THE SILHA Bulletin

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A Message from the Director

The Silha Center for the Study of Media Ethics and Law has produced a special report and analysis of media law issues arising from the extraordinary assault on the U.S. Capitol in Washington, D.C. on Jan. 6, 2021. We recount attacks on and detention of working journalists, discuss the First Amendment implications of social media platforms' decisions to ban President Donald Trump, and consider whether statements by President Trump calling on his supporters to march to the Capitol violate federal laws against incitement to violence, rioting, or advocating overthrow of the government — extremely serious offenses that must meet a high bar prior to prosecution. Future issues of the *Bulletin* will continue covering these and related events.

I would like to thank Postdoctoral Associate and former *Bulletin* editor Scott Memmel, as well as Program Assistant Elaine Hargrove, for their quick work in preparing this special report.

Jane E. Kirtley, Director
Silha Center for the Study of Media Ethics and Law

Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions

On Jan. 6, 2021, President Donald Trump spoke at the "March to Save America" rally in Washington, D.C. The rally was held to protest Congress' imminent certification of the 2020 Electoral College results, in which President-elect Joe Biden and Vice President-elect Kamala Harris were elected as the next president and vice president of the United States. In his speech, President Trump urged his supporters to march to the U.S. Capitol building (Capitol) to protest the Electoral College vote count.

Later the same day, protests around the Capitol erupted into chaos as hundreds of President Trump's supporters forced their way into the Capitol. The insurrectionists, as they were referred to by several media outlets around the United States, caused significant property damage and forced members of Congress — who were set to confirm the election results despite opposition from some Republican representatives and senators — to retreat to safety elsewhere in the Capitol. *The Washington Post* described in a Jan. 8, 2021 article how "[m]embers of the mob scaled walls, smashed doors and windows, vandalized works of art, and stole laptops, correspondence and personal items from offices, forcing the emergency evacuation of lawmakers and staff."

Additionally, at least five individuals died as a result of the Capitol attack, including U.S. Capitol Police (USCP) officer Brian D. Sicknick. CNN reported on Jan. 7, 2021 that Sicknick "was injured while physically engaging with the rioters and collapsed after returning to his division office." According to a USCP statement, Sicknick "was taken to a local hospital where he succumbed to his injuries." The statement added, "The entire USCP Department expresses its deepest sympathies to Officer Sicknick's family and friends on their loss, and mourns the loss of a friend and colleague." CNN also noted that several additional USCP officers were injured during the Capitol attack.

Air Force veteran Ashli Babbitt was fatally shot by a "sworn USCP employee" as rioters sought to enter the U.S. House of Representatives Chamber where members of Congress were sheltering in place, according to a January 7 USCP press release. The press release read, "As protesters

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were forcing their way toward the House Chamber where Members of Congress were sheltering in place, a sworn USCP employee discharged their service weapon, striking an adult female. Medical assistance was rendered immediately, and the female was transported to the hospital where she later succumbed to her injuries." The full press release is available online at: https://www.uscp.gov/media-center/press-releases/statement-steven-sund-chief-police.

Three additional individuals at the protests died of "medical emergencies," as reported by CNN. Metropolitan Police Department (MPD) Chief Robert Contee told CNN that "[o]ne adult female and two adult males appear to have suffered from separate medical emergencies, which resulted in their deaths." He added, "Any loss of life in the District is tragic and our thoughts are with anyone impacted by their loss."

Several important First Amendment and media law issues and questions came to the forefront during the course of the Capitol attack. First, President Trump's speech at the January 6 "March to Save America" rally included multiple instances of anti-press rhetoric, continuing a trend from throughout his presidency. First Amendment experts also debated whether the speech constituted "incitement" of violence, a category of speech that would not receive First Amendment protection under U.S. Supreme Court precedent.

Second, during the attack on the Capitol and surrounding protests, journalists faced arrests by law enforcement, as well as violence, threats, and equipment damage by President Trump's supporters. Press advocacy organizations denounced the attacks on the news media, citing President Trump's anti-press rhetoric as a contributing factor.

Also on January 6, Twitter and Facebook, among other social media platforms, temporarily suspended President Trump's accounts, citing posts that violated their rules and guidelines against inciting or promoting violence and/or spreading misinformation. Within two days, Twitter had permanently banned President Trump from the platform, while Facebook extended the suspension of his account through at least the end of his term as president. The moves promoted praise from some observers, though several noted that the actions came too late. Other observers raised concerns about the precedent set by social media companies in suspending or banning President Trump from their platforms.

President Trump Continues Anti-Press Rhetoric; Some View His Speech as Incitement

On Jan. 6, 2021, President Donald Trump spoke at the "March to Save America" rally at the Ellipse in President's Park located in Washington, D.C. The rally, which was based on President Trump's statement, "We will never concede [the 2020 Presidential Election]," included several instances of anti-press rhetoric, continuing a trend throughout President Trump's tenure in the White House.

As a candidate and as president, Trump repeatedly verbally attacked the news media, including frequently referring to journalists and news outlets as the "fake news media" and "enemies of the people." Furthermore, during the COVID-19 pandemic, President Trump's daily press briefings included "tense back-and-forth[s]" between the president and reporters, as characterized by *The Washington Post* on May 12. President Trump also tweeted on May 15, 2020, "FAKE NEWS IS NOT ESSENTIAL," quoting a Commack, N.Y. protester filmed by News 12 Long Island reporter Kevin Vesey during a demonstration criticizing the exemption for journalists from New York's "stay-at-home" order. (For more information on President Trump's anti-press rhetoric amidst the COVID-19 pandemic, see "Special Report: COVID-19 Pandemic Raises Media Law and Ethics Issues, Challenges, and Opportunities" in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

Observers have argued that President Trump's anti-press rhetoric has led to violence against journalists. For example, on Feb. 11, 2019, BBC cameraman Ron Skeans was attacked at a rally for President Trump in El Paso, Texas. The BBC reported the next day that Skeans was unharmed, despite the "incredibly violent attack," which BBC Washington producer Eleanor Montague suggested was prompted by the president's references to "fake news" and how the media misrepresented him in his remarks prior to the assault. (For more information on the attack of Skeans, see *BBC Cameraman Attacked at Trump Rally in El Paso* in "Journalists in the U.S. and Abroad Continue to Face Violence and Imprisonment; U.S. Court Holds Syria Liable for Role in Journalist's 2012 Death" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

(For more information on President Trump's anti-press rhetoric and actions more generally, see "Special Report: COVID-19 Pandemic Raises Media Law and Ethics Issues, Challenges, and Opportunities" in the Winter/Spring 2020 issue of the Silha *Bulletin*, "Federal Judge Orders White House to Reinstate Reporter's Press Credential" in the Fall 2019 issue, "White House Revokes and Suspends Hard Press Passes Under New Rules" in the Summer 2019 issue, "President Trump Continues Anti-Press Rhetoric and Actions" and "Journalists in the United States and Abroad Face Threats of Violence and Incarceration" in the Fall 2018 issue, *Five Newspaper Staff Members Killed*, *Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Physical Violence, Other Dangers in the United States and Abroad," and *Federal Prosecutors Seize Phone and Email Records of* New York Times *Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents," in the Summer 2018 issue, "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue, "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.)

In multiple instances throughout his Jan. 6, 2021 speech, President Trump referred to the press as the "fake news media." He began his remarks by suggesting that the media would "not show the magnitude of th[e] crowd" attending the rally and added, "The media is the biggest problem we have as far as I'm concerned, single biggest problem."

President Trump later argued, as he had falsely repeated since the 2020 election, that the "election victory stolen by emboldened radical left Democrats, which is what they're doing and stolen by the fake news media." He added, "That's what they've done and what they're doing. We will never give

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up. We will never concede, it doesn't happen. You don't concede when there's theft involved."

Sixteen minutes into his speech, President Trump attacked the news media once more. "Our media is not free. It's not fair," he said. "It suppresses thought. It suppresses speech, and it's become the enemy of the people. It's become the enemy of the people. It's the biggest problem we have in this country. No third world countries would even attempt to do what we caught them doing and you'll hear about that in just a few minutes." Later, President Trump added, "No, we have a corrupt media. They've gone silent. They've gone dead."

The full transcript of President Trump's speech is available online at: https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

In his speech, President Trump also included calls to action geared towards his supporters. At one point, he said, "We're going to have to fight much harder and Mike Pence is going to have to come through for us. If he doesn't, that will be a sad day for our country because you're sworn to uphold our constitution. Now it is up to Congress to confront this egregious assault on our democracy. After this, we're going to walk down and I'll be there with you. We're going to walk down. We're going to walk down any one you want, but I think right here. We're going walk down to the Capitol, and we're going to cheer on our brave senators, and congressmen and women. We're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong."

At the end of his speech, President Trump told those at the rally, "[W]e're going to, we're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol and we're going to try and give" before trailing off and stating, "The Democrats are hopeless." President Trump repeated, "So let's walk down Pennsylvania Avenue. I want to thank you all."

Following President Trump's speech and the ensuing protests and storming of the U.S. Capitol building (Capitol), some news outlets contended that President Trump had incited the violence. For example, *The New York Times* Editorial Board argued in a January 6 editorial, titled "Trump Is to Blame for Capitol Attack," that President Trump had "incited his followers to violence." The piece added, "President Trump and his Republican enablers in Congress incited a violent attack Wednesday against the government they lead and the nation they profess to love. This cannot be allowed to stand. Mr. Trump's seditious rhetoric prompted a mob of thousands of people to storm the U.S. Capitol building[.]" The full editorial is available online at: https://www.nytimes.com/2021/01/06/opinion/trump-capitol-dc-protests.html.

Similarly, *The Washington Post* Editorial Board published an opinion piece titled, "Trump caused the assault on the Capitol. He must be removed." In the piece, the *Post* wrote, "Responsibility for this act of sedition lies squarely with the president, who has shown that his continued tenure in office poses a grave threat to U.S. democracy.. . . The president is unfit to remain in office for the next 14 days.. . . Every second he retains the vast powers of the presidency is a threat to public order and national security." The full piece is available online at: https://www.washingtonpost.com/opinions/remove-trump-incitement-sedition-25th-amendment/2021/01/06/b22c6ad4-506d-11eb-b96e-0e54447b23a1_story.html.

On January 7, *The Guardian* posted "a timeline of Trump's inflammatory rhetoric before the Capitol riot," calling the rhetoric "incitement." The full timeline is available online at: https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot.

First Amendment and media law experts debated whether President Trump's comments led to the ensuing violence and storming of the Capitol, thereby constituting "incitement," "incitement to riot," and/or "incitement to insurrection."

On Jan. 8, 2021, David L. Hudson, Jr., an assistant professor of law at Belmont University, wrote a piece for First Amendment Watch, an online news and educational resource based at New York University (NYU), in which he grappled with the question: "Does the First Amendment Protect Trump on Incitement to Riot?" Hudson argued that although there was "no doubt that Trump's speech was inappropriate, imprudent, rash, offensive, and even repugnant," it would be "more difficult to determine whether Trump's comments constitute incitement to imminent lawless action."

He cited *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the U.S. Supreme Court established the "incitement test," which includes two steps for speech to fall under this category of unprotected speech. First, the speech needs to be "directed to inciting or producing imminent lawless action." Second, the speech must be "likely to incite or produce such action." Hudson also cited *Hess v. Indiana*, 414 U.S. 105 (1973), in which the Court clarified that for speech to constitute incitement, it must advocate for illegal action immediately to take place.

Hudson also cited *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018), in which the U.S. Court of Appeals for the Sixth Circuit held that then-Republican presidential candidate Trump did not "incite a riot" when he called for security to remove protestors at a March 2016 rally, which led to an altercation between the protesters and some of Trump's supporters." The Sixth Circuit held that the United States has "chosen to protect unrefined, disagreeable, and even hurtful speech to ensure that we do not stifle public debate."

The court added that the case law derived from the *Brandenburg* test "makes clear . . . that, even if plaintiffs' allegations could be deemed to make out a plausible claim for incitement to riot under Kentucky law, the First Amendment would not permit prosecution of the claim.. . . [The] speaker's intent to encourage violence . . . and the tendency of his statement to result in violence . . . are not enough to forfeit First Amendment protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly." (For more information on *Nwanguma v. Trump*, see *Sixth Circuit Holds that Presidential Candidate Trump Did Not Incite a Riot at 2016 Rally* in "President Trump Prevails in Two Federal Courts' First Amendment Rulings, Faces New First Amendment Lawsuit" in the Fall 2018 issue of the Silha *Bulletin*.)

Hudson quoted several First Amendment experts, including some who argued that President Trump's Jan. 6, 2021 remarks constituted incitement

and other experts who argued that they did not.

Kevin Francis O'Neill, a law professor at Cleveland Marshall College of Law, contended that "Trump's remarks *were* an incitement within the unprotected boundaries of *Brandenburg* — because he dispatched his followers directly and immediately to the Capitol, and he did so for a specific unlawful purpose: to interrupt the counting of electoral votes" (emphasis in original).

Conversely, Clay Calvert, a media law professor and director of the Marion B. Brechner First Amendment Project at the University of Florida, contended that it would be difficult to establish incitement under the *Brandenburg-Hess* framework. He told Hudson, "Focusing only on Trump's rally speech, proving the intent element — the requirement that the words Trump used were directed to cause imminent violence — would be the toughest hurdle." Calvert noted that Trump "never explicitly called for violence during his rally, never used a command like 'go down there and attack them.'"

Calvert added, "It would be a very tough case — there's a difference between heated political rhetoric and actually directing one's followers to commit violence.. . . Trump sent them off down the street, for sure, with his words, but did he send them off to commit violence? That's the trickier part to prove."

In a Jan. 8, 2021 piece for *The Washington Post*, former federal prosecutor Randall Eliason contended that "[w]e want to avoid the risk of criminalizing political differences. But that understanding has nothing to do with what happened at the Capitol. It's impossible to characterize Trump's incitement of the riot as having anything to do with the legitimate exercise of his executive power — just the opposite."

Eliason contended that President Trump may have violated several federal laws, including 18 U.S.C. § 2383, which governs "Rebellion and insurrection." The statute provides that "[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."

Also potentially relevant is 18 U.S.C. § 373, which provides that "[w]hoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States . . . shall be imprisoned not more than one-half the maximum term of imprisonment or . . . fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both[.]" The provision states that "if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years."

> "Like members of Congress, their staffs and others who work in the Capitol complex, these reporters work daily in those buildings, and an assault on the Capitol is an assault on them, too.. . . We are deeply disturbed at the attacks, threats and rhetoric that we saw targeting reporters yesterday."
>
> **— Bruce Brown, Reporters Committee for Freedom of the Press executive director**

18 U.S.C. § 2101 specifically governs "Riots" and provides, in part, that "[w]hoever travels in interstate or foreign commerce . . with intent to (1) to incite a riot; or (2) to organize, promote, encourage, participate in, or carry on a riot; or (3) to commit any act of violence in furtherance of a riot; or (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot . . . Shall be fined under this title, or imprisoned not more than five years, or both." The full text of the statute is available online at: https://www.law.cornell.edu/uscode/text/18/2101.

Finally, 18 U.S.C. § 2385, titled "Advocating overthrow of Government," provides, in part, that "[w]hoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

The statute includes the same penalties for an individual who has "intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes," as well as who "organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof." The full text of the statute is available online at: https://www.law.cornell.edu/uscode/text/18/2385.

On Jan. 13, 2021, the U.S. House of Representatives voted to impeach President Trump for incitement of insurrection, marking the first time in American history that a president was impeached twice. As the *Bulletin* went to press, the U.S. Senate had not voted to convict President Trump.

Journalists Face Arrests, Violence During Capitol Chaos

During the course of the Jan. 6, 2021 protests and storming of the U.S. Capitol building (Capitol), two *Washington Post* photojournalists, as well as a freelance journalist, were detained by law enforcement. Additionally, members of the press were subjected to violence, threats, and equipment damage by President Donald Trump's supporters in Washington, D.C. and around the United States, prompting some observers to argue that the violence was a result of President Donald Trump's anti-press rhetoric.

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On January 8, the U.S. Press Freedom Tracker (Tracker), a database of press freedom violations in the United States and around the world managed by the Freedom of the Press Foundation, tweeted that it was "currently investigating 5 arrests/detainments; 9 assaults, 2 with equipment damage; [e]quipment damage of multiple outlets' gear, [including CNN, MSNBC, The *Washington Post*, the Associated Press (AP), and other news outlets]; and multiple threats and harassment of journalists across the [United States]." The full tweet thread is available online at: https://twitter.com/uspresstracker/status/1347633655204687875.

For example, the U.S. Press Freedom Tracker — which has an advisory committee chaired by the Committee to Protect Journalists (CPJ) and also includes the Reporters Committee for Freedom of the Press (RCFP), among other organizations — reported on Jan. 6, 2021 that *Washington Post* video journalist Zoeann Murphy "was detained alongside a colleague while documenting the ongoing riots" in Washington, D.C. In a live video with the *Post*, Murphy described how she and fellow video photojournalist Whitney Leaming were held by Metropolitan Police Department (MPD) officers using a technique known as "kettling," a term that refers to police "surround[ing] a group from all sides to prevent exit."

In the video, Murphy can be heard saying, "I have a credential: a *Washington Post* credential press badge that I wear. And then I actually have my *Washington Post* fleece on today as well." While still live with the *Post*, Murphy said, "They've just told us that they're letting the press go and have told us that we can go."

The full video of the incident, which was filmed by Leaming, is available online at: https://www.washingtonpost.com/video/politics/washington-post-reporters-momentarily-arrested-outside-the-capitol/2021/01/06/da04479d-cdb7-4870-b354-9333e4712c74_video.html?tid=ptv_ch.

In a statement to *The Wrap*, the *Post* stated, "Our journalists were just doing their jobs and should never have been arrested in the first place. However, we're pleased that police quickly released them."

In a short emailed statement to the U.S. Press Freedom Tracker, an MPD spokesperson declined to comment on the case and wrote, "When we detain any reporters, it's to maintain order and safety."

According to the U.S. Press Freedom Tracker, independent journalist Talia Jane was also briefly detained by law enforcement amidst the ongoing riots. In an interview with the database, Jane said, "MPD made three warnings for people to leave within the space of a minute or two, then started moving people back." She continued, "Eventually they formed a big circle, told me because I was press I could leave any time but didn't answer questions about non-press people still there." Law enforcement summarily released Jane after several officers examined her press credentials.

On Jan. 9, 2021, *The Washington Post* reported that there were "several instances of violence [by protesters and rioters] against journalists covering the deadly takeover of the Capitol." One incident took place when a crowd of President Trump's supporters pushed towards a police barricade. As they did so, AP photographer John Minchillo was documenting what was taking place.

However, according to the *Post*, "[s]everal men grabbed Minchillo by his backpack, pulling him down a flight of stairs. Others grasped the lanyard that identified him as media, dragging him through" a large crowd of President Trump's supporters. Fellow AP photographer Julio Cortez filmed the attack and later posted it on Instagram and other social media platforms. In the video footage, someone could be heard yelling, "We'll f-–ing kill you" as a man pushed Minchillo over a ledge. Another man could be heard calling Minchillo "antifa," a putative left-wing extremist group described by CBS News on Oct. 16, 2021 as "short for "anti-fascist" and referring to a "loose affiliation of local activists scattered across the United States and a few other countries." After being pushed over the wall, another individual is heard questioning whether Minchillo was "antifa." Two protesters then helped Minchillo get out of the crowd.

In a Twitter Post, Minchillo wrote that he was "banged up" but "kept at it the rest of the day." The full video of the incident is available online at: https://www.instagram.com/tv/CJxKMArpN0_/?utm_source=ig_embed.

In a caption accompanying the video on Instagram, Cortez wrote, "Thankfully, he wasn't injured.. . . [Minchillo] was labeled as an [anti-protester], even though he kept flashing his press credentials, and one person can be heard threatening to kill him. This is an unedited, real life situation of a member of the press keeping his cool even though he was being attacked. A true professional and a great teammate, I'm glad we were able to get away."

Also on January 6, several "protestors charg[ed] the media," according to *Bloomberg* reporter William Turton in a January 6 tweet. He posted a video of the incident, which depicted several men breaking journalists' equipment, including cameras, lights, and more. Several individuals can be heard shouting, "Get out of here!" while advancing towards a group of journalists. Others yelled "CNN sucks." The full video is available online at: https://twitter.com/WilliamTurton/status/1346940440935870472?s=20.

The Washington Post reported that several journalists had said they felt "shaken" following the acts of violence. For example, on January 6, *The Independent* journalist Richard Hall retweeted a photo of his destroyed camera equipment posted by *BuzzFeed News* Capitol Hill reporter Paul McLeod and wrote, "This is why I stopped doing interviews after a certain point. Today was the first day I've felt uncomfortable identifying myself as a journalist in America."

McLeod also later shared a photo depicting a noose fashioned by rioters using a camera cord hanging from a tree. The photo is available online at: https://twitter.com/pdmcleod/status/1346942367543091200?s=20.

Journalists also faced violence and sought shelter inside the Capitol as insurrectionists burst their way in, according to *The New York Times* on January 6. For example, NBC News producer Haley Talbot called into a live MSNBC broadcast and said, "We were told to get under our chairs, we were all sheltering." She added that she and others grabbed gas masks during the "dire situation," as reported by the *Times*, which noted that someone had carved "MURDER THE MEDIA" into a Capitol door.

On January 7, Erin Schaff, a staff photographer at *The New York Times*, detailed a similar run-in with rioters. She wrote, "Grabbing my press pass, they saw that my ID said *The New York Times* and became really angry." She

continued, "They threw me to the floor, trying to take my cameras. I started screaming for help as loudly as I could. No one came. People just watched. At this point, I thought I could be killed and no one would stop them. They ripped one of my cameras away from me, broke a lens on the other and ran away."

