-secret-rules/.

Albury's attorneys released a statement on March 29 explaining

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DOJ, *continued from page 11*

Albury's actions. "Terry Albury served the U.S. with distinction both here at home and abroad in Iraq.. . . He accepts full responsibility for the conduct set forth.. . . We would like to add that as the only African-American FBI field agent in Minnesota, Mr. Albury's actions were driven by a conscientious commitment to long-term national security and addressing the well-documented systemic biases within the FBI."

The Intercept's editor-in-chief Betsy Reed released a statement on March 28 criticizing the charges against Albury. "We understand that there is an Espionage Act prosecution underway against an alleged FBI whistleblower in Minnesota, who is accused of leaking materials relating to the FBI's use of confidential human sources," she wrote. "News reports have suggested that the prosecution may be linked to stories published by The Intercept. We do not discuss anonymous sources. The use of the Espionage Act to prosecute whistleblowers seeking to shed light on matters of vital public concern is an outrage, and all journalists have the right under the First Amendment to report these stories."

In a March 29 statement, the Press Freedom Defense Fund, which supports journalists, filmmakers, whistleblowers, and news organizations through the charitable organization First Look Media, criticized the use of the Espionage Act to prosecute individuals who release information detailing government wrongdoing. The statement "condemn[ed] prosecutions under the 1917 Espionage Act that criminalize the release of information of government wrongdoing. The misuse of the Espionage Act chills truth tellers, impedes investigative reporting, and compromises the democratic process."

In an April 9 article for *The Washington Post*, Zack Kopplin, an investigator at the Government Accountability Project, a whistleblower support nonprofit, argued that the DOJ had "crossed a red line that will sour relationships with journalists and whistleblowers, with negative consequences for everyone" by "us[ing] as evidence against Albany the FOIA requests made by the Intercept." Kopplin continued, "If news organizations have to worry about the federal government prosecuting, firing and harming their sources because of a FOIA request they sent, they will obviously start publishing them without giving the government the opportunity to protect valid national security secrets."

In an interview with Kopplin, Trevor Timm, executive director of the Freedom of the Press Foundation, argued that the FBI should end this practice. "It is quite disturbing that [the FBI] are scrutinizing FOIA requests in an attempt to root out whistleblowers," he said.

The prosecution of Albury under the Espionage Act marked the second criminal leak case under President Donald Trump's administration. On June 9, 2017, Reality Leigh Winner, a National Security Agency (NSA) contractor who leaked a classified report to *The Intercept* in May 2017, pled not guilty after being indicted by a federal grand jury on one count of "willful retention and transmission of national defense information."

> "[We] condemn prosecutions under the 1917 Espionage Act that criminalize the release of information of government wrongdoing. The misuse of the Espionage Act chills truth tellers, impedes investigative reporting, and compromises the democratic process."
>
> **— Press Freedom Defense Fund**

The NSA document detailed two cyberattacks by Russia's Main Intelligence Agency (GRU) on a U.S. voting software supplier during the 2016 presidential election. According to *Ars Technica* on June 6, 2017, by handing over a copy of the document to the NSA to verify its authenticity, *The Intercept* had exposed Winner as the source. (For more information on the Winner case, see *Department of Justice Arrest of NSA Leaker Marks First Such Prosecution under Trump Administration* in "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue of the Silha *Bulletin*.)

Winner faces 10 years in prison and/or a $250,000 fine if convicted under the Espionage Act. On March 15, 2018, *Bloomberg* reported that Winner's trial had been delayed until October 2018. As the *Bulletin* went to press, Winner's trial had not commenced.

Attorney General Jeff Sessions previously discussed the Trump administration's desire to crack down on leakers. In an Aug. 4, 2017 press conference, Sessions said the DOJ had "more than tripled the number of leak investigations compared to the number that were ongoing at the end of the last administration." Sessions added that the Trump administration had created an FBI counterintelligence unit for managing leak cases, and was "reviewing its policies" regarding subpoenas for members of the news media who publish leaked information. Sessions said during the press conference, "This culture of leaking must stop.. . . I strongly agree with the president and condemn in the strongest terms the staggering number of leaks."

Sessions' comments led to widespread criticism from media organizations and experts, including Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, who said in an interview with *Yahoo! News* that the targeting of journalists who publish sensitive information was "a reality that we have to prepare for." Kirtley continued, "We knew the Trump administration was going to take on the issue of leaking.. . . We've never had a prosecution of journalists for being the recipient of leaks. This could be the first time that happens." (For more information on Sessions' comments and criticism from media organizations and experts, see *U.S. Attorney General Announces New Efforts in Search for Leakers, Including Subpoenaing Reporters* in "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue of the Silha *Bulletin*.)

FBI Shuts Down Backpage.com, Agents Raid Founder's Home

On April 6, 2018, multiple news outlets reported that Backpage.com (Backpage), an online classified advertising website, had been shut down by the Federal Bureau of Investigation (FBI) in connection to a 93-count indictment charging Backpage and seven individuals with money laundering and facilitating prostitution. Additionally, *The Arizona Republic* reported that FBI agents had raided the home of Backpage's co-founder, Michael Lacey. Meanwhile, on March 21, the U.S. Senate passed H.R. 1865, a bill aimed at cracking down on online sex trafficking

and prostitution, as well as hold websites liable for hosting sex trafficking content.

Founded in 2004 by Lacey and Jim Larkin, Backpage allowed users to post classified ads online. The website offered users with a variety of categories, including "automotive," "rentals," "dating," and "jobs," among others. The website also provided an "adult section" where users could post advertisements under subdivisions, such as "escorts," "body rubs," "strippers & strip clubs," "dom & fetish," and "male escorts," among others. In 2010, Backpage shut down its sex advertising section in the face of pressure from federal and state authorities.

Backpage was then confronted with several legal challenges to its adult content section, including whether it was facilitating sex trafficking. In June 2015, Cook County (Illinois) Sheriff Tom Dart attempted to cut off the website's revenue stream by sending letters to Visa and MasterCard demanding that the companies stop processing any transactions made through Backpage's website. After the companies complied, Backpage filed a complaint in the U.S. District Court for the Northern District of Illinois against Dart seeking a preliminary injunction and a court order requiring the sheriff to retract his letter. The U.S. Court of Appeals for the Seventh Circuit ultimately ruled against Dart, finding that his actions amounted to government censorship in violation of Backpage's First Amendment rights. *Backpage.com v. Dart*, 807 F.3d 229 (7th Cir. 2015).

In October 2015, the U.S. Senate Homeland Security Permanent Subcommittee on Investigations (PSI) began investigating online sex trafficking and issued a subpoena to Backpage and CEO Carl Ferrer, ordering that they appear before the committee. Ferrer refused to comply, but a federal district court eventually granted PSI's request to require Ferrer to testify. *Senate Permanent Subcommittee on Investigations v. Ferrer*, 2016 WL 4179289 (D.D.C. 2016). However, the Associated Press (AP) reported on Jan. 10, 2017 that Backpage executives refused to answer questions during the PSI's committee hearing, invoking their Fifth Amendment rights against self-incrimination. PSI later published a report alleging that Backpage had actively worked to conceal prostitution and child sex trafficking advertised on the website. The 53-page report is available online at: https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf.

On Jan. 9, 2017, Backpage announced it was removing its adult content section following the several legal battles it had faced. Nevertheless, *The New York Times* reported on April 7, 2018 that adult listings were simply moved to sections that were dedicated to dating. (For more information on Backpage's legal battles and decision to close its adult content section, see "Backpage Closes Adult Content Section after Government Scrutiny" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

On April 6, 2018, federal law enforcement authorities seized and shut down Backpage, replacing the content of the website with the message, "Backpage.com and affiliated websites have been seized as part of an enforcement action by the Federal Bureau of Investigation, the U.S. Postal Inspection Service, and the Internal Revenue Service Criminal Investigation Division." According to *The Arizona Republic*, the FBI seized the website because it was allegedly being used to "facilitate crime."

The Arizona Republic also reported that FBI agents had raided the home of Lacey as part of "law enforcement activity." *The Washington Post* reported on April 6 that the search stemmed from an investigation by a Phoenix, Az. grand jury regarding allegations that Backpage had facilitated sex trafficking and prostitution. *Newsweek* and Reuters reported on April 7 that seven individuals had been charged by the grand jury with 93 criminal counts in a sealed indictment, including money laundering and facilitating prostitution. On April 9, the *Post* reported that the indictment had been unsealed and indicated that seven top officials at Backpage, including Lacey and Larkin, had been arrested. The indictment cited 17 victims trafficked on Backpage and alleged that the company had laundered at least $500 million in prostitution-related advertising revenue, according to the *Post*. The full indictment is available online at: https://www.documentcloud.org/documents/4434358-Backpage.html.

On April 12, the AP reported that Ferrer had pleaded guilty to one count of conspiracy and three counts of money laundering in California. Under the April 5 plea agreement, Ferrer would serve no more than five years in prison, but agreed to testify in ongoing prosecutions against others at Backpage, according to the AP. Ferrer also agreed to make the company's data available to law enforcement as investigations and prosecutions continue. Additionally, the AP reported that Texas Attorney General Ken Paxton had announced the company pleaded guilty to human trafficking.

In an interview with the *Post*, Sen. Amy Klobuchar (D-Minn.) said, "[W]ebsites like Backpage.com facilitate sex trafficking across Minnesota and our country. The announcement by the FBI that they have seized this website and affiliated sites is long overdue, but another positive step forward in the fight against human trafficking. We must keep working to bring perpetrators to justice and get victims the support they deserve."

In an April 6 statement, Sen. John McCain (R-Ariz.) praised the law enforcement action. "The seizure of the malicious sex marketplace Backpage.com marks an important step forward in the fight against human trafficking," he wrote. "This builds on the historic effort in Congress to reform the law that for too long has protected websites like Backpage from being held liable for enabling the sale of young women and children. Today's action sends a strong message to Backpage and any other company facilitating online sex trafficking that they will be held accountable for these horrific crimes."

The legislation referred to by Sen. McCain was passed on March 21 by the U.S. Senate in a 97-2 vote. H.R. 1865 combined elements of the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA) in an effort to crack down on online sex trafficking and prostitution, as well as hold websites liable for hosting sex trafficking content.

The bill, previously passed by the U.S. House of Representatives on February 27, amended Section 230 of the Communications Act of 1934, also known as the Communications Decency Act (CDA), which provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230. According to the Electronic Frontier Foundation (EFF), Section 230 means online entities that "host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do." The protected entities include Internet Service Providers (ISPs), as well as any "online service that publishes third-party content."

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The bill amended the Communications Act of 1934 to include language that "nothing in [Section 230] . . . shall be construed to impair or limit" federal or state civil or criminal prosecutions "related to sex trafficking." Such prosecutions may include a federal civil claim for conduct that constitutes sex trafficking, a federal criminal charge for conduct that constitutes sex trafficking, or a state criminal charge for conduct that promotes or facilitates prostitution in violation of this bill." Previously, the exceptions to Section 230 included "only federal criminal law, intellectual property laws, and the Electronic Communications Privacy Act," according to *Lawfare* on March 28.

H.R. 1865 also "expresse[d] the sense of Congress that section 230 of the Communications Act of 1934 was not intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims," which would include Backpage.

Additionally, the bill created a new section in the federal criminal code that provides "[w]hoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both." It also established enhanced penalties — a fine, a prison term of up to 25 years, or both — for an individual who "(1) promotes or facilitates the prostitution of five or more persons, or (2) acts with reckless disregard that such conduct contributes to sex trafficking."

On April 11, several news outlets reported that President Trump had signed the bill into law.

H.R. 1865 was criticized by a variety of groups, including advocates for sex workers and victims of sex trafficking, as well as open internet advocates. On March 21, 2018, *Motherboard* argued that the bill makes the internet a more hostile place for sex workers, victims of sex trafficking, and fans of internet freedom."

In a March 21 letter to Congress, the Center for Health and Gender Equity (CHANGE) and the International Women's Health Coalition advocated for the legislation to be "shelved" because it put sex workers in more danger, rather than "protect[ing] sex workers from violence." The letter quoted Serra Sippel, president of CHANGE, who said, "By removing online platforms for sex workers, the legislation eliminates an important tool to screen clients and negotiate safe working conditions, exposing sex workers to violence and putting their lives at risk. The legislation not only harms sex workers, it will also undermine the U.S. government's own goal of ending trafficking."

> "To mitigate liability risks [under FOSTA/SESTA], platforms will err on the side of removing potentially questionable speech rather than leaving it up. Inevitably, a moderator doing his/her job will over-censor, catching up lawful speech protected by the Constitution in an attempt to be as comprehensive as possible."
>
> **— Center for Democracy & Technology**

On February 22, EFF contended that Section 230 "strikes an important balance for when online platforms can be held liable for their users' speech" and that H.R. 1865 would "force online platforms to police their users' speech more forcefully than ever before, silencing legitimate voices in the process." Furthermore, EFF argued that the bill "would chill innovation and competition among Internet companies" because while Google and Facebook "may have the budgets to survive the massive increase in litigation and liability that FOSTA would bring . . . Small startups don't."

EFF also asserted that the DOJ already had the power to prosecute an internet company that "knowingly engages in the advertising of sex trafficking" because Section 230 has an "express exemption for federal criminal law, meaning that Internet intermediaries can be prosecuted in federal court."

In a March 8 blog post, the Center for Democracy & Technology (CDT), a Washington, D.C. non-profit promoting an open internet, contended that another consequence of H.R. 1865 is "an unambiguous chilling of speech." The CDT wrote, "To mitigate liability risks, platforms will err on the side of removing potentially questionable speech rather than leaving it up. Inevitably, a moderator doing his/her job will over-censor, catching up lawful speech protected by the Constitution in an attempt to be as comprehensive as possible."

The *Daily Beast* pointed out on April 4 that the bill had already chilled speech, citing Craigslist's March 23, 2018 decision to shut down its "personals" section and replace it with an explanation that "US Congress just passed HR 1865 . . . seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully.. . . Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we are regretfully taking craigslist personals offline. Hopefully we can bring them back some day."

Scott Memmel
Silha *Bulletin* Editor

FCC Repeals Net Neutrality, Prompts Legal and Legislative Responses

NET NEUTRALITY

On Dec. 14, 2017, the Federal Communications Commission (FCC) voted to repeal the net neutrality rules put in place in 2015, which prohibited Internet Service Providers (ISPs) from blocking or "throttling" websites, or charging for higher-quality service or access to certain content. After the FCC published the new rules in the Federal Register on Feb. 22, 2018, state attorneys general, several companies and organizations, the U.S. Senate, and state legislatures took a variety of actions in response to the net neutrality repeal. On Feb. 22, 2018, 23 state attorneys general filed a lawsuit against the FCC, claiming that the agency's repeal of net neutrality was "arbitrary, capricious, and an abuse of discretion," as well as in violation of federal law and the FCC's statutory mandates. Several technology and internet companies, as well as multiple public interest organizations, filed petitions seeking review of the FCC's action. On Feb. 27, 2018, Sen. Edward J. Markey (D-Mass.) formally introduced a resolution of disapproval in an attempt to overturn the net neutrality repeal under the Congressional Review Act (CRA), which allows Congress 60 days to challenge new rules passed by an independent agency, such as the FCC. Finally, on March 6, 2018, Washington became the first state to pass a statute protecting net neutrality after Gov. Jay Inslee signed House Bill 2282 into law.

Net neutrality is the principle that ISPs should treat all data on the internet the same, regardless of the source. This principle prevents discrimination or censorship of certain types of online data based on content, source, or platform. Proponents of net neutrality include technology firms, consumer advocates, and internet companies, such as Twitter and Amazon. ISPs are the major opponents of net neutrality because they want to retain control over their data delivery standards.

In February 2015, the FCC adopted the 2015 Open Internet Order, Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1), which implemented rules that reclassified broadband internet access as a "telecommunications service" under Title II of the Communications Act, providing the FCC the authority to regulate ISPs. Formerly, broadband internet access was classified as an "information service," which made it immune to FCC regulations similar to those applied to "common carrier" communication services, like telephones. The Open Internet Order enforced net neutrality through a variety of provisions, including three "bright-line" rules prohibiting ISPs from blocking and throttling lawful internet content, as well as prohibiting paid prioritization for internet content delivery, which would allow ISPs to favor some internet traffic over others.

On June 14, 2016, the U.S. Court of Appeals for the D.C. Circuit upheld the Open Internet Order in a 2-1 decision, finding that the FCC had the authority to implement the Order and that ISPs are utilities and should provide equal access to all users. *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F.3d 674 (D.C. Cir. 2016). (For more information about the background of net neutrality and the D.C. Circuit ruling, see "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue of the Silha *Bulletin*, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation" in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.) As the *Bulletin* went to press, the U.S. Supreme Court had not announced whether it would grant *certiorari* in the *U.S. Telecom* case.

FCC Votes to Repeal Net Neutrality Rules, Publishes Vote in Federal Register

On Dec. 14, 2017, the Federal Communications Commission (FCC) voted along party lines to repeal the net neutrality rules it had adopted in the 2015 Open Internet Order and set out new policies reclassifying broadband internet and discarding rules against blocking, throttling, and paid prioritization. On Feb. 22, 2018, the FCC published the new rules in the Federal Register, the government's official record of all administrative actions, making the new rules official. During and following the vote and publication of the new policies, the FCC commissioners expressed their support or criticism of the net neutrality repeal.

On December 14, several news outlets reported that the FCC had voted 3-2 to repeal its net neutrality rules in a Declaratory Ruling, a Report and Order, and an Order tilted "Restoring Internet Freedom" (collectively "Order"). WC Docket No. 17-108, FCC 17-166, 83 Fed, Reg, 7852 (Feb. 22, 2018). FCC Chairman Ajit Pai, Commissioner Brendan Carr, and Commissioner Mike O'Reilly voted in favor of repeal. Commissioners Mignon Clyburn and Jessica Rosenworcel were opposed.

The Order first "[r]estor[ed] the classification of broadband Internet access service as an 'information service'" as it had been classified prior to the 2015 Open Internet Order. In so doing, the FCC argued, it would "end utility style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom." The FCC further argued that reclassification would allow for "light-touch" regulation meant to "promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service."

Second, the Order "[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission," including network management practices, performance, and commercial terms of service. The FCC contended that increased transparency would allow consumers to "choose what works best for them," rather than having the government make such a determination.

Finally, the FCC eliminated its conduct rules for ISPs, including the bright-line rules preventing blocking, throttling, and paid prioritization. The FCC contended that the costs of such rules – decreasing of innovation and investment – outweighed any benefits. The full Order, as well as a Fact Sheet published by the FCC, are available online at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-347927A1.pdf.

Over two months after the vote, on Feb. 22, 2018, the FCC made the repeal of net neutrality official by publishing the new rules in the Federal Register. However, *The Washington Post* reported on February 22 that it was unclear when

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the FCC's new net neutrality policy would go into effect. The copy of the order published in the Federal Register stated the repeal would take effect on April 23, according to CNN on February 22. As the *Bulletin* went to press, a majority of the provisions had not taken effect.

The FCC vote and publication in the Federal Register set off widespread, renewed debate about net neutrality, including between the five FCC commissioners. At the hearing prior to the initial vote on net neutrality rules, Chairman Pai defended the repeal. "Within a generation, we have gone from email as the killer app to high-definition video streaming," Pai said, according to *The Washington Post* on Dec. 14, 2017. "Entrepreneurs and innovators guided the Internet far better than the heavy hand of government ever could have." According to National Public Radio (NPR) on the same day, Pai added after the vote, "What is responsible for the phenomenal development of the Internet? Certainly wasn't heavy-handed government regulation.. . . [There] was no problem to solve. The Internet wasn't broken in 2015, we were not living in some digital dystopia.. . . It is time for us to bring faster, better and cheaper Internet access to all Americans."

During the vote, Commissioner Carr said it was a "great day," according to *The New York Times*, and dismissed warnings about the "apocalyptic" effects of the vote. He added, "I'm proud to end this two-year experiment with heavy-handed regulation." In a Jan. 4, 2018 statement, Commissioner O'Rielly wrote that he was "not persuaded that heavy-handed rules are needed to protect against hypothetical harms" of ISPs blocking, throttling, or practicing paid prioritization. He continued, "In all this time, I have yet to hear recent, unquestionable evidence of demonstrable harms to consumers that demands providers be constrained by this completely flawed regulatory intervention. I still cannot endorse guilt by imagination."

During the vote, Commissioner Clyburn accused the Republican commissioners of defying the wishes of the American people. "I dissent, because I am among the millions outraged.. . . Outraged, because the F.C.C. pulls its own teeth, abdicating responsibility to protect the nation's broadband consumers." She added in a February 22 statement, "Today it is official: the FCC majority has taken the next step in handing the keys to the internet over to billion-dollar broadband providers by publishing the Destroying Internet Freedom Order in the Federal Register. I am both disappointed and hopeful. Disappointed that this is one more anti-consumer notch on this FCC's belt, but hopeful that the arc of history is bent in favor of net neutrality protections."

In a separate February 22 statement, Commissioner Rosenworcel agreed that the FCC had ignored millions of consumer comments about net neutrality. "The FCC's net neutrality decision is a study in just what's wrong with Washington," she wrote. "This agency failed the American public. It failed to listen to their concerns and gave short shrift to their deeply held belief that internet openness should remain the law of the land. It turned a blind eye to all kinds of corruption in our public record—from Russian intervention to fake comments to stolen identities in our files. As a result of the mess the agency created, broadband providers will now have the power to block websites, throttle services, and censor online content. This is not right."

Jack Nadler, a partner at the law firm Squire Patton Boggs, asserted in a December 14 interview with *The Washington Post* that the future remains unclear for net neutrality. "For the last decade, we've been on a regulatory roller coaster.. . . We are likely looking at two or three more years of uncertainty. And then there is the 2020 presidential election, which could lead to yet another policy upheaval," he said.

Further uncertainty is created by lawsuits against the FCC by state attorneys general, internet freedom organizations, and technology and internet companies; a bill introduced in the U.S. Senate; and state actions to adopt net neutrality laws or issue executive orders.

Twenty-Three State Attorneys General, Several Companies and Organizations Sue the FCC

On Feb. 22, 2018, multiple media outlets reported that 22 state attorneys general and the attorney general of Washington, D.C., in an effort to preserve the net neutrality rules passed in the 2015 Open Internet Order, had formally re-filed their petition for review in the U.S. Court of Appeals for the District of Columbia Circuit against the FCC after the Commission published the new rules in the Federal Register on the same day. *New York v. FCC*, No. 18-1055 (D.C. Cir. 2018). Additionally, multiple technology and internet companies, including Mozilla Corporation (Mozilla) and Vimeo, Inc., as well as public interest organizations, including Free Press and Public Knowledge, filed similar lawsuits against the FCC.

The coalition of 23 attorneys general, led by New York Attorney General Eric Schneiderman, filed the petition for review. The attorneys general were from New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, and Mississippi, as well as New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

In their petition, the attorneys general asked the D.C. Circuit to rule that the FCC's "Restoring Internet Freedom" Order (Order), WC Docket No. 17-108, FCC 17-166, 83 Fed, Reg, 7852 (Feb. 22, 2018), was "arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*" The petition also asserted that the Order violated federal law, including "the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder." Additionally, the petition contended that the Order "conflict[ed] with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553."

The petition further explained that the attorneys general were filing the petition for review within 10 days of the publication of the Order so the request could be included in the "judicial lottery procedure." As *The Washington Post* reported on February 22, this procedure determines which federal appeals court hears the case(s) brought against the FCC. According to the *Post*, the output of the lottery, which is handled by the Judicial Panel on Multidistrict Litigation, "is determined by which courts have received a lawsuit on the issue." *Gizmodo* added on February 22 that the lottery selections are made randomly by computer. On March 8, 2018, Reuters reported that the Judicial Panel on Multidistrict litigation had randomly selected the U.S. Court of Appeals for the Ninth Circuit to hear the consolidated challenges to the FCC's repeal of net neutrality. However, on March 28, 2018, multiple news outlets reported that the Ninth Circuit granted an unopposed motion to send the consolidated cases to the D.C. Circuit,

which had heard the two previous appeals related to net neutrality in 2011 and 2015. The full petition for review is available online at: https://ag.ny.gov/sites/default/files/petition.pdf.

In a January 16 statement after the attorneys general had filed their initial petition, Schneiderman explained why the group had chosen to do so. "An open internet – and the free exchange of ideas it allows – is critical to our democratic process," Schneiderman wrote. "The repeal of net neutrality would turn internet service providers into gatekeepers – allowing them to put profits over consumers while controlling what we see, what we do, and what we say online. This would be a disaster for New York consumers and businesses, and for everyone who cares about a free and open internet. That's why I'm proud to lead this broad coalition of 22 Attorneys General in filing suit to stop the FCC's illegal rollback of net neutrality."

According to *Gizmodo*, the Internet Association (IA), a trade and lobbying group representing 40 of the country's biggest tech companies, including Google, Amazon, and Facebook, announced in January 2018 that it was planning to intervene in the case against the FCC, allowing it to demonstrate to the court that the new Order may injure its member companies. In a January statement, IA CEO Michael Beckerman wrote, "IA intends to act as an intervenor in a judicial action against this order and, along with our member companies, will continue our push to restore strong, enforceable net neutrality protections through a legislative solution."

The attorneys general were not alone in filing lawsuits against the FCC. Several companies and organizations, including Free Press, Public Knowledge, Mozilla, and Vimeo, Inc., among others, filed separate lawsuits against the FCC. Additionally, *Gizmodo* reported on April 24 that INCOMPAS, a trade association whose members include streaming services, edge providers, and competitive carriers, such as Facebook, Google, and Netflix, had also filed a lawsuit.