Schaff was later found by police, but they questioned her account. She wrote, "I told them [police officers] that I was a photojournalist and that my pass had been stolen, but they didn't believe me. They drew their guns, pointed them and yelled at me to get down on my hands and knees. As I lay on the ground, two other photojournalists came into the hall and started shouting 'She's a journalist!'" Schaff's full account is available online at: https://www.nytimes.com/2021/01/07/us/politics/capitol-lockdown.html.

The *Post* also noted that other journalists had stopped identifying themselves amidst the chaos. *The New York Times* reported on the same day that MSNBC anchor Yasmin Vossoughian, who was accompanied by two security officers, said on air that she and several of her colleagues intentionally avoided clothing with the station's branding, expecting hostility because "the president is continuously talking about the fake news media."

The *Times* also noted that the "threats and attacks were not limited to Washington" on January 6. The *Times* provided the example of Sara Gentzler, a reporter with *The Olympian* in Washington State, who tweeted she and a colleague were approached by an armed man who told them that the news media were not welcome at the rally of President Trump supporters that was taking place. Similarly, the *Times* reported that "Rick Egan, a photographer who has worked for *The Salt Lake Tribune* for more than 36 years, was documenting a mostly peaceful gathering outside Utah's State Capitol when he was shoved, verbally attacked and pepper-sprayed in the eyes by protesters unhappy with the results of the presidential election."

Following the arrests and violence against journalists, Reporters Committee for Freedom of the Press (RCFP) executive director Bruce Brown released a statement in which he praised "professional and brave journalists and photographers who risked their safety to document the events as they unfolded." Brown continued, "Like members of Congress, their staffs and others who work in the Capitol complex, these reporters work daily in those buildings, and an assault on the Capitol is an assault on them, too.. . . We are deeply disturbed at the attacks, threats and rhetoric that we saw targeting reporters yesterday. Rioters at the Capitol called for violence against members of the news media, destroyed news equipment and verbally harassed journalists as the 'enemy of the people' — actions that not only pose a dire threat to those working tirelessly to bring information to our communities, but also to the press freedom that is a bedrock value of our nation."

Brown cited President Trump's anti-press rhetoric as directly leading to the violence. He wrote, "These actions are the direct result of years of this language stoking fear and hate for one of our most vital institutions. Our free press is crucial to democracy, and indeed, one of the pillars that will help keep it standing beyond this moment." Brown concluded by stating, "In the days, weeks, months and years ahead, we are committed to vigorously defending the press and the public's First Amendment rights to freely report and receive the news, and to ensuring journalists have the legal support to fulfill their constitutional responsibility." The full statement is available online at: https://www.rcfp.org/rcfp-us-capitol-attack-statement/.

The Committee to Protect Journalists (CPJ) released a statement on January 8 in which it called on "U.S. authorities [to] thoroughly investigate the many attacks on journalists during the violent takeover of the U.S. Capitol this week, and hold the perpetrators to account." In its statement, CPJ Program Director Carlos Martinez de la Serna was quoted as saying, "The violence displayed toward the media during the assault on the United States Capitol has no place in a democracy. Individuals who threatened and assaulted journalists must be held accountable for their actions."

Martinez de la Serna also cited President Trump's anti-press rhetoric, stating, "For the past four years, the Trump administration has lobbed attacks against individual and institutional news media. As the world has now witnessed, this rhetoric is not just a political diversion — it can embolden mobs to attack reporters who are simply trying to do their job of keeping the public informed."

CPJ noted that legislators were 'planning a "minute-by-minute' investigation into the failure of law enforcement to curb the assault on the Capitol," as reported by *BuzzFeed News* on Jan. 7, 2021. CPJ's full statement is available online at: https://cpj.org/2021/01/cpj-calls-for-accountability-for-attacks-on-media-during-us-capitol-assault/.

As the *Bulletin* went to press, charges against protesters and rioters who targeted journalists and their equipment had not been announced.

In light of the events surrounding the Capitol attack, *The Washington Post* argued on January 8 that the "brief takeover of the U.S. Capitol by pro-Trump extremists . . . was . . . a profound failure of policing." The *Post* continued, "Despite the presence of both Vice President Pence and House Speaker Nancy Pelosi — second and third in the presidential line of succession — and despite the hundreds of members of Congress gathered in joint session, angry Trump supporters were able to breach perimeter after perimeter, at times simply walking past [U.S. Capitol Police (USCP)] officers who made no apparent effort to stop them."

The *Post* added that "[i]t was the largest assault on the Capitol since the British attack during the War of 1812." The *Post* contended that the failure by the USCP was "a direct consequence of the way the police agency that protects the legislative branch is organized, with far too little accountability or diversity, jumbled oversight, and too many opportunities for politics to creep into its mission." The full report is available online at: https://www.washingtonpost.com/outlook/capitol-police-failure-oversight/2021/01/08/d7ea1c5c-5136-11eb-bda4-615aaefd0555_story.html.

Social Media Companies Suspend President Trump's Accounts

On Jan. 6, 2021, Facebook, Twitter, and other social media platforms temporarily suspended President Donald Trump's accounts, citing posts that violated their rules and guidelines prohibiting inciting violence and spreading misinformation. Within the next two days, Facebook announced that it was suspending President

Insurrection, *continued on page 8*

Insurrection, *continued from page 7*

Trump's account through at least the Presidential Inauguration on January 20, while Twitter announced a permanent ban of President Trump's account @realDonaldTrump. The moves prompted praise from some observers, who argued that such actions should have been taken sooner. Other observers raised concerns about the precedent set by Facebook, Twitter, and other social media platforms in suspending or banning President Trump.

On January 6, several media outlets reported that Facebook and Twitter had both temporarily locked President Trump's accounts. The moves came after President Trump posted a video telling the rioters at the U.S. Capitol building (Capitol) to "Go home," but also calling them "special" and added, "We love you." In a Jan. 7, 2021 interview with KSTP-TV, the Twin Cities' ABC affiliate, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley asserted that "It's very clear to [President Trump's] followers that he is with them and supports them, and that his comments about 'go home,' 'be peaceful,' and so forth are seen as being conveyed with sort of a wink and a nod." KSTP's full report is available online at: https://kstp.com/politics/twitter-facebook-temporarily-block-trump-after-dc-violence/5970727/.

Twitter removed three of President Trump's tweets, including the tweet posting his video, and suspended his account for 12 hours. Twitter also warned that further violations would result in a "permanent suspension," according to CNN. Twitter's "Twitter Safety" account also tweeted that if President Trump removed the three tweets, his account would be unlocked. NBC News noted that before taking it down, Twitter had added a tag line to President Trump's video reading, "This claim of election fraud is disputed, and this Tweet can't be replied to, [r]etweeted, or liked due to a risk of violence." Twitter had also blocked retweets and replies to the video.

Facebook and YouTube also removed the video from President Trump's accounts, as reported by NBC News. Facebook also announced that it was blocking the president's account from posting for 24 hours. The social media company said in a statement, "[t]he violent protests in the Capitol today are a disgrace. We prohibit incitement and calls for violence on our platform. We are actively reviewing and removing any content that breaks these rules." YouTube said in a separate statement that President Trump's video violated "policies regarding content that alleges widespread fraud or errors changed the outcome" of the election.

The following day, Facebook CEO Mark Zuckerberg wrote in a blog post that Facebook and Instagram were "ban[ning] President Donald Trump's account from posting for at least the remainder of his term in office and perhaps "indefinitely." The blog post read, "We believe the risks of allowing the President to continue to use our service during this period are simply too great.. . . Therefore, we are extending the block we have placed on his Facebook and Instagram accounts indefinitely and for at least the next two weeks until the peaceful transition of power is complete."

> "It's very clear to [President Trump's] followers that he is with them and supports them, and that his comments about 'go home,' 'be peaceful,' and so forth are seen as being conveyed with a wink and a nod."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Zuckerberg added that Facebook had determined that President Trump's latest posts had been "likely" to only further escalate the violence occurring at the Capitol. The full blog post is available online at: https://www.facebook.com/zuck/posts/10112681480907401.

On January 8, Twitter released a blog post in which it wrote that President Trump's account had been permanently suspended. The blog post read, "After close review of recent Tweets from the @realDonaldTrump account and the context around them — specifically how they are being received and interpreted on and off Twitter — we have permanently suspended the account due to the risk of further incitement of violence." The blog post continued, "In the context of horrific events this week, we made it clear on Wednesday that additional violations of the Twitter Rules would potentially result in this very course of action.. . . [W]e [also] made it clear going back years that these accounts are not above our rules entirely and cannot use Twitter to incite violence, among other things. We will continue to be transparent around our policies and their enforcement."

The blog post then detailed each of President Trump's tweets that had violated Twitter's rules and guidelines, warranting the permanent suspension. In particular, one tweet read, "The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!" A second tweet read, "To all of those who have asked, I will not be going to the Inauguration on January 20th."

Twitter concluded that "[d]ue to the ongoing tensions in the United States, and an uptick in the global conversation in regards to the people who violently stormed the Capitol, . . . these two Tweets must be read in the context of broader events in the country and the ways in which the President's statements can be mobilized by different audiences, including to incite violence, as well as in the context of the pattern of behavior from this account in recent weeks. After assessing the language in these Tweets, . . . we have determined that these Tweets are in violation of the Glorification of Violence Policy and the user @realDonaldTrump should be immediately permanently suspended from the service." The policy provides that Twitter users "may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence."

The full blog post is available online at: https://blog.twitter.com/en_us/topics/company/2020/suspension.html. Twitter's full Glorification of Violence Policy is available online at: https://help.twitter.com/en/rules-and-policies/glorification-of-violence.

According to the Associated Press (AP) on January 9, Twitch and Snapchat had also disabled President Trump's

accounts, among other examples of social media platforms and websites removing content related to President Trump.

Following the actions by the social media companies, several media law experts explained that the social media platforms' decisions to suspend President Trump's accounts did not violate the First Amendment. Experts pointed to the "State Action Doctrine," which provides that the First Amendment only applies to government suppression of speech and expression, not private companies. For example, in a January 7 tweet, Jared Schroeder, an associate professor at the Southern Methodist University (SMU) Meadows School of the Arts tweeted, "To clarify — again: Social media firms blocking/suspending Trump's accounts does not violate the First Amendment. Forcing social media firms to leave his accounts up would violate the First Amendment."

Other observers argued that Facebook's and Twitter's actions came too late. In a Jan. 9, 2021 interview with *Bloomberg*, Jessica González, co-chief executive officer of Free Press, a media advocacy group, praised the move by Twitter and Facebook, but noted that it was "a day late and a dollar short."

Sen. Mark Warner (D-Va.) tweeted on January 8 that Twitter's move was "[a]n overdue step," but added that "it's important to remember, this is much bigger than one person. It's about an entire ecosystem that allows misinformation and hate to spread and fester unchecked."

Laura Gomez, a former Twitter employee and founder of Proyecto Solace, an online platform providing "safe spaces" for Latinx peoples, said on Bloomberg Television on January 8, "Many people of color and women who worked at [Twitter] and used this platform warned about the dangers of Trump and all of his supporters and these extremists using this platform.. . . But unfortunately no one listened."

However, other experts raised concerns about social media platforms temporarily or permanently suspending President Trump. On January 8, Kate Ruane, a senior legislative counsel at the American Civil Liberties Union (ACLU) said in a statement that social media platforms' decision to suspend President Trump could set a dangerous precedent allowing the companies to silence different voices. "For months, President Trump has been using social media platforms to seed doubt about the results of the election and to undermine the will of voters," the statement read. "We understand the desire to permanently suspend him now, but it should concern everyone when companies like Facebook and Twitter wield the unchecked power to remove people from platforms that have become indispensable for the speech of billions — especially when political realities make those decisions easier."

In an interview with *The New York Times*, Gregory P. Magarian, a law professor at Washington University, said, "I want a wide range of ideas, even those I loathe, to be heard, and I think Twitter especially holds a concerning degree of power over public discourse."

In a January 7 statement, the Electronic Frontier Foundation (EFF) wrote that "[t]he decisions by Twitter, Facebook, Instagram, Snapchat, and others to suspend and/or block President Trump's communications via their platforms is a simple exercise of their rights, under the First Amendment and Section 230 [of the Communications Decency Act], to curate their sites. We support those rights." However, EFF also wrote that the organization was "always concerned when platforms take on the role of censors, which is why we continue to call on them to apply a human rights framework to those decisions. We also note that those same platforms have chosen, for years, to privilege some speakers — particularly governmental officials — over others, not just in the U.S., but in other countries as well. A platform should not apply one set of rules to most of its users, and then apply a more permissive set of rules to politicians and world leaders who are already immensely powerful. Instead, they should be precisely as judicious about removing the content of ordinary users as they have been to date regarding heads of state."

EFF added, "Going forward, we call once again on the platforms to be more transparent and consistent in how they apply their rules — and we call on policymakers to find ways to foster competition so that users have numerous editorial options and policies from which to choose." The full statement is available online at: https://www.eff.org/deeplinks/2021/01/eff-response-social-media-companies-decision-block-president-trumps-accounts.

Following the permanent bans by Facebook and Twitter, President Trump sought alternative social media options. The AP reported on Jan. 9, 2021 that Parler, a far-right friendly social media platform, could be "a leading candidate." However, the AP noted that Google and Apple had both removed Parler from their app stores.

Additionally, on January 9, several media outlets reported that Amazon had removed Parler from its web hosting service, Amazon Web Services (AWS), citing numerous examples of posts "encourag[ing] and incit[ing] violence." In an email obtained by *BuzzFeed News*, an AWS Trust and Safety team told Parler Chief Policy Officer Amy Peikoff that the calls for violence on the social media platform violated AWS's terms of service. The email read, "Recently, we've seen a steady increase in this violent content on your website, all of which violates our terms.. . . It's clear that Parler does not have an effective process to comply with the AWS terms of service." According to *BuzzFeed News* on January 9, Amazon said that the company "was unconvinced that the [platform's] plan to use volunteers to moderate calls for violence and hate speech would be effective." The full email is available online at: buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws.

In a January 9 post, Parler CEO John Matze said that Amazon's move could mean the platform would be offline and unavailable for up to a week. He added, "This was a coordinated attack by the tech giants to kill competition in the market place.. . . We were too successful too fast."

The AP also suggested the possibility that President Trump "may launch his own platform," but added that it "won't happen overnight." In a statement on January 8, President Trump said, "We have been negotiating with various other sites, and will have a big announcement soon, while we also look at the possibilities of building out our own platform in the near future."

As the *Bulletin* went to press, President Trump had not joined another social media platform, nor had he announced the creation of his own.

— Scott Memmel
Postdoctoral Associate

Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy

In the second half of 2020, protests and riots stemming from calls for racial equality following police killings of Black men and women continued across the United States. Amidst the protests, journalists faced arrests, attacks, and threats by police. According to the U.S. Press Freedom Tracker, a database of press freedom violations in the United States and around the world managed by the Freedom of the Press Foundation, between May 26, 2020 and December 2020, there were over 800 reported incidents of journalists being "assaulted, arrested or otherwise prevented from documenting history" by police or demonstrators amidst the protests across the country for racial justice. The incidents took place across at least 79 cities and included at least 255 physical attacks of journalists by police or protestors and 115 arrests, among other incidents. The U.S. Press Freedom Tracker's full report is available online at: https://pressfreedomtracker.us/george-floyd-protests/.

PROTESTS

The ongoing protests for racial justice across the United States, as well as continuing cases of conflict between the press and police, prompted numerous legal actions, debates over media ethics, and a letter by media advocates to several law enforcement organizations. On Sept. 21, 2020, the Seattle Police Department (SPD) dropped a subpoena requiring five Seattle, Wash. news organizations to turn over unpublished videos and photos in relation to several cases of arson and theft during racial justice protests on May 30.

On October 9, the U.S. Court of Appeals for the Ninth Circuit denied a motion by federal law enforcement agencies seeking a stay on a preliminary injunction prohibiting federal agents from targeting journalists and "legal observers" with arrests and assaults in Portland, Ore. Protesters assembled in the city — and elsewhere around the country — after George Floyd, an unarmed Black man, was killed by police in Minneapolis, Minn. on May 25.

Also on October 9, Duluth, Minn. City Attorney Rebecca St. George announced that her office had filed misdemeanor charges against Duane Waldriff, the man accused of punching a WCCO-TV photojournalist's smartphone out of his hands near President Donald Trump's campaign rally.

Meanwhile, on Oct. 10, 2020, several media outlets reported that a security guard hired by KUSA-TV, the NBC affiliate in Denver, Colo., had shot and killed a protester amidst political rallies in Denver. The incident raised ethical questions about journalists using armed security guards at protests, with observers acknowledging on one hand that such security could be necessary to keep journalists safe, while on the other hand arguing that utilizing it can undermine the independence of the press.

Finally, on October 30, the Society of Professional Journalists (SPJ) and 25 other journalism groups sent a letter to 28 law enforcement organizations across the United States emphasizing that journalists have a right under the First Amendment to cover protests and public events without fear of arrests, attacks, threats, or "harassment" by law enforcement.

On May 25, 2020, Floyd, a 46-year-old Black man, was arrested in south Minneapolis after he allegedly used a counterfeit $20 bill. After Floyd was pulled out of his vehicle, Minneapolis Police Department (MPD) Officer J.A. Kueng held Floyd's back and Officer Thomas Lane held his legs. Officer Tou Thoa, who arrived at the scene with MPD Officer Derek Chauvin, blocked witnesses from interfering. Chauvin "dug his knee into [Floyd's] neck" for nearly nine minutes despite Floyd pleading that he was in pain and could not breathe. Floyd was transported to the Hennepin County Medical Center where he was pronounced dead at approximately 9:25 p.m.

In the days, weeks, and months following Floyd's death, peaceful and violent protests erupted in Minneapolis and across the country, including following the deaths of other Black men and women at the hands of police. Local and national journalists provided live coverage of the protests each night that they took place. Amid the protests, numerous journalists in Minneapolis and around the country faced arrests, attacks, and threats by law enforcement. For example, on May 29, 2020, CNN correspondent Omar Jimenez, photojournalist Leonel Mendez, and producer Bill Kirkos were arrested by Minnesota State Patrol officers while reporting live from protests in south Minneapolis. The arrests prompted significant criticism from observers, including the Silha Center for the Study of Ethics and Media Law. On May 30, Tom Aviles, a veteran photographer at WCCO, the Twin Cities' CBS affiliate, was arrested while also covering the ongoing protests.

Some journalists covering the fallout of Floyd's death filed federal lawsuits against city governments and law enforcement, arguing that arrests and/or attacks by police violated their First and Fourth Amendment rights, among other claims. For example, on June 2, 2020, the American Civil Liberties Union (ACLU) of Minnesota filed a class-action lawsuit in the U.S. District Court for the District of Minnesota on behalf of freelance journalist Jared Goyette and several additional journalists who faced arrests, rubber bullets, pepper bullets, tear gas, physical attacks, and more by law enforcement.

The complaint made several claims, including that the police actions created a chilling effect on constitutionally-protected activity, namely journalists' ability "to observe and record some events of public interest, including constitutionally protected demonstrations and the conduct of law enforcement officers on duty in a public place." As the *Bulletin* went to press, the plaintiffs had filed a second amended complaint in the District of Minnesota.

For a full list of the incidents at racial justice protests between the press and police, as well as the press and demonstrators, around the United States, see the U.S. Press Freedom Tracker's ongoing coverage titled "Press Freedom in Crisis: Journalists Impeded While Documenting National Protests," available online at: https://pressfreedomtracker.us/george-floyd-protests/. (For more information on the

protests around the death of George Floyd, the incidents between the press and police, incidents between the press and demonstrators, and resulting lawsuits, see "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue of the Silha *Bulletin* and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue).

Seattle Withdraws Subpoena for Unpublished Photos and Videos of Protests

On Sept. 21, 2020, the *Seattle Times* reported that the Seattle Police Department (SPD) was dropping a subpoena requiring five news organizations to turn over unpublished videos and photos taken during racial justice protests on May 30. The SPD had claimed that such footage would help investigators solve several arson and theft cases.

On May 30, 2020, protests continued in Seattle, Wash. following the May 25 death of George Floyd in police custody in Minneapolis, Minn. According to police and media accounts, a number of individuals vandalized and lit on fire six SPD vehicles, as well as stole five loaded firearms from those vehicles. Three of the firearms were later recovered, but two were not.

On June 18, 2020, SPD applied for a subpoena in King County Superior Court against the *Seattle Times* and four local television stations: KIRO, KING, KOMO and KCPQ (news media). Judge Patrick Oishi approved and signed the subpoena, which sought raw video footage and photographs in order to help identify the perpetrators of the vandalism, fires, and thefts. The full subpoena is available online at: https://www.documentcloud.org/documents/6979683-Subpoena-Duces-Tecum-Seattle-Times-Company-Et-Al.html.

On June 29, the news media filed a brief objecting to the subpoena and asking the court to quash it. The brief argued that the subpoena was a "procedurally irregular, overbroad and impermissible assault on the independence of the press." The brief first contended that the subpoena "targeted Seattle's five largest news outlets with an expansive demand for vast amounts of unaired news footage and unpublished news photographs. The demand is not limited to evidence of the single unsolved crime alleged in its supporting affidavit; instead, it seeks all images from 90 minutes of protests across four city blocks." The brief therefore argued that the subpoena was "unduly burdensome and overly broad."