Mozilla was the first to formally re-file its complaint after the FCC published its new rules in the Federal Register on February 22. In its petition for review, Mozilla asserted, like the attorneys general, that the FCC "depart[ed] from its prior reasoning and precedent" and, therefore, "violate[d] federal law, including, but not limited to, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*., as amended, and the Telecommunications Act of 1996, and FCC regulations promulgated thereunder." *Mozilla Corp. v. Fed. Comm. Comm'n*, No. 18-1051 (D.C. Cir. 2018). Mozilla also contended that the Order violated the FCC's statutory mandates and was "arbitrary, capricious, and an and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*." Thus, the petition for review called on the court to "hold unlawful, vacate, enjoin, and set aside the Order, and that it provide additional relief as may be appropriate." Mozilla's full petition for review is available online at: https://ffp4g1ylyit3jdyti1hqcvtb-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/as-filed-Mozilla-Petition-for-Review-WC-Docket-No.-17-108-22Feb2018.pdf.

In a February 22 blog post on *The Mozilla Blog*, Mozilla Chief Business and Legal Officer Denelle Dixon that the company was "not taking any chances with an issue of this importance." She continued, "That is why today, immediately after the order was published, Mozilla re-filed our suit challenging the FCC net neutrality order. We won't waste a minute in our fight to protect net neutrality because it's our mission to ensure the internet is a global public resource, open and accessible to all. An internet that truly puts people first, where individuals can shape their own experience and are empowered, safe and independent."

On March 12, 2018, *Ars Technica* reported that the lawsuits filed by the state attorneys general, technology firms, and advocacy organizations had been merged into one suit. *Gizmodo* reported on April 24 that INCOMPAS's lawsuit would also be merged into the suit. As the *Bulletin* went to press, no further announcements had been made on the lawsuit.

U.S. Senate Introduces Resolution to Protect Net Neutrality

On Feb. 27, 2018, Sen. Edward J. Markey (D-Mass.) formally introduced a resolution of disapproval in an attempt to overturn the FCC's repeal of net neutrality. Previously, in January 2018, Democratic Senators announced that they were only one vote away from the simple majority of 51 senators necessary to pass the resolution. However, multiple media outlets observed that it still had an uphill battle because the resolution would have to be passed in the Republican-controlled U.S. House of Representatives and signed into law by President Donald Trump.

On February 27, Sen. Markey posted a tweet, which read "Today, we are officially introducing the [Congressional Review Act] resolution, which would reverse the @FCC's actions and restore #NetNeutrality. And when we take this vote on the Senate floor, every one of my colleagues will have to answer this simple question: Whose side are you on? #OneMoreVote."

The resolution of disapproval was proposed under the Congressional Review Act (CRA), which allows Congress 60 days to challenge new rules passed by an independent agency, such as the FCC, according to *The Washington Post* on February 22. The Senate can pass the resolution with a simple majority vote, which requires 51 Senators. According to *The Verge* on Feb. 27, 2018, the resolution first goes to committee for consideration, but 30 senators can force the Senate to put it on the calendar after 20 days.

On Jan. 15, 2018, Senate Democrats announced that they were one vote away from passing the resolution. In addition to all 49 Republican Senators, they also had the support of Republican Sen. Susan Collins (R-Maine), according to *The New York Times* on January 16. In a February 27 editorial in *Wired* Magazine, Senate minority leader Chuck Schumer (D-N.Y.) called for more Republican support. "All 49 senators in the Democratic caucus are united in support of our CRA to stop the FCC from destroying the free and open internet," he wrote. "We also have the backing of senator Susan Collins . . . who has pledged to vote with us. That leaves just one more vote to ensure the internet remains free and accessible to all. That vote must come from the ranks of the Republicans, who so far have sided with internet service providers, the *only* group that is clamoring to remove the important consumer protections enshrined in net neutrality" (emphasis in original).

However, *The New York Times* on January 16, among other news outlets, pointed out that even if the resolution passed the Senate, it faced an uphill battle in the Republican-controlled House of Representatives, where passing the resolution required 150 out of 218 votes. The *Times* reported that Rep. Mike Doyle (D-Pa.), who was leading the effort in the House, had gained support from only 80 Democrats, and that it was also possible that Speaker Paul D. Ryan (R-Wis.) could refuse to bring the resolution to a vote, which would

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then require 218 signatures to bring the resolution to the floor in the form of a petition.

Additionally, the resolution would have to be signed by President Trump, which experts predicted was unlikely because White House press secretary Sarah Sanders told reporters on December 14, "The [Trump] administration supports the FCC's efforts and at the same time the White House certainly has and always will support a free and fair internet."

The New York Times speculated that Senate Democrats may have pushed for the resolution, even though it was a "long shot," in order to "turn net neutrality into a bigger political issue ahead of the 2018 midterms. The efforts to overturn the F.C.C. order are aimed to raise awareness about an issue that has broad interest, particularly among younger voters." *Politico* added on February 27 that Democrats "sa[id] a Senate vote will put Republicans opposed to the regulation on the record as favoring internet service providers like Comcast and Verizon over consumers."

As the *Bulletin* went to press, no further action on the resolution had been announced.

Washington Enacts First State Net Neutrality Law; Other Governors Sign Executive Orders

On March 6, 2018, Washington Gov. Jay Inslee signed House Bill 2282, making Washington the first state to pass a law protecting net neutrality. The law was passed after governors from five other states had previously issued executive orders also aimed at protecting net neutrality.

HB 2282 was passed by the Washington House of Representatives on February 9 by a vote of 93-5 and by the state Senate on February 27 by a 35-14 vote. The new law first requires "[a]ny person providing broadband internet access service in Washington state [to] publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services." The purpose of the requirement is to "enable consumers to make informed choices regarding the purchase and use of such services and [to enable] entrepreneurs and other small businesses to develop, market, and maintain internet offerings."

Second, the law prohibits any "person engaged in the provision of broadband internet access service in Washington state" from "(a) Block[ing] lawful content, applications, services, or nonharmful devices, subject to reasonable network management; (b) Impair[ing] or degrad[ing] lawful internet traffic on the basis of internet content, application, or service . . . or (c) Engag[ing] in paid prioritization." The law does not apply in cases where internet service providers (ISPs) have an obligation or authorization "to address the needs of emergency communications or law enforcement, public safety, or national security authorities" or in cases in which the ISP regulates unlawful content, such as copyright infringement.

Finally, the law covers practices and matters "vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW." Thus, the statute provides that any violation "is not reasonable in relation to the development and preservation of business" and also constitutes "an unfair or deceptive act in trade or commerce and an unfair method of competition" in violation of 19.86 RCW. *USA Today* reported on March 6 that the bill would take effect on June 6, 2018.

Before signing the bill, Inslee explained the reasoning for enacting it. "We know that when D.C. fails to act, Washington state has to do so," he said, according to the Associated Press (AP) on March 5. "We know how important this is."

Governing magazine pointed out that the law "would almost certainly be subject to lawsuits by broadband companies arguing that it violates the FCC's December order [because the] FCC made clear that it would preempt any state or local government that tried to enact net neutrality regulations of its own." However, telecommunications law expert Pantelis Michalopoulos told *Governing* in a January 23 interview that the FCC would have a difficult time proving their case. "Here, we have an attempt to preempt state laws based on nothing, or virtually nothing, precisely because the FCC has decided not to promulgate substantive rules on [net neutrality]," Michalopoulos said. "This makes it a little more difficult for this kind of preemption to succeed."

According to the National Conference of State Legislatures on February 23, the governors of Hawaii, New Jersey, New York, Vermont, and Montana each issued executive orders in response to the FCC's repeal of net neutrality. In Hawaii, Gov. David Y. Ige's Executive Order No. 18-02 directed all state government agencies to contract only with ISPs "who demonstrate and contractually agree to support and practice net neutrality principles where all Internet traffic is treated equally." He further directed state agencies to add contractual language that "suppliers of telecommunications, Internet, broadband, and data communication services shall abide by net neutrality principles," which include "providing access to all lawful content and applications regardless of the source," "treating all data fairly [and] . . . the same," and refraining from the practices of "throttling, restricting, or prioritizing internet content, applications, or certain data streams."

New Jersey Gov. Philip D. Murphy, in Executive Order No. 9; New York, Gov. Andrew M. Cuomo, in Executive Order No. 175; Montana Gov. Steve Bullock, in Executive Order, No. 3-2018; and Vermont Gov. Philip B. Scott, in Executive Order No. 2-18, also required state entities award future contracts only to ISPs that adhere to these "net neutrality principles," which generally prohibit blocking, throttling, and paid prioritization of lawful internet content by ISPs.

According to *Wired* magazine on Jan. 23, 2018, it is likely that more states and cities will take action to maintain net neutrality within their jurisdictions. The article cited former FCC enforcement chief Travis LeBlanc, who contended that state and local action probably has the best chance of making an impact in the short term.

Scott Memmel
Silha *Bulletin* Editor

Parkland Shooting Raises Ethical Questions about Covering Mass Shootings, Sparks Proliferation of Fake News and Conspiracy Theories

On Feb. 14, 2018, 17 adults and teenagers were killed and 17 more were injured after a gunman opened fire at Marjory Stoneman Douglas High School (Stoneman Douglas) in Parkland, Fla., garnering significant media coverage. Several elements of the Parkland shooting coverage set it apart from the coverage of other mass shootings. They included the media coverage of the teenage survivors, students, and activists; the proliferation of fake news and conspiracy theories in the aftermath of the shooting; a conservative talk show host's controversial comments about one of the survivors, leading to the loss of several sponsors; and commentary focusing on how local and national media should cover mass shootings.

MEDIA ETHICS

On Feb. 14, 2018, 19-year-old Nikolas Cruz opened fire at Stoneman Douglas. Cruz, who had previously stated on social media his aspiration to become a "professional school shooter," was subsequently charged with 17 counts of premeditated murder and 17 attempted murders. Details of the shooting were revealed through numerous media reports, as well as social media images, audio, and videos during and following the shooting, many of which depicted students hiding with rapid gunshots in the background, overturned chairs, blood-stained floors, and more.

In the aftermath of the shooting, several students from Stoneman Douglas founded Never Again MSD, a gun control advocacy organization. The initial co-founders of the group were Cameron Kasky, Alex Wind, and Sofie Whitney. Additional students joined prior to and after a gun-control rally in Fort Lauderdale, Fla. on Feb. 17, 2018, including Emma González and David Hogg. Several of the students were featured in national media interviews and town hall meetings. The group used the hashtags #NeverAgain and #EnoughIsEnough on multiple social media platforms. On March 24, 2018, Never Again MSD led a nationwide protest called "March for Our Lives," during which millions of people marched across 800 sites in the United States and internationally in support of tighter gun control regulations and solutions.

Coverage of Teenagers Distinguishes Parkland Shooting from Other Mass Shootings

In February and March of 2018, several media outlets and observers noted that the Parkland shooting, and the ensuing media coverage, were distinct from previous mass shootings because the victims and survivors were teenagers and students, many of whom would gain national prominence for their statements regarding the shooting and gun control. As a consequence of this coverage, the Parkland shooting remained on the national consciousness longer than other mass shootings. However, many observers also criticized the news media for not adequately covering black individuals, including students from Marjory Stoneman Douglas High School, and the black community as a whole in their coverage of the Parkland shooting. The National Rifle Association (NRA) also criticized the media, claiming they "love" mass shootings because of the boost in ratings, leading several reporters to defend their practices.

On Feb. 22, 2018, CNN reported that one possible reason for the continuing coverage of the shooting was that Parkland's survivors and their supporters "[were] old enough to organize, tweet, stage walkouts and protest . . . prompting even more media coverage." This was in contrast to the shooting at Sandy Hook Elementary School in 2012, where the survivors were "too young to mobilize." CNN also differentiated the Parkland shooting from the Oct. 1, 2017 shooting in Las Vegas, Nev. where a gunman opened fire on a country music concert, killing 58 and wounding at least 500 who came from a variety of locations. Unlike in the Las Vegas shooting, the Parkland survivors are part of "the same tight knit community."

According to TVEyes, a media monitoring program, in the week following the Parkland shooting, there were 1,024 mentions of "gun control" on CNN, Fox News, and MSNBC, and more than 200 mentions on ABC, CBS, and NBC broadcasts, most of which stemmed from the coverage of Never Again MSD and the survivors of the Parkland shooting.

In a March 2 post on *The Washington Post*'s "Wonkblog," Rachel Siegel, a national business reporter, agreed that the news coverage of the Parkland shooting was different. She quoted Jane Hall, a professor at American University's School of Communication, who said, "I think that this has been building as a story.. . . What has happened with the Parkland story is the eloquence of the young people coming forward immediately after this happened, speaking for themselves, and speaking with anger and saying, 'It is time for the grown-ups to do something about this.'"

Siegel also highlighted statistics found by the *Post* in partnership with researchers from Media Cloud, an open-source archive collecting content from 60,000 digital publications each day. They found that there were 7,900 stories by U.S. media outlets about the Parkland shooting in the two weeks following the incident. In comparison, there were 4,200 about the Las Vegas shooting and 4,500 about the San Bernardino shooting in which a married couple carried out a mass shooting at the Inland Regional Center in San Bernardino, Calif. in 2015. The only shooting that prompted more stories was the mass shooting at Pulse nightclub in Orlando, Fla. in June 2016, though most of the stories were published in the immediate days following the incident.

Siegel cited her interview with Sasha Costanza-Chock, an associate professor of civic media at the Massachusetts Institute of Technology, who contended that the media savvy of teenage activists was a major reason the shooting received continuing media coverage. "They have organizational support from existing organizations, as well as personal experience," Costanza-Chock said. "And they grew up with social media. They've given hundreds of interviews to print and TV journalists, so within a couple days they learned how to do that, and how do you use talking points with a reporter." Timothy Johnson, the guns and public safety program director for Media Matters for America, also credited the students, saying that there was much more talk about an assault-weapons ban than after other mass shootings.

However, the media coverage of the teens also raised concerns from

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Parkland, *continued from page 19*
some observers. One particular area of criticism was that the media coverage largely ignored black individuals and communities, including students at Stoneman Douglas. Online publishing platform *Medium* contributor Aditi Juneja contended that the media coverage of the Parkland shooting appeared to demonstrate "a colorism in who the media chooses to cover." She continued, "The faces that we have seen are either White or White-passing. This choice is particularly odd given that more than half of kids killed in firearm homicides are Black."

Juneja cited a 2017 study by the medical journal *Pediatrics*, which found that black youth were killed in 56 percent of firearm homicides between 2012 and 2014, the highest of any demographic. Additionally, black male teenagers were 10 times more likely to be killed in gun violence than their white counterparts. Juneja provided some potential explanations for the lack of coverage of the black students from Parkland, such as events are most newsworthy "when they are unusual and unexpected" or that the media "has become desensitized to gun violence in communities of color and only takes notice when it happens in wealthier, Whiter communities." She also suggested that it is perhaps "a reflection of who is in our newsrooms and whose stories they relate to and deem worth telling."

One of the survivors of the shooting, David Hogg, also criticized the media for not providing more coverage not only of the black students at his school, but also of the black community more broadly. In a live Twitter Q&A on March 19, Hogg said that there was "a lot of racial disparity in the way that this [shooting] is covered." He continued, "If this happened in a place of a lower socioeconomic status or . . . a black community, no matter how well those people spoke, I don't think the media would cover it the same.. . . We have to use our white privilege now to make sure that all of the people that have died as a result of [gun violence] and haven't been covered the same can now be heard."

Another survivor, Cameron Kasky, agreed with Hogg. During the same Q&A, Kasky said, "We're an affluent community – that's why initially everybody followed this [shooting] so closely.. . . There are communities that . . . have to deal with [gun violence] on a much more regular basis and have to feel a lot less safe than we do."

At a press conference on March 29, several black students from Stoneman Douglas pointed out that the media coverage did not reflect the fact that their school is 11 percent black, according to *Vox* the same day. Student Tyah-Amoy Roberts said, "I am here today with my classmates because we have been thoroughly underrepresented and, in some cases, misrepresented." In an interview with CNN on March 29, Kai Koerber, a junior, said, "I would say that our voices were not intentionally excluded, but they were not intentionally included.. . . Now more than ever, it is time to represent the diversity of our school, and the diversity in the world."

Another organization critical of the media coverage of the Parkland shooting was the NRA. On February 22, *Politico* reported that NRA spokeswoman Dana Loesch said at the annual Conservative Political Action Conference that "[m]any in legacy media love mass shootings. You guys love it." She added, "Now, I'm not saying that you love the tragedy. But I am saying that you love the ratings. Crying white mothers are ratings gold to you and many in the legacy media."

In a February 28 story, *USA Today* quoted several of its reporters who refuted Loesch's claims, including Rick Jervis who wrote, "No, the media doesn't love mass shootings. But we love the humanity that inevitably shines through each event." Trevor Hughes described the difficulty for journalists to cover mass shootings and other tragedies. "The reality is that some days, the hardest thing a reporter must do is pick up the phone to call a grieving family," he wrote. "But that's what we do. We seek primary sources and hold an honest mirror up to our communities. We don't have the luxury of conspiracy theories or parroting talking points. We report. We cry. And we wrestle with our coverage decisions through sleepless nights and broken relationships and a seemingly unending parade of grief."

Fake News and Conspiracy Theories Spread in the Aftermath of the Parkland Shooting

In the days and months following the Parkland shooting, fake news and conspiracy theories spread rapidly across social media and from some conservative commentators. Perhaps the most notable example, among many others, involved allegations by one of the survivors of the shooting who claimed that CNN had provided him "scripted" questions to ask during a town hall event, an assertion that was later debunked.

On Feb. 22, 2018, the *Washington Examiner*, a conservative website and weekly magazine, reported that Colton Haab, a survivor of the Parkland shooting, had claimed that CNN provided him a list of "scripted questions" in advance of a televised town hall meeting on February 28. He told the local ABC affiliate, WPLG-TV, "I expected to be able to ask my questions and give my opinions on my questions.. . . CNN had originally asked me to write a speech and questions, and it ended up being all scripted." According to *Business Insider* on February 23, Haab's father, Glenn Haab, provided CNN with a lengthy speech he wanted his son to read, and pulled his son out of the town hall after CNN refused to let him read it.

CNN denied the allegations in a February 22 statement, claiming that there was "absolutely no truth to this. CNN did not provide or script questions for anyone in last night's town hall, nor have we ever."

The following day, CNN released a series of emails between the Haabs and producer Carrie Stevenson in order to demonstrate that the family provided doctored emails to media outlets as their evidence that CNN provided Colton a scripted question. The first email was Colton sending his proposed questions to Stevenson, who approved one of the questions. Glenn then provided Stevenson with the speech he wanted Colton to read, several pages of "background" points contextualizing his question.

Stevenson's response to the speech was the email in question. In both versions of the email provided by the Haabs and CNN, Stevenson wrote that the notes were "way too long. There are quick questions so that we can get to as many as possible." In a version of the email distributed by the Haabs to several media outlets, Stevenson wrote, "This is what Colton and I discussed on the phone. He needs to stick to this." However, CNN's version included three additional words: "This is what Colton and I discussed on the phone *that he submitted*. He needs to stick to this" (emphasis added). In both versions, Stevenson then provided a condensed version of the notes Colton could read.

In a February 23 post on *The Washington* Post's "Erik Wemple" blog, Wemple explained that the Haabs had cut off the portion of the email demonstrating that Stevenson was

insisting that Colton use a question he had already "submitted." The released emails are available online at: https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/02/23/scripted-controversy-cnn-releases-emails-of-correspondence-with-florida-student/?utm_term=.757e34e0e597.

The same day it released the emails, CNN issued an additional statement, which said in part, "It is unfortunate that an effort to discredit CNN and the town hall with doctored emails has taken any attention away from the purpose of the event. However, when presented with doctored email exchanges, we felt the need to set the record straight."

The Haabs' claims were not the only prominent examples of fake news circulating in the aftermath of the Parkland shooting. In a Feb. 27, 2018 interview with National Public Radio (NPR), *Miami Herald* reporter Alex Harris discussed how several witnesses and survivors seemed to be upset with her when she was trying to arrange interviews in the aftermath of the shooting. She explained that they had seen a screenshot of a doctored version of one of her tweets from earlier in the day, which was altered to say that she was requesting photos or videos of dead bodies, rather than interviews. A second screenshot altered a separate tweet to indicate that Harris wanted to know whether the shooter was white, which Harris said seemed to show that she had "some sort of agenda" or that she was "race-baiting." Harris said in the interview with NPR, "This is obvious fake news. It is obviously a hoax. And it is obviously being sent out there so people can harass me and target me with abuse."

On February 14, the No. 1 trending video on YouTube contained the false allegation that Parkland shooting survivor David Hogg was an "actor." The video showed a clip of him speaking on camera for a Los Angeles local news segment in 2017, suggesting that he followed the cameras to different newsworthy events. *The New York Times* reported on February 20 that other YouTube videos falsely alleged that the students were "crisis actors" or "FBI plants." YouTube eventually took down many of the videos, according to *Vox* on February 26. However, right-wing commentators Alex Jones and Rush Limbaugh continued to push the false "crisis actors" allegation, among other conspiracy theories, according to *Media Matters* on March 4.

On March 26, conservative website *RedState* falsely reported that Hogg, was not actually at school on the day of the Parkland shooting. The author of the article, Sarah Rumpf, relied on what she believed were two conflicting interviews with Hogg, according to *Mediaite*, a news and opinion blog, on March 26. In an interview with *Time*, Hogg said he was hiding in a closet during the shooting. In a CBS documentary, Hogg said that on the day of the shooting, he got on his bike and rode as quickly to the school as possible. Rumpf later issued two updates after cellphone video showed Hogg, was, in fact, hiding in a closet during the shooting. Additionally, several news outlets clarified that Hogg, a student journalist, was riding his bike to school, but it was hours after the shooting in order to take photographs and interview people at the scene.

Finally, in late March, a photo circulated of survivor Emma González, which appeared to show her tearing a copy of the U.S. Constitution. However, on March 24, director of the La Follette School of Public Affairs at the University of Wisconsin Don Moynihan posted a tweet demonstrating that the photo was fake and was based on an image and Graphics Interchange Format (GIF) of González ripping a gun-target poster in a *Teen Vogue* feature. Nevertheless, the images were shared by several prominent conservative figures, including actor and commentator Adam Baldwin, who defended it as "political satire," according to the *Daily Intelligencer* on March 25. He later deleted his tweet of the image.

On February 26, *Vox* science reporter Brian Resnick offered two reasons why conspiracy theories and fake news "flourished" after the Parkland shooting. First, he explained that conspiracy theorizing is a type of politically-motivated reasoning in which individuals seek to protect the groups and worldviews to which they adhere. Resnick quoted Texas Tech University psychologist Asheley Landrum, who wrote in an email to *Vox*, "To counteract the kids' powerful speech, a conspiracy narrative arises that allows individuals to dismiss or ignore [the kids' perspectives]" without having to actually engage with their arguments.

Second, Resnick contended that conspiracy theories are "a tool to cope with a painful, uncertain world." He cited the work of Jan-Willem van Prooijen, a social and organizational psychologist at Vrije Universiteit Amsterdam, who found that conspiracy theories are a "self-protective mechanism people have." In a 2017 interview with Resnick, van Prooijen added that education level, political ideology, and personality characteristics are all factors determining how susceptible one is to believing conspiracy theories.

On February 23, *The New York Times* contended that part of the problem was that Facebook, YouTube, and other social media sites, although they promised to remove false or conspiratory content related to the Parkland shooting, were unable to eradicate much of the content. In an interview with the *Times*, Jonathon Morgan, founder of New Knowledge, a company that tracks disinformation online, said Facebook and YouTube "[are] not able to police their platforms when the type of content that they're promising to prohibit changes on a too-frequent basis."

Conservative Radio Show Host Criticizes Parkland Shooting Survivor, Loses Sponsors

On March 28, 2018, conservative television and radio talk show host Laura Ingraham posted a tweet criticizing Parkland shooting survivor David Hogg for "whining" about being rejected by four universities, leading to immediate criticism on Twitter. Although Ingraham apologized, at least nine sponsors pulled their advertisements from her show, a consequence for controversial actions and statements previously faced by Fox News hosts Bill O'Reilly and Sean Hannity in 2017.

On March 28, Ingraham posted a tweet, which read "David Hogg Rejected By Four Colleges To Which He Applied and whines about it. (Dinged by UCLA with a 4.1 GPA...totally predictable given acceptance rates.)" According to *The Washington Post* the following day, the tweet received immediate backlash, with many criticizing Ingraham for attacking the survivor of a school shooting. Hogg tweeted, "Soooo @IngrahamAngle what are your biggest advertisers ... Asking for a friend. #BoycottIngramAdverts."

On March 29, multiple news outlets reported that Ingraham had apologized in two tweets that said, "Any student should be proud of a 4.2 GPA —incl. [Hogg]. On reflection, in the spirit of Holy Week, I apologize for any upset or hurt my tweet caused him or any of the brave victims of Parkland. For the record, I believe my show was the first to feature David . . . immediately after that horrific shooting and even noted

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how 'poised' he was given the tragedy. As always, he's welcome to return to the show anytime for a productive discussion." The *Post* said that the Ingraham's quick apology "showcase[d] the power that the Parkland survivors have, not just in organizing rallies but in spurring corporate America to act."

However, NBC News and National Public Radio (NPR) reported on March 30 that Ingraham had lost several advertisers, including TripAdvisor, Expedia, Hulu, Johnson & Johnson, Wayfair, Nestlé, and Nutrish. Wayfair, an e-commerce company, said in a statement, "The decision of an adult to personally criticize a high school student who has lost his classmates in an unspeakable tragedy is not consistent with our values." Nutrish, a pet food brand, said in a separate statement that "[t]he comments [Ingraham] made are not consistent with how we feel people should be treated."

In a March 29 tweet, Hogg wrote that he would "accept [Ingraham's] apology only if [she] denounce[d] the way [Fox News] has treated [his] friends and [himself] in this fight. It's time to love thy neighbor, not mudsling at children." In an interview the same day with *The New York Times*, Hogg added that he was not impressed by the apology. "She only apologized after we went after her advertisers. It kind of speaks for itself," he said.

The New York Times noted that Ingraham was not the first Fox News host to lose sponsors, or at least face the risk of losing sponsors, after consumers on social media demanded that advertisers address controversial actions or comments by the hosts. In April 2017, 50 brands pulled advertisements from "The O'Reilly Factor" after host Bill O'Reilly reportedly reached settlements with several women who had accused him of sexual harassment or other inappropriate behavior. He was later fired by Fox. In November 2017, similar calls were made regarding host Sean Hannity after he seemed to justify then-Republican nominee for the U.S. Senate Roy Moore's alleged sexual advances toward teenage girls when he was in his early 30s as "consensual." However, according to the *Times*, the calls against Hannity were less effective, with several brands initially stating they would drop advertising for his show, but later deleting those statements.

The *Times* also noted that Ingraham had been the center of controversy in February 2018 when she said, regarding NBA players discussing their political opinions, "Must they run their mouths like that? . . . Keep the political commentary to yourself, or as someone once said, shut up and dribble."

On April 3, *Fortune* magazine reported that Fox News had defended Ingraham. In a statement, Fox News co-president Jack Abernethy said, "We cannot and will not allow voices to be censored by agenda-driven intimidation efforts. We look forward to having Laura Ingraham back hosting her program next Monday when she returns from spring vacation with her children." Ingraham and Fox News had previously claimed that the vacation was preplanned, according to *Fortune*.

Media Outlets Grapple with Covering Mass Shootings, Raise Particular Issues with the Parkland Shooting

Following the Parkland shooting, media organizations grappled with ethical questions about how to report on mass shootings. *The Washington Post* and *Columbia Journalism Review* (*CJR*) each discussed particular issues raised by the Parkland shooting, namely covering and interviewing minors in the aftermath of tragedies, and digging into the failures of law enforcement and healthcare in the case of the shooter, Nikolas Cruz.

On Feb. 15, 2018, *The Washington Post* discussed how the media should cover cases such as the Parkland shooting where the survivors are minors. The *Post* first provided the example of NBC's February 15 "Today Show" interview of Samantha Grady, a student at Marjory Stoneman Douglas High School who had witnessed the shooting of her best friend and classmate. When co-host Savannah Guthrie asked how her friend was doing, Grady cried and responded "Yeah, unfortunately, she didn't make it," which was followed by silence before co-host Hoda Kotb said, "We're so sorry about that, Samantha, so sorry." The *Post* explained that although the question of balancing informing the public and mining a tragedy for ratings was not new, the Parkland shooting and subsequent media coverage, such as that by the "Today Show," raised a secondary concern about interviewing minors: whether a teenager, especially one who has so recently experienced trauma, can provide informed consent to be interviewed.

According to the *Post*, various media outlets handled the issue differently. NBC sought permission from Grady's parents, while CNN, in each interview, told the student that she did not have to talk about anything she did not want to, even if the network had received consent. *Washington Post* Managing Editor Cameron Barr said the paper did not have a specific policy, but that it required that its journalists "use the utmost compassion and sensitivity in interviewing children in such circumstances."

In an interview with the *Post*, Bruce Shapiro, executive director of the Dart Center for Journalism and Trauma, a Columbia Journalism School project that focuses on disaster and violence reporting, criticized NBC's subsequent decision to post the interview with Grady on social media. "Whatever the mistakes of the interview itself, that tweet is clearly exploitative of a teenager's grief," he said. "If the segment is 'absolutely heartbreaking' [as NBC's tweet describes it] it is because Kotb and Guthrie were ignorant of her loss. NBC should be apologizing for its mistake, not selling that girl's tears like reality TV."

On February 16, *CJR* published an essay about what stories journalists should be writing about the Parkland shooting. More specifically, Meg Kissinger, an investigative reporter for the Milwaukee *Journal Sentinel* and instructor at Columbia University's Graduate School of Journalism, urged journalists to avoid the "quick, easy story of carnage or swayed by the cheap opportunism of those looking to advance their own political agendas." Instead, Kissinger called on reporters to "[f]ollow the money," especially regarding the Parkland shooting because "[e]very red flag was there" but the school and law enforcement "did [not do] anything" regarding the mental health of the shooter, Nikolas Cruz.

Media outlets and observers also reaffirmed several recommendations made after previous mass shootings, including to refrain from focusing on the shooter, but instead on the survivors; to be empathetic and make sure survivors feel safe, as well as interviewing a range of survivors; and to practice introspection and self-criticism, especially in cases when they make mistakes, among other recommendations. For more information and resources about media coverage of mass shootings and other tragedies, visit the Dart Center for Journalism & Trauma's website at https://dartcenter.org/topic/homicide-mass-shooting.

Scott Memmel
Silha *Bulletin* Editor

Undercover Video Maker James O'Keefe Continues Attacks on the News Media, Faces Setbacks in Some Legal Disputes

In October 2017, political activist James O'Keefe, who is known for publishing controversial hidden camera videos on his website, Project Veritas, targeted *The New York Times* in his latest operation intended to target the mass media. In December, O'Keefe obtained a legal victory after a federal judge lifted a restraining order that had barred Project Veritas from disclosing videos and other information obtained in an operation against the Michigan chapter of the American Federation of Teachers (AFT Michigan).

DATA PRIVACY

However, in the winter of 2017/2018, O'Keefe also encountered two setbacks. On Nov. 27, 2017, *The Washington Post* published an extensive report describing how a woman who had made several false claims about then-Republican U.S. Senate candidate Roy Moore in interviews with the *Post* was actually an operative from Project Veritas seeking to discredit the newspaper. Amidst significant criticism from journalists and advocates, O'Keefe eventually admitted to being behind the operation, but maintained that Project Veritas' intention was not to plant a fake story. On Jan. 4, 2018, a federal judge allowed a lawsuit brought by Robert Creamer, co-founder of Strategic Consulting Group, NA, Inc., a member organization of Democratic National Committee vendor Democracy Partners, LLC, to proceed. O'Keefe filed two motions seeking to dismiss the lawsuit, which arose after he published a series of videos to Project Veritas following a "sting operation" into Democracy Partners LLC.

O'Keefe has a long history of posting undercover videos on the Project Veritas website, https://www.projectveritas.com/, that raise several legal and ethical questions. In 2009, O'Keefe first gained notoriety after releasing a series of undercover videos on Project Veritas depicting a community organizing group, the Association of Community Organizations for Reform Now (ACORN), advising a couple posing as a pimp and a prostitute on how to make their business legal. The couple was later revealed to be O'Keefe and his associate Hannah Giles. The videos appeared to be heavily edited, according to the *Columbia Journalism Review* (*CJR*) on March 15, 2011. *The New Yorker* magazine reported on May 20, 2016 that the videos "raised serious questions about [O'Keefe's] methods and ethics — questions that have trailed him ever since." O'Keefe and Giles eventually settled with ACORN for $100,000 on a wire-tap claim after losing a motion for summary judgment. (For more information on the ACORN videos and the resulting lawsuit, see "ACORN Videos Provoke Media Debate, Trigger Lawsuit" in the Fall 2009 issue of the Silha *Bulletin*).

In 2010, two of O'Keefe's accomplices were criminally charged after they disguised themselves as telephone repairmen in an attempt to enter the offices of then-U.S. Senator Mary Landrieu (D-La.). The accomplices allegedly tampered with the office's phone system, according to *The Washington Post* on Jan. 27, 2010. The accomplices, O'Keefe, and an additional employee of Project Veritas pled guilty to one count each of entering federal property under false pretenses. O'Keefe was sentenced to three years of probation, 100 hours of community service, and a $1,500 fine.

In 2011, O'Keefe targeted senior vice president of National Public Radio (NPR) Ron Schiller, who was depicted in a Project Veritas video making negative comments about the "Tea Party" political movement. Schiller was also shown saying that NPR would be "better off in the long run without federal funding." The video ultimately led to the resignation of Schiller and NPR Chief Executive Officer Vivian Schiller. (For more information on O'Keefe's stings in 2010 and 2011, see *NPR Executives Resign after Hidden Camera Sting* in "Prank Phone Call, Hidden Camera Spur Ethical Controversies for News Media" in the Winter/Spring 2011 issue of the Silha *Bulletin*.)

In the summer of 2017, O'Keefe released a series of videos targeting CNN. In one video, a CNN producer can be heard saying the coverage of President Donald Trump's possible collusion with Russia during the 2016 presidential election was "mostly bullshit" and all about "ratings." In another video, CNN contributor and host of "Messy Truth" Van Jones is heard calling the possible collusion of the Trump administration with Russia during the 2016 presidential campaign "a nothingburger," according to *The Hill* on June 30, 2017. Following the posting of the videos, several media members and scholars once again criticized O'Keefe's methods and called into question the legitimacy of the videos. (For more information on the CNN videos, see *Political Operatives Target Hidden Camera Videographer in Civil Lawsuit* in "Controversial Undercover Video Makers Face Legal Action and Ethical Concerns" in the Summer 2017 issue of the Silha *Bulletin*.)

Project Vertias Targets *The New York Times*

On Oct. 10, 2017, *The New York Times* reported that James O'Keefe had published a video on the Project Veritas website, https://www.projectveritas.com/, which allegedly depicted a junior *Times* editor, Nick Dudich, mocking the idea of acting as an objective journalist. Dudich, who joined the *Times* in the spring of 2017 as an audience strategy editor, did not know he was being recorded, according to the *Times*.

In a statement in response to the video, *Times* spokeswoman Danielle Rhoades Ha said, "Based on what we've seen in the Project Veritas video, it appears that a recent hire in a junior position violated our ethical standards and misrepresented his role." She continued, "In his role at The Times, he was responsible for posting already published video on other platforms and was never involved in the creation or editing of Times videos. We are reviewing the situation now."

The following day, Project Veritas posted a second heavily edited video depicting Dudich in which he allegedly discussed how he serves as a "gatekeeper . . . choos[ing] what goes out and what doesn't go out." On October 17, O'Keefe posted a tweet in which he claimed that Dudich had been fired, though as the *Bulletin* went to press, the *Times* had not announced whether this was the case.

The videos depicting Dudich were the first two in a four-part series targeting the *Times*, titled "American Pravda, NYT." The third video depicted homepage

O'Keefe, *continued on page 24*

O'Keefe, *continued from page 23*
editor Desiree Shoe criticizing Vice President Mike Pence. The fourth video showed Todd Gordon, an IT consultant for the *Times*, stating that bias against President Donald Trump was part of the company culture.

As the *Bulletin* went to press, no further videos had been posted and the *Times* had not responded to the new videos.

Federal Judge Lifts Temporary Restraining Order Against Project Veritas

On Dec. 27, 2017, *Politico* and *The Washington Post* reported that U.S. District Court for the Eastern District of Michigan Judge Linda Parker had lifted a temporary restraining order (TRO) against James O'Keefe and Project Veritas related to an undercover operation into the Michigan affiliate of the American Federation of Teachers (AFT Michigan). *AFT Michigan v. Project Veritas*, No. 17-cv-13292 (E.D. Mich. 2017). Parker also denied a request for a temporary injunction brought by the teachers union, citing First Amendment concerns.

On Sept. 27, 2017, AFT Michigan filed a complaint and demand for trial by jury in the Third Judicial Circuit of Michigan against Project Veritas and Marisa Jorge seeking "redress for the fraudulent, unauthorized and unlawful surveillance of [Project Veritas] and its staff and the fraudulent, unauthorized and unlawful gathering of information." According to the complaint, Jorge, who used the pseudonym Marissa Perez, was a political operative who had previously attempted to infiltrate Disrupt J20, an organization that opposed the election of President Donald Trump. The complaint also stated that Jorge perhaps shared a residence with O'Keefe and was likely employed by Project Veritas.

The complaint alleged that in the spring of 2017, Jorge approached AFT Michigan seeking to work as an intern for the organization. She claimed to be a student at the University of Michigan and wanted to teach second grade students, both of which were later revealed to be untrue. AFT Michigan accepted Jorge as an intern in May 2017 and assigned her various projects. According to the complaint, Jorge often engaged with AFT Michigan staff, seeking confidential and proprietary information outside the scope of her projects, such as grievances related to employee discipline stemming from inappropriate sexual contact with students. Additionally, the complaint alleges that Jorge repeatedly accessed other staff members' computers, gaining access to more proprietary and confidential information.

The complaint's first claim was that Jorge fraudulently misrepresented "(a) her identity; (b) her purpose for seeking an internship; (c) her interest in public education or the labor movement" in order to disparage AFT Michigan and generate economic contributions to Project Veritas. The second claim was that Jorge trespassed in order to gain access to AFT Michigan members, computers, files, and records. The complaint stated that AFT Michigan would not have given access to their offices had it known Jorge's truth identity and purpose.

Third, the complaint contended that Jorge eavesdropped on AFT Michigan employees by "interrogating" them and reviewing proprietary physical and electronic files and records. Additionally, AFT Michigan alleged that Jorge may have surreptitiously recorded interactions in the AFT Michigan offices because she often wore "adornments which are capable of hiding a camera or recording device." The complaint stated that because Project Veritas had a history of "creating false and misleading stories, which . . . [have] taken comments out of context, have materially misrepresented the words of persons interviewed[, and have] cast organizations in a false light for the purpose [of] bringing harm to these entities," the court should intervene to avoid irreparable harm.

Fourth, the complaint alleged that Jorge secured her internship "by trick," which resulted in larceny, the "taking of valuable material for personal gain." Finally, the complaint alleged that Jorge and O'Keefe conspired together to infiltrate the AFT Michigan offices for the purpose of casting the organization in a false light.

Among the remedies sought by AFT Michigan were orders "enjoining and restraining . . . Jorge, [Project Veritas,] and any organization associated with [it] from disseminating, publishing, displaying or otherwise releasing to the public information obtained in violation of the law." The full complaint is available online at: https://www.aft.org/sites/default/files/complaint_aftmi_veritas_092717.pdf.

On Sept. 29, 2017, the *Detroit Free Press* reported that Judge Brian Sullivan had issued a temporary restraining order (TRO) against Project Veritas, which prevented the organization, its employees, and Jorge from "publishing, releasing to the public or otherwise disclosing information pertaining to or relating to the Plaintiff AFT Michigan, its officers, employees or affiliated location unions until the further order of the Court." Sullivan ruled that it appeared Jorge had "secured access to private, confidential and proprietary information" and that Project Veritas intended to "publish this information . . . which . . . [was] taken without authority or consent." He added that it appeared that "the publication of private, confidential and proprietary information will result in an irreparable injury to [AFT Michigan] because information released to the public cannot be recalled or the privacy of the information restored." The full order is available online at: https://www.aft.org/sites/default/files/tro_aftmi_veritas_092917.pdf.

However, on December 27, Judge Parker vacated the TRO and denied AFT Michigan's request for a preliminary injunction. Parker ruled that AFT Michigan, despite producing 221 documents as evidence, failed to meet the criteria for issuance of a preliminary injunction because the documents did not provide adequate evidence to demonstrate violations of the Michigan Uniform Trade Secrets Act (MUTSA), Mich. Comp. Laws § 445.1903(1), the Michigan Eavesdropping Act, Mich. Comp. Laws § 750.539d, and breach of fiduciary duty. Parker concluded that AFT Michigan would "not suffer irreparable harm" because there was "no factual support that [Jorge or Project Veritas] violated either the MUTSA or the Eavesdropping Act," as well as because there was "no certainty that what could be published could harm AFT Michigan]."

Parker also said that granting a preliminary injunction "raises First Amendment concerns" because it would be a prior restraint. In such cases, courts must consider whether the publication "threaten[s] an interest more fundamental than the First Amendment itself and to forego the prerequisites from the realm of everyday resolution of civil disputes governed by the Federal Rules. Only if a plaintiff can meet this substantially higher standard can a court issue an injunction prohibiting publication of pure speech," as stated in the Eastern District of Michigan's 1999 case *Ford Motor Co. v. Lane*. 67 F. Supp. 2d 745, 749 (E.D. Mich. 1999). Parker concluded that AFT Michigan had "not persuaded the Court that its commercial interests are more fundamental than the Defendants' First Amendment right."

AFT Michigan had contended that because Jorge and Project Veritas unlawfully obtained private and proprietary information, they should not be able to benefit from First Amendment protections. However, Parker cited the U.S. Court of Appeals for the Sixth Circuit's ruling in *Proctor & Gamble v. Bankers Trust Co.* in which the court held that "allegedly improper conduct in obtaining the information is insufficient to justify imposing a prior restraint." 78 F.3d 219, 225 (6th Cir. 1996). Therefore, Parker concluded that "in light of the potential First Amendment issues, a preliminary injunction most certainly will infringe upon Defendants' First Amendment right."

However, Parker also said that AFT Michigan had "a likelihood to succeed on the merits of its breach of duty of loyalty claim" because Jorge "fraudulently misrepresent[ed] herself, misusing and mishandling confidential information, and failing to disclose that she worked for an organization whose interests conflicted with [AFT Michigan]." As the *Bulletin* went to press, no further legal proceedings had been announced.

Following the ruling, AFT President Randi Weingarten and AFT Michigan President David Hecker published a joint statement, which said, "Today, a judge made clear to Project Veritas that its unlawful tactics have a price. We understand that Judge Parker chose to show deference to free speech in lifting the injunction that has been in place for three months, but she made crystal clear that the AFT's claim about Project Veritas violating Michigan law when it infiltrated our confidential operations is likely to succeed." They added that while they "believe strongly in the First Amendment," they were pleased that Parker's decision "supports [their] position that [AFT Michigan has] a right of action the moment Project Veritas publishes anything illegally obtained by its operative Marisa Jorge. Today's decision gives clear warning that Project Veritas and the people working on its behalf . . . will be held liable for their actions."

Project Vertias spokesman Stephen Gordon issued a statement, in which he said the organization was "particularly happy that the court . . . removed this restraint to our First Amendment rights." He added that AFT Michigan "obviously ha[s] something they don't wish for the citizens of Michigan or even the entire country to find out about." As the *Bulletin* went to press, Project Veritas had not published any material from Jorge's undercover operation.

Washington Post Uncovers Alleged Failed Sting Attempt

On Nov. 27, 2017, *The Washington Post* published an extensive report describing how a woman had falsely claimed in several interviews with the newspaper that then-Republican U.S. Senate candidate in Alabama Roy Moore had impregnated her as a teenager. The *Post* reported that the woman, Jaime T. Phillips, was from Project Veritas, after she was seen entering the New York offices of the organization. Following the *Post*'s report, several media scholars praised the work of the *Post*, while also criticizing the tactics of James O'Keefe and employees of Project Veritas. Although O'Keefe admitted to being behind the operation in an email to his supporters, he later contended in interviews with the *Post* and the *Observer* that his intention was not to plant a fake story.

According to the *Post*, on Nov. 10, 2017, Phillips first met with reporter Beth Reinard, who co-authored an article published the day before about allegations that Moore had initiated a sexual encounter with 14-year-old Leigh Corfman. The *Post* explained that Phillips shared a dramatic story about an alleged sexual relationship with Moore in 1992. In the series of interviews that lasted over two weeks, she also claimed that the relationship led to her getting an abortion at age 15. Frequently, Phillips asked if her account would lead to Moore being taken off the ballot or lose the U.S. Senate race.

The *Post* stated that it did not publish the article because her account was unsubstantiated and contained several inconsistencies. For example, Reinhard found that although Phillips had said she lived in Alabama for only one summer while a teenager, she had a cellphone number with an Alabama area code. Reinhard also found that the company Phillips claimed to work for, NFM Lending, had no records of anyone by that name having worked there.

Additionally, Alice Crites, a *Post* researcher who was looking into Phillips's background, found a webpage that suggested Phillips was tied to Project Veritas. The webpage, which was under the name Jaime Phillips, was on the website GoFundMe.com, a platform for personal fundraising efforts. According to the *Post*, Phillips was using the page to request money because she was "moving to New York." The page further stated, "I've accepted a job to work in the conservative media movement to combat the lies and deceipt [*sic*] of the liberal MSM. I'll be using my skills as a researcher and fact-checker to help our movement. I was laid off from my mortgage job a few months ago and came across the opportunity to change my career path." These details largely matched a March Facebook post by Project Veritas advertising an opening for 12 new "undercover reporters."

Meanwhile, Phillips also met with another *Post* reporter, Stephanie McCrummen, who had co-authored the story about Corfman with Reinhard. However, in this case, *Post* video reporters accompanied McCrummen, who confronted Phillips about the GoFundMe.com page. Phillips claimed she was going to work for the *Daily Caller*, a conservative news outlet founded by political commentator Tucker Carlson and Neil Patel, former adviser to Vice President Dick Cheney, and was interviewed by a woman named "Kathy Johnson." However, when the *Post* emailed Paul Connor, executive editor of the *Daily Caller*, he responded that no such person worked for the publication.

After the *Post* determined that Phillips lived in Stamford, Conn., just 16 miles from Project Veritas' offices in Mamaroneck, N.Y, it positioned video reporters nearby. Additionally, two reporters followed Phillips from her home to Project Veritas' office. The *Post* concluded that she worked for Project Veritas after she was seen entering the building and her car remained in the parking lot for more than an hour.

The *Post* subsequently decided to report on Phillips' previously off-the-record comments to Reinhard and McCrummen. In the *Post*'s November 27 story, Martin Baron, the newspaper's executive editor, is quoted as saying, "We always honor 'off-the-record' agreements when they're entered into in good faith.. . . But this so-called off-the-record conversation was the essence of a scheme to deceive and embarrass us. The intent by Project Veritas clearly was to publicize the conversation if we fell for the trap. Because of our customary journalistic rigor, we weren't fooled, and we can't honor an 'off-the-record' agreement that was solicited in maliciously bad faith."

Shortly after the *Post* published its report about Phillips, O'Keefe tweeted a video, which he described as a "confrontation" with Aaron Davis, one of the authors of the *Post*'s investigation. When Davis and another *Post* reporter, as well as two video reporters, went to the Project Veritas offices to determine whether Phillips worked for the organization, they were approached

O'Keefe, *continued on page 26*

O'Keefe, *continued from page 25*
by O'Keefe who initially declined to answer questions, according to the *Post* on November 27. Later the same day, O'Keefe agreed to meet with Davis. O'Keefe later posted a heavily edited video of the meeting, and tweeted "*The Washington Post* sends a reporter to question me, but take a look. Who's interviewing who?"

O'Keefe's video focused on Davis declining to comment on Project Veritas' release of a surreptitiously recorded conversation with Dan Lamothe, a staff writer for the *Post*, in which he allegedly discussed the paper's "hidden agenda" and alleged bias against President Donald Trump. Lamothe posted a series of tweets on November 27 criticizing the video, saying it "was likely recorded months ago, and obviously without my knowledge." He added that the video "does unleash a secret," but that it is that his "own politics are hard to pin down." Lamothe praised the *Post* and said he was "grateful" to cover stories from "at least 12 countries and the Arctic Ocean" in 2017.

In its November 27 story, the *Post* included the full video of the encounter between Davis and O'Keefe, which, unlike the Project Veritas version, depicted O'Keefe refusing to answer Davis' questions about Phillips and her affiliation with Project Veritas, which he repeated several times. At one point, Davis asked, "Your employee [Phillips], she's your employee? If you're not going to answer that, I'll assume she is your employee. Is that correct?" O'Keefe responded, "So I'm actually going to talk to you about . . ." before Davis interjected and asked about Project Veritas' methodology of using fake employment information and inaccurate accounts about interactions with Moore. The full video ended with Davis getting into his car after O'Keefe further refused to answer questions regarding Phillips.

CNN reported on November 28 that O'Keefe admitted that Phillips worked for Project Veritas in an email to his supporters, which read "Following months of undercover work within The Washington Post, our investigative journalist embedded within the publication had their cover blown.. . . This is how undercover work goes. This isn't the first time that has happened, and it won't be the last time." *Slate* magazine reported that the same email asked for donations so Project Veritas could "launch [its] latest series exposing another so-called pillar of the Establishment Media." The email also called for donations to pay for the "expensive work" that goes into "review[ing] dozens of hours of footage, edit[ing] it down, fact check[ing] with [Project Vertias'] series of investigative techniques and then get[ting] the story out to the public."

However, on Jan. 24, 2018, *The Washington Post*'s "Erik Wemple Blog" reported that O'Keefe, in an interview with the blog, had denied the claim that he and Project Veritas had intended to plant a false story. "Let me make something very clear to you.. . . We never intended to plant a fake story,' he said. He argued instead that Project Veritas' intention was the same as it has always been: conducting undercover operations in order to record candid comments from individuals within a media or political organization. Later in the interview, he characterized the goal of Project Veritas as the use of "deception as a means to gain access to people." O'Keefe continued, "We posed as a rape victim in order to draw the reporter out in order to extract comments."

In an interview with the *Observer* on February 2, O'Keefe further argued that *The Washington Post* had falsely accused him of attempting to plant a fake story. "If you actually trace back the facts and read the article, you'll see they didn't actually state it as fact," he said. "They deduced it." O'Keefe added that he was speaking with his lawyers about "suing *The Washington Post* for defamation" because the newspaper's claims that he attempted to plant a fake story are "grounds for a defamation lawsuit." As the *Bulletin* went to press, O'Keefe had not filed a lawsuit against the *Post*.

In his January 24 blog post, Erik Wemple pointed out that there is a "very surface-level problem with O'Keefe's protestations," which is that "[w]hen you deploy an operative to send in a false tip to a newspaper, you are, in effect, attempting to plant a fake story." Wemple continued, "O'Keefe rebuts this notion by arguing that if The Post had been ramping up to publish such an account, he would have taken some preemptive action.. . . Ironic that O'Keefe appears to have trusted that The Post wouldn't just run straight to the presses with the explosive allegations about Moore. That, after all, is the very stereotype of the mainstream media that O'Keefe and his brethren have sold for years."

In an interview with the Associated Press (AP), Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley praised the work of *The Washington Post*. "This is how good journalists do their jobs and how they don't get taken in by hoaxes," she said. "It's such an important lesson." She continued, "Good journalists don't just take information that is given to them at face value.. . . They question it. They check it. They go behind the scenes. Things don't drop into your lap, and I think that's how some people think journalists work."

Dan Kennedy, a professor at Northeastern University, agreed. "It was such an amazing piece of journalism," he told the AP. "One can only imagine the world of hurt we'd all be in journalism if the Post had been taken in [by the ruse]."