Second, the brief asserted that "SPD's fishing expedition disregards procedural safeguards that must be followed when seeking evidence from news outlets." The brief cited the Washington state Shield Law, RCW 5.68.010, which provides that "no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce, or otherwise disclose: (a) The identity of a source of any news or information . . .; or (b) Any news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised. This does not include physical evidence of a crime."

However, the statute also contains a provision providing that a "court may compel disclosure of the news or information . . . if the court finds that the party seeking such news or information established by clear and convincing evidence . . . that there are reasonable grounds to believe that a crime has occurred." The party seeking disclosure must demonstrate that:

(i) The news or information is highly material and relevant;

(ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto;

(iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and

(iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure.

The full statute is available online at: https://apps.leg.wa.gov/rcw/default.aspx?cite=5.68.010.

Finally, the brief further argued that SPD's subpoena "violates the constitutional and statutory privileges against compelled disclosure of journalistic work product, particularly unpublished material" under the Washington Shield Law and the First Amendment. The brief cited *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993), in which the U.S. Court of Appeals for the Ninth Circuit held that "[C]ompelled disclosure of non-confidential information harms the press' ability to gather information by . . . 'converting the press in the public's mind into an investigative arm of prosecutors and the courts.. . . If perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally.'"

The full brief is available online at: https://www.documentcloud.org/documents/6979686-Objections-to-Subpoena-for-Protected.html.

On the same day, the Reporters Committee for Freedom of the Press (RCFP) filed an *amicus curiae* brief in support of the news media. The brief echoed several of the arguments made by the Seattle news media, and also contended that "Washington courts have long recognized the importance of a journalist's privilege" and that the "First Amendment also affords a qualified privilege against compelling disclosure of "facts acquired by a journalist in the course of gathering the news," citing *Shoen*.

The brief added, "Requiring members of the news media to assist law enforcement officers in an ongoing investigation by turning over their journalistic work product increases the likelihood that members of the public will incorrectly perceive journalists to be an extension of law enforcement, rather than independent press," citing a series of cases, including *Gonzales v. National Broad. Co.*, 194 F.3d 29, 35 (2nd Cir. 1999).

The brief added that concerns over the risk of violence against the press were "well-founded" because "[p]rotests have consistently been the most dangerous place for working

Protests, *continued on page 12*

Protests, *continued from page 11*

journalists in the United States in recent years.. . . Amidst the wave of physical assaults on journalists covering the recent nationwide protests sparked by the killings of George Floyd, Breonna Taylor, and other Black Americans, some assailants have made clear that they view journalists as an unwelcome extension of law enforcement.'" RCFP therefore contended that "[a]s these recent examples show, journalists covering protests are already at heightened risk. Compelling them to turn over to the police unaired video footage and photographs gathered to report the news will sharply increase that risk."

The full brief is available online at: https://www.documentcloud.org/documents/6979675-Amicus-Brief-of-Reporters-Committee-for-Freedom.html.

On July 30, King County Judge Nelson Lee ordered the news media to produce the requested evidence for an *in camera* review, meaning a judge would privately look at the information. In the review, the court would determine whether SPD had shown "clear and convincing evidence" required to compel disclosure of the footage and photographs under the Washington Shield Law.

In his ruling, Lee held the SPD had "shown by clear and convincing evidence that the material requested is highly material and relevant to the investigation," as well as "'critical or necessary' to its investigation." He further held that SPD had "shown by clear and convincing evidence that it has exhausted all reasonable and available means to identify the suspects' identity from alternative sources" and demonstrated that there was a compelling interest in the disclosure. Lee's full ruling is available online at: https://www.documentcloud.org/documents/7011712-Judge-Lee-s-Order.html.

However, on August 20, a Washington State Supreme Court commissioner granted a stay in the case, meaning the media would not be required to produce any evidence for the review until mid-2021, at which point the value of the evidence might be diminished, according to court records. Additionally, on Sept. 4, 2020, federal authorities arrested the man suspected of stealing one of the unrecovered SPD firearms.

On September 21, SPD filed a "motion to dismiss appeal [as] moot," in which it wrote, "[R]ealistically, SPD would not now get to see any relevant evidence the News Media may possess now until sometime in 2021 or later, even if it wins on appeal." The motion continued, "Given that likely delay in getting further evidence regarding the crimes committed on May 30, given the decreasing value of such evidence as time goes on, given the recent developments in the investigation into the theft of the [SPD firearm], and in light of its many other priorities, SPD has decided to withdraw the subpoena and not seek enforcement of the Order." The motion argued that the case was therefore "moot."

The full motion is available online at: https://www.documentcloud.org/documents/7214851-SPD-Motion-to-Dismiss-Subpoena-Case-as-Moot.html.

In a September 21 statement, Seattle City Attorney Pete Holmes said that the subpoena "was about trying to recover dangerous weapons. The urgency of getting this evidence collided with the more ponderous processes of our judicial system, and the process won out."

In a separate statement, attorney Eric Stahl, who represented the five news media outlets, said that what Holmes was "calling a 'process' is actually an important protection for journalism, free speech and the public's right to know." He added, "And fortunately in this case, the process worked."

Ninth Circuit Rules Federal Agents Can't Target Journalists and Legal Observers at Portland Protests

On Oct. 9, 2020, the U.S. Court of Appeals for the Ninth Circuit ruled that federal agents cannot target journalists and "legal observers" with arrests and assaults in Portland, Ore. amidst the ongoing protests over the May 25 death of George Floyd while in police custody. *Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817 (9th Cir. 2020). The ruling was limited, however, in that the court denied a motion by federal law enforcement agencies seeking a stay on a preliminary injunction while the government's appeal of the injunction was still pending.

The case arose following protests in Portland in May and June 2020, in which some demonstrations became violent, leading to vandalism, destruction of property, looting, arson, and assault. On June 28, several newspaper organizations and individual journalists and legal observers filed a class-action complaint against the City of Portland, alleging that the crowd control measures used by law enforcement violated their First and Fourth Amendment rights. The plaintiffs claimed that local authorities shot them with less-lethal munitions, including pepper balls, tear gas canisters, and more, as well as pepper sprayed and shoved them. The complaint alleged that such actions prevented the plaintiffs from recording and reporting on the protests and the law enforcement response.

Four days later, on July 2, the U.S. District Court for the District of Oregon entered a temporary restraining order (TRO) against the City of Portland, regulating the local police's use of crowd-control tactics against journalists and legal observers. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI (D. Or. July 2, 2020). On July 16, the City of Portland and the plaintiffs reached an agreement in a stipulation to a preliminary injunction, in which the city agreed not to enforce orders to disperse against journalists and legal observers, not to use violence or the threat of violence and arrest against them, and promised not to seize their photographic equipment or press passes, as had happened to several plaintiffs in the case," as reported by *Courthouse News* on July 23.

Meanwhile, protests continued in Portland, including around the Mark O. Hatfield Federal Courthouse. In response, the U.S. Department of Homeland Security (DHS), the U.S. Marshals Service (USMS), and later the U.S. Customs and Border Protection (CBP) (federal defendants) deployed agents to protect the building and enforce crowd control.

On July 23, District Judge Michael Simon granted the plaintiffs' motion to add the federal agencies as defendants in the case, and also entered a TRO against the federal defendants. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4220820 (D. Or. July 23, 2020). Judge Michael Simon acknowledged that the federal defendants had engaged in "violence, threats, or intimidation" towards journalists, including the Plaintiffs, which can lead to a "real and immediate threat of repeated injury" to the plaintiffs' First Amendment rights.

He wrote, "An open government has been a hallmark of our democracy since our nation's founding.. . . When wrongdoing is underway, officials have

great incentive to blindfold the watchful eyes of the fourth estate. The free press is the guardian of the public's interests and the independent judiciary is the guardian of the free press," citing *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012). The full ruling is available online at: https://www.courthousenews.com/wp-content/uploads/2020/07/Feds-TRO.pdf.

On Aug. 5, 2020, the Reporters Committee for Freedom of the Press (RCFP), along with several other media advocacy organizations, filed an *amici curiae* brief on behalf of the plaintiffs. The brief responded to a July 31 hearing in which Simon "invited briefing on whether it should, *inter alia*, restrict the definition of 'Journalist' to a 'professional or authorized journalist' who has been given a vest" by the American Civil Liberties Union (ACLU) of Oregon. The brief argued that the district court "cannot and should not adopt such a restriction. A regime that outsources registration or licensing to a non-governmental entity like the ACLU, pursuant to an order of this Court, would pose the same constitutional concerns as any direct governmental licensing regime, one of the *primary constraints* on an independent press that the First Amendment was ratified to prohibit" (emphasis in original). The brief added that journalists "are defined by the function they perform, not governmental registration or licensing."

The brief continued, "Not only would such a regime itself be injurious to the First Amendment and journalists' ability to engage in newsgathering, but it would not solve the practical issues complained of by the Federal Defendants; indeed, it could exacerbate them by creating a single indicator of one's status as a journalist." The brief contended that the court should "[i]nstead, to the extent the Court believes clarification of the TRO is necessary, it should evaluate the Federal Defendants' compliance according to whether a reasonable officer, under the totality of the circumstances, knew or should have known that they were interacting with a member of the press."

The full *amici* brief is available online at: https://www.courthousenews.com/wp-content/uploads/2020/08/PortlandProtestPress-Amicus.pdf.

On Aug. 6, 2020, Simon extended the TRO by 14 days in an oral ruling from the bench. He said, according to *Courthouse News*, "Given that we still have federal officers here and what has been said by them and by the administration, that's sufficient for good cause to extend this TRO for one more 14-day period.. . . Whether or not that changes in the next few weeks, we'll see what happens."

On August 20, Simon granted the plaintiffs' motion for a preliminary injunction, which had terms largely identical to the July 23 TRO. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017 (D. Or. Aug. 20, 2020). He wrote that the general police power is reserved to the states, and that the federal defendants had not argued that they had the authority to issue general dispersal orders on Portland's public streets and sidewalks. He also noted that he had "serious concerns" that the federal defendants had not complied with the July 23 TRO. According to the Ninth Circuit, in a separate preliminary injunction, the City of Portland agreed that it would not require journalists and legal observers to disperse from streets and sidewalks after issuing general dispersal orders.

The federal defendants summarily appealed the preliminary injunction to the Ninth Circuit. On August 25, Simon denied the federal defendants' motion for a stay of the preliminary injunction pending its appeal. Two days later, a divided three-judge motions panel of the Ninth Circuit granted the Federal Defendants' motion for an administrative stay of the injunction pending resolution of their emergency motion for a stay pending appeal.

On September 2, RCFP and several media organizations filed a new *amici curiae* brief in the Ninth Circuit. The brief argued that the preliminary injunction "properly protects the right of the press and public to document the actions of law enforcement in public places — a right this Court has expressly recognized," citing *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

The brief continued, "[T]he preliminary injunction is necessary to ensure that people throughout state of Oregon, and the United States, are fully and accurately informed as to what is occurring on the ground. Accordingly, amici respectfully request that the Court deny Defendants-Appellants' motion for an emergency stay." The full brief is available online at: https://www.rcfp.org/wp-content/uploads/2020/09/2020-09-02-RCFP-Ninght-Circuit-amicus-brief-in-Index-Newspapers-v.-U.S.-Marshals-Service.pdf.

On Oct. 9, 2020, the Ninth Circuit took up the issue once more after reviewing the parties' complete briefings and holding oral arguments, and denied the federal defendants' motion for a stay. Judge Johnnie B. Rawlinson, who was joined by Judge Morgan Christen, wrote the 2-1 majority opinion in which she explained that the court, in deciding whether to grant a stay, must consider: "(1) whether the Federal Defendants have made a strong showing that they are likely to succeed on the merits; (2) whether the Federal Defendants will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Regarding the first prong, Rawlinson held that the federal defendants had "not made the strong showing . . . that they are likely to succeed on the merits of plaintiffs' First Amendment retaliation claim." She explained that the plaintiffs needed "to show that they were engaged in a constitutionally protected activity, the Federal Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity, and the protected activity was a substantial or motivating factor in the Federal Defendants' conduct," citing *Pinard v. Clatskanie School District 6J*, 467 F.3d 755, 770 (9th Cir. 2006).

According to Rawlinson, the federal defendants did "not contest the first or second elements of the retaliation claim, nor does there appear to be a good faith basis for doing so." In terms of the final portion, she held that "[t]he district court's extensive and thorough factual findings provide robust support for its conclusion that plaintiffs' exercise of their First Amendment rights was a substantial or motivating factor in the Federal Defendants' conduct." Rawlinson provided several examples of journalists facing arrests, attacks, and threats by federal agents in Portland in July 2020, which she found were "retaliatory in nature and did not reflect appropriate crowd-control tactics," including because the journalists were "nowhere near the protesters." She called such conduct a "shocking pattern of misconduct."

Rawlinson therefore held that the "many instances . . . provide exceptionally strong evidentiary support for the district court's finding

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Protests, *continued from page 13*

that some of the Federal Defendants were motivated to target journalists in retaliation for plaintiffs' exercise of their First Amendment rights."

Furthermore, Rawlinson held that the federal defendants had "not shown that they are likely to succeed on the merits of plaintiffs' First Amendment right-of-access claim." She agreed with the plaintiffs "that the press is entitled to a right of access at least coextensive with the right enjoyed by the public at large; the press is certainly not disfavored," citing *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974), *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980); and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Rawlinson also reasoned that "[p]ublic demonstrations and protests are clearly protected by the First Amendment, and a protest not open to the press and general public is not a public demonstration," citing *Snyder v. Phelps*, 562 U.S. 443, (2011), among other cases.

Additionally, she held that the federal defendants had "not shown the general dispersal orders they issued were lawful, much less essential or narrowly tailored" as required by *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 9 (1986). Rawlinson added, "We do not condone any form of violence, nor did the district court, but the court found no evidence that any of the named plaintiffs engaged in unlawful conduct. The many peaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others."

Rawlinson also suggested that Simon consider detailing where federal agents have authority to disperse protesters, writing, "We need not precisely define the limits of the Federal Defendants' authority in order to resolve their emergency motion, but it cannot be debated that the United States Constitution reserves the general police power to the states, and the district court found that the Federal Defendants 'routinely have left federal property and engaged in crowd control and other enforcement on the streets, sidewalks, and parks of the City of Portland.'"

Regarding the second prong, Rawlinson wrote that the court was "not persuaded" by the federal defendants' argument that "the injunction will force federal officers to make snap judgments to distinguish journalists and legal observers from protesters." The federal defendants argued that this would "constitute irreparable injury absent a stay pending appeal because the preliminary injunction will hinder their ability to safely protect federal property and people on federal property, and will generally place them in the untenable position of having to choose between risking their safety and violating the preliminary injunction."

Rawlinson provided several reasons why she disagreed with the defendants, including that "the preliminary injunction unambiguously provides that the Federal Defendants will not be held liable for violating the preliminary injunction by incidentally exposing journalists or legal observers to otherwise lawful crowd-control measures." She also noted that the City of Portland had agreed to similar requirements without arguing that they were intrusive, unworkable, or vague.

She further held that the federal defendants had "not made the required showing that they will suffer irreparable harm if the preliminary injunction is not stayed pending a decision on the merits of the appeal" because Judge Simon "took care to address the Federal Defendants' concerns regarding the workability of the injunction. The terms of the injunction itself adequately address their concerns, and the Federal Defendants' continued objection that the injunction is unworkable is undermined by the City's agreement to operate pursuant to a substantially similar order" and expert opinion calling the injunction "safe and workable."

In terms of the third prong, Rawlinson concluded that the City of Portland would not "suffer substantial injury[, which] supports denial of the emergency motion for a stay pending appeal." Conversely, the plaintiffs faced substantial injury if the motion were granted "because the district court found that the Federal Defendants' conduct chilled the exercise of their First Amendment rights."

Finally, Rawlinson weighed the public interests in the case. On one hand, the federal defendants argued for the interest in protecting federal agents and property. On the other hand, the plaintiffs "assert[ed] a strong public interest: 'It is always in the public interest to prevent the violation of a party's constitutional rights,'" citing *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134, 1147–48 (9th Cir. 2020). She also cited *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012), in which the Ninth Circuit held that courts have "consistently recognized the significant public interest in upholding First Amendment principles."

Rawlinson added, "The Federal Defendants assert a very important public interest, but the record fully supports the district court's conclusion that the Federal Defendants' interest does not require dispersing plaintiffs. They have not threatened federal property, and the journalists, in particular, provide a vitally important service to the public."

Rawlinson therefore denied the federal defendants' emergency motion for a stay pending appeal, which meant that the Ninth Circuit put the enforcement against federal agents back in place while the agencies' appeal remains pending, according to *Courthouse News*, the Associated Press (AP), and First Amendment Watch, a media advocacy organization at New York University (NYU).

Judge Diarmuid O'Scannlain filed a dissenting opinion in which he wrote that he would have granted the motion for stay. He provided several reasons, including that he disagreed with the majority "transform[ing] . . . the First Amendment-based 'right of public access' to governmental proceedings into a special privilege for self-proclaimed journalists and "legal observers" to disregard crowd dispersal orders issued by federal law enforcement officers." He further contended that the district court's finding of numerous incidents of federal agents "retaliating" against the plaintiffs "cannot justify granting journalists and 'legal observers' a unique exemption from lawful dispersal orders — orders that were neither found, nor alleged, to be retaliatory."

Additionally, O'Scannlain argued the preliminary injunction "erroneously curtails an important law enforcement tool for responding to protest events that threaten federal property and personnel, thereby limiting options available for federal officers precisely when they are most needed."

The Ninth Circuit's full ruling is available online at: https://www.courthousenews.com/wp-content/uploads/2020/10/Ruling.pdf. As the *Bulletin* went to press, the Ninth Circuit had not ruled on the federal defendants' appeal of the preliminary injunction.

In a statement following the ruling, attorney Matthew Borden, who

represented the members of the news media, said, "This is a crucial victory for civil liberties and the freedom of the press, which are critical to the functioning of our democracy. The court's opinion affirms that the government cannot use violence to control the narrative about what is happening at these historic protests."

Duluth, Minn. City Attorney Files Charges Against Man Who Knocked WCCO Photojournalist's Phone Out of His Hands

On Oct. 9, 2020, the Minneapolis *Star Tribune* and Duluth *News Tribune* reported that Duluth, Minn. City Attorney Rebecca St. George had filed misdemeanor charges against Duane Waldriff, a 70-year-old man who allegedly knocked a WCCO-TV photojournalist's phone out of his hands near a rally by President Donald Trump a week earlier.

On Sept. 30, 2020, President Trump held a campaign rally in Duluth, which Waldriff attended. According to WCCO, the Twin Cities' CBS affiliate, Dymanh Chhoun was on assignment "to get reaction before President Donald Trump's rally." As Chhoun was gathering video in a public space, he began recording one of President Trump's supporters when the man turned around and said: "You guys want to be peaceful? Be peaceful! You want to be violent? Come to me!" The man then punched Chhoun's smartphone out of his hands, despite the photojournalist identifying himself as a member of the press. Chhoun was not hurt, nor was his device damaged.

WCCO aired the footage of the attack on October 1. The full video is available online at: https://minnesota.cbslocal.com/2020/10/01/trump-supporter-attacks-wcco-photojournalist-in-duluth-you-want-to-be-violent-come-to-me/.

Following the incident, Chhoun said, "I was scared.. . . I'm used to people verbally attacking me but not physically. I was just doing my job."

The Asian American Journalists Association released a statement in which the organization urged authorities in Duluth to fully investigate the attack. "The press is not the enemy," the statement said. "[I]t serves a fundamental role in a democracy by informing the public and holding powerful people and institutions accountable. Any threat to the press is a threat to a free society, free speech and the First Amendment."

On October 2, the Duluth Police Department announced that it had identified Waldriff as the man who attacked Chhoun. On October 6, the *Star Tribune* reported that Chhoun was seeking charges against Waldriff. In a statement, the Duluth Police Department stated, "The victim expressed the desire to move forward with seeking charges.. . . We are forwarding the case to the City Attorney's Office for review of misdemeanor charges of Disorderly Conduct."

On October 9, St. George announced that the city had filed misdemeanor assault and disorderly conduct charges against Waldriff, who claimed in an interview with the *Star Tribune* that Chhoun "violated his space" and that he did not know it was legal to film people in public spaces without their consent. He added, "I've got nothing against him personally but he wasn't assaulted.. . . He was aggressively coming after me, and I defended myself."

In a statement, St. George said, "Our office looked at all currently available evidence and asked the Duluth Police Department to issue a citation based on our review.. . . We take all criminal matters very seriously, and will prosecute this case accordingly."

As the *Bulletin* went to press, the charges against Waldriff, which carried a maximum sentence of 90 days in jail and a $1,000 fine, remained pending.

Incident During Ongoing Protests in Denver Prompt Ethical Considerations, Advice for Journalists

On Oct. 10, 2020, several media outlets reported that a security guard hired by KUSA-TV, the NBC affiliate in Denver, Colo., had shot and killed a demonstrator, Lee Keltner, in the course of dueling right- and left-wing political rallies. In the wake of the incident, which took place at the "Patriot Rally" in downtown Denver, commentators grappled with ethical questions around journalists bringing security guards with them to protests, including weighing the importance of keeping journalists safe versus the independence of the press.

On October 10, the Denver Police Department sent out a tweet explaining that officers were "investigating a shooting that occurred in the Courtyard by the Art Museum." At the time, the agency said one victim was hospitalized and one suspect was in custody. The department later announced that the suspect "was acting in a professional capacity as an armed security guard for a local media outlet and [was] . . . not a protest participant."

The security guard was later identified as Matthew Dolloff. KUSA, which is referred to as 9NEWS locally, claimed that it thought it had hired a guard from the Pinkerton security company. However, the company asserted in a statement that Dolloff was subcontracted from another company. Additionally, Dolloff did not have a security license, according to the *Denver Post*.

On October 10, the *Post* reported that photographs and video footage taken at the scene appeared to show Keltner in a dispute with Dolloff and a 9NEWS producer, whom Dolloff was guarding. The altercation reportedly escalated when Keltner slapped Dolloff on the side of the head and sprayed mace at Dolloff. According to *Post*, Dolloff shot Keltner in the head and was immediately taken into police custody.

On October 15, Denver District Attorney Beth McCann announced that she was filing second-degree murder charges against Dolloff, which carries a maximum sentence of 48 years in prison. The *Denver Post* noted, however, that Dolloff was claiming he acted in self-defense. The *Post* also stated that Denver officials said Dolloff could face additional criminal or civil action for working in Denver without the city's required municipal security guard license.

Following the incident, 9NEWS general manager Mark Cornetta released a statement in which he said, "9NEWS is deeply saddened by this loss of life. We have and will continue to cooperate fully with law enforcement."

As the *Bulletin* went to press, Dolloff's trial had not yet begun.

Also on October 15, 9NEWS' investigative team reported Dolloff was "not the only unlicensed or not properly credentialed security guard to accompany 9NEWS crews as they covered protests and riots during the past five months." The report added that "[b]ecause they were not licensed, those guards were not required to go through the extensive training Denver mandates all private security guards receive." The full report is available online at: https://www.9news.com/article/news/

Protests, *continued on page 16*

Protests, *continued from page 15*

investigations/unlicensed-security-guards-9news/73-1ee788f1-41db-4fed-b811-d25b44ee950d.

The incident involving Dolloff prompted ethical discussions by journalists and media ethics experts. On October 18, the *Denver Post* reported that other news outlets had also hired security during protests in Denver, including ABC News, which "hired local freelance video journalist Carl Filoreto to cover the demonstrations — and paid for armed security guards to accompany him." Filoreto told the *Post*, "I never felt threatened in Denver but knowing you have that extra set of eyes on you that are there for protection, it's very reassuring when you're out covering that kind of thing.. . . You just never know what spark is going to incite a major confrontation."

In an interview with the *Post*, Committee to Protect Journalists (CPJ) deputy executive director Robert Mahoney noted that large news organizations like CNN and *The New York Times* employ in-house security, while smaller outlets hire outside contractors due to fewer resources. Regardless of the type of security, Mahoney contended that "[t]he environment for news reporters and media crews has become more dangerous in recent years.. . . You're out there covering stories against the backdrop of people seeing the media as the 'enemy of the people.' There's background music of hostility against the media before you even get out on the streets."

For example, on May 30, 2020, the U.S. Press Freedom Tracker reported that "[i]n the span of two minutes on May 30, . . . a news crew from [Minneapolis, Minn.] NBC-affiliate KARE 11 that was covering protests and unrest in Minneapolis . . . was held up at gunpoint by one man, and threated by another man wielding a crowbar." The crew members included investigative journalist A.J. Lagoe and photojournalist Devin Krinke.

On Nov. 5, 2020, a Twitter account for CBS Newspath, which provides content to network affiliates and owned-and-operated stations, tweeted that KPHO reporters and anchors in Phoenix, Ariz. were "told to wear bullet proof vests because of death threats directed at the station and its employees" amidst protests over the 2020 presidential election vote count and results. The tweet is available online at: https://twitter.com/cbsnewspath/status/1324517950880051200?s=20.

Mahoney added that news outlets can and should perform risk assessments to determine what steps are needed to protect journalists. He also advocated for journalists to be trained in how to address dangerous situations. "If you go out to a street protest in the U.S., you're going to see everything from experienced, well-equipped, well-trained journalists to an independent journalist with an iPhone," Mahoney said.

Chris Roberts, an associate professor in the University of Alabama's Department of Journalism and Creative Media, told the *Post*, "Crazies follow television cameras the way moths follow flames.. . . It's reasonable to have some sort of security."

On Oct. 13, 2020, the Poynter Institute of Media Studies (Poynter), a non-profit journalism school and research organization in St. Petersburg, Fla., stated that several journalists told the organization that "from networks to local stations, it has become common practice to send security officers with news crews, and that it is not at all uncommon in some TV markets for those guards to be armed."

Poynter Author and Senior Faculty for Broadcast Al Tompkins wrote that this was not surprising given the number of attacks faced by journalists from protesters and police. He wrote, "Cameras attract trouble and troublemakers. Veteran journalists I spoke with told me they feel they need security to travel with them because journalists are under attack from all sides."

Tompkins provided the example of San Francisco television stations, which began sending guards with their crews during the "Occupy Wallstreet" protests in 2011. According to Tomkins, veteran journalists resisted because they wanted to appear independent, meaning "not affiliated with any organization, not with the police or anybody," as stated by KPIZ-TV reporter Joe Vazquez.

Vazquez explained that he and others had adjusted. "We started to learn that our security guards, most of them retired, experienced police officers, draw an imaginary perimeter around us and confront anyone who breaches that perimeter," Vazquez said. "These are experienced officers, they are the ones who are steeped in de-escalation. We don't know how many times they picked off an attack. Sometimes they say 'it is time to go' and we go. Maybe they see somebody drive by more than once."

However, the *Post* argued that "[t]he decision to hire personal security also brings ethical questions. Do media disclose they have security? Do they require security to wear identification?" The *Post* stated that "[o]pinions are mixed. Some say identifying security might prevent journalists from getting hit with pepper spray or projectiles fired by police, but it might not work the other way when facing the general public." Put differently, observers were torn between the value of police keeping journalists safe versus the risks to journalists' independence.

Roberts told the *Post* that one main concern about employing security is that "identifying security accompanying journalists while covering a police protest could confuse the general public, who might see the security guards as law enforcement. And part of the strategy behind security sometimes means it is invisible."

Vazquez asserted that the presence of security guards changed the way reporters approach some stories. "What we have decided is we are going to approach every single situation differently," Vazquez said. "When we go out on an assignment, we have a little meeting with the guard and agree that if we get in the thick of it that we immediately move out of the thick of it. Maybe we go in with our cellphone cameras to keep a low profile."

Chris Post, chair of the National Press Photographers Association's (NPPA) Safety and Security Committee, told Tompkins he understood why journalists feel the need for security, but emphasized the role of the guards should be "verbal de-escalation." Otherwise, the presence of security could lead to a situation escalating unnecessarily. "There is a belief structure that has been created over several years," Post said, "where the media is the enemy."

NPPA general counsel Mickey Osterreicher contended in an interview with Poynter that using armed security "is more of a decision by news organizations than by journalists." He added, "It may be a decision made to protect the organization from liability (or even an insurance requirement) as much as to protect the journalists themselves. It may or may not be something those journalists agree with but as employees

or contracted freelancers they must follow."

Osterreicher continued, "The bigger question . . . is what training and qualifications those guards have and if they are hired directly by the news organization or through a security firm. Another issue to be examined is the use of force and self-defense statutes in each state as well as the licensing requirements to be able to carry a firearm (open or concealed)."

Nevertheless, Mahoney, Roberts, and Osterreicher each told the *Denver Post* that "[a]t the end of the day, news outlets have a responsibility to keep their journalists safe."

Previously, media education and advocacy organizations have provided journalists with guidelines and advice when covering protests. For example, in June 2020, the Reporters Committee for Freedom of the Press published its guide titled, "Police, Protesters, and the Press." The purpose of the guide, which was originally published in 2018 before being updated in 2020, was to "help journalists understand their rights at protests and avoid arrest when reporting on these events. It summarizes the legal landscape and provides strategies and tools to help journalists avoid incidents with police and navigate them successfully should they arise."

RCFP's full guide is available online at: https://www.rcfp.org/resources/police-protesters-and-the-press/.

On June 5, the University of Wisconsin-Madison School of Journalism and Mass Communication (SJMC) Center for Journalism Ethics posted a series of five "problems" with protest coverage, as well as recommendations for correcting such issues. For example, Doug McLeod, the SJMC Evjue Centennial Professor in the School of Journalism & Mass Communication, contended that a problem with protest coverage is framing it "as a contest between protesters and police." McLeod recommended instead that journalists represent protesters as "part of the community and that they are citizens actively engaged in trying to bring about positive social change. Whether the audience agrees with them or not, it is important to see them not as troublemakers but as active citizens who are expressing opinions and attempting to make changes in society." The full article is available online at: https://ethics.journalism.wisc.edu/2020/06/05/five-problems-with-your-protest-coverage/.

Media Advocacy Organizations Pen Letter Emphasizing the Importance and Rights of the Press Covering Protests and Public Events Free From Police "Harassment"

On Oct. 30, 2020, the Society of Professional Journalists (SPJ), along with 25 other journalism groups, including the National Press Photographers Association (NPPA), the Brechner Center for Freedom of Information at the University of Florida, and the Student Press Law Center (SPLC), a non-profit organization in Washington, D.C., sent a letter to 28 law enforcement organizations across the United States emphasizing that journalists have a right to cover protests and news events without fear of arrests, attacks, or threats by police under the First Amendment. Among the law enforcement agencies was the American Criminal Justice Association, the Federal Law Enforcement Officers Association, and the National Association of Police Organizations.

The letter began by stating that "[i]t is no secret that 2020 has been a unique and challenging year for all of us. Law enforcement professionals and journalists alike face new and greater challenges and more scrutiny than ever before." The letter also acknowledged "the difficult job you are required to do every day." The letter continued, "We see it up close. The scenes and situations that demand so much of your attention are often the same as ours. We both have obligations, through our professions, to the American public: Yours is to protect. Ours is to inform."

However, the letter then noted that the press "is the only [profession] explicitly named and protected in the U.S. Constitution. Despite the time-tested First Amendment, law enforcement authorities nationwide have been targeting and arresting journalists with alarming frequency in recent years, and especially during this year's protests." The letter also explained the negative effects and consequences of the police, intentionally or not, targeting members of the press, including that "journalists can't do their jobs without fear of harassment, violence or arrest, or that charges against them aren't dropped as quickly as possible once the facts are sorted out."

> "We the people are less able to govern ourselves absent the ability to know what is going on in our society. And journalists are instrumental in making sure that Americans stay informed."
>
> **— Letter from the Society of Professional Journalists and other journalism groups to law enforcement organizations**

The letter therefore called on the law enforcement organizations "to change this." It read, "You can influence the attitudes and actions of your members. You can ask them to refrain from arresting journalists — and if and when journalists have been arrested, you can ask prosecutors to drop charges against them. We the people are less able to govern ourselves absent the ability to know what is going on in our society. And journalists are instrumental in making sure that Americans stay informed." The letter added, "We urge you to speak out against the arrests of journalists in the field and to encourage better officer training."

The letter concluded by stating, "When journalists tell the stories of the communities your members protect and serve, they tell the stories of your officers as well. There must be a way for both law enforcement officials and journalists to do their respective jobs. Respectfully, all journalists need to do their work without any officers stifling it."

The full letter is available online at: https://www.spj.org/pdf/ldf/law-enforcement-letter.pdf.

— Scott Memmel
Postdoctoral Associate

Court Access and Medical Privacy Issues Arise in Wake of George Floyd Killing

In fall 2020, several notable access-to-information and privacy issues arose stemming from the police killing of George Floyd on May 25, 2020. On November 4, Hennepin County District Judge Peter Cahill ruled that the upcoming trial of police officers charged in connection with Floyd's death may be recorded, broadcast, and livestreamed — the first time a trial judge has allowed such access in Minnesota history. The Minnesota Attorney General subsequently filed a motion asking Cahill to reconsider the order. A media coalition opposed the Attorney General's reconsideration request. Cahill later affirmed his original order. On October 12, the Minnesota Attorney General asked Cahill to prevent public access to all new court filings in the criminal case involving the police officers for 48 hours so lawyers could assess whether any information in the filings should be withheld from the public. A media coalition opposed the request, which Cahill denied. On October 10, KARE-11 journalist Chris Hrapsky filed a request with the Hennepin County District Court to access materials that Cahill reportedly reviewed before allowing Derek Chauvin, the police officer charged with killing Floyd, to live in an undisclosed location potentially out of state until the trial commences because of safety concerns. Finally, on September 24, the Minneapolis *Star Tribune* reported that multiple Hennepin Healthcare employees had improperly accessed Floyd's medical records. Lawyers for the Floyd family responded by saying that they were exploring their options in response to the invasion of privacy.

ACCESS

Four Minneapolis police officers have been criminally charged in connection with Floyd's death. Derek Chauvin, who pinned his knee on Floyd's neck, is facing charges of second-degree murder and second-degree manslaughter. Officers Thomas Lane, J. Alexander Kueng, and Tou Thao are each charged with aiding and abetting murder and manslaughter. (For more information on Floyd's death, protests that followed, incidents between the press and police, incidents between the press and demonstrators, and subsequent litigation, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" on page 10 of this issue of the Silha *Bulletin*; "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue; and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue.)

Judge Allows Audio-Video Recording, Livestreaming of Trial

On Nov. 4, 2020, Hennepin County District Judge Peter Cahill issued an order allowing live audio and video coverage of the trial. The order noted that all defendants requested audio and video broadcast of the trial, but that the state did not consent to audio-video coverage. The order states that the trial "may be recorded, broadcast, and livestreamed in audio and video" subject to certain conditions. The order restricts such coverage to the courtroom and only during trial sessions. The order further states that "only matters that are on the record are subject to audio coverage." Sidebar discussions between the court and counsel are presumed to be off the record unless the court otherwise indicates. Matters that are off the record may be covered by video, but only when the trial is in session and when the judge is on the bench. The order restricts photography and audio recording in all other parts of the Hennepin County Government Center where recording is prohibited.

The court order further limits what cameras and microphones can cover. Jurors and potential jurors may not be video recorded, nor can there be audio coverage of any *in camera* examination of potential jurors. There can be no video coverage of witnesses who are under the age of 18, unless they and at least one parent or guardian have consented in writing. The order further prohibits video coverage of members of the George Floyd family without their consent.

Cahill's order provides that up to three video cameras may be installed in the trial courtroom. The cameras will be operated by one media organization (pool producer), which the court will select. The pool producer will provide a transmission of the video feed to other media outlets and to overflow courtrooms. The order states that "[n]either the [p]ool [p]roducer nor any media outlet will hold a copyright or any other intellectual property right for any of the raw footage from cameras or the single transmission feed that is produced that would prevent any other media outlet or entity from using, broadcasting, or sharing the footage or any other free use thereof." The pool producer must also provide a transmission feed to the Minnesota Judicial Branch for use on its website.

Attached to Cahill's order was a memorandum that explained his reasoning. The memorandum recognized that the issue of trial access is premised on two rights. First, Cahill wrote that defendants have a right to a public trial under the Sixth Amendment of the U.S. Constitution and Article One, Section Six of the Minnesota Constitution. Public trials help ensure that "the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions." Second, Cahill found that the press and public have a right of access to public trials pursuant to the First Amendment of the U.S. Constitution. Quoting *Globe Newspaper Company v. Superior Court for Norfolk County*, 457 U.S. 596 (1982), Cahill wrote: "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.. . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check up on the judicial process — an essential component in our structure of self-government."

Cahill acknowledged that his order provides access beyond what is authorized under Minnesota Supreme Court rules, which prohibit audio-video recording and reproduction except when all parties consent. Minn. Gen. R. Prac. 4. The rule can normally be applied without concerns that it would "impinge on the right to a public trial or the right of access held by the public and press," Cahill wrote, because spectators would usually be able to freely attend the proceedings in person, including journalists. "The instant situation, however, not only is abnormal — it is in fact quite unique," Cahill wrote, citing three major factors in particular.

First, Cahill said that social distancing during the COVID-19 pandemic means far fewer people than normal can physically sit in a courtroom to observe the trial. This is true even taking into account that Hennepin County has rebuilt a courtroom specifically for the upcoming trial. Second, because most police officers will be tried at once, more people will be involved in the proceedings. And third, the case has attracted significant attention from the public and from news organizations locally, nationally, and internationally, and thus numerous journalists will be on hand to cover the proceedings. "This court concludes that the only way to vindicate the defendant's constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media in accordance with the provisions on the attached order," Cahill wrote.

Thus, Cahill concluded, following Minnesota Supreme Court rules would mean "that nothing would be known about the empaneled jurors, all witnesses could veto coverage of their testimony, and the public would be left with nothing but the arguments of counsel." That "is hardly a basis for the public 'to participate in and serve as a check upon the judicial process,'" Cahill said, quoting *Globe Newspaper Company*. Cahill wrote that the order "seeks to accommodate the interests served by the current rule by expanding audio and video coverage only as necessary to vindicate the Defendants' constitutional right to a public trial and the public's and press rights of access to criminal trials in the unique circumstances currently prevailing in the COVID-19 pandemic and the intense public and media interest in the cases." Doing so helps ensure that "'the public may see [that Defendants] [are] fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep [their] triers keenly alive to a sense of their responsibility and the importance of their functions,'" Cahill concluded, quoting *Waller v. Georgia*, 467 U.S. 39 (1984).

A full copy of Cahill's order and memorandum is available online at: https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/27-CR-20-12646_Order-Regarding-Audio-Video-Coverage.pdf.

The news media did not initially submit a brief on the issue of audio-video coverage of the trial. However, media coalition attorney Leita Walker of Ballard Spahr LLP told the *Bulletin* that media outlets had addressed similar issues previously in the case, which may have informed Judge Cahill's decision. "The media has intervened in this case twice before — in July and again in October — and I think those public, substantive briefs probably did inform the judge's thinking on the First Amendment rights of access," Walker wrote in an email to the *Bulletin*. The Silha Center for the Study of Media Ethics and Law was part of the media coalition that had previously intervened in the case.

In response to Cahill's decision, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley told the Minneapolis *Star Tribune* that the ruling is an exemplar of how judges should approach courtroom access. "I'm thrilled," Kirtley told the newspaper. "This is the kind of memorandum I'm going to give my students to say, 'This is what a judge should say about cameras in the courtroom.'" Mitchell Hamline School of Law Professor Raleigh Levine told the *Star Tribune* that the level of access afforded by Cahill's order may help the public better trust the judicial process. "This ruling is not only unusual for Minnesota but it goes farther than the U.S. Supreme Court has gone in interpreting the very broad right to public access," Levin said. "Given the intense feelings that the murder has generated, I think it makes a lot of sense to say we can avoid a lot of angst, we can possibly even avoid protests if people can see what's going on in the courthouse and reassure themselves as to the fair administration of the trial by the judge."

Suki Dardarian, managing editor of the *Star Tribune*, one of the outlets that pushed for courtroom access, said the decision is historic for cameras in Minnesota courtrooms. "Minnesota's rules on cameras in the courtroom are among the most restrictive in the country, so we are extremely gratified that the court determined that both the defendants' right to a fair, public trial and the media's right of access can be met by providing live coverage," Dardarian told the newspaper.

Attorney Earl Gray, who represents one of the police officers charged in the case, described his experiences with cameras in the court in Wisconsin, where cameras are allowed more often than in Minnesota. "It doesn't interfere with anybody's procedures in the courtroom," Gray told the *Star Tribune*. "We never show the jury. They're never on TV. It's just the witnesses, the judge and the lawyer. I thought that's way overdue."

On November 25, Minnesota Attorney General Keith Ellison filed a motion for reconsideration with the court, asking Cahill to either prohibit recording and livestreaming unless all parties consent or narrow his order so all witnesses who testify can object to being recorded and livestreamed. The Attorney General argued that allowing audio-video coverage of witnesses without their consent could lead to harassment and intimidation and might discourage them from participating. "Ordinary citizens have been thrust into these proceedings simply because they witnessed George Floyd's death," the Attorney General's motion reads. "They should not be forced to sacrifice their privacy or suffer possible threats of intimidation when they perform their civic duty and testify." The Attorney General further pushed back against Cahill's conclusion that audio-video coverage is constitutionally required because of the special circumstances, namely the significant number of trial participants, social distancing requirements because of COVID-19, and intense public and press interest in the case. The Attorney General argued that the court does not have discretion to deviate from existing Minnesota Supreme Court Rules governing cameras in the court, which require consent from the parties. Minn. Gen. R. Prac. 4. "The State absolutely welcomes a public trial; it just wants that trial to proceed under the rules Minnesota has devised to protect the privacy and safety of witnesses, to safeguard them from undue publicity and harassment that might make them reluctant to testify, and to thereby ensure that the trial may best perform its truth-seeking function," the Attorney General's motion reads. The Attorney General's motion for reconsideration is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Motion11252020.pdf.

On December 14, the media coalition, which had not previously submitted formal briefing on the issue of camera access, filed an opposition to the state's motion for reconsideration. The coalition made two primary arguments. First, the media coalition argued that if the courtroom is closed to the public and press, "then the First Amendment requires expansive audio-visual coverage." The coalition wrote that the key question "is not whether the Constitution *requires* the live broadcast or recording of a criminal trial — no one is arguing that it does, at least under normal circumstances. Rather, the question is about what reasonable measures the Court must take, given the *actual*

Floyd, *continued on page 20*

Floyd, *continued from page 19*
circumstances, to preserve the public trial rights guaranteed under the First and Sixth Amendments" (emphasis in original).