Brent Bozell, founder of Media Research Center, an organization that denounces alleged liberal bias in the media, criticized Project Veritas and O'Keefe, calling the act "shameful" and "do[ing] nothing but hurt the cause of conservative journalism."

Federal Judge Allows Lawsuit Against O'Keefe to Proceed

In 2017, James O'Keefe published another series of videos to the Project Veritas website, following an undercover investigation by two employees of Project Veritas into Robert Creamer, co-founder of Strategic Consulting Group, NA, Inc., a member organization of Democratic National Committee vendor Democracy Partners, LLC. The operation, which began in April 2016, led to a lawsuit against O'Keefe, claiming that his accomplices had trespassed on private property, among other claims. After O'Keefe filed two unsuccessful motions to dismiss the lawsuit, a federal judge on Jan. 4, 2018 allowed the lawsuit to proceed, finding that the complaint had plausibly asserted several claims, including trespassing and wiretapping. *Democracy Partners v. Project Veritas Action Fund*, No. 17-1047 (D.D.C. 2017).

In the summer of 2017, O'Keefe posted a series of videos following a "sting operation" in which Project Veritas employee Allison Maass posed as an intern and infiltrated Democracy Partners' private offices. The infiltration began on June 24, 2016 when Creamer met "Charles Roth," who claimed he was a potential donor to Americans United for Change (AUFC), a non-profit organization for which Creamer worked. Roth's real name was Daniel Sandini, an employee of the Project Veritas Action Fund (Project Veritas Action), which was created to "[i]nvestigate and expose corruption, dishonesty, self-dealing, waste, fraud and other misconduct." According to the complaint, on July

15, 2016, Sandini told Creamer that his niece, "Angela Brandt," was interested in volunteering for Democratic candidates or organizations.

Brandt, who in reality was Maass, eventually began an internship at Democracy Partners, during which she recorded numerous private conversations, and acquired several private messages and documents, all of which were later used by Project Veritas in four separate videos posted on the website between October 17 and October 24. Project Veritas Action also published the videos on its website under the heading "VeritasLeaks" on Oct. 26, 2016. *The Washington Post* reported on October 19 that the videos appeared to be heavily edited, often combining statements in a way that did not make sense or suggested that something was missing from the video. This style of production was consistent with past videos by Project Veritas, according to the *Post*.

In light of the information and recordings published by Project Veritas, Creamer and Scott Foval, another Democratic political operative, left their jobs. In June 2017, Creamer, Democracy Partners, and Strategic Consulting Group filed a civil complaint against Project Veritas, Project Vertias Action, O'Keefe, Maass, and Sandini. The complaint alleged that various actions during the course of their undercover operation violated federal and District of Columbia law, including trespassing, among other claims. (For more information on the Democracy Partners sting and the subsequent lawsuit filed by Creamer, including the claims against Project Veritas included in the complaint, see *Political Operatives Target Hidden Camera Videographer in Civil Lawsuit* in "Controversial Undercover Video Makers Face Legal Action and Ethical Concerns" in the Summer 2017 issue of the Silha *Bulletin*.)

On Jan. 4, 2018, *Politico* reported that U.S. District Court for the District of Columbia Judge Ellen Huvelle had denied two motions by Project Veritas, Project Veritas Action Fund, and O'Keefe (defendants) to dismiss the lawsuit. Huvelle began with the first motion, which sought to dismiss the case "for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)."

Huvelle turned to the defendants' contention that there was "at least one problem with the 'legal theory of liability' for each claim in the complaint," which included misrepresentation, trespass, breach of fiduciary duty, wiretap claims, and civil conspiracy. Huvelle walked through each claim, determining whether each should be dismissed. For example, Huvelle ruled that although Maass obtained her job, and was therefore provided "consent" to enter the Democracy Partners' office, she was still liable for trespass and that the claim "can proceed even if there are no actual damages."

As reported by *Politico*, Huvelle also left open the possibility that the defendants' conduct violated the D.C. wiretap statute, D.C. Code § 23-542, even though Maass appeared to have been present during the recordings, with D.C. law generally requiring consent from only one person involved in a conversation in order to record it. Huvelle ultimately declined to dismiss any of the liability claims brought by Creamer.

Huvelle next turned to the defendants' attempt to dismiss most of the plaintiffs' claims for damages, specifically reputation damages, lost contract damages, and damages for the "diminishment of the economic value of confidential and proprietary information." O'Keefe contended that the damages were not the result of trespassing or other alleged illegal actions, but by the underlying conduct that was exposed. Regarding reputational damages in particular, the defendants cited the Supreme Court's ruling in *Hustler v. Falwell*, 485 U.S. 46 (1988), which established that reputation damages are not recoverable without pleading a viable defamation claim, according to Huvelle. (For more information on the case, see "Spring Symposium Marks the 30th Anniversary of *Hustler Magazine*, *Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons" on page 48 of this issue of the Silha *Bulletin*. The case was a main topic discussed in the Silha Center's spring symposium titled, "The State of Our Satirical Union: *Hustler Magazine*, *Inc. v. Falwell* at 30.") However, Huvelle ruled that because the plaintiffs were "not seeking damages based on the publication of the videos, . . . *Hustler* does not bar their claim for reputation damages." She continued, "Whether plaintiffs will ultimately be able to show that the PV defendants' non-expressive conduct resulted in damage to their reputation remains to be seen, but the Court cannot prematurely deprive them of that opportunity."

Huvelle also rejected the second motion, which sought to dismiss the lawsuit pursuant to the D.C. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act. D.C. Code §§ 16-5501-5505. Anti-SLAPP laws are meant to provide a remedy for defendants against meritless claims brought by plaintiffs involving publications regarding matters of public concern or the defendant's right to free speech, right to petition the government, or right of association. The D.C. Anti-SLAPP Act imposes a heightened pleading standard for claims related to "act[s] in furtherance of the right of advocacy on issues of public interest" by requiring plaintiffs to show that their claims are "likely to succeed on the merits."

Huvelle found that recent court precedent "foreclose[d] application of D.C.'s Anti-SLAPP Act in [a] federal court" that is exercising diversity jurisdiction, which Huvelle argued was the case in the present legal dispute. *Deripaska v. The Associated Press*, No. 17-cv-0913 (D.D.C. 2017).

Following the ruling, Stephen Gordon, a spokesman for Project Veritas, criticized Creamer's lawsuit. "Our belief is that this is a carefully crafted lawsuit which may have survived the motion to dismiss but will fail in the end," Gordon said in an interview with *Politico*. "As the case proceeds, our attorneys will show the entire case is nothing more than an attempt to retaliate against Veritas for exposing Democracy Partners' dirty political operation."

Joseph Sandler, a lawyer for the plaintiffs, praised the ruling. "We are pleased that the court has decided to let this important case to proceed and to allow our clients, who were really injured by the tactics and actions of Project Veritas, to pursue all of their claims," Sandler said. "We look forward to proving that Project Veritas' tactics were not merely dishonest and underhanded but violated the legal rights of the people affected — people who were doing nothing more than participating in the political process by legitimately helping candidates and causes in which they believed."

As the *Bulletin* went to press, no further legal proceedings had been announced.

Scott Memmel
Silha *Bulletin* Editor

Sinclair Broadcasting Group's "Must-Run" Segment Raises Ethical Questions

On March 31, 2018, *Deadspin*, an alternative sports blog that also provides political commentary, posted a video depicting news anchors from various local broadcast television outlets repeating the same scripted lines about fake news and fair reporting. Several media outlets reported that Sinclair Broadcasting Group (Sinclair), a television station owner that observers assert has a right-leaning agenda, had mandated that the script be read by anchors at each of its local stations, referred to as a "must-run" segment. *Deadspin*'s video prompted widespread criticism of Sinclair, with several observers arguing that it was ethically problematic for a national corporation to dictate what local stations should say and cover.

MEDIA ETHICS

Baltimore-based Sinclair owns or operates 193 stations across the United States, making it the largest television station owner in the nation. In a May 8, 2017 press release, Tribune Media Company (Tribune) reported that it was being acquired by Sinclair for $3.9 billion. The *Baltimore Sun* reported that the deal would give Sinclair control of 233 television stations across 108 markets, reaching 72 percent of U.S. households. According to CNN on Nov. 10, 2017, the merger requires approval by the Federal Communications Commission (FCC), which delayed its self-imposed 180-day deadline for review of the deal in order to allow for additional public comment. As the *Bulletin* went to press, the FCC had not announced whether it would approve the merger.

According to *The New York Times* on April 2, Sinclair "regularly sends video segments to the stations it owns," known as "must-runs," that can include content such as terrorism news updates, commentators speaking in support of President Donald Trump, or speeches from company executives. In an April 10 article for *The Washington Post*, a former video editor at KHGI in Kearney, Neb. asserted that when Sinclair purchased the station in 2016, "[i]t didn't take long for the ["must-run"] segments our new parent company said we had to air during our local news broadcasts to arrive." Critics have claimed that Sinclair uses its stations to advance a mostly right-leaning agenda, according to the *Times*.

On February 10, *The Washington Post* provided several instances in which Sinclair had demonstrated a right-leaning agenda. In 2004, the company announced it would televise a documentary critical of then-Democratic presidential candidate John F. Kerry, but ultimately decided against it amidst significant political pressure and criticism. Also in 2004, Sinclair pulled an ABC "Nightline" episode from its affiliates in eight cities. The 40-minute program, titled "The Fallen," included host Ted Koppel reading the names of 721 Americans who have lost their lives in the war with Iraq, and showed pictures of the deceased. Sinclair's decision drew significant criticism, including from Sen. John McCain (R-Ariz.) who wrote in a letter to Sinclair, "Your decision to deny your viewers an opportunity to be reminded of war's terrible costs, in all their heartbreaking detail, is a gross disservice to the public, and to the men and women of the United States Armed Forces. It is in short . . . unpatriotic. I hope it meets with the public opprobrium it most certainly deserves." (For more information on Sinclair's decision to pull the "Nightline" broadcast, see "ABC's 'Nightline' Honors Iraqi War Dead Despite Protests" in the Spring 2004 issue of the Silha *Bulletin*.)

During the 2012 presidential campaign, Sinclair mandated that several of its stations in battleground states air a half-hour news "special" criticizing President Barack Obama's healthcare policies, as well as his administration's handling of the economy and the 2012 terrorist attack on a U.S. installation in Benghazi, Libya, according to the *Post*. During the 2016 presidential campaign, Sinclair was criticized for reportedly mandating that its stations air favorable news coverage of Trump on a mandatory, "must-run," basis. The *Post* also noted that Sinclair hired President Trump's former aide Boris Epshteyn to be its chief political analyst, and required that its local stations air several of his commentaries.

In an April 10 article for *The Washington Post*, Mark Feldstein, the Richard Eaton chair of broadcast journalism at the University of Maryland, asserted that in the past, journalists applying for jobs at Sinclair were questioned by Sinclair executives "about their views on abortion and other hot-button political issues — and [were] turned down if they were 'too liberal.'" He added that Sinclair executives had also solicited donations in February 2018 from its news directors for the company's political action committee, which finances candidates that support its conservative deregulatory agenda. Additionally, Feldstein claimed that Sinclair was "notorious for the draconian legal contracts it forces its journalists to sign, which impose financial penalties for quitting and gag ex-employees from speaking out against the company." Feldstein called these practices, and those listed by the *Post*, "a dramatic departure from traditional newsroom norms, which try to maintain at least the appearance of neutrality."

In a video posted on March 31, 2018, *Deadspin* video director Timothy Burke pieced together several broadcasts by local television stations owned by Sinclair. The video, along with a similar version created by left-leaning news outlet *ThinkProgress*, depicted what Burke called a "forced read" in which Sinclair executives required that anchors or reporters at their various stations repeat the same script, which contained a warning about fake news and a promise to report fairly and accurately, as well as criticism of members of the mainstream media for biased or false coverage.

The script read in part, "[W]e're concerned about the troubling trend of irresponsible, one sided news stories plaguing our country. The sharing of biased and false news has become all too common on social media.. . . Unfortunately, some members of the media use their platforms to push their own personal bias and agenda to control 'exactly what people think.'. . . This is extremely dangerous to a democracy." The full script and the *Deadspin* video are available online at: https://theconcourse.deadspin.com/how-americas-largest-local-tv-owner-turned-its-news-anc-1824233490.

In a March 31 story accompanying his video, Burke explained that he had uncovered the "must-run" segment after CNN's Brian Stelter reported on March 7 that Sinclair executives were passing down a "mandate" requiring an "anchor delivered journalistic responsibility message." Burke contended that the result of the mandate was "dozens upon dozens of local news anchors looking like hostages in proof-of-life videos, trying their hardest to spit out words attacking the industry they'd chosen as a life vocation."

On April 2, President Trump tweeted his support for Sinclair while also criticizing other media outlets. "So funny to watch Fake News Networks, among the most dishonest groups of people I have ever dealt with, criticize Sinclair Broadcasting

for being biased," he wrote. "Sinclair is far superior to CNN and even more Fake NBC, which is a total joke."

David D. Smith, the chairman of Sinclair, defended his company's decision in an April 3 email correspondence with *The New York Times*, contending that other media companies "do exactly the same promotional things that we do" and that such segments were "standard practice in the industry," according to the *Times* on April 4. When asked about the widespread criticism following the *Deadspin* video, Smith wrote, "You can't be serious! Do you understand that as a practical matter every word that comes out of the mouths of network news people is scripted and approved by someone?"

In an April 7 statement, Scott Livingston, Sinclair's senior vice president of news, questioned the reasoning behind the criticism of the "must-run" segment. "We aren't sure of the motivation for the criticism, but find it curious that we would be attacked for asking our news people to remind their audiences that unsubstantiated stories exist on social media, which result in an ill-informed public with potentially dangerous consequences," Livingston wrote. "It is ironic that we would be attacked for messages promoting our journalistic initiative for fair and objective reporting, and for specifically asking the public to hold our newsrooms accountable."

On April 10, CNN reported that in a memo to staffers, Sinclair CEO Chris Ripley apologized not for the controversial "must-run" segment, but for the "politically motivated attacks" that followed. "For having to field nasty calls, threats, personal confrontations and trolling on social media, I am truly sorry you had to endure such an experience," Ripley said. "However, as an organization it is important that we do not let extremists on any side of the political fence bully us because they do not like what they hear or see."

On April 6, 2018, the Poynter Institute (Poynter) reported that deans and department chairs from 13 universities had sent a letter to Sinclair condemning the company's "must-run" segment. The letter was signed by the heads of journalism schools at the University of Maryland, Syracuse University, Louisiana State University, University of Georgia, University of Mississippi, Temple University, Ohio University, University of Arizona, University of Southern California, University of California-Berkeley, University of Illinois, The George Washington University, and Morgan State University. On April 9, Poynter reported that three additional heads of journalism schools had signed the letter, including from the University of Oregon, New York University, and Elon University.

The letter read in part, "While news organizations have historically had and used the prerogative to publish and broadcast editorials clearly identified as opinion, we believe that line was crossed at Sinclair stations when anchors were required to read scripts making claims about 'the troubling trend of irresponsible, one-sided news stories plaguing our country.'" The full letter is available online at: https://www.poynter.org/news/13-j-school-deans-and-chairs-issue-letter-concern-sinclair.

In an April 3 interview on Wisconsin Public Radio (WPR), Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley explained that although Sinclair's message seemed benign on the surface, it was actually more problematic. "On the face of it, it seems okay until you start thinking about how it is essentially an attack on . . . journalistic independence," she said. "Ultimately, if you are going to undermine the public trust in the independent news media, you are really doing something that's much more important than just trying to gain a competitive advantage.. . . You are undermining something that I think is central to our system, our democratic republic, which is that you have to be able to turn to the news media for truthful, accurate information."

However, Kirtley argued that the main problem of the "must-run" segment was not the content, but how it was mandated and delivered. "Packaged content in and of itself is not new," she said. "The main issue I have is when it is basically being palmed off to the viewer as locally created.. . . [I]t is an issue of deception." Kirtley added, "It is turning away from something that during the Obama administration the [FCC] really supported, which was the idea of localism, that is, that if you are going to have a broadcast license in a particular area, you really do have an obligation to be sensitive to the needs and interests of the people in your community."

In an April 3 interview on KPCC radio's "AirTalk," Jeffrey McCall, a professor of communication at DePauw University, agreed with Kirtley. "I'm a big believer in localism.. . . So I'm really opposed philosophically on having big media corporations in a corporate headquarters trying to dictate what should happen at a local station.. . . Having the script dictated by the corporate office is a problem."

University of Minnesota Hubbard School of Journalism and Mass Communication senior fellow Scott Libin largely defended the content of Sinclair's script in an April 3 interview on KARE 11 in Minneapolis. "These words really couldn't offend any principled journalist. You look through this statement, which I think was painstakingly vetted, and you can't find anything in there to oppose. So the content of this commentary is not the issue." However, Libin explained why Sinclair's mandate was still "icky" to a lot of people. "[First,] it does echo the president's even broader brush smear of journalists," he said. "But secondly, and maybe even more powerfully, it indicates these anchors, that viewers want to think of as their neighbors, people they trust, are being told what to say by some distant, faceless, centralized corporation that maybe they don't trust."

When asked whether it was ethical for Sinclair to compel its anchors to read scripted messages, Kirtley told "AirTalk" host Larry Mantle, "What I think is Orwellian about this is giving to these anchors in diverse markets essentially the exact same script that they have to read and . . . with the exact same intonation. The idea that news organizations that are engaged in legitimate reporting are concerned about fake news is legitimate and the notion that the public should develop media literacy is legitimate. But . . . the problem for me is that the clear implication of this is that the mainstream media are lying to you and you shouldn't believe them."

On April 9, Sinclair allowed an advertisement critical of its coverage and "must-run" segment to air on some of its stations, according to *The Washington Post* and CNN on the same day. The ad, which was created and paid for by the liberal watchdog group Allied Progress, said in a voiceover "What happens when your local news isn't local? This." and depicted *Deadspin*'s video. However, Sinclair ran 15-second disclaimers before and after the ad, which said that Sinclair was airing the ad because it was "proud to present both sides of the issues," according to the *Post*. The disclaimers continued, "The misleading ad you just saw focused on a brief promotional message that simply said we're a source for truthful news.. . . It ignored thousands of hours of local news we produce each year to keep you informed. The ad was purchased by a group known for its liberal bias and we hope you won't buy into the hysteria and hype."

Scott Memmel
Silha *Bulletin* Editor

Canada Passes Federal Shield Law; Courts Deny Requests to Compel a Journalist and Internet Media Company to Disclose Sources and Information

In the final months of 2017, the Parliament of Canada, as well as a state and federal judge in the United States, supported a reporter's privilege to protect confidential sources and information. On Oct. 4, 2017, the Parliament of Canada unanimously passed the Journalistic Source Protection Act (JSPA), providing protection for journalists' confidential sources, documents, and information. On Dec. 13, 2017, an Illinois Circuit Court judge quashed a subpoena seeking the testimony of Jamie Kalven, a freelance journalist who uncovered the 2014 police cover-up of the shooting of teenager Laquan McDonald. Three years after his initial reporting, Kalven was subpoenaed by the police officer charged with first-degree murder in McDonald's death. Finally, on Dec. 21, 2017, a Florida magistrate judge ruled against Russian businessman Aleksej Gubarev, who claimed *BuzzFeed* must reveal its source for the "Steele Dossier," a 35-page memo compiled by former MI6 intelligence officer Christopher Steele, which the internet company published in January 2017.

REPORTER'S PRIVILEGE

Journalistic Source Protection Act Passed by Canadian Parliament

On Oct. 19, 2017, Canada's new federal shield law took effect. Unanimously passed by the Parliament of Canada, the Journalistic Source Protection Act (JSPA), Bill S-231, amended the Canada Evidence Act and Criminal Code to provide legal protection for a journalist's promise of confidentiality to a source. Following its passage, media experts praised the JSPA as providing important protections for Canadian journalists, though some argued it did not go far enough.

Prior to the passage of the JSPA, journalists in Canada were required to convince a court that their sources were worthy of protection. According to the Canadian Journalism Project, in such a situation, the court would decide whether or not to shield the source's identity based on the "Wigmore Test," a four-part test proposed by American jurist John Henry Wigmore and established in *Adele Rosemary Gruenke v. Her Majesty The Queen*, 3 S.C.R. 263 (1991). In order for communications to be deemed privileged, "the communications must originate in a confidence that they will not be disclosed; this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; the relation must be one which in the opinion of the community ought to be sedulously fostered; [and] the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

In November 2016, Conservative Sen. Claude Carignan (Mille Isles), former Leader of the Opposition in the Senate, introduced the JSPA. Both houses of Parliament, the House of Commons and the Senate, unanimously passed the bill in 2017. The law defines a journalist as an individual "whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person." "Journalistic source" is defined as a "source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source."

The law amended the Canada Evidence Act to allow a journalist to "object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source." In order for a court to compel the disclosure of a confidential source, information, or document, it must be proven that "(a) the information or document cannot be produced in evidence by any other reasonable means; and (b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things, (i) the importance of the information to a central issue, (ii) freedom of the press, and (iii) the impact of disclosure on the source and journalist."

The law also amended section 488 of the Canadian Criminal Code, requiring that an applicant for a warrant, authorization, or order must "know that the application relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist," and must "make an application to a judge of a superior court of criminal jurisdiction or to a judge as defined" in a different section of the Criminal Code. The JSPA states that the judge has "exclusive jurisdiction to dispose of the application" and may only issue a warrant, authorization, or order if "he or she is satisfied that "(a) there is no other way by which the information can reasonably be obtained; and (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information."

The JSPA also includes a provision stating that if an officer "becomes aware" that he or she is dealing with a journalist's communications, objects, documents, or data, the officer must make an "*ex parte* application to the [appropriate] judge[;] . . . refrain from examining or reproducing, in whole or in part, any document obtained pursuant to the warrant, authorization or order; and place any document obtained pursuant to the warrant, authorization or order in a sealed packet and keep it in a place to which the public has no access." The JSPA does not apply in cases in which a warrant or order is made "in relation to the commission of an offence by a journalist."

In such an instance, the JSPA states a judge may take one of four actions. First, the judge may confirm the warrant, authorization, or order, if he or she "is of the opinion that no additional conditions to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities should be imposed." Second, the judge can choose to amend the warrant, authorization, or order "to impose any conditions that the judge considers appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities." Third, if the judge "considers it necessary to protect the confidentiality of journalistic sources," he or she

may order any documents obtained to be placed under seal and be kept in the custody of the court. Finally, the judge may revoke the warrant, authorization, or order if he or she believes the applicant "knew or ought reasonably to have known that the application . . . related to a journalist's communications[, object, document, or data]." The full text of the JSPA is available online at: http://www.parl.ca/DocumentViewer/en/42-1/bill/S-231/royal-assent.

In an October 2017 Ryerson Review of Journalism "Pull Quotes" podcast, Sen. Carignan said the new law will provide whistleblowers more confidence when they take the risk of revealing vital information about matters of public interest. "It's sending a message to the population that they will be protected if they ask for the protection from the journalist," he said. "It will probably help the media to receive more information to keep the government and public authorities accountable."

In the same podcast, Toronto-based media lawyer Iris Fischer praised the JSPA as an important step for journalism. "I think this this bill goes a very long way in protecting confidential sources," she said. "This issue of sources has been a big one (for journalism) and it's great to see that being addressed."

Mark Bantey, a media lawyer in Montreal, agreed in an October 4 interview with *Vice News*. "It's a great step for democratic society," he said. "It's a little late in coming, but who's going to complain? Now we have some protections for confidential sources, and it's a very well-drafted piece of legislation."

In an Oct. 4, 2017 press release, Canadian Journalists for Free Expression (CJFE) executive director Tom Henheffer also expressed approval of the passage of the law. "We applaud parliamentarians for taking this historic step to protect press freedom in Canada," he said. "This bill is the beginning of full legal recognition for the role that journalists play in serving the public and protecting democracy."

However, Henheffer also cautioned the law has limitations, specifically its definition of a journalist. "Though this is a significant and important bill, it is only a first step to addressing the many issues facing journalists in Canada today," he said. "Many of the definitions are still too restrictive, including who can legally call themselves a journalist. Further reforms will be required in future so these protections reflect the reality of Canada's modern media landscape and the emergence of newer practitioners of journalism such as bloggers." The CJFE press release noted New Democratic Party member of the House of Commons Matthew Dubé (Chambly-Borduas) introduced an amendment to expand the definition, but it was defeated in committee.

Chicago Freelance Journalist Not Required to Reveal Sources in Laquan McDonald Homicide Investigation

On Dec. 13, 2017, Circuit Court of Cook County (Illinois) Judge Vincent M. Gaughan ruled that Jamie Kalven, an independent journalist based in Chicago, would not have to testify about his reporting on the fatal shooting of 17-year-old Laquan McDonald by a Chicago police officer in 2014. *Illinois v. Dyke*, No. 17 CR 4286 (2017). Gaughan ruled the subpoena issued to Kalven by Jason Van Dyke, the officer charged with shooting and killing McDonald, was "not sufficiently specific and [sought] irrelevant and privileged material," and that Kalven's sources were protected by the Illinois Reporter's Privilege Act, which generally prohibits a court from compelling "any person to disclose the source of any information obtained by a reporter." 735 ILCS 5/8-907 (2001).

> "[Canada's new shield law is] sending a message to the population that they will be protected if they ask for protection from the journalist.. . . It will probably help the media to receive more information to keep the government and public authorities accountable."
>
> **— Sen. Claude Carignan**

On Oct. 20, 2014, Chicago police responded to a 911 call reporting a man with a knife trying to break into vehicles in a trucking yard. Officers approached McDonald, who was holding a folding knife, and told him to drop it. According to officers, McDonald refused and began jogging down a four-lane road. Two officers followed him on foot and in a car for several blocks before Van Dyke, one of the six police officers at the scene, fired his weapon and struck the teenager 16 times. Van Dyke pled not guilty to first-degree murder charges in the case. Three other officers were indicted on state felony charges of conspiracy, official misconduct, and obstruction of justice, as well as filing false reports and lying about what happened the night of McDonald's death.