The coalition then pointed to six important circumstances at issue here: "(1) the extreme interest in these prosecutions, which involve issues of utmost public concern at an international (but also intensely local) scale"; "(2) the inherent danger, during the pandemic, in requiring those interested in observing the trial to come to the courthouse to do so, as large crowds will undoubtedly assemble"; "(3) the likelihood that social distancing requirements will limit the number of spectators in overflow rooms to a mere fraction of those who wish to attend (and no spectators will be allowed in the courtroom itself)"; "(4) the utter inadequacy of a closed-circuit feed"; "(5) the existence of technology that will, without disrupting trial . . . enable anyone who wants to observe the trial to do so in real time, from the safety of their own homes via high-quality livestream"; and "(6) that audio-visual coverage will occur not over the criminal Defendants' objection, but with their consent and at their request."

Thus, the coalition said, "it is of no moment that the State is 'not aware of a single case — from Minnesota, or any other jurisdiction — holding that the Constitution mandates the public broadcast of an entire criminal trial.' . . . No court has ever faced the challenges this Court is facing and no court has ever tried to address those challenges as this Court proposes."

Second, the media coalition argued that claims about "witness concerns for privacy and safety are speculative" and "must be addressed on an individualized basis." This argument was raised in response to the state's request that if audio-visual coverage could not be barred entirely, then coverage should be allowed only if testifying witnesses consent. The coalition argued that consent limitations were incorporated into Rule 4.02 not out of concern about any potential "chilling effects" on witnesses, but rather, because "coverage could prejudice defendant's right to a fair trial." The coalition noted that in this case, the defendants want audio-visual coverage. The coalition also cited *Waller v. Georgia*, in which the U.S. Supreme Court found that "a public trial *encourages* witnesses to come forward and *discourages* perjury" (emphasis in original). 467 U.S. 39 (1984). The coalition further highlighted that no witness thus far has raised a concern about "testifying in front of a camera." The media coalition's opposition is available online at: https://z.umn.edu/6jq7.

On December 18, Cahill affirmed his original order, "conclud[ing] that televising the trial is the only reasonable and meaningful method to safeguard the Sixth and First Amendment rights implicated in these cases." In the order, Cahill again noted that a special courtroom was being renovated to host the trial to allow for social distancing during the COVID-19 pandemic, and that the public gallery had to be removed to accommodate all trial participants. In the end, only one seat would remain in the courtroom for a non-trial participant, and if the trial were televised, a technician would likely have to use the seat.

"No other seating is available in the trial courtroom," Cahill wrote. "It would be farcical to say that this arrangement, by itself, provides meaningful access to the public or the press or vindicates the defendants' right to a public trial." Cahill also responded to the state's argument that there is not a constitutional right for a televised criminal trial. "This Court never said there was," Cahill wrote. "This Court merely concluded that audio and video coverage of the trial despite the State's objection is the only reasonable alternative to ensure a truly public trial for the defendants and meaningful access to the trial for the public and the press. Those rights are constitutional in nature and must be protected."

Cahill also rejected the argument that an overflow courtroom would be a "reasonable solution." Numerous members of the public and press would likely be vying for access every day during the trial, which would complicate if not violate social distancing rules. Cahill questioned how many overflow courtrooms would be necessary, and acknowledged that overflow courtrooms do not sufficiently replicate the experience of being in a trial courtroom. A copy of Cahill's order is available online at: https://z.umn.edu/6jq6.

On Jan. 11, 2021, Cahill ordered that Chauvin would be tried separately from the three other defendants because of social-distancing restrictions under COVID-19 and the number of lawyers and support staff who will be present for each of the defendants. Chauvin's trial is scheduled to start March 8. The trial for the three remaining defendants is scheduled to start August 23.

Judge Denies Prosecution Request For Two-Day Delay in Release of Court Filings

On Oct. 12, 2020, Minnesota Attorney General Keith Ellison asked Hennepin County District Judge Peter Cahill to temporarily seal new court documents as they are filed in the criminal case of the four police officers charged in connection with George Floyd's death. The purpose for the sealing, the state said, was to assess whether any information in the filings should be withheld from the public. The Attorney General raised concerns that filings in the case might include inadmissible or protected evidence, which if made public could prejudice the jury. "A temporary protective order lasting two business days will ensure the parties and the Court have sufficient time to review future filings and exhibits before they are made public — and, if necessary, will permit the parties to object to the public disclosure of that information, and allow the Court to order further briefing and set a briefing schedule on a motion opposing public disclosure," the Attorney General's motion read.

On October 14, the Attorney General filed another motion seeking to restrict access to video from a 2019 traffic stop in which Floyd was a passenger in the vehicle. Counsel for one of the defendants had asked the court to introduce the video as evidence. The state argued that the recording, at least at the time the motion was filed, was inadmissible and should not be publicly-accessible because it could prejudice the jury and taint the jury pool. "If the records filed about the victim in this case are made public, they are likely to be widely broadcast, and will have the obvious potential to prejudice the jury pool," the Attorney General's motion reads. "The harm is likely to be particularly severe here because evidence of this incident has already been ruled inadmissible. Inadmissible evidence is particularly prejudicial because a court has found that it is not proper evidence for the jury to consider."

On October 15, a media coalition, including the Silha Center for the Study of Media Ethics and Law, opposed the Attorney General's request for a protective order. The state's motion, the coalition said, "turns the common law and the First Amendment on their head." The coalition argued that "the law is clear that under both the common law and the First Amendment the press and the public have a *contemporaneous* right of access to criminal proceedings" (emphasis in original). Once a document is filed in court, it is presumptively public, and even short delays can raise First Amendment concerns. The coalition further argued that the state's request for a 48-hour hold

on public access to new court filings would be unworkable during trial. "[T]wo business days during a fast-moving trial is an eternity," the media coalition argued. "Under the State's proposal, it is not just possible but quite probable that the Court would receive and rule upon some issue before the two-business-day window passes, leaving the media and the public it serves completely in the dark about the issue, the substantive support for the parties' arguments, the Court's ruling, and how that ruling may change the trajectory of the trial. There is thus a real likelihood that journalists covering the proceedings will end up confused and that their coverage will reflect that confusion, to the detriment of the public."

The coalition suggested that the state and defense could arrange a process in which they exchange draft filings and wait two days before filing the documents publicly with the court. "What matters to the Media Coalition — and what is required by the law — is that motions to seal get filed before the sealing occurs and that those motions themselves are publicly filed (along with a redacted copy of the materials at issue) so that members of the press and public can review them, and if the situation warrants, respond and request a meaningful opportunity to be heard," the media coalition argued. A copy of the media coalition's opposition to the state's request for a protective order is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Memorandum10152020.pdf.

On October 15, Cahill issued an oral ruling denying the state's request to seal the May 2019 video of Floyd and further denying the state's motion for a 48-hour protective order on all new filings in the case, according to the Minneapolis *Star Tribune*. However, Cahill did say he would not allow any photos, video, or audio to be included in any future filings. Any audio-visual material already filed may be accessed at the courthouse.

KARE-11 Reporter Requests Evidence Showing Safety Threats Against Derek Chauvin

On Oct. 10, 2020, the Minneapolis *Star Tribune* reported that Hennepin County District Judge Peter Cahill allowed Derek Chauvin, one of the officers charged in connection with George Floyd's death, to live in a state adjacent to Minnesota while free on bail because of "unspecified safety concerns." Following that decision, KARE-11 journalist Chris Hrapsky filed a request with the Hennepin County District Court seeking to access "the in-camera evidence presented to Judge Cahill showing how/why Mr. Chauvin's safety is at risk." On October 15, Hennepin County District Court Communications Specialist Spenser Bickett responded to Hrapsky's request and wrote "There is no record of the in camera evidence you have requested access to." Bickett suggested that Hrapsky contact the Minnesota Department of Corrections for additional information. A copy of Hrapsky's request is available online at: https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/RequestforAccess10102020.pdf.

Several days earlier, Chauvin was released from prison after he posted bail on a bond of $1 million. Under the conditions of his release, Chauvin must carry a mobile phone with him at all times and keep in contact with the Minnesota Department of Corrections and other agencies, according to the *Star Tribune*.

On November 20, the *Star Tribune* reported that a judge rejected a proposed divorce agreement between Chauvin and his wife, Kellie Chauvin. Washington County District Judge Juanita Freeman ruled that a judge may deny an agreement when "the transfer features 'badges of fraud,'" according to the newspaper. "The Court has a duty to ensure that marriage dissolution agreements are fair and equitable," Freeman wrote in an order, according to the *Star Tribune*. "One badge of fraud is a party's transfer of 'substantially all' of his or her assets." The newspaper included comment from divorce attorneys not involved in the case who said the ruling "adds to suspicions that Derek and Kellie Chauvin are trying to protect their assets." The terms of the divorce settlement are not known publicly because they are under seal. (For more information about the sealing of the Chauvins' divorce file, see *Multiple Disputes Arise About Access to Information* in "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue of the Silha *Bulletin*.)

Hospital Employees Fired After Improperly Accessing George Floyd's Medical Records

On Sept. 24, 2020, the Minneapolis *Star Tribune* reported that multiple Hennepin Healthcare employees had improperly accessed George Floyd's medical records. The conduct violated the hospital's policy on confidentiality of patient information, according to the newspaper, which had obtained dismissal letters issued to five employees pursuant to a public records request. Although the letters did not specify whose patient information was breached, they did refer to a "high profile patient" and a case that was receiving news coverage. After the letters were sent to the employees, Hennepin Healthcare also wrote to Floyd's family notifying them that several workers had accessed his private data and were no longer employed by the hospital.

The letters obtained by the *Star Tribune* show that some employees offered explanations for why they reviewed the medical records. One employee said they were "concerned about the safety of the paramedics that had worked on this patient." Another letter reviewed by the newspaper showed that a lab specialist claimed to have looked at the patient's records because of a request from the medical examiner, but that the employee later said they "did accidentally slip up." The letter reads: "You stated that co-workers were talking about the medical information that was being reported on the news, and you clarified for them what was stated/written in the medical record."

A spokesperson for Hennepin Healthcare would not answer questions from the *Star Tribune* about the privacy beaches but said the hospital performs "privacy audits" and has an obligation to notify patients whose privacy has been breached. In a statement to the newspaper, attorneys for the Floyd family said they were examining ways to "make this right and make the family whole for this incredible intrusion of privacy." They continued, "The security of medical records and personal information is of critical importance in Minnesota and across the country." The law firm added: "When George Floyd was desperate for a breath, the city of Minneapolis pushed on his neck further. And even after death, he was abused and mistreated by the system. Shameful."

On September 11, the *HIPAA Journal* wrote that the alleged privacy breaches were "in clear violation of hospital policies and the Health Insurance Portability and Accountability Act (HIPAA)." As the *Bulletin* went to press, the Floyd family had not filed a lawsuit in relation to reported privacy breaches.

— Jonathan Anderson
Silha *Bulletin* Editor

Justice Ginsburg Passes Away; Authored and Joined Key First and Fourth Amendment Majority and Dissenting Opinions

On Sept. 18, 2020, U.S. Supreme Court Associate Justice Ruth Bader Ginsburg died of complications of metastatic pancreatic cancer. Justice Ginsburg, who was 87 years old, was revered as a crusader for women's rights and equality, but also authored and joined several majority and dissenting opinions in key First and Fourth Amendment cases.

SUPREME COURT

On June 14, 1993, Ginsburg accepted President Bill Clinton's nomination to the Supreme Court where she served for over 27 years before her death. Her most notable majority opinion in a free speech case came in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). She held that Colorado violated the First Amendment when it required people circulating petitions to place initiatives on a general ballot to meet three conditions — 1) be registered voters, 2) wear an identification badge bearing the circulator's name, and 3) file monthly disclosures — all violated the First Amendment.

Justice Ginsburg cited the Court's ruling in *Meyer v. Grant*, 486 U.S. 414 (1988), in which it held that "petition circulation is 'core political speech' for which First Amendment protection is 'at its zenith'" and that the First Amendment "requires vigilance . . . to guard against undue hindrances to political conversations and the exchange of ideas." She added, "Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions. That requirement produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*." Justice Ginsburg's full ruling is available online at: https://supreme.justia.com/cases/federal/us/525/182/.

In a Sept. 24, 2020 commentary for the Freedom Forum, David L. Hudson Jr., an assistant professor of law at Belmont University and a First Amendment Fellow at the Freedom Forum, explained that Justice Ginsburg's First Amendment jurisprudence was most notable in relation to speech and the press in two areas: 1) commercial speech and 2) "the intersection between the First Amendment and copyright law."

Hudson wrote, "Ginsburg's First Amendment jurisprudence . . . is marked by a generally strong commitment to the protection of commercial speech or advertising." He cited Justice Ginsburg's majority opinion in *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994), in which she held that Silvia Safille Ibanez, an attorney and public accountant, had not intended to deceive the public and was merely disclosing information in a Yellow Pages advertisement stating that she was a certified public accountant and a certified financial planner. Justice Ginsburg's full ruling is available online at: https://casetext.com/case/ibanez-v-florida-dept-of-bus-prof-reg.

Hudson added that Justice Ginsburg "consistently voted with her colleagues in cases that held the government to a strict standard when attempting to regulate truthful, non-misleading advertising — such as the alcohol advertising decision *44 Liquormart, Inc. v. Rhode Island* (1996)[.]" In that case, the Supreme Court held that Rhode Island's complete ban on advertisements providing the retail price of alcoholic beverages violated the First Amendment. 517 U.S. 484 (1996).

Hudson noted, however, that Justice Ginsburg joined the dissenting justices in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Justice Stephen Breyer wrote in the dissenting opinion that "[t]he First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing . . . a lawful governmental effort to regulate a commercial enterprise." Conversely, the majority opinion written by Justice Anthony Kennedy held that a Vermont law restricting "the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors" "imposes a speaker- and content-based burden on protected expression," necessitating a "stricter form of judicial scrutiny." (For more information on *Sorrell*, see "U.S. Supreme Court Invalidates Vermont Prescription Confidentiality Law" in the Summer 2011 issue of the Silha *Bulletin*.)

Regarding copyright, Justice Ginsburg authored majority opinions in two significant copyright cases. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme Court held that the Copyright Term Extension Act of 1998 (CTEA), which extended the terms of existing and future copyrights by 20 years, did not violate the First Amendment. Justice Ginsburg wrote, "The First Amendment securely protects the freedom to make — or decline to make — one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." Justice Ginsburg's ruling is available online at: https://www.law.cornell.edu/supct/html/01-618.ZO.html. (For more information on *Eldred*, see "Recent Developments in Copyright Law: Copyright Term Extension Upheld as Constitutional" in the Winter 2003 issue of the Silha *Bulletin*.)

Nearly a decade later, in *Golan v. Holder*, 565 U.S. 302 (2012), the Court upheld the constitutionality of Section 514 of the Uruguay Round Agreements Act (URAA), which restored copyright protection for thousands of foreign works that were previously in the public domain. Justice Ginsburg cited her opinion in *Eldred v. Ashcroft* and wrote, "Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit." Justice Ginsburg's ruling is available online at: https://scholar.google.com/scholar_case?case=3239612723066820072.

Justice Ginsburg also authored notable concurring opinions, including in cases implicating freedom of the press. *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), arose when California "amended Cal. Govt. Code Ann. § 6254(f)(3) to require that a person requesting an arrestee's address declare that the request is being made for one of five prescribed purposes and that the address will not be used directly or indirectly to sell a product or service." United Reporting Publishing had previously provided "names and addresses of recently arrested individuals to its customers,"

which included attorneys, insurance companies, and others.

The Supreme Court held that the government may selectively grant access to public record information, reasoning that the Los Angeles Police Department (LAPD) was "correct that § 6254(f)(3) is not an abridgment of anyone's right to engage in speech, but simply a law regulating access to information in the government's hands." The Court found that "this [was] not a case in which the government [prohibited] a speaker from conveying information that the[y] already possess[]. The California statute . . . merely requires respondent to qualify under the statute if it wishes to obtain arrestees' addresses[.]"

In a concurring opinion, Justice Ginsburg agreed with the majority in asserting that "[a]nyone who comes upon arrestee address information in the public domain is free to use that information as she sees fit. It is true . . . that the information could be provided to and published by journalists, and § 6254(f)(3) would indeed be a speech restriction if it then prohibited people from using that published information to speak to or about arrestees. But the statute contains no such prohibition. Once address information is in the public domain, the statute does not restrict its use in any way."

She further argued that statutes allowing for "selective disclosure" of records is better than "an all-or-nothing regime" because states would be likely to choose, under such circumstances, to release "nothing" because that would be "a State's easiest response." Justice Ginsburg added, "[I]f States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech." Her full concurring opinion is available online at: https://supreme.justia.com/cases/federal/us/528/32/.

Justice Ginsburg, who was known for her sharp dissents in other areas of law, garnering her the nickname "the Notorious RBG," dissented in several First Amendment cases as well, often ruling in favor of stronger First Amendment protections. One such case was *Beard v. Banks*, 548 U.S. 521 (2006), in which the majority held that a prison's ban on reading materials, including newspapers, magazines, and photographs, did not violate the First Amendment. In her dissenting opinion, which focused largely on the issue of summary judgment, Justice Ginsburg also wrote that she joined Justice John Paul Stevens in holding that "the justifications advanced by the Secretary of Pennsylvania's Department of Corrections (Secretary) do not warrant pretrial dismissal of Ronald Banks's complaint alleging arbitrary deprivation of access to the news of the day." Her full dissent is available online at: https://supreme.justia.com/cases/federal/us/548/521/.

Justice Ginsburg also authored an important dissenting opinion in *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), in which the majority upheld the Federal Communication Commission's (FCC) new policy on "indecency," which no longer required that vulgar four-letter words be repeated in order for the speech to be actionable. The new policy therefore banned even a single, "fleeting" use of such a word between 10 a.m. and 6 p.m. because children could be listening or watching.

In her dissenting opinion, Justice Ginsburg wrote that "there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow." She further held that the FCC's decision was "arbitrary, capricious, an abuse of discretion" in violation of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A), requiring remand of the case to the agency. Justice Ginsburg reasoned that the FCC generally "provide[d] no empirical or other information explaining why [its] considerations, which did not justify its new policy before [in relation to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)], justify it now." In April 2013, the FCC adopted the "egregious situation standard," meaning it would only pursue "egregious cases" of indecency. Justice Ginsburg's dissent is available online at: https://supreme.justia.com/cases/federal/us/567/10-1293/case.pdf. (For more information on *Fox Television Stations, Inc.*, see "U.S. Supreme Court Ruling Leaves FCC's Ban on Fleeting Expletives in Place" in the Spring 2009 issue of the Silha *Bulletin*.)

In other significant speech and press cases, Justice Ginsburg joined her colleague's dissenting opinions. For example, in *Citizens United v. FEC*, 58 U.S. 310 (2010), the Supreme Court ultimately struck down portions of the Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U.S.C. § 441b, a federal campaign finance law, because it impermissibly discriminated against the First Amendment rights of corporations to expressly support political candidates." The 5-4 majority held that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."

Justice Ginsburg joined Justice Stevens' dissenting opinion in which he primarily contended that he would have reached a narrower ruling and that the majority had ignored or worked around existing Court precedent. Justice Stevens also focused on the risk of corporations undermining the democratic system of self-government, as well as contending that corporations' "domination" of political speech, especially during an election, would limit the marketplace of ideas. He therefore called for the recognition of "the integrity of the marketplace of political ideas" in candidate elections. (For more information on *Citizens United* and Justice Stevens' dissenting opinion, see "Former Supreme Court Justice John Paul Stevens Passes Away; Authored Notable First Amendment Majority and Dissenting Opinions" in the Summer 2019 issue of the Silha *Bulletin* and "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue. Campaign finance was also the topic of the 2003 Silha Lecture, featuring attorney Ken Starr. For more information on his lecture, "Political Liberty: Campaign Finance and the Freedoms of Speech and Association" see "Ken Starr Presents 18th Annual Silha Lecture" in the Fall 2003 issue of the Silha *Bulletin*, which is available online at: https://conservancy.umn.edu/bitstream/handle/11299/150038/BulletinFall2003.pdf?sequence=1&isAllowed=y.)

Another example was in the area of student speech. In 2007, the Supreme Court held in *Morse v. Frederick* that school officials can prohibit students from displaying messages that promote illegal drug use. 551 U.S. 393 (2007). The Court further held that although students do have some right to political speech even while in school, this right does

Ginsburg, *continued on page 24*

Ginsburg, *continued from page 23*

not extend to pro-drug messages that may undermine the school's mission of discouraging drug use. The case arose after a group of high school students, including Joseph Frederick, held up a sign reading "BONG HiTS 4 JESUS" as the Olympic Torch passed through Juneau, Alaska.

Justice Ginsburg once again joined a dissenting opinion by Justice Stevens. In this case, he wrote that the First Amendment should "protect[] student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." He concluded, "This nonsense banner does neither." Justice Stevens further argued that the majority did "serious violence to the First Amendment in upholding — indeed, lauding — a school's decision to punish Frederick for expressing a view with which it disagreed." (For more information on *Morse* and Justice Stevens' dissenting opinion, see "Former Supreme Court Justice John Paul Stevens Passes Away; Authored Notable First Amendment Majority and Dissenting Opinions" in the Summer 2019 issue of the Silha *Bulletin* and "In *Morse v. Frederick*, Court Places Limits on Student Expression" in the Summer 2007 issue.)

Finally, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (*Turner I*), the unanimous Supreme Court held that the First Amendment allowed for different standards between cable television and broadcast media. The Court concluded that the "less rigorous standard of scrutiny now reserved for broadcast regulation . . . should not be extended to cable regulation, since the rationale for such review — the dual problems of spectrum scarcity and signal interference — does not apply in the context of cable."

However, after the Court remanded the case to the lower court, the case returned to the Supreme Court in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) (*Turner II*). In that case, a five-judge majority held that the "must-carry" provisions at issue in *Turner I* — namely the requirement that "cable television systems . . . dedicate some of their channels to local broadcast television stations" — were constitutional under the First Amendment because they satisfied the "intermediate scrutiny standard," whereby "a content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."

Justice Ginsburg joined the dissenting opinion in *Turner II*, in which Justice Sandra Day O'Connor argued that the "must-carry requirements thus burden an operator's First Amendment freedom to exercise unfettered control over a number of channels in its system, whether or not the operator's present choice is aligned with that of the Government." She ultimately held that the statute at issue "is not narrowly tailored to serve a substantial interest in preventing anticompetitive conduct."

Justice Ginsburg also authored dissenting opinions in Fourth Amendment cases, including in *Kentucky v. King*, 563 U.S. 452 (2011), which arose when Lexington, Ky. police officers "set up a controlled buy of crack cocaine outside an apartment complex" and "by knocking on the door of a residence and announcing their presence, cause[d] the occupants to attempt to destroy evidence." The Court held that police may enter a private home without a warrant under "exigent circumstances," such as the imminent destruction of evidence, so long as the law enforcement officers do not create the emergency through conduct in violation of the Fourth Amendment. The Court found that the officers knocking on the door was "entirely lawful" and "did not violate the Fourth Amendment or threaten to do so," meaning the exigent circumstances rule applies.

Justice Ginsburg, the lone dissenting vote, wrote that the majority "arm[ed] the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force." She provided several reasons, including that "[i]n no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as 'entitled to special protection,'" citing *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

Justice Ginsburg added that she "would not allow an expedient knock to override the warrant requirement. Instead, I would accord that core requirement of the Fourth Amendment full respect. When possible, 'a warrant must generally be secured,' the Court acknowledges. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion." Justice Ginsburg's full dissent is available online at: https://casetext.com/case/king-v-commonwealth-14.

Justice Ginsburg would also promote stronger Fourth Amendment protections by joining majority rulings by her colleagues. For example, in *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206 (2018), she joined Chief Justice John Roberts' majority opinion holding that government actors need a warrant to obtain historical data from cell phone carriers detailing the movements of a cell phone user, known as cell site location information (CSLI). (For more information on *Carpenter*, see "U.S. Supreme Court Rules Law Enforcement Must Obtain Warrant to Access Individuals' Historical Cell Site Records" in the Summer 2018 issue of the Silha *Bulletin*.)

Justice Ginsburg also joined Chief Justice Robert's opinion in *Riley v. California*, 573 U.S. 373 (2014), in which the Supreme Court unanimously held that law enforcement officers are required to obtain a warrant before searching an arrested individual's cell phone data. (For more information on *Riley*, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

In his Sept. 24, 2020 commentary, Hudson concluded by writing, "Justice Ruth Bader Ginsburg was small in stature, but a giant in American jurisprudence and — in later years — popular culture. Her seminal accomplishments in making the world a better place by advocating for gender equality should not cause us to lose sight of her many other contributions, including those to the First Amendment."

— Scott Memmel
Postdoctoral Associate

Associate Justice Amy Coney Barrett Has "Relatively Light" Record on First Amendment and Press Law, Legal Experts Say

On Oct. 27, 2020, Amy Coney Barrett was sworn into office as an Associate Justice of the U.S. Supreme Court, succeeding Associate Justice Ruth Bader Ginsburg, who died on Sept. 18, 2020. Before President Donald Trump nominated Barrett to the Supreme Court, she served as a judge on the U.S. Court of Appeals for the Seventh Circuit and was also a professor at Notre Dame Law School. Barrett's nomination drew scrutiny and commentary about her record on various legal topics, including issues that affect speech and press rights. (For more information about Ginsburg's time on the Court and her role in notable cases, see "Justice Ginsburg Passes Away; Authored and Joined Key First and Fourth Amendment Majority and Dissenting Opinions" on page 14 of this issue of the Silha *Bulletin*.)

SUPREME COURT

On October 9, Grayson Clary of the Reporters Committee for Freedom of the Press (RCFP) published an analysis of Barrett's record on the First Amendment and press law. "That record is relatively light," Clary wrote. "Judge Barrett has joined very few published opinions addressing First Amendment issues and has written fewer. Her academic work, for its part, is primarily focused on questions of judicial method rather than particular areas of the law." Clary identified three cases that related to speech, and one case that involved defamation. Each of those cases was reviewed in turn. RCFP's analysis is available online at: https://www.rcfp.org/amy-coney-barrett-press-rights/.

Two of the cases involved employment speech. In *Lett v. City of Chicago*, 946 F.3d 398 (7th Cir. 2020), the plaintiff-appellant, Kelvin Lett, a City of Chicago investigator, claimed that the city and his superiors violated the First Amendment by retaliating against him after he refused to alter a report about a police shooting. Barrett, who authored the January 2020 decision for the three-judge panel, concluded that Lett's First Amendment rights were not violated because he was speaking as a public employee not as a private citizen. Barrett cited *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which "supplies the test for distinguishing employee and citizen speech." (For more information about *Garcetti*, see "Government Interference with Speech, *Garcetti v. Ceballos*" in the Spring 2006 issue of the Silha *Bulletin*.) Under *Garcetti*, if speech "owes its existence to a public employee's professional responsibilities," "then the employee speaks in his capacity as an employee rather than a private citizen and his speech is not protected." The full ruling is available online at: https://z.umn.edu/61r5.

In the second case, *Adams v. Board of Education of Harvey School Dist. 152*, 968 F.3d 713 (7th Cir. 2020), a three-judge panel upheld a jury award of $400,000 to an Illinois school principal who alleged that she was the subject of retaliation in violation of the First Amendment. The full ruling, which Barrett did not author, is available online at: https://z.umn.edu/61r6.

Finally, in the third speech case, *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2020), a three-judge panel upheld a Chicago ordinance that imposed an 8-foot "bubble zone" around abortion clinics prohibiting "sidewalk counselors" from engaging in passersby for the purpose of "counseling, education, leafletting, handbilling, or protest." Barrett did not author the opinion, but the vote was unanimous. The panel wrote that it was bound by precedent under *Hill v. Colorado*, 530 U.S. 703 (2000), in which the Supreme Court "upheld a nearly identical Colorado law against a similar First Amendment challenge." The full ruling in *Price* is available online at: https://z.umn.edu/61r7.

Barrett also ruled in a case that partly involved a defamation claim. In *Shea v. Winnebago County Sheriff's Department*, 746 F. App'x 541 (7th Cir. 2018), a three-judge panel issued a non-precedential opinion in a *pro se* lawsuit brought by an Illinois attorney against his sister, brother-in-law, and various deputies and jail employees of the Winnebago County Sheriff's Department. One of the claims was defamation, in which Shea alleged that his sister filed a "false criminal complaint" that accused him of domestic battery and that his brother-in-law falsely told sheriff's deputies that he was responsible for a hit-and-run, improperly used a van owned by his mother, and stole his mother's keys. The District Court dismissed the defamation claim on the grounds that it lacked sufficient detail. The three-judge panel upheld the dismissal, but for a different reason: In Illinois, "'statements made to law enforcement officials, for the purpose of instituting legal proceedings, are granted absolute privilege' from defamation actions." In support of that proposition, the panel cited *Morris v. Harvey Cycle & Camper, Inc.*, 911 N.E.2d 1049, 1055 (Ill. App. Ct. 2009) and *Vincent v. Williams*, 664 N.E.2d 650, 655 (Ill. App. Ct. 1996). The full ruling is available online at: https://z.umn.edu/61r4.

During her confirmation hearing, Barrett was asked to name the five First Amendment freedoms but could recite only four. On October 14, Sen. Ben Sasse (R-Neb.) asked Barrett, "What are the five freedoms of the First Amendment?" Barrett responded: "Speech, religion, press, assembly . . . I don't know; what am I missing?" Barrett's response omitted the right to "petition the government for a redress of grievances." Sasse then asked Barrett why the five rights were grouped in the same amendment. Barrett said she did not know, but added that "assembly and protest and speech bear more relation to one another than necessarily free exercise." Barrett also said, "I think they are in the First Amendment and that reflects that those were core values that reflects that the states who ratified the original constitution on the understanding that a Bill of Rights would be added wanted protections like that to be included because they were really core to what the new Americans thought was going to be America." In that statement, Barrett emphasized the word "First" in saying "First Amendment," perhaps suggesting that the First Amendment is important because it is

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numerically first. However, Akhil Reed Amar, the Sterling Professor of Law and Political Science at Yale University, has observed that the text of the First Amendment was not actually the first article proposed or ratified to append to the Constitution, but rather the third. Only because the first two proposed amendments failed ratification did what is known as the First Amendment become first. Amar's analysis is available online at: https://lawreview.law.ucdavis.edu/issues/47/4/Lecture/47-4_Amar.pdf. The exchange between Sasse and Barrett is available online at: https://www.youtube.com/watch?v=a6-mJpqTqSw.

On Oct. 14, 2020, Ken Paulson of the Free Speech Center at Middle Tennessee State University commented on the exchange between Sasse and Barrett. Paulson noted that Sasse's reply to Barrett — when she could not remember the fifth right contained in the First Amendment — was that she was missing "redress or protest." Said Paulson: "Nope. They're not the fifth freedom. That would be 'the right to petition government for redress of grievances.'" Paulson continued: "Protest can actually take place in tandem with any of the five freedoms — speech, press, assembly, religion and petition. Thanks to both Barrett and Sasse for making the case for First Amendment education." Paulson's full commentary is available online at: https://mtsu.edu/first-amendment/post/1038/confirmation-hearing-making-the-case-for-first-amendment-education.

Also during the hearing, on Oct. 14, 2020, Sen. Amy Klobuchar (D-Minn.) asked Barrett whether the actual malice standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), should be overturned, as Justice Clarence Thomas suggested in February 2019. (For more information about Justice Thomas' views on *Sullivan*, see "Justice Thomas Calls for Supreme Court to Reconsider the Actual Malice Standard" in the Winter/Spring 2019 issue of the Silha *Bulletin*.) Barrett responded: "I can't really express a view on either *New York Times v. Sullivan* or Justice Thomas' critique of it without violating the principle that I've repeatedly stated that all nominees follow that I can't comment on matters of litigation or grade precedents that the Court has already decided." Klobuchar also discussed *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the concept of reporter's privilege, asking Barrett: "Under its original public meaning, does the First Amendment protect a reporter's decision to protect a confidential source?" Barrett responded: "Again that would be eliciting a legal conclusion from me which I can't answer in a hypothetical form in the hearing itself, so a question as you point out that's closely related to ones that are being litigated." Klobuchar then asked: "Do you agree that if reporters cannot protect their sources, they are less likely to be able to find confidential witnesses willing to share information, confidential informers willing to share information about issues of public importance?" Barrett responded: "That would both be a policy question, a matter of public policy, which I can't express a view on, and presumably also one that might factor into the question of what the First Amendment protects, so again that's not something that I can give an opinion on in this context." The exchange between Klobuchar and Barrett is available online at: https://www.youtube.com/watch?v=qZqsSJqlehc.

— Jonathan Anderson
Silha *Bulletin* Editor

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Misinformation Concerns Precede and Follow Presidential Election

In Fall 2020, numerous concerns about misinformation preceded and followed the presidential election on November 3. In September and December, James O'Keefe, a political activist known for posting controversial surreptitious audio and video recordings on his website, Project Veritas, undertook separate efforts claiming to uncover evidence of voter fraud in Minneapolis, Minn. and anti-conservative bias by CNN and its employees. In October, the *New York Post* published an article containing unverified assertions that now-President Elect Joe Biden engaged in corruption to help his son's business activities in Ukraine. Also in October, and again in January 2021, major social media platforms took steps to ban conspiracy theories that advocate or have resulted in real-world violence, most notably theories advanced by the QAnon community. (For more information on social media platforms and the banning of President Trump, see "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" on page 1 of this issue of the Silha *Bulletin*.)

MISINFORMATION

Project Veritas Faces Renewed Criticism Following Disputed Election Fraud Claims and Targeting CNN Editorial Meetings

In September and December 2020, political activist James O'Keefe, who is known for publishing controversial hidden camera videos on his website, Project Veritas, was behind separate efforts to allege voter fraud in Minneapolis, Minn. and anti-conservative bias by CNN. On September 27, Project Veritas claimed that it had evidence proving that U.S. Rep. Ilhan Omar (D-Minn.) and Minneapolis City Council member Jamal Osman were part of election fraud schemes in the run up to the November 2020 elections. However, the video released by O'Keefe and Project Veritas was later discredited by several news outlets and experts. On December 1, O'Keefe released a series of recordings of CNN's daily editorial conference calls earlier in fall 2020. He also released a video depicting himself calling into CNN's December 1 conference call and questioning CNN President Jeff Zucker about the journalistic integrity and independence of the news outlet. The moves prompted renewed criticism from observers, as well as speculation that O'Keefe's actions were illegal.

O'Keefe has a long history of posting undercover videos on Project Veritas that raise legal and ethical questions. O'Keefe first gained notoriety in 2009 when he released a series of undercover videos 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. 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.). 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. (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*.)

O'Keefe's targeting of CNN in December 2020 was not the first instance of him doing so. In fall 2019, Project Veritas released a series of videos purporting to depict CNN employees discussing "tak[ing] down President Trump" and a "personal vendetta" against the president and his administration, among other comments. The videos were cited in a letter sent on behalf of President Donald Trump to Zucker and CNN General Counsel David Vigilante, accusing the network of violating the Lanham Act of 1946, 15 U.S.C. § 1051 *et seq.*, a federal statute that governs trademarks and also includes provisions against false advertising. (For more information on the letter, see "Letter Sent on Behalf of President Trump Threatens Legal Action Against CNN, Prompting Criticism" in the Fall 2019 issue of the Silha *Bulletin*.)

In 2017, O'Keefe released a series of videos targeting the news outlet, one of which purported to show a CNN producer calling the coverage of President Trump's possible collusion with Russia during the 2016 presidential election "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." (For more information on the 2017 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*.)

Following the release of each of these videos, news outlets and scholars criticized O'Keefe's undercover recording methods and called into question the legitimacy of the videos, which have also targeted *The Washington Post*, Democratic politicians, and others. (For more information on the operation against the *Post*, see "Undercover Video Maker James O'Keefe Continues Attacks on the News Media, Faces Setbacks in Some Legal Disputes" in the Winter/Spring 2018 issue of the Silha *Bulletin*.) In some cases, O'Keefe has faced legal action, including in 2010 when he was sentenced to three years of probation, 100 hours of community service, and a $1,500 fine in connection to Project Veritas' illegal surveillance of Landrieu.

Additionally, on Jan. 4, 2018, Judge Ellen Huvelle of the U.S. District Court for the District of Columbia 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 had 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. (For more information on the legal victories against O'Keefe, see "Undercover Video Maker James O'Keefe Continues Attacks on the News Media, Faces Setbacks in Some Legal Disputes" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

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On Sept. 29, 2020, the Minneapolis *Star Tribune* reported that President Trump and Minnesota Republican lawmakers had called for an investigation after Project Veritas alleged two days earlier that it had obtained video proving that Minneapolis City Council member Jamal Osman and U.S. Rep. Ilhan Omar (D-Minn.) were part of election fraud schemes in the leadup to the November 2020 elections. According to the *Star Tribune*, Project Veritas' video included Snapchat recordings posted in July 2020 depicting Minneapolis resident Liban Mohamed — the brother of Osman — saying that he had collected 300 absentee ballots in a single day for his brother's special election race in Minneapolis' Sixth Ward. Mohamed could be heard saying in the video, "Money is everything, money is the king of this world. If you don't have money you should not be here period." The video also depicted unnamed sources and covert footage alleging that canvassers for Omar were part of a "cash for ballots voter fraud scheme."

Project Veritas and some Republican observers claimed that the video was therefore evidence of a "cash-for-ballot scheme" and "ballot harvesting," a practice that allows third parties to collect ballots and return them to polling locations under certain circumstances. The full video is available online at: https://www.projectveritas.com/news/ilhan-omar-connected-cash-for-ballots-voter-fraud-scheme-corrupts-elections/. Significantly, the *Star Tribune* noted that there was "no direct evidence in the videos of money being exchanged for ballots."

Additionally, several media outlets noted that ballot harvesting was legal in Minnesota under certain circumstances. They cited a September 4 ruling by the Minnesota Supreme Court, which held that a third party may help more than three disabled people mark their ballots, but can only deliver absentee ballots of, at most, three people. *DSCC v. Simon*, No. A20-1017 (Minn. 2020). Chief Justice Lorie S. Gildea wrote the expedited four-page ruling, which affirmed in part and reversed in part the ruling of Minnesota Second Judicial District Judge Thomas Gilligan, who had ordered on July 28 that the state stop enforcing the three-person limit on both helping people fill out ballots *and* delivering them. On October 28, the Court released a full opinion to "explain[] the reasons for our [September 4] decision." *DSCC v. Simon*, 950 N.W.2d 280 (Minn. 2020). The Minnesota Supreme Court's September 4 ruling is available online at: https://scholar.google.com/scholar_case?case=8208851250102741992&hl=en&as_sdt=6&as_vis=1&oi=scholarr. The opinion explaining the ruling is available online at: https://casetext.com/case/dscc-v-simon.

Nevertheless, a spokesperson for the Minneapolis Police Department (MPD) told the *Star Tribune* that the department was "in the process of looking into the validity" of the group's statements. In a September 28 tweet, MPD wrote that it was "aware of the allegations of vote harvesting.. . . We are in the process of looking into the validity of those statements. No further information is available at this time on this." The Hennepin County Attorney's Office similarly told the *Star Tribune* it was made aware of the allegations, but had not received any information or cases involving "ballot harvesting." As the *Bulletin* went to press, no legal action had been taken as a result of Project Veritas' claims.

In a Facebook post, Osman condemned the allegations, writing, in part, "Throughout my campaign, I let my staff, volunteers and supporters know my values including the type of race I wanted to run.. . . I stated publicly the importance to run a positive and ethical campaign. I condemn behavior that contradicts these values. That is why I also condemn the continued attacks on the integrity of the East-African immigrant community in Minneapolis. The community is proud to be here, passionate about exercising their constitutional right to vote and excited to elect the next President of the United States." In a separate statement, Minnesota Democratic-Farmer-Labor Chairman Ken Martin said, "Project Veritas is a discredited, far-right propaganda outfit known for lying, entrapment, and breaking the law." In an October 6 tweet, Omar criticized Project Veritas' actions and claims, writing, "So you're saying a coordinated misinformation campaign by a known fraud was actually…a fraud?! . . . This is on brand for Trump and his stooges, fraudsters who love concocting desperate racist conspiracies and chaos in an effort to distract the public from their failures." But on September 17, President Trump retweeted a tweet by *Breitbart News* reporting on Project Veritas' claims. Trump also wrote, "This is totally illegal. Hope that the U.S. Attorney in Minnesota has this, and other of her many misdeeds, under serious review??? If not, why not??? We will win Minnesota because of her, and law enforcement. Saved Minneapolis & Iron O Range!"

In the days following the release of the video by Project Veritas, several media outlets and experts discredited the video. On Sept. 29, 2020, the Election Integrity Partnership (EIP) — a coalition of research entities focused on "detect[ing] and mitigate[ing] the impact of attempts to prevent or deter people from voting or to delegitimize election results" — concluded that Project Vertias' video was "an interesting example of what a domestic, coordinated elite disinformation campaign looks like in the United States." The report reasoned that "[t]he video made several falsifiable claims that have either been debunked by subsequent reporting or are without any factual support. As the video calls into question the integrity of the election using misleading or inaccurate information, we determined this video to be a form of election disinformation." The report went on to provide "the timeline of how the ideas in this video were initially seeded and then aggressively spread" by several political figures and observers on social media. The full report is available online at: https://www.eipartnership.net/rapid-response/project-veritas-ballotharvesting.

In a September 29 interview with *The New York Times*, Alex Stamos, the director of the Stanford Internet Observatory, one of the research organizations affiliated with the EIP, called the spread of Project Veritas' claims "a great example of what a coordinated disinformation campaign looks like: pre-seeding the ground and then simultaneously hitting from a bunch of different accounts at once."

On October 1, the *Daily Dot*, a digital media company covering multiple aspects of the Internet, reported that Project Veritas' "key whistleblower" in the Somali community in Minnesota was "hilariously uncredentialed." The report explained that Project Veritas claimed that the source, Omar Jamal, worked for the "Somali Watchdog Group." However, Jamal reportedly registered the website of the organization in late August 2020, at least one month after Project Veritas began producing the

videos alleging ballot harvesting in Minneapolis. On October 1, the *Sahan Journal* in Minneapolis reported that Jamal had backtracked on several of his claims of voter fraud in an interview with Somali American TV. Additionally, a spokesperson for Project Veritas told the *Daily Dot* that the organization could not confirm the authenticity of the Somali Watchdog Group, as well as whether Jamal worked for the Ramsey County Sheriff's Office as he had previously claimed.

On October 5, FOX 9, the Twin Cities' Fox affiliate, reported that Osman was offered $10,000 by a man working for Project Veritas to claim that he was harvesting ballots for Omar. In an interview with FOX 9, Osman said the man "was setting me up" and explained that he declined the offer. On Oct. 7, 2020, the *Huff Post* contended that the reports by FOX 9 and the Daily Dot both "debunk[ed] Project Veritas' claims" of election fraud. Finally, on October 16, *USA Today* concluded that there was no proof of a voter fraud scheme implicating Omar or Osman.