Kalven was the first journalist to report on inconsistencies in the Chicago Police Department's official reports of McDonald's death, according to the *Chicago Tribune* on Dec. 13, 2017. Following the shooting, Kalven had filed an Illinois Freedom of Information Act request seeking to obtain the autopsy report, which detailed the precise number of times Van Dyke shot McDonald, which previously had not been released. 5 ILCS 140/1 *et seq*. On Feb. 15, 2015, *Slate* magazine published Kalven's story detailing how the autopsy told a different story than what had been provided by police officials. Kalven reported the "clear case of self-defense," as portrayed by the Chicago police, did not align with the physical evidence of the shooting.

A key element of Kalven's investigation and reporting was information obtained by an anonymous source who revealed the existence of dash camera footage of the shooting. Kalven wrote in his February 2015 story, "A source close to the case confirmed to me that the dashboard camera in one of the squad cars on the scene captured the incident.. . . And it's clear from both the police narrative and the witness account that at least one of the squad cars on the scene had a clear perspective on the sequence of events." Kalven's full report is available online at: https:llperma.cc/X5BN-KQQ6.

On Nov. 19, 2015, NBC Chicago reported Cook County Judge Franklin Valderrama had ordered the Chicago Police Department to release the dash camera footage of the shooting, with which police officials complied on November 24. The U.S. Department of Justice (DOJ) later opened an investigation into the Chicago Police Department and published its findings in January 2017.

At a December 2017 hearing, Daniel Herbert, an attorney for Van Dyke, alleged the journalist had received leaked documents from the now-defunct Independent Police Review Authority (IPRA), which contained protected statements made by Van Dyke following

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Shield Laws, *continued from page 31*

the shooting, according to the *Chicago Sun Times* on December 6. Herbert additionally alleged Kalven "used that information to aid him in interviewing a witness, thus influencing that witness' statements to authorities and tainting the case against Van Dyke," according to the *Chicago Tribune* on December 13.

According to the *Chicago Sun Times*, Kalven's lawyer, Matt Topic, called Van Dyke's subpoena a "fishing expedition" and cited the Illinois Reporter's Privilege Act, which prohibits a court from compelling "any person to disclose the source of any information obtained by a reporter" except where no other law prevents the disclosure, "all other available sources of information have been exhausted," and such disclosure is "essential" to protect the public interest.

On Dec. 5, 2017, a coalition of 18 media organizations, headed by the Reporters Committee for Freedom of the Press (RCFP), filed an *amicus* brief supporting Kalven's motion to quash the subpoena. The brief first argued compelling Kalven's testimony would violate the Illinois Reporter's Privilege Act, which was "adopted to protect precisely the types of reporter-source communications at issue in this case - those that shed light on matters of critical public importance, such as how police shootings of civilians are investigated and resolved." Furthermore, the brief contended protection of reporters' confidential sources "serves the health of our democracy by ensuring that citizens have access to information needed 'to make informed political, social, and economic choices'" and is "crucial to effective reporting, since reporters often rely on confidential sources to publish news stories that inform the public of sensitive and important issues."

Second, the brief asserted the Illinois shield law cannot be "overcome by speculative arguments," such as allegations that Kalven "may have passed along [this] information to witnesses of the shooting, influencing their accounts to investigators" (emphasis in original). Finally, the brief argued the "public policy of [Illinois' shield law] weighs decisively in favor of quashing Van Dyke's subpoena" because the public interest of protecting confidential sources was "particularly compelling in this case . . . [as] Kalven's reporting exposed misconduct by the Chicago Police Department and an official cover-up." The brief continued, "This story illustrates precisely why confidential source protections are necessary. Without them, the public may have never known how McDonald died, depriving it of the opportunity to hold the government and law enforcement accountable."

In his December 13 ruling, Gaughan found Van Dyke's subpoena was "not sufficiently specific and seeks irrelevant and privileged material." He continued, "[T]o uphold the subpoena of Jamie Kalven would be nothing more than a fishing expedition in search of information that the timeline of events, discovery documents, and testimony suggest simply does not exist." Gaughan added Kalven could have obtained his information from multiple legitimate sources. "Without evidence that Kalven ever obtained Van Dyke's protected statements, the source of the reporter's information was irrelevant," he wrote.

> "Jamie Kalven's reporting in this case was essential to telling the full story of Laquan McDonald's death, and we're pleased that the court quashed the subpoena for his testimony.. . . Reporters must be able to protect their sources in order to bring important information, in this case, the truth about how McDonald died, to the public."
>
> **— Bruce Brown, Executive Director, Reporters Committee for Freedom of the Press**

Additionally, Gaughan ruled Kalven's source of information was "protected by the [Illinois] Reporter's Privilege [Act]." He wrote that his decision was largely based on the inadequacies of the subpoena, not Kalven's status as a reporter, though he noted reporters can only be compelled to testify about sources under "extraordinary circumstances." The full order is available online at: http://www.chicagotribune.com/ct-laquan-mcdonald-reporter-20171213-htmlstory.html.

Following the ruling, Kalven told reporters his work spoke for itself. "The whole effort was to find out what happened to Laquan McDonald," he said. "I think if you look at the consequences of the reporting and not just my reporting . . . it's contributed to a moment, an opportunity in Chicago for really fundamental change, police reform and I think even more broadly a kind of social change around basic issues of race."

RCFP Executive Director Bruce Brown praised the ruling. "Jamie Kalven's reporting in this case was essential to telling the full story of Laquan McDonald's death, and we're pleased that the court quashed the subpoena for his testimony, which could have forced him to reveal information about his confidential sources," he wrote in a December 13 press release. "Reporters must be able to protect their sources in order to bring important information, in this case the truth about how McDonald died, to the public."

Florida Magistrate Judge Rules *BuzzFeed* Does Not Have to Reveal Trump Dossier Source

On Dec. 21, 2017, U.S. District Court for the Southern District of Florida Magistrate Judge John O'Sullivan ruled against Russian businessman Aleksej Gubarev, who, as part of a defamation lawsuit, attempted to compel *BuzzFeed News* to disclose how it obtained the "Steele Dossier," a 35-page memo compiled by former MI6 intelligence officer Christopher Steele detailing ties between the Russian government and then-Republican presidential candidate Donald Trump's campaign. *Gubarev v. BuzzFeed*, No. 1:17-cv-60426-UU (S.D. Fla. 2018). O'Sullivan found *BuzzFeed* and its editor-in-chief Ben Smith qualified for protection under Florida's shield law, Fla. Stat. § 90.5015 (2006), and that such protection had not been overcome by the plaintiffs.

During the course of the 2016 U.S. presidential campaign, Steele compiled the dossier as part of opposition research against Trump, initially for Republicans during the primary process, and subsequently for Democrats after Trump won the Republican nomination. The dossier contained several claims suggesting, among other things, that Russia had information which could be used to blackmail President Trump, as well as allegations of cooperation between Russia and the Trump campaign during the course of the general presidential election. The dossier stated Gubarev was a "significant player" in an operation in which his companies, XBT and Webzilla, as well as their affiliates,

"had been using botnets and porn traffic to transmit viruses, plant bugs, steal data and conduct 'altering operations' against the Democratic Party leadership.'"

On Jan. 10, 2017, *BuzzFeed* published the 35-page dossier in its entirety. Although it flagged the allegations contained within the documents as "unverified, and potentially unverifiable," *BuzzFeed* explained it published the document in full "so that Americans can make up their own minds about allegations involving the president-elect that have circulated at the highest levels of the US government." (For more information about the dossier and *BuzzFeed* publication, see "Ethical Questions Debated After *BuzzFeed* Publishes Dossier Containing Controversial Unverified Claims About President Trump" in the Winter/Spring 2017 edition of the Silha *Bulletin*.)

On Feb. 3, 2017, CNN reported Gubarev had filed a defamation lawsuit against *BuzzFeed* and Smith in the U.S. District Court for the Southern District of Florida, contending that he and his companies had been severely damaged by the unsubstantiated accusations in the dossier. Gubarev criticized *BuzzFeed* in his complaint, alleging "[a]lthough *BuzzFeed* and Mr. Smith claim that they had the dossier in their possession for weeks prior to its publication . . . neither *BuzzFeed* nor Mr. Smith contacted the Plaintiffs to determine if the allegations made against them had any basis in fact." As the *Bulletin* went to press, the defamation litigation remained ongoing.

As part of the lawsuit, Gubarev "propounded document requests on the defendants," asserting that, as a Web-based news outlet, *BuzzFeed* did not qualify for protection under Florida's shield law because it is "not a 'newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine' and, as such . . . is not covered by the statute." Conversely, *BuzzFeed* "maintain[ed] that the Florida Shield Law applies to online news publications."

In his December 2017 ruling, O'Sullivan determined that *BuzzFeed* qualified for protection under the Florida shield law, which provides "[a] professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news." Under the statute, this privilege can only be overcome by a "clear and specific showing" that "(a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought; (b) The information cannot be obtained from alternative sources; and (c) A compelling interest exists for requiring disclosure of the information."

O'Sullivan ruled there is "nothing in the statute that limits the privilege to traditional print media. Because *BuzzFeed* writes stories and publishes news articles on its website, it qualifies as a 'news agency,' 'news journal' or 'news magazine,' which are included under the statute's definition of 'professional journalist.'" He also ruled the plaintiffs "failed to make a clear and specific showing that the information cannot be obtained from alternative sources." He wrote, "It is possible that through third-party discovery, the plaintiff may ultimately learn the identity of the defendants' source."

Finally, O'Sullivan dismissed the plaintiffs' assertion that *BuzzFeed* should not be permitted to continue asserting a "fair reporting privilege," which would provide the media company with immunity from liability in a defamation lawsuit. Gubarev claimed the privilege would not apply because *BuzzFeed* did not obtain the dossier via a government official. However, O'Sullivan found that limiting *BuzzFeed*'s and Smith's arguments and defenses was "premature" because "[d]iscovery is ongoing in this matter." The full decision is available online at: https://www.politico.com/f/?id=00000160-7a86-dcd4-a96b-7fafb9290000.

Politico noted on December 21 that O'Sullivan's ruling did not determine outright that Gubarev would never be successful in compelling *BuzzFeed* to provide its source, but that his legal team had not taken sufficient steps to obtain the information from other sources, something a litigant must do before seeking confidential information from a news organization under the Florida statute.

BuzzFeed spokesman Matt Mittenthal praised the decision in a statement following the ruling. "We're pleased the judge has reaffirmed the right of news organizations to safeguard the identities of sources - a right that is protected under both state and federal law," he wrote. "And we continue to stand by our decision to publish the dossier, which was being circulated at the highest levels of government and is the subject of multiple federal investigations."

Brittany Robb
Silha Research Assistant

Did you miss "The State of Our Satirical Union"?

If you were unable to attend "The State of Our Satirical Union," a symposium held April 20-21, 2018, co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Association of American Editorial Cartoonists, the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communication, videos are posted on the Silha Center's YouTube channel at:
https://www.youtube.com/channel/UCottXCU5zGzUSZjO-Djlzig/videos

Judge Orders Certain Files from Wetterling Investigation Be Returned to FBI, Allows Release of Remaining State Documents

In the spring of 2018, a district judge ruled on two separate motions for summary judgement regarding the release of the contested Jacob Wetterling murder investigation case files. On March 29, 2018, Stearns County (Minnesota) District Court Judge Ann Carrott granted the U.S. federal government's motion for summary judgement, requiring the Stearns County (Minnesota) Sheriff's Office to return the portion of the files originating from the Federal Bureau of Investigation (FBI), rather than release them under Minnesota law. On April 19, Carrott granted a motion for summary judgement filed by a coalition of 10 media and advocacy groups, including the Silha Center for the Study of Media Ethics & Law, which had intervened in the case. Carrott ruled that Stearns County could release the state's portion of the investigative file, finding that the Wetterlings' claim for a constitutional right of informational privacy "does not apply to prohibit the disclosure of government data classified as public by [a] state statute."

PRIVACY

The litigation stems from the projected release of documents related to the 1989 abduction and murder of 11-year-old Jacob Wetterling in St. Joseph, Minn. On Sept. 1, 2016, Danny Heinrich, who was already jailed on federal child pornography charges, confessed to kidnapping and killing Jacob in October 1989. The 27-year investigation by local, state, and federal authorities, including the Federal Bureau of Investigation (FBI), amounted to more than 56,000 pages of information and 10,000 total documents, which were set to be released in June 2017.

On June 2, 2017 the Wetterlings filed a lawsuit in the Minnesota District Court for the Seventh Judicial District, requesting a temporary restraining order (TRO) to halt the release of some documents in the investigative file. *Patty Wetterling and Jerry Wetterling v. Stearns County*, No. 73-CV-17-4904 (2017). The Wetterlings alleged that the investigative documents include "highly personal details about the Plaintiffs, their minor children, and the inner working of the Wetterling family." The complaint contended that such information "is protected from disclosure by the state and federal constitutions," rather than the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.*, which classifies documents and information from closed or inactive investigations as "public data," except in circumstances in which "the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data by this chapter or other law." Minn. Stat. § 13.39.

On the same day as the Wetterlings filed the lawsuit, Judge Carrott issued a TRO enjoining Stearns County from "disseminating or disclosing the personal information contained in the Jacob Wetterling criminal investigative file to any person." However, Carrott also stated that the files created by the FBI over the course of the investigation may belong to the federal agency and could not be released by Stearns County.

On June 27, 2017, ten media organizations and transparency advocates, including the Silha Center for the Study of Media Ethics & Law (media-intervenors), filed a "complaint in intervention," arguing for the release of the documents under the MGDPA, contending that there was no exception in the Act preventing the release of the contested records. The organizations sought to intervene "for the purpose of challenging plaintiffs' claim that there is a right of privacy arising under the state or federal constitutions that takes precedence over the public access requirements of the MGDPA." In a September 22 hearing, Carrott allowed the ten media and transparency organizations to become part of the legal proceedings, according to Minnesota Public Radio (MPR) on the same day.

On November 10, Mark Anfinson, a Minneapolis media lawyer representing the media-intervenors, filed a motion for summary judgment, asking that Carrott deny the Wetterlings' requested relief, contesting the Wetterlings' constitutional arguments. The motion also opposed Stearns County being required to return the documents compiled by the FBI during the investigation. On December 5, the *Star Tribune* reported that the federal government had filed a motion to intervene in the case, arguing that the FBI documents did, in fact, need to be returned to the agency under federal law. (For more information on the background of the Wetterling investigation and previous motions and hearings in the ensuing litigation, see "Media Groups Allowed to Join Lawsuit over Access to Documents in Wetterling Investigation; Dispute Expands to over Half the Case File" in the Fall 2017 issue of the Silha *Bulletin* and "Media Groups and Transparency Advocates Challenge Family's Lawsuit, Judge's Ruling Halting the Release of 'Personal' Information" in the Summer 2017 issue.)

Judge Orders the Return of Investigative Files to the FBI

On March 29, 2018, District Judge Ann Carrott granted the federal government's January 17 motion for summary judgement, ordering Stearns County officials to return thousands of pages of investigative documents to the FBI, which had compiled the files during the Jacob Wetterling investigation. *Wetterling v. Stearns County*, No. 73-CV-17-4904 (March 29, 2018). In accordance with the ruling, the records would become subject to the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, rather than the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01, *et seq*.

On January 16, Carrott had issued an order permitting the federal government to intervene in the Wetterling documents litigation. The following day, U.S. Attorney Gregory G. Brooker filed a motion for summary judgement, contending that "as a matter of law, Stearns County must return criminal investigative documents that had been compiled by the FBI and loaned to the county" and that Stearns County officials were prohibited from disseminating those records to the public, except pursuant to federal law. In a memorandum in support of its motion, Brooker first contended that there "can be no question the records created by the FBI and loaned to the County during the Wetterling investigation are federal records." The memorandum asserted that the FBI's records "do not cease being federal records when they are loaned to a State" and that the MGDPA "works alongside and defers to federal law as to federal records."

Second, the memorandum argued that the disclosure of the FBI's records is governed by FOIA, not the MGDPA, and that any requests for the documents are handled by the FBI's Records Management Division. Third, Brooker asserted that the media-intervenors did not have standing to dispute the federal government's claim to possession and control of the FBI records. Finally, Brooker argued that the federal government was "entitled to injunctive relief in the form of an Order prohibiting the County from disseminating any FBI records and requiring the return of those records to the [federal government]." The memorandum stated that an injunction was necessary "to address the fundamental harm of dissemination of FBI records being disseminated other than in accordance with federal laws by the FBI."

Despite a January 26 motion by the media-intervenors, Carrott ruled in favor of the federal government on March 29, finding that the FBI's records fall "under federal law and can be distributed only by the FBI pursuant to federal law" and that Stearns County was "enjoined from possessing, using, disseminating, or distributing in any form the FBI's records and must return all FBI records to the FBI immediately."

Carrott first found that the media-intervenors had standing to object to the motion because they had become a party to the litigation before the federal government intervened. Second, Carrott ruled that federal law prohibits disclosure of the FBI documents. She found that the FBI has a "right to control its own law enforcement records," citing two cases in which the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court of the Southern District of Iowa ruled that the government may "retrieve documents, which it owns and . . . possesses." *United States v. Napper*, 887 F.2d 1528 (11th Cir. 1989); *United States v. Story County, Iowa*, 28 F. Supp. 3d 861 (S.D. Iowa 2014).

Carrott further held that the MGDPA, although it "governs data collected, received, or maintained by a Minnesota state agency," does not control federal records because "[f]ederal law clearly establishes that loaned FBI documents are federal property and must be returned." She cited 28 U.S.C. § 534, titled "Acquisition, preservation, and exchange of identification records and information; appointment of officials," which allows the FBI "to exchange records with local law enforcement and to cancel that exchange." Carrott also noted that the MGDPA presumes that all "government data" is public unless there is a "*federal law*, a state statute, or a temporary classification of data that provides that certain data are not public" (emphasis in original). Minn. Stat. § 13.01 subd. 3. She added that a state law that "actually conflicts with federal law is preempted" under the Supremacy Clause of the U.S. Constitution.

Carrott concluded that the MGDPA "works in concert with 28 U.S.C. § 534 to allow for the sharing of information during coordinated criminal investigations." She continued, "Consequently, because 28 U.S.C. § 534(b) clearly provides for a conditional loan of federal documents and that the documents are not to be disseminated outside the state agency, the federal documents are not public under the MGDPA." Carrott granted injunctive relief to the federal government to prevent the release of the FBI documents, which Stearns County had previously stated it "intend[ed] to release . . . unless prohibited by court order." She added that the documents would be subject to FOIA, which "provides a comprehensive means through which the public can gain access to federal records."

Mark Anfinson, who represented the media-intervenors, told the Minneapolis *Star Tribune* following the ruling that he was "disappointed but not surprised." He continued, "When the federal government comes into a state district court and says the foundations of the republic are going to be shaken if you rule against us, it's tough to ignore that. And the judge, understandably, is going to be deferential to a federal agency's claim." As the *Bulletin* went to press, Anfinson had not announced whether the media-intervenors would appeal the ruling.

Judge Orders Release of State Investigative Documents Pursuant to MGDPA

On April 19, 2018, District Judge Ann Carrott granted the media-intervenors' November 10 motion for summary judgement regarding the state documents in the Wetterling file not belonging to the FBI. *Wetterling v. Stearns County*, No. 73-CV-17-4904 (April 19, 2018). Carrott held that the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01, *et seq*., allowed for the release of "inactive law enforcement investigative file documents" and that "a constitutional right of informational privacy does not apply to prohibit the disclosure of government data classified as public by state statute."

Carrott first ruled that the documents could be released by Stearns County because the MGDPA allows for the disclosure of data from an inactive law enforcement investigation. Minn. Stat. § 13.82. Carrott found that because the MGDPA classifies documents and information from closed or inactive investigations as "public data" and that the Wetterlings had "not identified a federal or state statute that creates an exception to the public classification of the challenged documents," the documents in question "are public."

Prior to Carrott's ruling, some members of the Minnesota legislature had expressed concern that the MGDPA protects the disclosure of inactive investigative data, including "sensitive" and "personal" data, like that related to the Wetterlings. On March 7, 2018, Sen. Richard Cohen (DFL-St. Paul) introduced SF 3137, a bill to amend section 13.82 of the MGDPA governing law enforcement data to provide that "[u]pon request of the subject of the data, inactive investigative data are private data on individuals if the law enforcement agency reasonably determines that the data were not relevant to the preparation or prosecution of the case for which the data were collected or created and: (1) the interest of the subject of the data in not releasing the data outweighs the interest of the public in disclosure; or (2) release of the data would constitute an unwarranted invasion of the privacy of the subject of the data." On March 22, Reps. Jeff Howe (R-Rockville) and Mike Freiberg (DFL-Golden Valley) introduced the companion bill, HF 4166, in the House of Representatives. As the *Bulletin* went to press, no hearings had been held in either body of the Minnesota legislature on the bills.

The second finding by Carrott in her April 19 ruling was that "a constitutional right of informational privacy does not apply to prohibit the disclosure of government data classified as public by state statute." She explained that the Minnesota Supreme Court had previously found that the MGDPA recognizes two types of privacy, including "the right not to divulge private information to the government and the right to prevent the government from disclosing information." *In re Agerter*, 353 N.W.2d 908, 913 (1984). The Wetterlings contended that the second type of privacy should be applied in the current case and that Carrott should conduct a balancing test weighing their privacy interests against the public interest

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in disclosure asserted by the media-intervenors.

However, citing the Minnesota Court of Appeals case *Mpls. Fed. Of Teachers, AFL-CIO, Local 59*, 512 N.W.2d 107 (1994), Carrott found that section 13.82 of the MGDPA indicates that the Minnesota legislature "has already conducted a balancing of the rights of individual subjects of government data against the public's right to obtain information from the government in crafting the statute." She wrote that it was "[e]vident in the classification of the law enforcement investigative data as confidential or protected nonpublic during an active investigation but public when the investigation is completed or deemed inactive."

Carrott also found that the U.S. Supreme Court "has not extended the constitutional right of privacy to include the right to prevent the disclosure of personal information." Additionally, she noted that the U.S. Court of Appeals for the Eighth Circuit — which reviews federal court rulings in Minnesota, Arkansas, Iowa, Missouri, Nebraska, and the Dakotas — has recognized no basis to "support the conclusion that an individual can claim a right of informational privacy to prevent the government from disclosing information classified as public by state statute. The Eighth Circuit has ruled that a right to privacy exists in initial non-disclosure of personal information to a government agency, but it has never held that this right not to give personal information to the government bars the disclosure of information once it was obtained."

Carrott concluded by stating that the "applicable Minnesota statutes and case law . . . are dispositive and lead the Court to conclude that the Plaintiffs do not have a legally cognizable claim of informational privacy in the identified contested documents in the Stearns County investigative file." She added, "The [Wetterlings'] family tragedy had a profound effect on the people of Minnesota. In many ways, Jacob Wetterling's kidnapping on a dirt road in a small rural town in Minnesota made us all fee less safe. While the court has great personal empathy for the Wetterlings, the Court must impartially apply the law, unswayed by emotion. To do otherwise would result in an unfair application of the law." Carrott's full ruling is available online at: https://cbsminnesota.files.wordpress.com/2018/04/order-other-granting-media-intervenors-summary-jdgmnt-motion.pdf.

> "The [Wetterling] family tragedy had a profound effect on the people of Minnesota.. . . While the court has great personal empathy for the Wetterlings, the Court must impartially apply the law, unswayed by emotion. To do otherwise would result in an unfair application of the law."
>
> **— Stearns County District Court Judge Ann Carrott**

In a statement following Carrott's decision, the Wetterlings said that although they were saddened to hear the ruling, they were thankful for Carrott's "careful consideration" of their concerns in the case and never intended to prevent members of the media from seeing the case file in its entirety. "From the beginning, we have witnessed firsthand the integrity and accuracy of the Minnesota news media," the statement said. "They have set the bar very high and have always treated our family with respect and dignity. We trust that this high level of reporting will continue. Our hope is that beyond the media, whoever reads the file will also have a discerning eye and will treat information respectfully."

Mark Anfinson, who represented the media-intervenors, told the *Pioneer Press* on April 20 that Carrott's ruling was "a thoughtful, careful decision, which is all you can ask for from a judge." He added, "Of course, I'm gratified with the decision, but what is more gratifying is how she approached this important issue."

In a statement following the ruling, the Stearns County Attorney's Office announced it was awaiting notice on an appeal before releasing the Wetterling investigation documents. As the *Bulletin* went to press, the Wetterlings had not announced whether they would file an appeal.

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The Silha *Bulletin* is available online at the University of Minnesota Digital Conservancy.

Go to:
http://conservancy.umn.edu/discover?query=Silha+Bulletin
to search past issues.

D.C. Circuit Finds FBI Failed to Conduct a "Reasonable" Search of Records Regarding Media Impersonation

On Dec. 15, 2017, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Reporters Committee for Freedom of the Press (RCFP) and the Associated Press (AP) in their Freedom of Information Act (FOIA) , 5 U.S.C. § 552, lawsuit against the Federal Bureau of Investigation (FBI) and the U.S. Department of Justice (DOJ). *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, No. 17-5042 (D.C. Cir. 2017). The court found that the FBI failed to demonstrate that it "conduct[ed] a search for the requested records, using methods which can be reasonably expected to produce the information requested," overturning a district court ruling.

FOIA

In October 2014, the FBI admitted that in 2007 it had created a fake AP news article in order to lure a bomb threat suspect into downloading malware onto his computer. Seattle-area Timberline High School had received several anonymous bomb threats in 2007, prompting local law enforcement to call in the FBI's Seattle Division cybercrime experts. An FBI agent subsequently identified himself as an AP "Staff Publisher" in order to convince the suspect to click on the link to the fake AP story, which enabled the FBI to track the suspect's location, ultimately leading to an arrest.

Then-FBI Director James Comey defended the agency's actions in a Nov. 6, 2014 *New York Times* letter to the editor. "That technique was proper and appropriate under Justice Department and F.B.I. guidelines at the time," Comey wrote. "Today, the use of such an unusual technique would probably require higher-level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate." (For more information on the investigation, see "Federal Investigators' Deceptive Use of Media Raises Concerns" in the Fall 2014 Silha *Bulletin* and *Records Reveal that FBI Broke Internal Rules when Impersonating the Associated Press* in "Canadian and U.S. News Organizations Raise Complaints over Law Enforcement Officers Impersonating Journalists" in the Winter/Spring 2016 issue.)

In response to the revelations, the RCFP and AP filed three FOIA requests seeking information about the FBI's policies governing media impersonation, the use of such tactics during the Timberline investigation, and any other occasions on which the FBI had used fake news links to deliver malware. (For more information on the FOIA requests, see *Records Reveal that FBI Broke Internal Rules when Impersonating the Associated Press* in "Canadian and U.S. News Organizations Raise Complaints over Law Enforcement Officers Impersonating Journalists" in the Winter/Spring 2016 issue of the Silha *Bulletin*.)

According to the D.C. Circuit's ruling, the FBI responded to one request by the RCFP and AP, declaring it had found no responsive records. After the agency failed to respond to the other two FOIA requests, the RCFP and AP filed a lawsuit against the FBI and the DOJ, claiming that the agency had conducted an inadequate records search, among other claims. During the litigation, the FBI eventually located and released some responsive records, most pertaining to the Timberline investigation and none identifying any other instances of media impersonation.

One document released by the FBI contained portions of the Attorney General's Guidelines on FBI Undercover Operations (AGG-UCO), which outlined the process for approving undercover operations involving 15 categories of "sensitive circumstances," which could include allowing an undercover agent to pose as a member of the news media. The FBI also produced one heavily redacted document indicating that the FBI's Seattle field office did not follow the agency's internal rules when the agent posed as an AP reporter. The record, called a "Situation Action Background" report, was drafted by the Seattle office's Cyber Division in October 2014 and reviewed the FBI's 2007 investigation using the false AP story. The report found that "although an argument can be made the reported impersonation of a fictitious member of the media constituted a 'sensitive circumstance'" under the required processes, the Seattle office's decisions were not unreasonable even though it failed to follow internal protocols. (For more information on the records released by the FBI, see *Records Reveal that FBI Broke Internal Rules when Impersonating the Associated Press* in "Canadian and U.S. News Organizations Raise Complaints over Law Enforcement Officers Impersonating Journalists" in the Winter/Spring 2016 issue of the Silha *Bulletin*.)

Despite the disclosures, the RCFP maintained that the FBI's search efforts were insufficient. U.S. District Court for the District of Columbia Judge Richard Leon disagreed and granted summary judgment to the FBI and DOJ on Feb. 23, 2017. *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, 236 F.Supp.3d 268 (D.D.C. 2017). Leon found that the FBI "conducted a good faith, reasonable search of the systems of records likely to possess records responsive to plaintiffs' requests." He added, "Nothing in these [FBI documents and reports] persuades me that plaintiffs' arguments are anything more than '[m]ere speculation that as yet uncovered documents may exist." As a result, Leon concluded that the FBI had "carried its burden to show that its search was adequate."

On Dec. 15, 2017, the D.C. Circuit overturned Leon's summary judgement order, ruling that the FBI failed to demonstrate that it "conduct[ed] a search for the requested records, using methods which can be reasonably expected to produce the information requested." Judge David Tatel, writing the unanimous opinion, first explained that FOIA, "[d]esigned 'to facilitate public access to Government documents,' requires federal agencies to disclose information to the public upon reasonable request unless the records at issue fall within specifically delineated exemptions." Tatel clarified that none of the exemptions under FOIA were at issue in the appeal. The lone issue before the court was "whether the FBI responded to the [RCFP's and AP's] FOIA requests by conducting a search adequate to support summary judgment in the government's favor," he wrote.

Next, Tatel explained that in order to prevail on summary judgement in

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FOIA cases, a federal agency must demonstrate that it made a "good faith effort" to search for requested records, doing so "using methods which can be reasonably expected to produce the information requested," a standard developed in the D.C. Circuit's 1990 case *Oglesby v. U.S. Department of the Army*. 920 F.2d 57, 68 (D.C. Cir. 1990). Such methods could include submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." Tatel also cited *Founding Church of Scientology v. NSA* in which the D.C. Circuit held in 1979 that if "a review of the record raises substantial doubt" as to the search's adequacy, "particularly in view of 'well defined requests and positive indications of overlooked materials,'" summary judgement is inappropriate. 610 F.2d 824, 837 (D.C. Cir. 1979).

Tatel next described how the FBI conducted the search for relevant records, citing two declarations submitted by David M. Hardy, Section Chief of the FBI's Record/Information Dissemination Section (Records Section), which describe a two-phase search. The first phase was made up of so-called "targeted searches," in which the Records Section identified the FBI divisions that would be "reasonably likely" to hold appropriate records. The targeted searches were divided into two groups. "Group One" records were those "concerning the FBI's utilization of links to what are, or appear to be, news media articles or news media websites to install" certain malware. For these documents, the Records Section ordered a targeted search of only the FBI's Operational Technology Division. "Group Two" records included Timberline-specific documents and media-related policy and training materials, as well as "[a]n accounting of the number of times . . . the [FBI] has impersonated media organizations or generated media-style material" to deliver malware. For these records, the Records Section ordered targeted searches of several internal divisions, including the FBI's Seattle Division, the Office of General Counsel, the Operational Technology Division, the Behavioral Analysis Unit, the National Covert Operations Section, and the Training Division. According to the Hardy declarations, these internal divisions "completed" the searches they were directed to carry out, with no records being provided for Group 1 and some records being provided for Group 2.

The second phase was a limited index search by the Records Section of the FBI's agency-wide Central Records System, which "index[es] terms in files that are useful to a particular investigation or that are deemed potentially useful for future investigative/intelligence retrieval purposes, such as names of individuals, organizations, companies, publications, activities, or foreign intelligence matters (or programs)." The Records Section initially declined to search the records system, but the FBI later conducted the search using the search terms "media impersonation" and "Computer and Internet Protocol Address Verifier (CIPAV)," the name of the malware used in the Timberline investigation. However, the search yielded no results.

Tatel then discussed why the Hardy declarations "fail[ed] to carry the government's burden of showing that it conducted an adequate search under this circuit's standards," as required by *Oglesby*. Tatel explained that the declarations' "principal flaw [lay] in their failure to 'set[] forth the search terms and the type of search performed' with the specificity our precedent requires." Tatel argued that the declarations claimed that the targeted divisions "completed" the searches requested by the Records Section, but the declarations did not indicate how the divisions did so. He continued, "[Regarding the first phase of the search], the Hardy declarations are utterly silent as to which files or record systems were examined in connection with the targeted searches and how any such searches were conducted, including, where relevant, which search terms were used to hunt within electronically stored materials." He compared this "defect" with the declarations' "far more specific description of the [second phase of] search the Records Section conducted for Timberline records," in which the FBI explained the search terms used and how the agency conducted a "page-by-page review" of the results.

Tatel concluded that an affidavit containing "no information about the search strategies" and no "indication of what each [component's] search specifically yielded" is inadequate to carry the agency's summary-judgment burden. Otherwise, according to the D.C. Circuit precedent, a FOIA requester would not have an opportunity to challenge the adequacy of the search.

Before concluding, Tatel cited "two additional aspects of the FBI's search that concerned [the court]." First, he agreed with the RCFP and AP that the FBI had "failed to justify its decision to limit its search for Group One records" to only the FBI's Operational Technology Division. Second, the RCFP and AP contended that the search was inadequate because the records contained "lead[s] that [are] both clear and certain" that the FBI should have searched additional offices, including the FBI Director's Office, additional field offices outside Seattle, and the offices responsible for assisting with a 2016 Office of the Inspector General (OIG) report concerning Timberline and the FBI's media impersonation policies. The court agreed that the Director's Office should have been included in the search because it was "intimately involved in coordinating the Bureau's response." However, the court disagreed that references to other field offices and the OIG report "constitute 'clear and certain' indications that additional, unsearched offices held responsive records," as required by *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). The court remanded the case to the district court for further proceedings. As the *Bulletin* went to press, no further legal action had been announced.

Katie Townsend, litigation director for the RCFP, praised the ruling in the organization's December 15 story about the decision. "This decision is a significant victory in our effort to help reporters and the public better understand law enforcement practices for impersonating the news media," she said. "These practices undermine the media's credibility and could make sources wary of trusting journalists in the future. The public has a right to this information." She continued, "The Court agreed with our position that the FBI should have — but did not — search the FBI Director's Office for records in response to the FOIA requests submitted by the Reporters Committee and the AP.. . . The FBI will now have to conduct that search, and it will have to explain and justify the limited search it did conduct when this case returns to the district court."

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Minnesota Legislature Seeks to End Use of Cameras in Courtrooms

CAMERAS IN COURTROOM

On March 8, 2018, Minnesota Rep. Jim Knoblach (R-St. Cloud) introduced HF 3436, a bill seeking to restrict the use of cameras in Minnesota courtrooms, citing the necessity of protecting defendants, victims, and witnesses during court proceedings. Press and transparency advocates criticized the bill, contending that there is a significant public interest in allowing audio and video recording in courtrooms. Other observers criticized the bill on the grounds that the judicial branch should determine the appropriate use of cameras in courtrooms, not the legislative branch.

On March 21, 2018, the Associated Press (AP) reported that the Minnesota House of Representatives Public Safety committee had unanimously approved HF 3436 in a voice vote. The committee also voted to lay the bill over for possible inclusion in a larger omnibus bill, according to the *Duluth News Tribune* the same day. As introduced, the bill prohibited the use of "state funds in fiscal years 2018 and 2019 to the Supreme Court or district courts" from being "used to expand or amend the use of audio and video coverage of criminal proceedings."

However, the committee approved an amended version of HF 3436, which stated that "no person may record or broadcast any criminal matter, including a trial, hearing, motion, or argument, absent the express consent of the defendant, the victim, the prosecutor, and any witness under subpoena or other compulsory process, and the permission of the presiding judge." The amended bill applied to "the use of television, radio, audio, photographic, or other recording equipment," but excluded "the use of electronic, photographic, or other recording equipment approved by the court for purposes of making the court record, including closed-circuit interactive television." The amended bill is available online at: http://www.house.leg.state.mn.us/comm/docs/ff4a9b24-34ab-4cca-9a7f-c3a7efde60d2.pdf.

According to an April 26 email to Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, Hal Davis, a member of the Minnesota Coalition on Government Information (MNCOGI), explained that the bill had been further amended to require only the consent of the defendant and victims, not lawyers or witnesses, for cameras to be allowed in criminal proceedings.

Rep. Knoblach said during the March 21 hearing that the purpose of the bill was to protect victims and defendants, according to the *Duluth News Tribune*. "People do have compassion for the victims and what they are going through in a trial and don't want to make things even harder on them," he said.

> "[The legislation is] really . . . a sneaky way to control media coverage of the courts.. . . [Cameras in courtrooms] provide a window into the often impenetrable world of the courts."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Rep. Debra Hilstrom (DFL-Brooklyn Center), the co-sponsor of the bill, said during the hearing that defendants and victims should have "a substantive right" to decide whether cameras are used, according to the Minneapolis *Star Tribune* on March 21. Caroline Palmer, legal affairs manager for the Minnesota Coalition Against Sexual Assault, called cameras "just another barrier" to survivors' willingness to report crimes and testify. "We also know, unfortunately, that so many survivors when they come forward kind of get dragged through the mud," she said, according to WCCO, the Twin-Cities' CBS affiliate.

Charles Hempeck, executive director of Anna Marie's Alliance, a St. Cloud, Minn. nonprofit that shelters battered women and their children, agreed. He contended at the March 21 hearing that there is no need to broadcast "the trauma that women might have to relive in the courtroom."

However, media and transparency advocates argued that audio and video recording in courtrooms serves an important public interest. Kirtley told the *Star Tribune* that the legislation was "really . . . a sneaky way to control media coverage of the courts." She added that cameras in courtrooms serve an important public interest by providing "a window into the often impenetrable world of the courts."

Minnesota Newspaper Association lawyer Mark Anfinson agreed at the March 21 House hearing. He said the coverage inside courts "provides a reassurance, a catharsis, a demonstration of how the justice system works." He added, "[T]hat has enormous value to the people whose court system it is, after all," according to the *Duluth News Tribune*. Davis added at the hearing, "Such coverage provides the public with information vital to its role in a functioning democracy and helps ensure that the information disseminated is more complete and accurate."

Scott Libin, a senior fellow at the University of Minnesota Hubbard School of Journalism and Mass Communication told the *Star Tribune* that the bill was counter to the tradition of transparency in Minnesota. "We are a state that prides itself in forward-thinking and openness and in this one area we can't seem to drag ourselves out of the 20th century," he said.

Other critics of the legislation argued that it was not up to the Minnesota legislature to determine whether courts should allow audio and video recording. As reported by Minnesota Public Radio (MPR), Minnesota State Bar Association president Sonia Miller-Van Oort said at the hearing that the organization opposed the bill on separation-of-powers grounds. "What the legislation seems to be suggesting is that it would be appropriate for the Legislature to dictate to the separate branch of the Judiciary how it should conduct its business," Miller-Van Ooert said. "It's in that way that we have a concern."

Sen. Ron Latz (DFL-St. Louis Park) said he did not support the "tactic" of the bill "due to separation of powers issues." On March 23, the *Star Tribune* Editorial Board wrote, "Legislators would rightly take umbrage

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Cameras, *continued from page 39*

if the courts sought to control which legislative proceedings could be aired or recorded. They should see that their attempt to control the judicial branch is just as offensive, and stand down." As the *Bulletin* went to press, no further announcements had been made regarding HF 3436. Additionally, a senate hearing had not been scheduled for the Senate version of the bill, SF 1882, sponsored by Sen. Jerry Relph (R-St. Cloud).

The *Star Tribune* Editorial Board also noted that Minnesota rules for cameras in the courts "have been painstakingly developed by the courts with much testing and public input." In 2011, Minnesota launched a two-year pilot project, which permitted cameras in most civil proceedings, but prohibited cameras in criminal proceedings, child custody, family law and juvenile proceedings, and petitions for protective orders.

In 2015, the Minnesota Supreme Court issued an order authorizing a two-year pilot project relaxing restrictions on camera usage in courtrooms during limited portions of criminal cases, including sentencing. The order declared that the media need only a judge's approval to broadcast or take pictures in certain limited circumstances, whereas the previous rule required all parties in a case to consent prior to recording. Chief Justice Lorie Gildea was a main supporter and reason for the pilot program, writing for the court, "We conclude that there is good reason to lift the blanket exclusion of electronic coverage of public criminal proceedings so that we can study the impact of electronic coverage of those proceedings." (For more information about the evolution of cameras in Minnesota courtrooms, see "Court Access: Federal Law Would Allow Cameras in U.S. Courts," in the Fall 2007 issue of the Silha *Bulletin*, "Minnesota Supreme Court Holds Hearing on Cameras in Courts" in the Summer 2008 issue; "Minnesota Advisory Committee Resists Cameras in Courts" in the Winter 2008 issue, "Minnesota High Court Approves Cameras in-Court Pilot Program" in the Winter 2009 issue, "Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings" in the Fall 2010 issue, "Battles to Gain Camera/Audio Access to State and Federal Courtrooms Continue" in the Fall 2011 issue, "Minnesota Senate Expands Floor Access; State Supreme Court Approves Cameras" in the Winter/Spring 2011 issue, "Silha Spring Ethics Forum Focuses on Cameras in the Courtroom, Status of Minnesota Pilot Project" in the Spring 2012 issue, "Minnesota Supreme Court Approves Use of Cameras in Civil Cases, Considers Expansion to Criminal Cases" in the Fall 2013 issue, *Minnesota Supreme Court Eases Restrictions on Courtroom Cameras in Criminal Cases* in "Updates to State Laws Create Challenges, New Benefits for News Organizations" in the Summer 2015 issue; and "Minnesota Supreme Court Begins Livestreaming Video of Oral Arguments" in the Fall 2017 issue.)

> "We are a state that prides itself in forward-thinking and openness and in this one area, we can't seem to drag ourselves out of the 20th-century."
>
> **— Scott Libin, University of Minnesota Hubbard School of Journalism and Mass Communication senior fellow**

In January 2018, the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure, which was tasked by the Supreme Court to provide "recommendations for continuation, abandonment, or modification of the [2015] pilot project," filed a report recommending that the procedures for audio or video coverage of criminal proceedings be permanently codified under Rule 4 of the Minnesota General Rules of Practice. The report also recommended several amendments to the rule in order to address issues raised during the pilot, such as clarifying that coverage of domestic violence cases is only prohibited when the "victim is a family or household member." The full text of the report and the proposed amendments are available online at: http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM09-8009-and-ADM10-8049-Order-Establishing-Public-Comment-Period-12418.pdf.

On April 25, the *Star Tribune* reported that the Supreme Court had held an hour-long hearing about whether to extend the pilot program. Six justices heard arguments for and against the use of cameras in Minnesota courtrooms. According to MPR, some justices seemed opposed to extending the program. Justice Natalie Hudson said that she shares former "Justice [Alan] Page's concern that . . . it would over-represent particularly young African American men as violent." Justice Anne McKeig expressed concern of an "unintended consequence" that television coverage could stigmatize the families and children of criminal defendants.

Conversely, the *Star Tribune* reported that Judge Michelle Larkin, who had served as the chairwoman of the committee that studied the pilot project, asserted that allowing the use of cameras has not led to negative consequences as opponents of the program contended. "People said this is what is going to happen, this is why we shouldn't do this . . . and it didn't happen," Larkin said. "The sky has not fallen.. . . We simply did not see anything inflammatory. It was pretty dry actually." Justice Margaret Chutich supported the idea that coverage of crimes should go beyond "crime scene videos and mug shots taken during arrests," according to MPR.

The full video of the hearing is available online at: http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1202. As the *Bulletin* went to press, the Court had not announced its ruling.

Scott Memmel
Silha *Bulletin* Editor

Jesse Ventura Reaches Settlement in *American Sniper* Defamation Lawsuit

DEFAMATION

On Dec. 1, 2017, the Minneapolis *Star Tribune* reported that former Minnesota Gov. Jesse Ventura had reached a settlement in his defamation lawsuit against *American Sniper* author and former Navy SEAL Chris Kyle's estate. Ventura, who was governor from 1999 to 2003, was initially awarded $500,000 for defamation and $1.35 million for "unjust enrichment" in a federal jury trial, before the U.S. Court of Appeals for the Eighth Circuit overturned the decision. *Ventura v. Kyle*, 2016 825 F.3d 876 (8th Cir. 2016). Although the terms of the settlement were not disclosed, Ventura said he felt "vindicated" by the settlement.

The dispute between Ventura and Kyle began in January 2012 when William Morrow, an imprint of HarperCollins Publishers, published *American Sniper: The Autobiography of the Most Lethal Sniper in U.S. Military History*, by Kyle. One subchapter in the book recounted an alleged 2006 incident at a California bar between Kyle and an older celebrity Navy SEAL, identified only as "Scruff Face." Kyle claimed that he punched Scruff Face after the older SEAL had made disparaging remarks about the SEALs. Kyle also alleged that rumors had spread saying Scruff Face had a black eye while speaking at a SEAL graduation event the next day. In subsequent interviews and appearances, Kyle identified Scruff Face as Ventura, leading the latter to file a complaint in the United States District Court for the District of Minnesota, alleging defamation and "unjust enrichment," among other claims. Ventura contended that a Google search of his name resulted in millions of hits restating Kyle's alleged falsehoods, injuring Ventura's reputation.

In February 2013, Kyle was shot and killed by a military veteran suffering from post-traumatic stress disorder. Nevertheless, in July 2014, the trial began, with Kyle's wife, Taya, serving as the defendant as executrix of Kyle's estate. Ventura, because he was a public figure, was required to prove that Kyle had acted with actual malice, which is knowledge of falsity or with reckless disregard for the truth, as required by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

During jury deliberations, the attorneys for both sides agreed to accept a divided decision by the jury, after members had expressed doubt that they could reach a unanimous decision. On July 29, 2014, the jury reached an 8-2 verdict in favor of Ventura, awarding him $500,000 in damages on the defamation claim. Additionally, the jury awarded $1,345,477 to Ventura, finding that the Kyle estate had been unjustly enriched due to Kyle's fabrication. (For more information about the background of Ventura's claims and the jury trial, see "Jesse Ventura Awarded $1.8 Million for Libel and Unjust Enrichment" in the Summer 2014 issue of the Silha *Bulletin*.)

On June 13, 2016, the Eighth Circuit overturned the jury's decision. Judge William Riley, writing the 2-1 majority opinion, declined to dismiss Ventura's defamation claims as a matter of law. However, he ruled that the jury decision must be overturned because Ventura's attorneys had made improper statements about HarperCollins' insurance coverage related to *American Sniper*. The attorneys had suggested that the publisher had a direct financial interest in the outcome of the case because it was handling the Kyle estate's legal fees. The majority ruled that the Kyle estate received an unfair trial and remanded the defamation claim for a new trial. The court also unanimously ruled to vacate the $1.3 million award for the unjust enrichment claims. (For more information about the Eighth Circuit's decision, see "Eighth Circuit Overturns Jesse Ventura's Victory in Libel and Unjust Enrichment Suit" in the Summer 2016 issue of the Silha *Bulletin*.)

On Nov. 2, 2017, the Associated Press (AP) reported that a settlement was pending in the case. According to the AP, a court docket entry indicated that an upcoming pretrial conference and deadline for written statements had been cancelled "based on the pending settlement of this matter." The following month, Ventura reached a settlement with the Kyle estate, ending the five-year legal dispute. The financial terms of the settlement were not released; however, court documents showed that the parties agreed to dismiss the case with prejudice, meaning Ventura cannot sue the Kyle estate again on the same claim, according to a December 2 CBS News report.

In a December 4 meeting with reporters at the offices of the Henson Efron law firm in Minneapolis, Ventura said he felt "vindicated" after settling the lawsuit, according to Minnesota Public Radio (MPR) the same day. The AP reported that Ventura called Kyle an "American Liar" and said that the money he received in the settlement did not come from Taya Kyle or from Kyle's estate.

Scott Memmel
Silha *Bulletin* Editor

Videos of Silha events are available online at:

https://www.youtube.com/channel/UCottXCU5zGzUSZjO-Djlzig/videos

Check often as we are in the process of uploading current and past events.

Minnesota Legislature Introduces an "Ag-Gag" Law; Federal Appeals Courts Strike Down Two States' Laws

During the fall and winter of 2017 and 2018, so-called "ag-gag" laws, which generally prohibit individuals from conducting undercover investigations into agricultural operations or from criticizing agricultural products, were the focus of state legislatures and federal courts.

AG-GAG LAWS

On Feb. 20, 2018, the Minnesota legislature considered HF 2880, which aims to establish "a cause of action for disparagement of agricultural food products." Meanwhile, the appellate courts for the Ninth and Tenth Circuits both addressed the constitutionality of ag-gag laws. On Sept. 7, 2017, the Tenth Circuit, although it did not decide the constitutionality of Wyoming's ag-gag laws, held that the First Amendment applied to the expressive or investigative activities at issue in the statutes. The court remanded the case back to the district court, which had initially found that the First Amendment did not protect those activities. On Jan. 4, 2018, the Ninth Circuit ruled that two portions of Idaho's Interference with Agricultural Production law, Idaho Code § 18-7042, violated the First Amendment.

Ag-gag laws take different forms in different states. However, the general purpose of these laws is to criminalize or hold civilly liable individuals "who expose patterns of animal abuse or food safety violations on factory farms," according to The Humane Society of the United States. These laws often prohibit recording undercover videos of agricultural operations, raising First Amendment concerns from animal rights and food activist groups, as well as media organizations, who argue undercover investigations should be allowed to expose unsafe and unsanitary farming conditions.

Ag-gag laws can also take the form of agriculture disparagement laws, which establish a cause of action for damages arising from disparaging statements or dissemination of false information about the safety of food products. (For more on the conflict between journalism and ag-gag laws, see *Journalists Face Evolving, Uncertain Legal Landscape*, in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue of the Silha *Bulletin* and "States Consider Banning Undercover Recording at Agricultural Operations" in the Summer 2011 issue.)

One such agriculture disparagement law that recently received national coverage is South Dakota's Agricultural Food Products Disparagement Act (AFPDA), SDCL § 20-10A, which played a significant role in the litigation between American Broadcasting Company (ABC) and Beef Products Inc. (BPI), which became known as the "Pink Slime" case.

The case dated back to 2012 when ABC and ABC News reporter Jim Avila repeatedly referred to BPI's signature product, Lean Finely Textured Beef (LFTB), as "pink slime" in a series of news reports and tweets. In September 2012, BPI, as well as BPI Technology Inc. and Freezing Machines, Inc., brought a civil action in the Circuit Court of Union County in South Dakota against ABC, ABC News, Avila, anchor Diane Sawyer, correspondent David Kerley, USDA microbiologist Gerald Zirnstein, food scientist Carl Custer, and former BPI quality assurance manager Kit Foshee.

In its complaint, BPI alleged that the reports by ABC News contained disparaging statements about LFTB and each plaintiff, citing the AFPDA. The statute defines disparagement as "dissemination in any manner to the public of any information that the disseminator knows to be false and that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public." BPI claimed $1.9 billion in damages, though the total could have tripled to $5.7 billion under South Dakota's AFPDA.