Meanwhile, on Dec. 3, 2020, *The Washington Post* reported that O'Keefe had filmed himself calling into CNN's conference call on December 1 and summarily questioning Zucker about the journalistic integrity of the network. According to the *Post*, O'Keefe's actions were an effort to promote a new series of recordings of CNN's daily morning editorial calls, though some observers questioned the legality of O'Keefe's actions.

In a video released by Project Veritas, O'Keefe was depicted calling into a teleconference call hosted by Zucker. O'Keefe first stated that "we've been listening to your CNN calls for basically two months [and have been] recording everything." He then asked Zucker, "Do you still feel you are the most trusted name in news? . . . We've got a lot of records that indicate that you are not really that independent of a journalist." Zucker responded by suggesting that he would reschedule the meeting with the call attendees and use a "new system." O'Keefe then declared that Project Veritas would release several recordings of past CNN meetings later that day. The full video is available online at: https://www.pscp.tv/w/1mnxeaBlrlNxX.

According to *The Washington Post*, in one recording, Zucker was heard telling CNN employees, "I just wanted to reemphasize that we cannot normalize what has happened here in the last week with Trump and his behavior.. . . This is a president who knows he's losing, who knows he's in trouble, is sick, maybe is on the aftereffects of steroids or not, I don't know, but he is acting erratically and desperately, and we need to not normalize that." After O'Keefe posted the video of himself joining the CNN call to Twitter in a December 1 tweet, the CNN public relations staff responded through the "CNN Communications" Twitter account, "Legal experts say this may be a felony. We've referred it to law enforcement."

Although CNN did not elaborate on the legal issues, *The Washington Post* noted that several of the meeting attendees had called in from states "that require the consent of both parties for a recording to be made." One such state is California, where Cal. Penal Code § 632(a) (2020) provides that "a person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

In an interview with the *Post* on December 3, O'Keefe defended his actions, stating, "Project Veritas has legal experts, too, and we believe Jeff Zucker is just mad and embarrassed," he said. "Project Veritas follows the law." O'Keefe added that Project Veritas gained access to the meeting, as well as previous meeting recordings, after being "given access to the CNN calls by a brave insider."

As the *Bulletin* went to press, CNN had not initiated any legal action against O'Keefe or Project Veritas.

New York Post Publishes 'Questionable' Story About Hunter Biden

In October 2020, the *New York Post* published a story suggesting corrupt practices involving now-President Elect Joe Biden and his son, Hunter Biden, which other news organizations have yet to substantiate. The report was purportedly based on information found in a laptop alleged to have belonged to Hunter Biden. However, the Biden campaign denied the allegations in the report and some social media platforms limited dissemination of the article. Multiple *Post* reporters also raised doubts about the veracity of the story and its main writer refused to attach his byline to it, according to *The New York Times* on October 18.

On October 14, the *New York Post* published a story headlined "Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad." The story claimed to contradict Joe Biden's public statements that he had not been involved with Hunter's business dealings in Ukraine. The story was principally based on an email that an executive at a Ukrainian energy company allegedly sent to Hunter Biden thanking him for introducing him to his father. The *Post* reported that the email was found on a laptop dropped off at a Delaware computer repair shop by someone claiming to be Hunter Biden in April 2019. The owner of the store has said that after he never heard back from the customer, he copied its contents and contacted federal authorities about the laptop, which the FBI subsequently retrieved, according to the *Post*. The newspaper said it was tipped off about the existence of the laptop by Stephen K. Bannon, President Donald Trump's former adviser who was indicted by a grand jury in August 2020 for alleged fraud. Rudolph W. Giuliani, President Trump's personal lawyer, gave the *Post* a copy of the laptop's hard drive on October 11, according to *The New York Times*.

On October 18, the *Times* reported that two anonymous *Post* employees had said the reporter who was largely responsible for writing the article declined to attach his byline to the story because of concerns about its credibility. That reporter was not alone, according to the *Times*, which reported, "Many Post staff members questioned whether the paper had done enough to verify the authenticity of the hard drive's contents, said five people with knowledge of the tabloid's inner workings. Staff members also had concerns about the reliability of its sources and its timing, the people said."

Major national newspapers — *The New York Times*, *The Washington Post*,

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Misinformation, *continued from page 29*

and *The Wall Street Journal* — were unable to independently corroborate the information in the *Post*'s story, according to the *Times*. A spokesperson for the *Post* told the *Times* in a written statement, "The story was vetted and The Post stands by its reporting."

The New York Times reported that within hours of the *Post*'s article appearing on the Internet, at least two social media platforms restricted its reach. Facebook limited the article's distribution so it could work to verify the information in the story, and Twitter blocked accounts from linking to the article on the basis that the story violated the platform's policy governing hacked information and ban on disclosing personal email addresses and phone numbers. Twitter later reversed course and allowed the article to be shared after coming under pressure from President Donald Trump and other conservative political figures.

On October 17, National Public Radio (NPR) media reporter David Folkenflik produced a story explaining why the *Post*'s claims were "questionable." First, Folkenflik said the emails have not been authenticated. "They were said to have been extracted from a computer assumed — but not proven — to have belonged to the younger Biden. They were said to have been given to the Post by Trump's personal lawyer Rudy Giuliani, who is known for making discredited claims about the Bidens," Folkenflik reported. Second, Folkenflik contended the *Post* as an outlet also raises concerns because it is owned by Rupert Murdoch, who has long supported Trump. One of the named reporters on the story also previously worked as a producer for Sean Hannity, the Fox News host who is friends with Trump. Murdoch also owns Fox News. Third, Folkenflik said there are important contextual factors to consider: "U.S. officials say Russian disinformation campaigns have sought to keep Hunter Biden's business dealings in Ukraine in the public eye. According to *The Washington Post*, intelligence officials warned the White House last year that Russian operatives had sought to give misinformation to Giuliani to be used against the Bidens. And NBC is now reporting that the FBI is investigating whether the material in the New York Post story originated in a foreign power's disinformation campaign," Folkenflik reported. He thus concluded that the *Post* story or parts of it might eventually be proven accurate, or that it might just amount to "speculative partisan advocacy." Whatever the story, Folkenflik said, it is "[a] totem of our media moment."

Major Social Media Platforms Ban QAnon Content

On Oct. 6, 2020, Facebook said it would close accounts that openly identify with QAnon, a community of conspiracy theorists whose claims have resulted in real-world violence. Facebook said the action would apply to both on its platform and Instagram, which Facebook also owns, even if the accounts do not contain violent content. On October 15, YouTube, among other Internet outlets, also announced that it would remove QAnon content.

QAnon began in 2017 after an unknown person with the Internet handle "Q Clearance Patriot," or "Q," posted on a message board that they had information about a war being waged between President Trump and a band of pedophiles, according to the *Times*. Members of the movement have falsely accused Democratic leaders of participating in a sex-trafficking scheme, the most prominent example of which was "Pizzagate," a false allegation that trafficked girls were being kept in the basement of a Washington, D.C., pizza restaurant. In December 2016, a North Carolina man fired an assault rifle inside the restaurant claiming he was investigating the sex-trafficking allegations, according to NBC News on June 22, 2017. No one was injured.

Facebook's move followed efforts by the company in August 2020 to remove various types of content associated with QAnon that discussed the potential for violence and to limit the reach of such material. "We've been vigilant in enforcing our policy and studying its impact on the platform but we've seen several issues that led to today's update," Facebook said in a blog post on October 6. "For example, while we've removed QAnon content that celebrates and supports violence, we've seen other QAnon content tied to different forms of real world harm, including recent claims that the west coast wildfires were started by certain groups, which diverted attention of local officials from fighting the fires and protecting the public." Facebook's blog post is available online at: https://about.fb.com/news/2020/08/addressing-movements-and-organizations-tied-to-violence/.

Facebook later said in an update to its blog post that "when someone searches for terms related to QAnon on Facebook and Instagram, we will redirect them to credible resources from the Global Network on Extremism and Technology (GNET), the academic research network of the Global Internet Forum to Counter Terrorism. This is the latest expansion of our Redirect Initiative to help combat violent extremism and will direct people to resources that can help inform them of the realities of QAnon and its ties to violence and real world harm." The update is available online at: https://about.fb.com/news/2020/08/addressing-movements-and-organizations-tied-to-violence/.

On October 15, *The New York Times* reported that YouTube and other social media platforms — Pinterest, Etsy, and Triller — also began banning content promoting QAnon. YouTube revised its content policies to prohibit "content that targets an individual or group with conspiracy theories that have been used to justify real-world violence," according to a blog post from the company. YouTube will ban content that promotes QAnon and other similar conspiracy theories. However, news stories about QAnon and content discussing the group that does not "target[] individuals or protected groups may stay up."

The move comes after YouTube two years ago revised its recommendation system, which the company said has resulted in a significant drop in views of QAnon content. YouTube also said it had "removed tens of thousands of QAnon-videos and terminated hundreds of channels under our existing policies, particularly those that explicitly threaten violence or deny the existence of major violent events." YouTube's blog post is available online at: https://blog.youtube/news-and-events/harmful-conspiracy-theories-youtube/.

Additionally, YouTube was one of the platforms that removed content related to President Trump and suspended his official account. (For more information on social media platforms, suspending or banning President Trump, see "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" on page 1 of this issue of the Silha *Bulletin*.)

— Scott Memmel
Postdoctoral Associate
— Jonathan Anderson
Silha *Bulletin* Editor

National and Local News Outlets Face and Address Ethical Questions and Dilemmas

In fall 2020, news outlets across the United States faced a variety of ethical questions and dilemmas, prompting commentary, and in some cases criticism, from media ethics observers. On September 14, Minnesota Public Radio (MPR) announced that it had fired Eric Malmberg, a DJ at 89.3 The Current, MPR's sister station, who was accused of sexual harassment. The move came hours after MPR arts reporter Marianne Combs announced her resignation on Twitter, alleging that the company had attempted to cover for Malmberg despite significant evidence against him.

ETHICS

Following the death of U.S. Supreme Court Justice Ruth Bader Ginsburg on Sept. 18, 2020, several observers raised ethical questions about National Public Radio (NPR) correspondent Nina Totenberg's reporting on the Justice throughout her career after Totenberg wrote in an obituary that she and Justice Ginsburg had a longstanding friendship. (For more about the passing of U.S. Supreme Court Justice Ruth Bader Ginsburg, see "Justice Ginsburg Passes Away, Authored and Joined Key First and Fourth Amendment and Dissenting Opinions" on page 14 of this issue of the Silha *Bulletin*.) Media ethics experts argued that the friendship constituted a conflict of interest and a violation of the principle of independence, and should have been disclosed by NPR to the public.

On September 27, *The New York Times* published an investigative story based on President Donald Trump's tax returns, revealing several potentially problematic details about, and practices by, President Trump and his businesses. Following the revelations, observers generally agreed that the publication of information based on such records was both legal and ethical.

On October 15, several media outlets reported that C-SPAN had placed Steve Scully, the network's senior executive producer and political editor, on "administrative leave" after he admitted to lying about his Twitter account having been hacked earlier in the month.

Finally, also on October 15, NBC and ABC broadcast two separate town hall forums featuring President Donald Trump and then-presidential candidate Joe Biden, simultaneously, prompting criticism from observers primarily directed at NBC.

MPR Fires DJ Amidst Sexual Harassment Allegations, Resignation of MPR Reporter

On Sept. 14, 2020, Minnesota Public Radio (MPR) arts reporter Marianne Combs announced her resignation on Twitter, alleging that management attempted to cover for a DJ at the center of sexual misconduct allegations. Later the same day, MPR announced that it had fired Eric Malmberg, the DJ at 89.3 The Current, MPR's sister station, who was accused of sexual harassment.

In a string of tweets on September 14, Combs first wrote that "after more than 23 years at @MPRNews, I turned in my letter of resignation, effective immediately." She explained that in her letter of resignation, she had detailed spending "the past two and a half months investigating allegations made about the conduct of a DJ at our sister station, @TheCurrent. In that time, I gathered testimony from eight women who say that he sexually manipulated and psychologically abused them."

Combs asserted that she then "wrote a story draft and my editors presented it to our legal counsel for review. The lawyer judged the story to be compelling and well-sourced, with strong supporting documentation. She saw no legal threat to MPR News for airing the story." However, according to Combs, her "editors . . . failed to move forward on the story. They have countered that the DJ's actions were, for the most part, legal, and therefore don't rise to the level of warranting news coverage."

Combs continued, "While the editors have not gone so far as to cancel the story, they have shown such a complete lack of leadership that I no longer have any confidence they will handle the story appropriately.. . . This is not the first time in the past year that our newsroom has gathered, and then neglected, women's stories of abuse. For many of these women it took more than a decade to find the courage to speak up; when they eventually did, they put their trust in MPR News and me."

She added, "In my mind, by dragging our feet and sending the implicit message that their cause is not an urgent one, we are as good as silencing them. I cannot accept this course of action.. . . I'm resigning to show my continued support for these women.. . . These times call for leadership, a moral compass and courage. I sincerely hope that my resignation can serve as a catalyst for positive change and push the newsroom to do right by victims of abuse in the future."

Combs also addressed the importance of newsrooms reporting critically on their own company and employees, writing, "MPR hosts — whether they are news anchors or music DJs — are public figures and communicate what our organization stands for.. . . They must be held to a higher standard than simply obeying the law. And our newsroom must not flinch at turning a critical eye on our own company and staff." Combs' full string of tweets is available online at: https://twitter.com/MarianneSCombs/status/1305519037607292929.

On September 14, the Minneapolis *Star Tribune* reported that MPR responded that it was "blindsided" by Combs' resignation. In an on-air interview with MPR News' Cathy Wurzer, MPR President Duchesne Drew responded to Combs' tweets, stating that the editors "decided that the story, which deals with complex and sensitive issues, [was] not ready to run because it does not meet our journalistic standards. In fact, they were blindsided by Marianne's resignation and expected that she was continuing to work on the story."

Drew continued, "Editors had discussed with her how to strengthen the story.. . . The sources in the story do not allege that the subject of the story assaulted them or did anything illegal. None of the sources in the story were willing to be identified. The reporting could not confirm that any of the women had reported their allegations or incidents to authorities. No complaints regarding any action by him have been brought forward to MPR's HR staff. No MPR employee has made any accusations against him on their own behalf, nor on behalf of other employees.. . . Facts matter, to us and to our audiences, and we work hard to earn the trust of every listener by honoring the highest standards of professional journalism in every story."

However, on the same day, MPR News reported that the company, amid criticism from MPR employees and listeners, had announced that Malmberg would "no longer be a DJ at The Current." In a statement, Drew wrote, "Our hosts have to be able to attract an audience that wants to listen to them and trusts them and over

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the last 36 hours those conditions have changed for Malmberg." In a later email to the *Star Tribune*, Drew clarified that Malmberg was "fired."

NPR Correspondent's Relationship with Justice Ginsburg Raises Ethical Questions

On Sept. 18, 2020, U.S. Supreme Court Justice Ruth Bader Ginsburg died of complications of metastatic pancreatic cancer at the age of 87. In the wake of her death, several observers raised ethical questions regarding reporters covering those with whom they have a close personal relationship or friendship. In particular, observers cited Justice Ginsburg's friendship with National Public Radio (NPR) reporter and legal affairs correspondent Nina Totenberg.

On September 19, the day after Justice Ginsburg passed away, Totenberg published an obituary titled "A 5-Decade-Long Friendship That Began With A Phone Call." In the piece, Totenberg detailed how she and Justice Ginsburg "would become professional friends and later, close friends after she moved to Washington to serve on the federal appeals court here and later, on the U.S. Supreme Court." The full piece is available online at: https://www.npr.org/2020/09/19/896733375/a-five-decade-long-friendship-that-began-with-a-phone-call.

In a September 24 commentary, NPR Public Editor Kelly McBride, who also serves as the Chair of the Craig Newmark Center for Ethics and Leadership at the Poynter Institute of Media Studies (Poynter), a non-profit journalism school and research organization in St. Petersburg, Fla., observed that "[a]s one of American journalism's most respected legal affairs and Supreme Court reporters, Totenberg's long history of working with Ginsburg is not in and of itself surprising. Great reporters have great sources, and often know them well."

However, McBride also argued that Totenberg's essay revealed potential ethical issues, namely that "Totenberg's access to Ginsburg yields deep reporting that has well-served NPR audiences for years. But the closeness of that Totenberg-Ginsburg relationship was never fully disclosed, and raises the question of whether journalistic independence — also vital to NPR consumers — was as solid as listeners have a right to expect."

Similarly, in a Sept. 22, 2020 article, *Washington Post* media reporter Paul Farhi wrote that the relationship between Totenberg and Justice Ginsburg "raises an old journalistic question: Can a reporter, committed to neutrality and balance, fairly cover a public figure with whom they have a close friendship? Does such a relationship present a conflict of interest, or the appearance of one, that might lead readers, viewers or listeners to question whether a reporter is slanting his or her presentation to favor a friend?"

Leonard Downie Jr., the former executive editor of *The Washington Post* and currently a journalism professor at Arizona State University, agreed in an interview with Farhi that Totenberg's relationship with Ginsburg "creates an appearance [of conflict] question." He added, "On the face of it, I'm uncomfortable with it. I'd have to think about removing a reporter from the beat [under similar circumstances]. At the very least, it should be disclosed."

McBride argued that NPR, by failing to be transparent about the friendship between Totenberg and Justice Ginsburg, "missed two opportunities. First, NPR leaders could have shared the conversations they were having and the precautions they were taking to preserve the newsroom's independent judgment. Second, having those conversations in front of the public would have sharpened NPR's acuity in managing other personal conflicts of interest among its journalists." She further argued that NPR "le[ft] open the possibility that there is one set of standards for senior, elite journalists, and another set of standards for the rest of the staff. After all, why is it OK for Totenberg to be close friends with a key source on her beat, but it's not OK for a journalist to march in a Black Lives Matter protest? Blazing the ethical pathway through 'social incestuousness' and leaving trail markers that others might follow would have been a service to the broader public radio community."

McBride quoted Bob Steele, a former ethics scholar at Poynter, who argued that the friendship between Totenberg and Justice Ginsburg implicated "the principle of independence." He had continued, "The obligation of journalists is to have the public as their primary loyalty and to not let that loyalty be undermined by relationships with those that you are covering." McBride added that reporters are generally taught "that it is problematic to make friends with their sources."

NPR's Ethics Handbook includes a section on "Independence," which reads in part, "To secure the public's trust, we must make it clear that our primary allegiance is to the public. Any personal or professional interests that conflict with that allegiance, whether in appearance or in reality, risk compromising our credibility. We are vigilant in disclosing to both our supervisors and the public any circumstances where our loyalties may be divided — extending to the interests of spouses and other family members — and when necessary, we recuse ourselves from related coverage." The full entry, which also discusses conflicts of interest, is available online at: https://www.npr.org/about-npr/688405012/independence.

McBride also included a quote by Joe Mayer, the director of the Trusting News Project, which works with newsrooms to employ transparency practices. Mayer said, "We need to prove [our ethics]. We need to back it up with evidence.. . . In terms of earning listener trust, there was a real opportunity in this case for NPR to show the broader audience why the journalists at NPR felt comfortable with the arrangement."

McBride concluded her commentary by stating, "Totenberg's coverage of the Supreme Court is deeply respected. It's too bad that NPR didn't use the opportunity to publicly explain how it manages competing loyalties, and then apply those lessons to the many other conflicts testing its newsroom's values.. . . In journalism, the audience gets to decide if you're doing your job and deserves the necessary transparency to judge for itself." The full article is available online at: https://www.npr.org/sections/publiceditor/2020/09/24/916057100/nprs-should-have-revealed-totenberg-rbg-friendship-earlier.

Farhi similarly argued that "[t]raditional journalistic practice is to avoid such entanglements, or at least disclose them so that readers can judge for themselves. Totenberg and NPR rarely did the latter; her friendship with Ginsburg was almost never mentioned in the hundreds of news stories, interviews and features Totenberg has done about the court over the years."

He also cited the example of former *Washington Post* editor Ben Bradlee, who "faced similar questions about his relationship with John F. Kennedy and his wife, Jacqueline." Farhi explained that Bradlee became friends with the Kennedys "in the late 1950s when Bradlee was a top correspondent for *Newsweek* and Kennedy was a senator. The relationship carried over to Kennedy's term in the White House.. . . [I]t became an issue

during Bradlee's tenure as editor in the early 1970s . . . [w]hen *The Post* began breaking stories about the Watergate burglary and related crimes and coverups by the Nixon administration." According to Farhi, President Richard Nixon, who was Kennedy's opponent in the 1960 presidential race, "cited Bradlee's relationship with Kennedy as evidence that the newspaper was biased."

In a statement sent to McBride, Totenberg and her editor, Krishnadev Calamur, defended the lack of disclosure of the friendship. "I have never shaded my reporting because of my friendship with Justice Ginsburg, or any other member of the court," the statement read. "I have been privileged to have known and been friends with both liberal and conservative members of the court over the more than 50 years that I have covered the institution. Anyone who has listened to me over the years or watched any of the dozen interviews that I conducted with Justice Ginsburg, on the air, and in front of audiences of thousands knows that we had a longtime friendship. I have always mentioned that in the course of these interviews."

In a separate interview with Farhi, Totenberg said, "It's my job to learn as much as I can about the people I cover.. . . You're supposed to know them and understand them as much as you possibly can.. . . It's a great benefit to me as a reporter and my listeners."

According to Farhi, Totenberg further contended that she separated the personal from the professional, citing an interview with Justice Ginsburg in 2016 when the justice "had criticized then-candidate Donald Trump, stirring up a backlash. Totenberg said Ginsburg regretted the comments and asked the journalist not to ask her about them; Totenberg said she told Ginsburg that she had to and that it would be irresponsible if she didn't ask." She added, "You can have an arm's-length relationship [as a reporter] and still be a friend.. . . You can do both."