On June 28, 2017, ABC and BPI announced that they had reached a settlement in the case, though the terms were not disclosed. First Amendment attorney Thomas Julin told *Law360* on June 28, 2017 that the high level of damages claimed by BPI may have played a role in the settlement. "[I]t is worrisome, whenever there's a confidential settlement of a billion-dollar case, you don't know what the terms are; that can be as encouraging to plaintiffs as anything else.. . . There will be many plaintiffs and many lawyers that will look at this as a case that will show you media will settle these claims." (For more information on South Dakota's agriculture disparagement law and the Pink Slime case, see *ABC Reaches Settlement with Beef Products Inc. in "Pink Slime" Lawsuit* in "*Rolling Stone*, *Daily Mail*, and ABC Settle High-Profile Defamation Lawsuits" in the Summer 2017 issue of the Silha *Bulletin* and *"Pink Slime" Case to Be Heard in South Dakota State Court* in "Defamation Round-up: Recent Decisions and Pending Cases Put Defamation in Spotlight, Have Potential to Reshape Media-Friendly Laws" in the Summer 2013 issue.)

Minnesota House of Representatives Considers Agriculture Disparagement Law

On Feb. 20, 2018, Minnesota Reps. Tim Miller (R-Prinsburg) and Paul Anderson (R-Starbuck) introduced HF 2880, a bill largely identical to South Dakota's Agricultural Food Products Disparagement Act (AFPDA), SDCL § 20-10A. The main purpose of HF 2880 was to establish "a cause of action for disparagement of agricultural food products." The bill stated that "[a]ny producer of an agricultural food product who suffers damage as a result of another person's disparagement of the agricultural food product has a cause of action for damages and any other appropriate relief in a court of competent jurisdiction." Under the bill, "[a]ny person who disparages an agricultural food product with intent to harm the producer is liable to the producer for triple the damages caused."

The bill defined "disparagement" as "dissemination in any manner to the public any information that the disseminator knows to be false and that states or implies that (i) an agricultural food product is not safe for consumption by the public, or (ii) generally accepted agricultural and management practices make an agricultural food product unsafe for consumption by the public." "[G]enerally accepted agricultural and management practices" was defined as "agronomic and animal husbandry practices commonly used by farmers in the production of an agricultural commodity including tillage options, fertilizers, crop protection practices, and the feeding, transporting, housing, and health practices for livestock."

According to the Minneapolis *Star Tribune* on Oct. 27, 2016, the Minnesota legislature previously attempted to pass an ag-gag bill in 2011, but it died and was not re-introduced in subsequent legislative sessions. As the *Bulletin* went to press, the current bill remained in the Minnesota House of Representatives Agriculture Policy Committee.

Tenth Circuit Rules Wyoming Ag-Gag Laws Regulate Protected Speech

On Sept. 7, 2017, the Associated Press (AP) reported that the U.S. Court of Appeals for the Tenth Circuit had ruled that Wyoming's two "Data Trespass laws," which were modeled after ag-gag laws in other states, regulated protected expressive activities under the First Amendment. *Western Watersheds Project v. Michael*, No. 16-8083 (10th Cir. 2017). Although the court did not rule on the constitutionality of the laws, it remanded the case to the district court to determine what level of constitutional scrutiny should apply and whether the laws will survive that review.

In 2015, Wyoming enacted a pair of statutes that prohibited individuals from entering "open land for the purpose of collecting [or recording] resource data" without permission from the owner and with the intention of submitting the data to a government agency. The laws were largely identical except that one imposes criminal punishment, Wyo. Stat. §§ 6-3-414 (2015), while the other imposes civil liability, Wyo. Stat. §§ 40-27-101 (2015).

The bills defined "resource data" as "data relating to land or land use, [including] . . . air, water, soil, conservation, habitat, vegetation or animal species." The term "collect" was defined as taking a "sample of material" or a "photograph," or "otherwise preserv[ing] information in any form" that is "submitted or intended to be submitted to any agency of the state or federal government." Violations of the criminal statute carried a maximum prison term of one year and a $1,000 fine for first-time offenders. Repeat offenders faced a mandatory minimum sentence of 10 days in prison, a maximum of one year, and a $5,000 fine. The civil statute imposed liability for proximate damages and "litigation costs," including attorney's fees.

After the passage of the two laws, advocacy organizations led by Western Watersheds Project, an environmental watchdog organization, filed a lawsuit challenging the statutes, arguing that they violated the Free Speech and Petition Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, and were preempted by federal law. On July 6, 2016, U.S. District Court for the District of Wyoming Judge Scott W. Skavdahl issued a written order, which held the plaintiffs "(1) had standing to challenge the civil statute; (2) stated a plausible First Amendment Free Speech and Petition claim; (3) stated a plausible Equal Protection claim; (4) failed to state a Supremacy Clause or preemption claim; and (5) failed to state a claim against Defendant Governor Matthew Mead."

Following the issuance of the order, Wyoming amended the two statutes, eliminating references to "open lands." The revised statutes included three proscriptive subsections. Subsection (a) stated that an individual is guilty of trespassing or commits a civil trespass to unlawfully collect resource data from private land if he or she: "(i) Enters onto private land for the purpose of collecting resource data; and (ii) Does not have: (A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or (B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data." Subsection (b) included similar language, but applied to a person who not only has the purpose of collecting resource data, but actually does so.

Of significance in the Tenth Circuit's decision, subsection (c) still stated that an individual is guilty of trespassing or commits a civil trespass to "access adjacent or proximate land" if he or she: "(i) Crosses private land to access adjacent or proximate land where he collects resource data; and (ii) Does not have: (A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or (B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land."

The plaintiffs amended their complaint, contending that even as revised, the statutes were unconstitutional as applied and on their face. The amended complaint presented two constitutional causes of action: Free Speech and Equal Protection. However, Judge Skavdahl granted the defendants' motion to dismiss the case, finding that there was no constitutional right to trespass on private land and that the statutes did not regulate protected First Amendment activity. *Western Watersheds Project v. Michael*, 196 F.Supp.3d 1231 (2016).

On Sept. 7, 2017, the Tenth Circuit reversed and remanded the case. Judge Carlos F. Lucero wrote for the unanimous three-judge panel and first addressed whether the amended statutes still prohibited activity on public property. Lucero found that although subsections (a) and (b) now only applied to private property, subsection (c) regulated activity on public property because such public areas may be "adjacent or proximate to private property," as stated in the subsection.

Lucero next discussed the broad definitions which prohibited numerous lawful actions on public land, such as "collecting water samples, taking handwritten notes about habitat conditions, making an audio recording of one's observation of vegetation, or photographing animals."

He found that the plaintiffs' collection of resource data constituted "protected creation of speech." He cited several cases as precedent, including the 2001 U.S. Supreme Court case *Sorrell v. IMS Health Inc.* in which the Court explained that "the creation and dissemination of information are speech within the meaning of the First Amendment." 564 U.S. 552, 570 (2011). He also cited the Eleventh Circuit's 2015 ruling in *Buehrle v. City of Key West* in which the court held that if the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by "simply proceed[ing] upstream and dam[ming] the source" of speech. 813 F.3d 973, 977 (11th Cir. 2015). The Tenth Circuit concluded that an individual "who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter."

Finally, the court agreed with the plaintiffs that "such activities are indispensable to their participation in the formation of public policy" and that their speech-creating activities "further public debate." Lucero cited *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett* in which the Supreme Court held that there is "practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." 564 U.S. 721, 755 (2011).

Accordingly, the court concluded that the statutes regulated protected speech. However, because the district court did not determine the appropriate level of First Amendment scrutiny, and therefore did not determine whether the statutes would "survive the appropriate review," the court remanded the case so the district court could consider those issues in the first instance.

Following the ruling, Western Watersheds Project's Director for Wyoming, Utah, and Colorado Jonathan Ratner praised the decision in an interview with the National Resources Defense Council (NRDC) on September 7. "This is a victory for citizen science and for conservation groups who enforce

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environmental protection standards when agencies turn a blind eye, and a resounding defeat for the State of Wyoming's efforts to shield special interests from public scrutiny, oversight, and accountability."

David Muraskin, the Food Project Attorney at Public Justice, a nonprofit legal advocacy organization, agreed with Ratner. "Today's decision sends a clear message to other state legislatures that attempts to stifle free speech and shield polluters from accountability," he said. "This is the third time a court has held those laws will be scrutinized because they silence speech. The laws are being pushed by lobbyists looking to provide cover for some of the worst corporate actors. The court's ruling today is a win for transparency, free speech and citizen science."

Mickey Osterreicher, general counsel for the National Press Photographers Association (NPPA), a plaintiff in the case, praised the ruling for protecting the media and undercover investigations. "Censoring the press runs counter to the protections embodied in First Amendment. The government should not be allowed to chill that right by criminalizing the media's role of gathering and disseminating information and images on matters of public concern," he said to the NRDC.

The AP reported on the same day as the ruling that Wyoming Attorney General Peter Michael was reviewing the ruling and preparing for the next phase in the litigation, according to Gov. Matt Mead spokesman David Bush. As the *Bulletin* went to press, Wyoming had not announced whether it would file a petition for *certiorari* to the Supreme Court.

Ninth Circuit Strikes Down Two Idaho Ag-Gag Law Provisions

On Jan. 4, 2018, the Ninth Circuit ruled that the portion of Idaho's Interference with Agricultural Production law, Idaho Code § 18-7042, criminalizing misrepresentations committed in order to enter a production facility could not survive First Amendment scrutiny, finding that the subsection criminalized innocent behavior, was overbroad, and targeted speech and investigative journalists. *Animal Legal Defense Fund v. Wasden*, No. 1:14-cv-00104-BLW (9th Cir. 2018). The court also found that the clause prohibiting an individual from making audio or video recordings of the "conduct of an agricultural production facility's operations" was "a classic example of a content-based restriction that cannot survive strict scrutiny."

According to the Ninth Circuit's ruling, Idaho enacted its law in February 2014 in order to prohibit "interference with agricultural production" and protect Idaho farmers. The statute included four provisions for when an individual "commits the crime of interference with agricultural production," including that "the person knowingly: (a) Is not employed by an agricultural production facility and enters an agricultural facility by force, threat, misrepresentation or trespass; (b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass; (c) Obtains employment with an agricultural facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers; [or] (d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations[.]" "Agricultural production" broadly covered "activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses," and other activities such as "[p]reparing land for agricultural production" and "[h]andling or applying pesticides." "Agricultural production facility" was also defined broadly and covers "any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production."

In March 2014, the Animal Legal Defense Fund (ALDF), along with several other organizations including People for the Ethical Treatment of Animals (PETA) and the American Civil Liberties Union (ACLU) of Idaho, filed a lawsuit against Lawrence G. Wasden as Attorney General of Idaho. The complaint alleged that the purpose and effect of the statute was to "stifle political debate about modern agriculture by (1) criminalizing all employment-based undercover investigations; and (2) criminalizing investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds." The ALDF asserted that the statute therefore violated the First and Fourteenth Amendments.

The U.S. District Court for the District of Idaho struck down all four provisions of Idaho's ag-gag law, granting the ALDF's motion for summary judgment on its First Amendment and Equal Protection claims. *Animal Legal Defense Fund v. Otter*, 118 F.Supp.3d 1195 (D. Idaho 2015).

On appeal, the Ninth Circuit determined whether any of the four provisions of the ag-gag statute violated the First Amendment, explaining that the appeal "highlight[ed] the tension between journalists' claimed First Amendment right to engage in undercover investigations and the state's effort to protect privacy and property rights in the agricultural industry."

Judge Margaret McKeown wrote the majority opinion, which first cited the 2012 U.S. Supreme Court case *United States v. Alvarez*, in which the court examined the Stolen Valor Act, 18 U.S.C. § 704, which criminalized false claims that the speaker had received the Congressional Medal of Honor. 567 U.S. 709 (2012). The plurality opinion, written by Justice Anthony Kennedy, and Justice Stephen Breyer's concurrence both "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." However, the plurality held that false speech may be criminalized if made "for the purpose of material gain" or "material advantage," or if such speech inflicts a "legally cognizable harm." (For more information on the Supreme Court's ruling in *Alvarez*, see "Supreme Court Strikes Down Stolen Valor Act" in the Summer 2012 issue of the Silha *Bulletin*.)

McKeown turned first to subsection (a) of Idaho's ag-gag law, which she determined regulated speech protected by the First Amendment because "it criminalizes innocent behavior, . . . the overbreadth of th[e] subsection's coverage is staggering, and . . . the purpose of the statute was, in large part, targeted at speech and investigative journalists."

Regarding criminalizing innocent behavior, McKeown asserted that the statute, like the Stolen Valor Act in *Alvarez*, "[sought] to control and suppress all false statements in almost limitless times and settings. And it [did] so entirely without regard to whether the lie was made for the purpose of material gain."

McKeown provided an analogy to demonstrate that a lie, including a "misrepresentation" under the ag-gag law, can be "pure speech" in the context of trespass and does not necessarily lead to material gain. Her example imagined a teenager who, in order to impress his friends by obtaining a reservation at an exclusive restaurant, may make the reservation in the name of his famous mother, therefore constituting a misrepresentation. Under Idaho's ag-gag law, McKeown explained, the teenager would be subject to punishment of up to

one year in prison, a fine not to exceed $5,000, or both, even for just entering the restaurant. Because the entry alone "does not constitute material gain," the lie is pure speech under the *Alvarez* standard.

McKeown next wrote that the court "was unsettled by the sheer breadth of this subsection given the definitions of 'agricultural production facility' and 'agricultural production.'" She explained that under these definitions, the subsection applies to misrepresentations "not only in the context of a large-scale dairy facility or cattle feedlot, but also grocery stores, garden nurseries, restaurants that have an herb garden or grow their own produce, llama farms that produce wool for weaving, beekeepers, a chicken coop in the backyard, a field producing crops for ethanol, and hardware stores, to name a few."

Finally, McKeown asserted that a scenario like that regarding the teenager was also possible for investigative reporters who trespass as part of the newsgathering process. She wrote, "We are sensitive to journalists' constitutional right to investigate and publish exposés on the agricultural industry. Matters related to food safety and animal cruelty are of significant public importance." McKeown cited *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999), and *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), in which the courts invalidated trespass claims predicated on misrepresentations because "the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land."

Because subsection (a) constituted a restriction on speech, McKeown ruled that it must be "actually necessary" to achieve a compelling government interest, and that there must be a "direct causal link between the restriction imposed and the injury to be prevented." The majority found that the subsection did not survive such review. McKeown wrote, "Even assuming Idaho has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not 'actually necessary' to protect those rights." She added that Idaho had other alternatives to addressing this interest, such as utilizing its existing prohibition against trespass that does not implicate speech, or narrowing the subsection by requiring specific intent of the individual using misrepresentation.

Turning to subsections (b) and (c), McKeown ruled that they did not violate the First Amendment because they "protect[] against a 'legally cognizable harm associated with a false statement' and therefore survive constitutional scrutiny under *Alvarez*. She differentiated subsections (b) and (c) from (a) in that "acquiring records by misrepresentation results in something definitively more than does entry onto land—it wreaks actual and potential harm on a facility and bestows material gain on the fibber."

McKeown then turned to subsection (d), the "Recordings Clause" which prohibited a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the "conduct of an agricultural production facility's operations." She first refuted Idaho's claim that the act of creating an audiovisual recording is not speech protected by the First Amendment. McKeown considered this argument "akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not." Next, the majority held that subsection (d) is an "obvious" example of a content-based regulation of speech because it prohibits recording on a defined, specific topic, in this case, all audio and visual recordings of agricultural operations.

Because the Recordings Clause constitutes a content-based regulation, McKeown applied strict scrutiny, meaning the restriction of speech must be "necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." She first found that the subsection was underinclusive because it prohibited audio and video recordings, but made no mention of photographs. McKeown also found that the clause was overinclusive and suppressed more speech than necessary to protect property and privacy because there were "various other laws at [Idaho's] disposal that would [have] allow[ed] it to achieve its stated interests while burdening little or no speech," such as laws regarding invasion of privacy and defamation. She concluded that "[t]he remedy for speech that is false is speech that is true," citing *Alvarez*, "and not, as Idaho would like, the suppression of that speech."

Judge Carlos Bea filed an opinion dissenting in part and concurring in part. Bea disagreed with the majority's finding that entry upon land without consent is not a "legally cognizable harm" where it "merely allows the speaker to cross the threshold of another's property." He argued that as a matter of the applicable Idaho law, "such an unconsented entry constitutes a common law trespass, which is a legally cognizable harm—one from which damages are presumed to flow naturally," meaning subsection (a) would survive First Amendment review under *Alvarez*. Bea otherwise concurred with the majority opinion.

As the *Bulletin* went to press, Idaho had not announced whether it would file a petition for *certiorari* to the Supreme Court.

Following the ruling, ALDF Senior Attorney Matthew Liebman told the *Capital Press*, an agriculture weekly publication, that the decision was a victory for First Amendment advocates. "I think the whole point behind this law was to stop recordings coming out and now that that recording ban is unconstitutional, that's a major victory as far as we're concerned," he said.

Institute for Defense Analyses (IDA) attorney Dan Steenson contended in an interview with the *Capital Press* that the statute still afforded strong protection to agricultural producers after the ruling. "We believe the statute still provides significant protection for agricultural production facilities from wrongful interference," he said. "[Each of the provisions] address different types of interference that agricultural facilities might experience."

In a Jan. 26, 2018 commentary, Bryan Cave LLP attorney Merrit Jones and partner Jennifer Jackson predicted that the Ninth Circuit's ruling would not be the end of litigation related to ag-gag laws. They wrote, "If anything, the opinion provides a framework to assist ag-gag law drafters in navigating the constitutional labyrinth. One thing is for sure, ag-gag litigation is far from over."

In fact, in 2017 and early 2018, three federal district courts also ruled on ag-gag laws in Iowa, North Carolina, and Utah. On Feb. 28, 2018, U.S. District Court for the Southern District of Iowa Judge James E. Gritzner denied Iowa's motion to dismiss a lawsuit brought by a coalition of public interest groups, which argued that Iowa's ag gag law, Iowa Code § 717A.3A, violated the First Amendment. *Animal Legal Defense Fund v. Reynolds*, No. 4:17-cv-362 (S.D. Iowa 2017). Gritzner allowed the coalition's First Amendment arguments of the ag-gag law being a content and viewpoint-based restriction of speech, as well as being overbroad, to continue. As the *Bulletin* went to press, no further announcements had been announced regarding the case.

On July 7, 2017, U.S. District Court for the District of Utah Robert Shelby ruled that Utah's ag-gag law, which criminalizes both lying to gain access to an agricultural operation and filming once inside, violated

Ag-Gag Laws, *continued on page 46*

Special Report: Silha Center Interview with Panama Papers Journalist Kevin Hall

On Jan. 16, 2018, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley and Silha *Bulletin* Editor Scott Memmel met with Kevin Hall, the Chief Economics Correspondent for McClatchy Newspapers, Inc., which operates 29 daily newspapers in the United States, including the *Miami Herald* and the *Sacramento Bee*. Hall was also a member of the global team that won a Pulitzer Prize for its work on the "Panama Papers," a collection of 11.5 million files, totaling 2.6 terabytes of data involving offshore accounts linked to prominent figures and to criminals around the world.

SPECIAL REPORT

In 2015, an anonymous individual leaked the documents to *Suddeutsche Zeitung*, a German newspaper, likely marking the largest leak in history, according to *Wired* magazine on April 4, 2016. Beginning on April 3, 2016, a team of over 300 journalists and 100 media partners, working under the umbrella of the International Consortium of Investigative Journalists (ICIJ), sifted through the documents, which revealed that more than 214,000 offshore companies were connected to people in more than 200 countries and territories, according to ICIJ's Panama Papers website. The files were taken from the database of the world's fourth largest offshore law firm, Mossack Fonseca, and included emails, financial spreadsheets, passports, and corporate records containing information related to offshore holdings of twelve current or former world political leaders, celebrities, fraudsters, drug traffickers, and others, as reported by *The Guardian* on April 3, 2016.

The BBC reported on April 6, 2016 that the Panama Papers had revealed that Mossack Fonseca clients were able to launder money, dodge sanctions, and avoid tax payments. According to an April 3, 2017 story by ICIJ reporter Will Fitzgibbon, the investigation led to over 150 separate investigations, inquiries, audits, and probes in more than 70 countries, such as an investigation into Mossack Fonseca, which led to the detention of Jürgen Mossack and Ramón Fonseca, the firm's founders, on money laundering charges in February 2017. Another notable impact of the Panama Papers was the April 2016 resignation of Icelandic Prime Minister Sigmundur Davíð Gunnlaugsson, though he remained a member of parliament. For more information about the Panama Papers investigation, as well as several reports stemming from the project, see https://panamapapers.icij.org/.

In 2017, ICIJ began a separate investigation into a new leak of 13.4 million files from a combination of offshore service providers and several countries' company registries. Known as the "Paradise Papers," the documents include loan agreements, financial statements, emails, trust deeds and other paperwork largely tied to political leaders, financiers, and wealthy individuals, according to ICIJ. As the *Bulletin* went to press, some data had been released in November 2017, but the Paradise Papers investigation remained ongoing.

The meeting with Hall provided valuable expert insight into the journalistic responsibilities, as well as legal and ethical concerns, related to the Panama Papers project in particular and investigative stories involving massive data leaks more generally. This special report includes questions asked by Kirtley and Memmel, as well as by Dave Beal, a longtime business columnist for the St. Paul *Pioneer Press*, who also attended the meeting, and excerpts from Hall's responses.

Q: "Can you speak about your involvement with the Panama Papers?"

A: "I was the lead on the McClatchy side of things. McClatchy was the U.S. newspaper partner [for the project].. . . We were a good fit for [working with ICIJ] because of language skills; the *Miami Herald*, our paper, focuses on Latin American and the Caribbean.. . . We certainly didn't have the weight of *The Washington Post* or *The New York Times*, but I think the calculation on ICIJ's part [was] we would be more inclined to collaborate and what they were after on a project this big was collaboration.. . . In my case, I spent 15 months on this, probably the first eight before publication."

Q: "Why do you feel these disclosures, this whole process, . . . is important?"

A: "The whole database is not public because you have bank records, bank accounts, passports, licenses, marriage licenses, divorce papers; everything under the sun is in the private material. I think that's another reason ICIJ had to be very careful who it brought in. It was a contractual relationship, we had to sign off on a lot of privacy stuff and a lot of teamwork stuff. They took great steps because of that privacy angle because one misstep there could be a huge lawsuit for everybody."

Ag-Gag Laws, *continued from page 45*

the First Amendment rights of the People for the Ethical Treatment of Animals (PETA), the ALDF, and Amy Meyer, the first individual charged under the law. *Animal Legal Defense Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah 2017). Shelby found that the law did not survive strict scrutiny, which requires that the state has a compelling interest and that the restriction on speech is narrowly tailored to achieve that interest. On Sept. 9, 2017, the Associated Press (AP) reported that the Utah Attorney General's Office wrote in court documents that they were not planning to challenge the ruling.

But, on May 3, 2017, unlike in the rulings by the other federal district and appellate courts, U.S. District Court for the Middle District of North Carolina Judge Thomas D. Schroeder ruled against the organizations challenging North Carolina's ag-gag law. He dismissed the lawsuit brought by PETA and the ALDF, among others, because they could not show an "injury in fact" and, thus, did not have standing to bring the case. *People for the Ethical Treatment of Animals v. Stein*, No. 1:16cv25 (M.D.N.C. 2017). Schroeder wrote that the lawsuit "contain[ed] not a single allegation" that the defendants, which included the state and the University of North Carolina, "had ever sued or threatened to sue PETA or [the] ALDF for investigatory conduct." PETA, the ALDF, and other plaintiffs appealed the case to the Fourth Circuit, which held oral arguments in January 2018. As the *Bulletin* went to press, the Fourth Circuit had not released a ruling in the case.

Scott Memmel
Silha *Bulletin* Editor

"I think the reason it was important is now self-evident, that it showed what people had long suspected: that here's how bad guys are hiding their money and how they are using shell companies.. . . We showed how people were using the United States to camouflage assets abroad just like Americans might do in the Cayman Islands. We showed how drug money got cleaned through a process of offshore accounts and businesses. We showed how tax evasion happened. We showed how politicians hid their sources of wealth. [Former British Prime Minister David] Cameron had family wealth that he was hiding in offshores that he had to own up to. So, all those reasons for public disclosure [are] important."

"Was it stolen material as some suggest? It certainly wasn't public material. We know enough about it that we felt we didn't have concerns about motives [for the leaks].. . . We wanted to know what we were dealing with."

Q: "When you say you weren't concerned about motives . . . what kinds of concerns about motives would be concern[ing] to you? Besides authenticating the documents . . . what difference does it make why somebody [leaked] it to you?"

A: "From an ethical standpoint, one of our biggest concerns [was] is this a public person or not? We had a number of cases where we found Americans who were in these documents for wealth protection. We didn't bother them, we didn't call them, we didn't publish them because they weren't public people, there was no obvious wrongdoing that happened. But there were others that we focused on that we had to get over our own internal hurdle, that are they a sufficiently public person or involved in sufficiently questionable enterprises, that we can justify using this [private] information.. . . In this new digital era, we are having to confront some interesting ethical questions."

Q: "What immediately comes to mind about your experience with the Panama Papers project?"

A: "I think there's a sense of disappointment that more hasn't been done in terms of prosecution in the U.S. Our reporting did lead to changes in Wyoming and Nevada, the two places we focused on. It did not lead to any national change.. . . There has been reaction in lots of places in the world, but . . . there were no big fish in the Panama Papers from the United States. There were a lot of financial fraudsters, a lot of guys with SEC [Securities and Exchange Commission] and CFTC [Commodity Futures Trading Commission] violations, hedge funds who defrauded their investors, the kind of people . . . we expected to be in there were in there."

Q: "How much of this [lack of prosecutorial or Congressional action] would you say is a product of lack of public outrage?"

A: "I think a part of that goes to the diminishing reach of newspapers to some extent. But [President Barack] Obama had a platform to do something with this. He went the path of least resistance . . . I think he could have gotten something through [Congress], but they had other things on their plate. It did hurt that there wasn't a big obvious person on there. The Russians were the biggest part of that story [related to the Islandic Prime Minister]; are people gonna fall on their sword here for something that happened over there?"

Q: "Do you anticipate [Robert] Mueller's investigation [into Russian interference in the 2016 presidential election and potential involvement by President Donald Trump's administration] is going to touch on any of this?"

A: "I sure hope so. Our independent reporting this year has given him a lot to work with.. . . The answer is yes. The [Panama Papers] overlap with Trump SoHo [a luxury hotel in Manhattan], Trump Moscow, [a dropped plan to build a Trump Tower in Russia], and Miss Universe . . . [as well as] Trump's real estate rings."

Q: "Can you talk about how you deal with instances when [President] Trump's name comes up?"

A: Well in the Panama Papers, we were looking for Trump and Clinton, and people in their orbits, so we did two separate stories, one on each of them showing how donors of the Clinton Foundation were in there.. . . Trump appeared like 3,450 times . . . and we read every single one of [those documents and contracts].. . . [There was] a lot of insight into how he negotiates. What was in there was very interesting.. . . There was a lot of useful material. I think we've learned as much about the Trump empire as anywhere."

Q: "In contemplating legal ramifications of all this investigation, you mention [editorial] privacy as one concern . . . did you, individually or collectively, worry about being subpoenaed in legal cases? And what was your collective position?"

A: "Yeah. I think the idea was to fight it. We structured it in a way that the data was always with ICIJ so if anyone had to respond, it was going to be them. My sense is that they had the data in multiple places where they would avoid having to turn it over to a U.S. court or, in the case that they did, they would not lose it either.. . . My recollection is when we signed onto the deal that ICIJ would be the voice should there be legal challenge."

"[I]in Ecuador the journalists were threatened with jail, they were threatened to be brought in front of the congress, the president gave out their cell phone numbers and asked people to harass them. He was trying to force the release of the names of people, he wanted to go after his political opponents with it, and he wanted, as we reported later, he was trying to find documents that were implicating him and his brother."

Q: "Was there anything in particular that really surprised or shocked you when you were working with this partnership [on the Panama Papers]?"

A: The shock was that the Argentines [journalists on the Panama Papers team] were able to keep it quiet because they had information that would have changed the outcome of their election and it was killing them not to be able to report this. [But] we had all agreed that everyone publishes at the same time, no exceptions. And they had lots of ways that could have leaked out, but it didn't happen. Then they took a bit hit after the fact because now they were accused of covering up information, and they weren't because we can vouch for them.. . . Everybody did great work. Your job was to find stuff and put it into a collective space, and everybody did that. Everybody's stories were informed by stuff that someone else had found and put in a common thread.

Q: "What would be your takeaways for journalism students about this project?"

A: "I think the biggest takeaway is it is okay to collaborate. The old model of you having to be first and exclusive still is the case for a lot of stuff . . . [but] collaboration is the way to go deep on stuff.. . . It's given me the freedom to work with non-journalists who have overlapping research specialties. There are ways you can collaborate with people who never appear in print, but you have to do your due diligence, you have to know who they are."

Scott Memmel
Silha *Bulletin* Editor

Spring Symposium Marks the 30th Anniversary of *Hustler Magazine, Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons

Delivering the unanimous ruling of the U.S. Supreme Court in the 1988 case *Hustler Magazine, Inc. v. Falwell*, Chief Justice William Rehnquist wrote, "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate.. . . From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them." 485 U.S. 46 (1988).

SILHA CENTER EVENTS

On April 20 and 21, 2018, the Silha Center for the Study of Media Ethics and Law, the Minnesota Journalism Center, the Hubbard School of Journalism and Mass Communication, and the Association of American Editorial Cartoonists (AAEC) co-sponsored a symposium marking the 30th anniversary of the *Hustler* case, which affirmed the First Amendment right of editorial cartoonists and satirists to lampoon public figures. The symposium, titled "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30," included six panels and two speeches in which political cartoonists and First Amendment scholars discussed different aspects of the *Hustler* case, including Chief Justice Rehnquist's opinion, the impact of the case, old and new forms of satire and political cartoons in society, and threats to satire in the United States and abroad, among other topics. The event took place at the Courtyard Marriott in Minneapolis on April 20 and the University of Minnesota's Cowles Auditorium on April 21, with over 150 people in attendance over the course of the two days.

On April 20, Elisia Cohen, the director of the Hubbard School of Journalism and Mass Communication at the University of Minnesota, welcomed everyone to the symposium and stressed that "understanding how satire functions in a free and democratic society with the free press is profoundly important. Historically, when elected officials work to limit the ability of the press to perform its duties as a 'watchdog' on the powerful, satire often emerges. It emerges as an important site of resistance, a mechanism for inventive pushback, and also for creative criticism," she said.

Panel #1: The Power of Satire from Gillray to Trump

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley and Roslyn Mazer, who served as counsel to the AAEC *et al.* in the *Hustler* case and wrote a pivotal *amicus* brief, introduced the April 20 panel, which included Steve Sack, the Minneapolis *Star Tribune*'s editorial cartoonist, Ann Telnaes, *The Washington Post*'s editorial cartoonist, and Michael Kahn, senior counsel at Crowell & Moring, LLP in San Francisco, who served as the moderator of the panel.

Kahn, co-author of *Puck: What Fools Them Mortals Be!*, described how political cartoons have been a "powerful force in our western civilization for hundreds and hundreds of years." He provided several examples, including Martin Luther, who produced woodcuts

A Brief Overview of *Hustler Magazine, Inc. v. Falwell*

Hustler Magazine, Inc. v. Falwell arose following the publication of the November 1983 issue of *Hustler* magazine, which featured a parody of a Campari liqueur advertisement on the inside front cover. The ad was titled "Jerry Falwell talks about his first time," playing on the double entendre meaning of one's first sexual experiences. The ad purported to be an interview with Jerry Falwell, a nationally known minister who had frequently commented on politics and public affairs, in which he states his "first time" was a "drunken, incestuous rendezvous with his mother in an outhouse." The bottom of the ad included a disclaimer that it was an "ad parody" and was "not to be taken seriously."

Immediately following the publication of the ad, Falwell filed a lawsuit in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, the publisher of the magazine, and his distribution company, Flynt Distributing Co., Inc. ("petitioners"). Falwell sought to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The district court granted a directed verdict to the petitioners on the privacy claim, and the jury found in favor of the petitioners on the libel claim, finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." However, the jury found in favor of Falwell on the intentional infliction of emotional distress claim, stating that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners.

In an 8-0 decision, the Supreme Court ruled in favor of the petitioners, reversing a ruling by the U.S. Court of Appeals for the Fourth Circuit. Chief Justice Rehnquist found that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" and that sometimes the "sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures."

Chief Justice Rehnquist held that public officials and public figures may only recover damages for the tort of intentional infliction of emotional distress by "showing . . . that the publication contains a false statement of fact which was made with "actual malice," the standard created in *New York Times v. Sullivan* requiring plaintiffs to prove that the defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. 376 U.S. 254 (1964). Chief Justice Rehnquist also explained the necessity of protecting political cartoons. "Were we to hold [differently in this case], there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject."

during the 16th-century Reformation in Western Europe attacking the Catholic Church for granting indulgences. Another example was Thomas Nast, a political cartoonist who waged a campaign in the 1870s against William Magear Tweed, often referred to as "Boss" Tweed, who operated as the "boss" of Tammany Hall, the influential Democratic Party political machine, and was frequently accused of corruption until his arrest in 1873. Kahn explained that Tweed had once said "I don't care what the newspapers say about me, I don't like those damn pictures (Nast's cartoons) because my constituents can't read, but they can look at pictures."

Telnaes addressed the question "Is satire still relevant and powerful in the age of [President Donald] Trump?" She contended that President Trump's comments calling news organizations the "fake news media" and the "enemy of the American people" were "a significant choice of words, and dangerous to the role of a free press in democracy, which includes the editorial cartoonist." She continued, "It is our job through satire and ridicule, humor and pointed caricatures, to criticize leaders and governments who are behaving badly. It is our purpose to hold the politicians and powerful institutions accountable to the people they are supposed to serve." (For more information on President Trump's relationship with the press as a presidential candidate and as president, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue of the Silha *Bulletin*, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

Steve Sack asserted that "the most obvious power [of political cartoons] is the power to provoke." He also explained that the ability for viewers to complain about political cartoons had changed over time. "When I began, like all cartoonists, I got a lot of hate mail and angry calls.. . . Those were really the only ways for readers to give us feedback," he said. "And then came along the internet. As newspapers built websites, suddenly our work was accessible all over the world.. . . And as easily as the world could see our cartoons, the world had email access to us.. . . And then social media, Facebook, the wonderland of comment sections, and, of course, Twitter. With all these outlets to complain . . . people had a smorgasbord of places to react to a cartoon."

During a Q&A session, the panel also discussed the 2015 *Charlie Hebdo* attack in Paris, France in which brothers Said and Cherif Kouachi forced their way into the offices of the satirical French newspaper and opened fire with assault rifles, killing 12 people and injuring 11 more. Among the victims were *Charlie Hebdo* editor and cartoonist Stephane Charbonnier, as well as cartoonists Jean Cabut, Bernard Verlhac, Georges Wolinski, and Philippe Honore. (For more information on the attack, see "*Charlie Hebdo* Attack Leaves Several Dead, Sparks International Debate on Limits of Free Speech" in the Winter/Spring 2015 issue of the Silha *Bulletin* and "Journalists Abroad Face Uncertain Legal Challenges; U.S. Television News Reporters Slain During Live Report" in the Summer 2015 issue.)

> "It is our job through satire and ridicule, humor and pointed caricatures, to criticize leaders and governments who are behaving badly. It is our purpose to hold the politicians and powerful institutions accountable to the people they are supposed to serve."
>
> **— Ann Telnaes, *Washington Post* editorial cartoonist**

Panel #2: Reverend Falwell Goes to Court

On April 21, Pat Bagley, editorial cartoonist at the *Salt Lake Tribune* and president of the AAEC, welcomed everyone to the second day of the symposium. He stated that the event was taking place "because freedom of thought matters [and because of] freedom of the press."

Kirtley then introduced the panel, which discussed the background of the *Hustler* case and the ruling by Chief Justice Rehnquist. Ben Sargent, editorial cartoonist at the *Texas Observer* and president of the AAEC during the *Hustler* case, explained the AAEC's role in the litigation, saying it was "proud to be part of it." Sargent contended that the ruling "still stands as a bulwark for free expression in these very perilous times."

Mazer explained that the mainstream media had been "perplexed" about the case, namely whether they should support a petition for *certiorari* to the Supreme Court after the Fourth Circuit ruled against Flynt and *Hustler* magazine. Mazer said she and the AAEC were "surprised" not only that that the Court was unanimous, but that Chief Justice Rehnquist, who generally had a poor track record on First Amendment cases, wrote the opinion. However, Mazer stated that Chief Justice Rehnquist's ruling was perhaps less surprising after biographer Roger Newman uncovered Rehnquist's Shorewood (Wis.) High School yearbook from 1942. The entry next to Rehnquist's portrait stated that his "favorite pastime, in and out of school, [was] cartooning." Mazer concluded by stating that the case was significant because it "has been cited in many, many cases since 1988 and [is] . . . one of the most ringing endorsements for the First Amendment."

Mike Peters, creator of the internationally syndicated comic strip Mother Goose and Grimm, contended that prior to and during the *Hustler* litigation, "satire was truly under attack." He asserted that the broad protection granted by *Hustler* is "something we live with and we sort of take for granted."

Sargent concluded by observing that "the media environment . . . is fundamentally and substantially different from the seemingly long-ago world of 1988." But, he added that "[h]owever things play out in the new media environment, for now we can trust that the hardline protections from the First Amendment's long history are still in place, and we should be vigilant to ensure that they are defended, strengthened, and expanded. Speech is still speech and liberty is still liberty."

Panel #3: The *Hustler* Decision and its Impact

The second panel on April 21 included four media law scholars, including Len Niehoff, a professor at the University of Michigan Law School; Jonathan Peters, an assistant professor at the Grady College of Journalism and Mass Communication at the University of Georgia; Erica Salkin, an associate professor of communication studies at Whitworth University; and George Freeman, the executive director of the Media Law Resource Center, who served as the moderator. The panel also included Steven Breen, the editorial cartoonist at the *San Diego Union*.

Symposium, *continued on page 50*

Symposium, *continued from page 49*

Freeman asked what the panelists viewed as the significance of Chief Justice Rehnquist's ruling in the *Hustler* case. Salkin explained that the case has "a wide application to a wide variety of speech," including student speech in which courts have "embraced the protection of satire [and] echo[ed] the language of *Hustler*."

Breen argued that "what's great about [the case] is [editorial cartoonists and members of the press] don't have to worry about [censorship and other attacks on political cartooning]." He added that the protection of satire was important because the practice of cartooning "is looking at something, whether it is a person or idea, and you're basically saying 'you're not as important as you think you are' and there's different ways where you could knock that person or that thing off the pedestal."

Niehoff argued that "[a] lot of the power here for First Amendment purposes comes from the fact that satire is counterfactual. That it invites you into this imaginative process where the world just looks different. What it invites you to do is compare this alternative reality to our lived reality . . . and it does it efficiently, it does it quickly, it does it through a variety of devices like words and images and humor, [and] it cuts across socioeconomic lines," he said.

Niehoff also contended that one legacy of the *Hustler* ruling was that it set the stage for the 2011 Supreme Court case *Snyder v. Phelps* in which the Court ruled that the First Amendment protects the "hurtful" picketing of military funerals by the Westboro (Kan.) Baptist Church. 562 U.S. 443 (2011). (For more information on the case, see "In *Snyder*'s Wake, Protests Continue to Test Boundaries of Protected Expression, Spark Regulatory Efforts" in the Fall 2011 issue of the Silha *Bulletin*, "Supreme Court Ruling Protects Funeral Picketers" in the Winter/Spring 2011 issue, and "U.S. District Court Rules against Funeral Protesters" in the Winter 2008 issue.)

Finally, Peters explained that "[w]e protect some false speech because we are afraid that if we held public officials and public figures to a lower standard [than actual malice], it would be easier for them to sue and to win and that would have a chilling effect on the public discourse."

Speech: Why Satire is Good for Our Democracy

Sophia McClennen, a professor of comparative literature and international affairs at Penn State University, spoke about the important role satire plays in the United States. She identified the necessary elements "for a healthy democracy," including citizens who are "active," "informed," and "engaged," as well as a thriving news media, community action, the public sphere, and satire.

McClennen then argued that satire "helps remind us of the actual story" and "emerges in force in moments of crisis." She added that satire also "expos[es] faulty thinking" and "point[s] out stupidity anywhere it can find it, on the left, on the right, it doesn't matter." "Every human culture has satire. Every community will produce it when it's being told that it is not allowed to think, when it is being told that it's supposed to just get in line and follow whoever is in power," she said. As a result, she asserted that satire "had a measurable impact not only on public opinion, but on things that happened in politics," citing several examples including actress Tina Fey's portrayal of vice presidential candidate Sarah Palin on "Saturday Night Live" during the 2008 presidential campaign.

McClennen concluded by arguing that satire is closely tied to the millennial generation, social media, and social action, and is "constantly part of the public sphere," citing the example of signs at recent marches or protests "competing" to be the most "witty or ironic."

Keynote Address: Speaking Freely in the Age of Trump

In the symposium's keynote address, Jack Ohman, the editorial cartoonist at *The Sacramento Bee*, began by discussing his background, including as a cartoonist at the *Minnesota Daily*, the student newspaper at the University of Minnesota.

Alluding to earlier statements that the number of cartoonists working for daily newspapers had fallen to between 30 and 50, he turned to the "importance of [his] shrinking, but hearty craft." "The cartoonists are the rebels," he said. "Cartoonists are not just here to amuse, although we do. Cartoonists are not here solely to draw Trump's . . . hair. We are here . . . to hold him accountable."

He continued, "We are not portraitists of the absurd. We are looking for an honest man or woman and we have the ability to hold that lantern and shed light, not throw shade. Every single person on the podium today does that professionally. But it's not just that, we are not just gag writers of the apocalypse, we are part of the vanguard of the return of the value of truth in our democracy."

Ohman concluded that "these times demand the people on the stage here today" and that cartoonists should be "brutal when truth is threatened, but nice, like Minnesotans." During the Q&A, Ohman added that being a political cartoonist "is not a drawing job, it is a writing job . . . an editorial job."

Panel #4: Old and New Forms of Satire

The next panel was moderated by Kirtley and consisted of both media scholars and political cartoonists, who collectively focused on older forms of satire, including woodcuts and magazine parodies, and newer forms, such as Twitter parody accounts. Signe Wilkinson, editorial cartoonist for the Philadelphia Media Network, explained that Flynt and *Hustler* magazine had followed in the footsteps of Martin Luther and his use of the printing press. She also contended that "religious figures are granted more deference than political figures," therefore making the *Hustler* case "even more important" because it protected cartoonists who depict religious figures. She added, "When people claiming to represent a religion enter the political fray, cartoonists should have the freedom to cartoon them in the same way they cartoon every other actor on the American stage."

Cullum Rogers, a freelance editorial cartoonist, provided a series of historical examples of parodies of advertisements and periodicals. One example was "The Philistine: A Periodical of Protest," a "little" magazine published from 1895 to 1915 by Elbert Hubbard, who wrote about philosophy, religion, politics, literature, business, and self-improvement, among other topics. Rogers then pointed to Bert Leston Taylor, a *Chicago Tribune* columnist, who published "The Bilioustine: A Periodical of Knock" in 1901. Rogers explained that the magazine's style and content were a parody of "The Philistine," and that it is often referred to as the country's first full-length magazine parody. Rogers argued that such parodies were the predecessors of the *National Lampoon*, *The Onion*, and other satirical publications.

Genelle Belmas, an associate professor at the William Allen White School of Journalism and Mass Communication at the University of Kansas, and Bastiaan Vanacker, an associate professor and program director at the Center for Digital Ethics and Policy at Loyola University – Chicago, each discussed portions of a collaborative research paper regarding legal questions around parody accounts on Twitter, which Vanacker called a "new form" of satire. He provided several

examples, including a parody account of Jim Ardis, the mayor of Peoria, Ill. Vanacker explained that although Ardis disliked the parody account, which depicted him as drunk and vulgar, he could not find a legal basis to have the account removed. As a result, Ardis and the city of Peoria attempted to have the parody account removed under a false impersonation statute found under Article 17 of the Illinois Criminal Code. 720 ILCS 5/17-2. However, the statute only applied to government individuals who had been defrauded, leading the city to drop the case against the man behind the account, according to Vanacker.

Vanacker then turned to right of publicity statutes, a "property right in one's personality and provides individuals with causes of action when their likeness is being used for commercial purposes without their consent." Vanacker contended that individuals behind parody accounts are "pretty well protected" from such arguments and that artistic value and expressive elements may prevail over the commercial interests of plaintiffs.

Belmas discussed the copyright and trademark issues raised by parody Twitter accounts, providing the example of parody accounts using Graphics Interchange Formats (GIFs) previously published by other individuals or organizations. Balmas contended that such uses of these moving images would "probably [be] fair use" under the Digital Millennium Copyright Act, which states that "use by reproduction in copies or phonorecords or by any other means . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S. Code § 107.

Panel #5: Threats to Satire Here and Abroad

The final panel, moderated by Giovanna Dell'Orto, an associate professor at the Hubbard School of Journalism and Mass Communication, also included both cartoonists and scholars, who focused on the potential dangers and threats faced by satirists and cartoonists in the United States, and around the world. Andrew Pritchard, an assistant professor at the Greenlee School of Journalism and Mass Communication at Iowa State University, and Courtney Carstens, the editor-in-chief of *Veritas*, a student-run magazine at Iowa State, each discussed aspects of their research paper looking at the "pros and cons of immense protection for religious speech in the United States." Pritchard asserted that the *Hustler* ad was an example of "speech through images." He contended that the ad was "offensive" not because of "literal words that were written, but the picture they conjure up, it's the image that appears in my mind when I read the words that happened in that famous outhouse." Second, Pritchard argued that the ad was "speech about religion" and that Falwell was not only a public figure, but a "sacred" figure because he was a religious leader. Therefore, according to Pritchard, the ad could be argued to constitute a form of "blasphemy" or "profan[ing] the sacred."

Carstens explained that in "most" countries, these two characteristics of the ad "would create some serious legal problems" because of "blasphemy" and "defamation of religion" laws. However, she contended that the United States took a different course related to offensive religious speech, concluding that religion is part of the public sphere in the United States, whereas it is a "private practice" in Western and Central Europe.

Ritu Khanduri, an associate professor of anthropology at the University of Texas – Arlington discussed her research paper titled "Hustling Free Speech in a Global World," in which she contended that offensive cartoons depicting other races and ethnicities "can be deeply fraught" because they can "give a new lease on life to the colonial imagination and its troubling representation of 'natives' and unwittingly mobilize deeply conservative politics."

Chip Bok, an editorial cartoonist at Creators Syndicate, an independent media and syndication company founded in 1987, discussed how "nowadays, hurt feelings seem to be very important and we tend to steer away from unfortunate physical traits." He provided an example of a cartoon he drew for the *Clearwater Sun* in 1982 lampooning a Largo, Fla. city council candidate who had been seen "stacking dimes" in his driveway by a *Sun* reporter. Reflecting the nature of the activity, Bok depicted the candidate with the "typical" cartoon element of a fly coming out of his ear and included the caption, "Alright, alright. So I'm not insane. I still have other qualifications for the Largo Commission." Bok stated that the man killed himself later that week, but that, even in such circumstances, cartoonists should not stop drawing cartoons simply because they are "offensive," adding that "whatever happens is whatever happens." He then turned to threats to free speech in the United States, including Facebook's efforts to censor or remove hate speech, and the shouting down of speakers at college campuses, a practice known as the "heckler's veto." Bok, who was the 2000 Silha lecturer, concluded by saying "Our job isn't to make people feel safe, it is to make them feel uncomfortable." But he added that cartoonists do not have to risk their lives in the United States as they might do in other countries.

Joel Pett, editorial cartoonist at the *Lexington Herald-Leader*, further elaborated on the dangers for cartoonists abroad. He discussed the Cartoonists Rights Network International (CRNI), which aims to "defend political cartoonists on the front lines of free speed." Pett, who serves as president of the board of directors of CRNI, provided several examples of cartoonists abroad being detained, arrested, jailed, or physically harmed, as well as their offices being "ransacked." Pett said these examples demonstrate "how good [cartoonists] have it here [in the United States]" and added in the Q&A session that American cartoonists "don't have to be courageous" like those in other countries. He added, "The only award you don't want to win in cartooning is the international courage award because it basically means you are in big trouble."

Symposium Wrap Up: What Did We Learn?

The symposium concluded with a session in which Matt Wuerker, editorial cartoonist and founding staff member at *Politico*, along with Pett, displayed cartoons drawn by several of the cartoonists during the event. The purpose was to "memorialize the symposium . . . [using] cartoons about the proceedings." Some depicted the panels and speeches, while others provided commentary on the topics discussed during the symposium. One such cartoon by Bok is featured on the back cover of this issue of the Silha *Bulletin*. The final session was followed by closing remarks by Mazer and Bagley, who both thanked everyone for attending.

Videos of the symposium are available on the Silha Center's YouTube channel, available online at: https://www.youtube.com/channel/UCottXCU5zGzUSZjO-Djlzig/videos. Silha Center activities, including the symposium and annual Silha Lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

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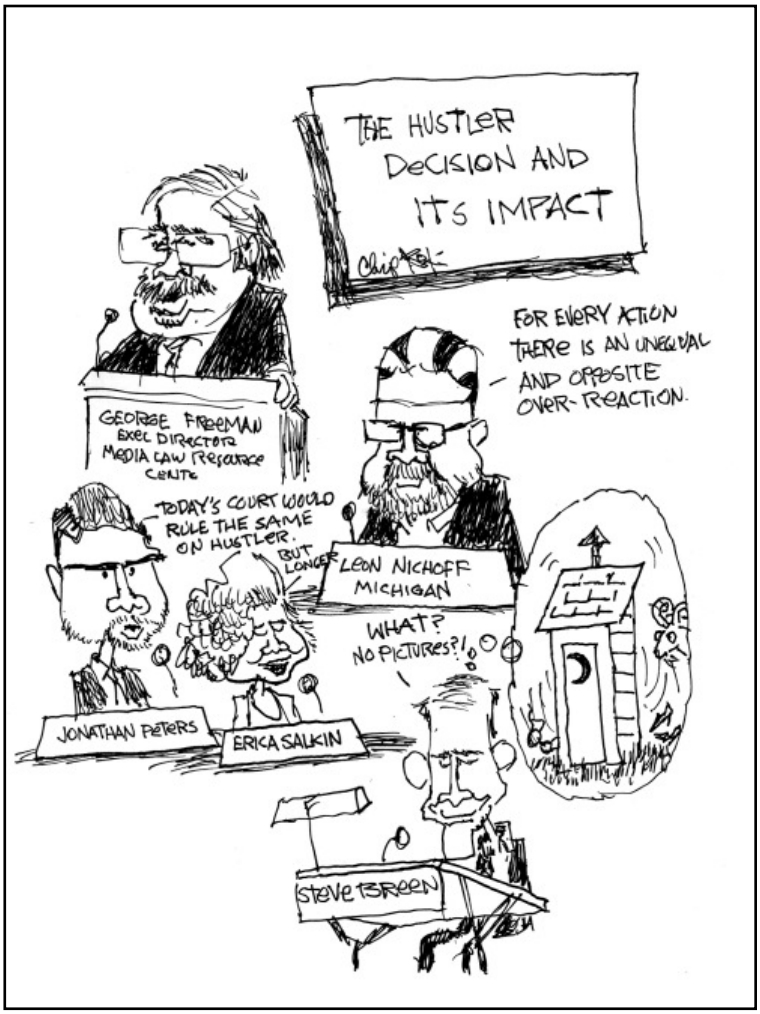

This cartoon by Chip Bok, an editorial cartoonist with Creators Syndicate, was one of many drawn by cartoonists attending "The State of Our Satirical Union," a symposium held April 20-21, 2018 in Minneapolis. The event was co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Association of American Editorial Cartoonists, the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communication. For more on the symposium, see page 48 of this issue of the Silha **Bulletin**.