Isabel Lara, NPR's executive director of media relations, similarly contended in an email to McBride that Totenberg and Justice Ginsburg "were merely friendly professional colleagues" and that their relationship did not warrant disclosure. Lara provided several examples, including that "[e]ach time Nina introduced Justice Ginsburg at an event she referred to their friendship."

In his daily newsletter on Sept. 21, 2020, Tom Jones, a senior media writer at Poynter, disagreed, stating, "While it's one thing to occasionally have coffee or lunch or drinks with someone you cover to further develop that source, the friendship between Totenberg and Ginsburg went far beyond that." Jones continued, "Totenberg is considered a top-notch journalist. Perhaps her friendship with Ginsberg did not impact how she did her job or how she shaped her stories. But we can't say it didn't impact her journalism, either. And that's the problem when you have even the appearance of a conflict of interest. We just don't know."

Jones added, "How can we be sure what stories Totenberg might have chosen to cover or ignore because of her relationship with Ginsburg? Not only does it bring into question Totenberg's coverage, but it lends credence to all those who think the media is in cahoots with the people they cover — especially liberals."

New York Times Reports on President Donald Trump's Tax Returns; Several Observers Call the Decision Lawful and Ethical

On Sept. 27, 2020, *The New York Times* published a story based on President Donald Trump's tax returns "extending over more than two decades," which revealed "struggling properties, vast write-offs, an audit battle and hundreds of millions in debt coming due." Following the publication of the story, several observers discussed the legal and ethical considerations that went into the *Times*' reporting and ultimately determined that the publication of such information was both legal and ethical.

In its September 27 story, *New York Times* reporters Russ Buettner, Susanne Craig and Mike McIntire reported several findings from President Trump's tax returns, including that he "paid $750 in federal income taxes the year he won the presidency. In his first year in the White House, he paid another $750." The *Times* also reported that President Trump "paid no income taxes at all in 10 of the previous 15 years — largely because he reported losing much more money than he made" and that he reduced his tax bills with "questionable measures, including a $72.9 million tax refund that is the subject of an audit by the Internal Revenue Service."

The story noted that "[a]ll of the information The Times obtained was provided by sources with legal access to it. While most of the tax data has not previously been made public, The Times was able to verify portions of it by comparing it with publicly available information and confidential records previously obtained by The Times." The *Times*' full story is available online at: https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html.

During a September 27 press conference, President Trump responded by calling the *Times*' reporting "fake news" and "totally made up." He added that the *Times* journalists "only do negative stories."

Following the publication of the story, *New York Times* executive editor Dean Baquet defended the reporting in an editor's note, writing, "We are publishing this series of reports because we believe citizens should understand as much as possible about their leaders and representatives — their priorities, their experiences and also their finances." Baquet continued, "Every president since the mid-1970s has made his tax information public. The tradition ensures that an official with the power to shake markets and change policy does not seek to benefit financially from his actions. Mr. Trump, one of the wealthiest presidents in the nation's history, has broken with that practice. As a candidate and as president, Mr. Trump has said he wanted to make his tax returns public, but he has never done so. In fact, he has fought relentlessly to hide them from public view and has falsely asserted that he could not release them because he was being audited by the Internal Revenue Service."

Baquet explained that although the *Times* was publishing information based on President Trump's tax records, the newspaper would "not mak[e] the records themselves public because we do not want to jeopardize our sources, who have taken enormous personal risks to help inform the public."

At the end of the note, Baquet wrote that the U.S. Supreme Court "has repeatedly ruled that the First Amendment allows the press to publish newsworthy information that was legally obtained by reporters even when those in power fight to keep it hidden. That powerful principle of the First Amendment applies here." One such case was *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which the Court held that members of the press could not be held liable for publishing or broadcasting illegally obtained information if they were not involved in its acquisition. (For more information on *Bartnicki*, see "U.S. Supreme Court Rules In Historic *Bartnicki* Case" in the Summer 2001 issue of the

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Silha *Bulletin* and "*Barnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue.)

The Supreme Court similarly held that the First Amendment protects the publication of lawfully obtained, truthful information in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 492 (1975) and *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989) — in which the Supreme Court held, in both cases, that the publication of a rape victim's name was protected by the First Amendment because the information was truthful and lawfully obtained — and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) — in which the Court held that the First Amendment protected the publication of the name of a juvenile defendant obtained lawfully through routine newsgathering practices even though there was a state law against it.

Baquet's full editor's note is available online at: https://www.nytimes.com/2020/09/27/us/trump-taxes-editors-note.html.

In a Sept. 28, 2020 interview with "Law & Crime," a website created by ABC News Chief Legal Affairs anchor Dan Abrams, First Amendment attorney Floyd Abrams, who is Dan Abrams' father, argued that it was "clear" that *The New York Times* was free to publish the reports on President Trump's tax returns. "First Amendment law could hardly be clearer than that the press is protected in publishing newsworthy information, let alone information about a President in the midst of his campaign for re-election, regardless of whether its source was authorized or permitted to provide it," Floyd Abrams said. "In any event, no law barred the Times from publishing its article and if there had been one it would in all likelihood be unconstitutional."

In a piece for "Law & Crime," managing editor Matt Naham contended that the *Times*' reporting was lawful, citing *Bartnicki*, as well as arguing that the newspaper was protected from investigations into its sources. Naham pointed to New York's shield law, which provides a reporter's privilege against compelled disclosure of confidential sources and information. More specifically, he cited the Reporters Committee for Freedom of the Press' (RCFP) finding that New York's Civil Rights Law § 79-h "provides an absolute privilege from forced disclosure of materials obtained or received in confidence by a professional journalist or newscaster, including the identity of a source."

In a Sept. 28, 2020 commentary for the Poynter Institute of Media Studies (Poynter), a non-profit journalism school and research organization in St. Petersburg, Fla., senior media writer Tom Jones argued that "[t]his is an important story, and of course the Times should publish such information. This is the president of the United States. His business dealings and personal finances are absolutely a story [of public interest]. Is this even a debate?"

Jones cited CNN correspondent Brian Stelter, who said, "I worked at The New York Times many years ago.. . . A story of this magnitude does not get published without weeks and months of reporting, editing, and — here's the important part — legal scrutiny."

C-SPAN Places Veteran Producer on Leave Following False Claims About His Twitter Account Being Hacked

On October 15, several media outlets, including CNN and the Associated Press, reported that C-SPAN had placed Steve Scully, the network's senior executive producer and political editor, on "administrative leave" after he admitted to falsely claiming that his Twitter account was hacked one week earlier.

The situation arose on Oct. 8, 2020 when Scully sent a tweet to Anthony Scaramucci, who previously served as the White House Director of Communications for a short period in 2017 and later became a vocal critic of President Donald Trump. The tweet read, "@Scaramucci should I respond to trump," referencing a comment earlier in the day by President Trump calling Scully a "Never Trumper," according to CNN.

The following day, Scully claimed that he had not sent the tweet and that his Twitter account had been hacked. In a statement, C-SPAN supported Scully, writing in a statement that he "did not originate the tweet and believes his account has been hacked."

However, on October 15, Scully released a statement in which he admitted that he had sent the tweet, calling the tweet and his false claim about his account being hacked "both errors in judgement for which I am totally responsible. I apologize." He added that the tweet and false claim were made "[o]ut of frustration" after President Trump went "on national television . . . and falsely attack[ed Scully] by name."

Scully, who was set to be the moderator of the second presidential debate in 2020 before it was ultimately canceled, added, "These actions have let down a lot of people, including my colleagues at C-SPAN, where I have worked for the past 30 years, colleagues in the media, and the team at the Commission on Presidential Debates. I ask for their forgiveness as I try to move forward in a moment of reflection and disappointment in myself."

In a separate statement, C-SPAN wrote in part, "By not being immediately forthcoming to C-SPAN and the Commission about his tweet, [Scully] understands that he made a serious mistake. We were very saddened by this news and do not condone his actions. During his 30 years at C-SPAN, Steve consistently demonstrated his fairness and professionalism as a journalist. He has built a reservoir of goodwill among those he has interviewed, fellow journalists, our viewers, and with us. Starting immediately, we have placed Steve on administrative leave. After some distance from this episode, we believe in his ability to continue to contribute to C-SPAN."

Scully's and C-SPAN's statements are available online at: https://twitter.com/oliverdarcy/status/1316825168262635520/photo/1. As the *Bulletin* went to press, C-SPAN had not announced Scully's return to working for the network.

Previously, on July 15, 2020, Twitter was the target of a hacking effort in which hackers breached the company's internal systems and compromised 130 user accounts, in some instances posting rogue tweets and downloading user data from the accounts. (For more information on the Twitter hack, see "Twitter Hack Included Data Breach of User Accounts" in the Summer 2020 issue of the Silha *Bulletin*.)

NBC and ABC Broadcast Dueling Town Hall Debates with Vice President Biden and President Trump

On Oct. 15, 2020, NBC and ABC broadcast competing town hall debates featuring President Donald Trump and then-presidential candidate Joe Biden. NBC faced significant criticism for several reasons, including that it offered to host its town hall at the same time as ABC's event, which had been scheduled first.

The Commission on Presidential Debates (CPD) originally set a schedule of September 29, October 15, and October 22 for the 2020 Presidential Debates to take place. The September 29 debate took place as scheduled. Then, on October 2, the White House disclosed that President

Trump had tested positive for COVID-19. The president was hospitalized and treated for three days at Walter Reed National Military Medical Center. After being released, President Trump returned to the White House.

According to recommendations from the Centers for Disease Control and Prevention (CDC), President Trump should have self-quarantined for 14 days, meaning he would be unavailable for the scheduled October 15 debate. Therefore, on October 8, the CPD announced that the second debate would be held virtually in an effort to accommodate President Trump. But President Trump told Fox Business that he was "not going to waste my time on a virtual debate" in part because "they cut you off whenever they want." Donald J. Trump for President campaign (Trump campaign) manager Bill Stepien later said they would be willing to push the October 15 debate back a week and then move the third debate to October 29, just days before the November 3 election.

Biden's campaign rejected the Trump campaign's proposal. According to CNN on October 16, Biden spokesperson Kate Bedingfield responded, saying, "Donald Trump doesn't make the debate schedule; the Debate Commission does.. . . Biden would be happy to appear virtually, but said if the president declines to appear, the former vice president will hold a town hall elsewhere." (Kate Bedingfield is the daughter of University of Minnesota Hubbard School of Journalism and Mass Communication associate professor Sid Bedingfield.) The Biden campaign then scheduled a nationally-televised town hall on ABC with George Stephanopoulos on October 15 at 8 pm ET.

According to CNN, NBC then offered President Trump the opportunity to schedule a town hall debate at the same time and on the same day as the Biden debate on ABC. According to the *Hollywood Reporter*, NBC stipulated two conditions: that Trump had to provide evidence that he would not present a safety risk to others attending the event, and that the moderator would be NBC's "Today" co-anchor Savannah Guthrie. President Trump agreed.

NBC defended its decision to air the program directly opposite the Biden debate, telling *The New York Times* that when NBC executives were asked why they decided not to hold the Trump debate on a different night, they responded that not only was that evening their own choice; it also fit better into President Trump's schedule. NBC executives further defended their choice of time slot, saying that if the Trump debate followed the Biden debate, it would give Trump a favorable advantage over Biden, since more viewers prefer to watch television later in the evening than the Biden debate was scheduled. But *The New York Times* noted that NBC had the potential for a wider viewing audience and therefore increased ratings because the network could carry the debate on its sister cable channels, MSNBC and CNBC.

Several media reports noted that NBC had carried Trump's reality show, "The Apprentice," which ran on the network from 2004 until 2015, and which, as *The Washington Post* pointed out, was the program through which "Trump first entered the consciousness of most people."

Quartz, a business-focused English-language international news organization, characterized NBC's treatment of Trump as "preferential," noting that Trump had hosted *Saturday Night Live* during the 2015 Republican primary race; that Trump had been a guest in September 2016 on the *Tonight Show*, when host Jimmy Fallon playfully tousled Trump's hair, and that during that same month, former NBC anchor Matt Lauer had asked Trump softball questions during a "Commander-in-Chief" forum.

Reaction to NBC's hosting the Trump town hall debate and scheduling it head-to-head with Biden's came from a variety of sources. One former NBC executive, Mark Lukasiewicz, told *The New York Times*, "This is a bad result for American voters, who should not be forced to choose which to watch."

Vivian Schiller, a former NBC, Twitter, and National Public Radio executive, told *The Washington Post*, "The point of a news organization is to serve the public. This is the opposite."

Kyle Pope, editor and publisher of the *Columbia Journalism Review*, tweeted on October 14, "I'm reminded of Chris Wallace bemoaning the fact that Trump's shouting meant the American people didn't get the benefit of hearing from both candidates. @NBCNews apparently has no such view. This is a craven ratings stunt, caving to the Trumpian impulses the network helped hone."

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said in an October 15 interview with WCCO radio in Minneapolis, "I'm incandescent with rage that they have chosen to do this. I'm a big supporter of the news media and I'll fight to the death to defend their First Amendment rights. But this is just so tacky because it looks like one of two things. Either it's a ratings grab or they're acting at the behest of the President."

Kirtley continued, "My view is that the President knew what the ground rules were; he got sick, they had to change the format. He said he didn't want to play. That's his prerogative. Vice President Biden was prepared to go forward and then I guess because he was feeling better or because he didn't want to not be out there, the President apparently was approached by or went to NBC and asked them to run this. And I have no problem with them running a town hall with President Trump, I just don't think it should be at the same time as Vice President Biden's town hall. The public should be able to watch both of these things without having to have a split screen and go back and forth and try to figure out what's going on. I just don't think it's serving the public interest to do this."

On October 15, the *Hollywood Reporter* reported that more than 100 "top showrunners, producers, and stars" had sent a petition to Comcast and NBCUniversal executives, protesting the timing of the Trump town hall. "You are enabling the president's bad behavior while undercutting the Presidential Debate Commission and doing a disservice to the American public.. . . This is not a partisan issue. This is about the political health of our democracy." The petition concluded, "We are simply asking that NBC air the President's town hall either before or after Vice President Biden's so that American voters can have the opportunity to watch both." Signatories to the petition included such notables as actors Debra Messing, Jon Hamm, and Mariska Hargitay, as well as Adam Sorkin, creator of the NBC political drama series, "West Wing."

The Wall Street Journal reported that NBCUniversal News Group Chairman Cesar Conde responded to the criticism by issuing a statement that read in part, "Our decision is motivated only by fairness, not business considerations." *The Wall Street Journal* further reported that NBC had scheduled the Trump town hall at the same time at the Biden town hall because the network had given the same time slot to Biden at a previous town hall and it wanted to keep all things equal between the two candidates.

— Scott Memmel
Postdoctoral Associate

— Elaine Hargrove
Silha Center Staff

Courts Reject Efforts to Block or Impede Publication of Books About President Donald Trump

In summer 2020, President Donald Trump's family and administration sought to block or impede publication of three books about him. Each effort failed and the books were published.

On June 20, Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia denied the federal government's motion for a temporary restraining order and preliminary injunction against former National Security Advisor John Bolton, who authored the book *The Room Where It Happened*.

PRIOR RESTRAINT

On June 30, New York state Supreme Court Judge Hal B. Greenwald issued a temporary injunction restraining President Donald Trump's niece, Mary L. Trump, and her publisher, Simon & Schuster, from publishing her book *Too Much and Never Enough, How My Family Created the World's Most Dangerous Man*. The plaintiff, Robert S. Trump, President's Trump's brother, sought the injunction arguing that the book was produced in violation of a nondisclosure agreement that Mary L. Trump had signed to resolve an earlier family dispute. A state appeals court subsequently vacated the temporary injunction against Simon & Schuster but upheld the temporary injunction against Mary L. Trump pending a hearing on whether to grant the preliminary injunction.

On July 13, Greenwald vacated the temporary injunction against Mary L. Trump, and declined to issue a preliminary injunction against Mary L. Trump and Simon & Schuster.

Finally, on July 23, Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York concluded that the federal government sent former Trump attorney Michael Cohen back to prison because he was writing a book about Trump — action that Hellerstein concluded was retaliatory and in violation of the First Amendment — and ordered that Cohen be released from custody.

Court Declines to Stop Distribution of John Bolton Book

On June 20, 2020, Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia denied the federal government's motion for a temporary restraining order and preliminary injunction against former National Security Advisor John Bolton, who authored the book *The Room Where It Happened. United States of America v. John R. Bolton*, No. 1:20-cv-1580-RCL (D.D.C. June 20, 2020). The Justice Department took legal action alleging that Bolton had failed to comply with prepublication review requirements and that the book contained classified information. Lamberth recognized that Bolton failed to fully comply with prepublication review rules, but determined that the government had not met the legal standard for seeking a preliminary injunction and dismissed the action.

The facts of the case principally stem from December 2019, when Bolton sent the National Security Council a draft manuscript for prepublication review. Over the course of four months, Bolton worked with the NSC in editing the draft. On April 27, 2020, an NSC official told Bolton that "she no longer considered the manuscript to contain classified material." However, written authorization reflecting such a determination did not follow, and the NSC official later clarified that the prepublication review process was still ongoing. Weeks later, a White House lawyer notified Bolton that the manuscript still had classified information in it. By that time, however, Bolton had already sent the manuscript to his publisher without notice to or approval from the government. The manuscript was subsequently printed and shipped to booksellers around the United States.

The government asked the court on June 16 to issue a temporary restraining order or preliminary injunction that would, among other things, prevent Bolton from "proceeding with the publication of his book in any form or media without first obtaining written authorization from the United States through their pre-publication review process." The government also asked the court to require that Bolton "ensure that his publisher and resellers received notice that the book contains classified information that he was not authorized to release"; "instruct his publisher to delay the release date of the book pending the completion of the prepublication review process and authorization from the United States that no classified information remains in the book"; "instruct his publisher to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party"; prevent Bolton from "taking any additional steps toward[s] public[ly] disclosing classified information without first obtaining authorization from the United States through the prepublication review process"; and finally to mandate that Bolton "ensure that his publisher and resellers received notice of [the injunction]."

In his ruling, Judge Lamberth articulated the legal standard for issuing a preliminary injunction, which he called "an extraordinary remedy." To prevail in seeking a preliminary injunction, the moving party must make a "clear showing that four factors, taken together, warrant relief." Those four factors are: "(1) a substantial likelihood of success on the merits, (2) that the movant would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." As to the first prong of the test, the court agreed that the government was likely to succeed on the merits. The court said that it was "persuaded that defendant Bolton likely jeopardized national security by disclosing classified information in violation of his nondisclosure agreement obligations." The court further said that "it is well settled that a mandated prepublication review process is not an unconstitutional prior restraint," citing *McGhee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), and *Snepp v. United States*, 444 U.S. 507 (1980). Ultimately, the court said that the nondisclosure agreements did bar publication of classified materials and that Bolton had likely published classified materials in his book.

However, Lamberth found that the government failed to establish that an injunction would actually prevent irreparable injury. More than 200,000 copies of the book had already been

shipped around the United States and to numerous countries around the world, and various excerpts of the book had been posted on the Internet. Moreover, "For reasons that hardly need to be stated, the court will not order a nationwide seizure and destruction of a political memoir," Lamberth wrote. "In taking it upon himself to publish his book without securing final approval from national intelligence authorities, Bolton may indeed have caused the country irreparable harm. But in the Internet age, even a handful of copies in circulation could irrevocably destroy confidentiality. A single dedicated individual with a book in hand could publish its contents far and wide from his local coffee shop. With hundreds of thousands of copies around the globe — many in newsrooms — the damage is done. There is no restoring the status quo." The court further suggested that the government may lack standing to pursue the preliminary injunction because the relief being sought — a prior restraint — would not remedy the injury the government argued it would suffer.

Thus, Lamberth held that, although Bolton had "gambled with the national security of the United States and exposed his country to harm himself to civil and potentially criminal liability the government had failed to establish an injunction would prevent irreparable harm." The court did not address the First Amendment issues raised in the case. A copy of the ruling is available online at: https://z.umn.edu/62hc.

Bolton's attorney, Charles J. Cooper, said he was happy about the outcome but disputed Lamberth's conclusion that Bolton had not followed pre-publication protocol, according to *The New York Times* on June 20, 2020. "We welcome today's decision by the court denying the government's attempt to suppress Ambassador Bolton's book," Cooper told the newspaper. "We respectfully take issue, however, with the court's preliminary conclusion at this early stage of the case that Ambassador Bolton did not comply fully with his contractual prepublication obligation to the government, and the case will now proceed to development of the full record on that issue. The full story of these events has yet to be told — but it will be."

Jameel Jaffer, executive director of the Knight First Amendment Institute at Columbia University, told the *Times* in a written statement: "The court was of course right to reject the government's request for a prior restraint, especially because the injunction the government sought here was broader than the one the Supreme Court rejected in the Pentagon Papers case. In other respects, though, the ruling is a troubling reaffirmation of broad government power to censor in the name of national security. The prepublication review system puts far too much power in the hands of government censors, and reform of this dysfunctional system is long overdue." The Knight First Amendment Institute is representing a group of former federal officials in a lawsuit against the government challenging the constitutionality of the pre-publication review system.

> "For reasons that hardly need to be stated, the court will not order a nationwide seizure and destruction of a political memoir."
>
> **— Judge Royce C. Lamberth, U.S. District Court for the District of Columbia**

Injunctions Ultimately Rejected Against Mary Trump, Simon & Schuster

On June 30, 2020, New York state Supreme Court Judge Hal B. Greenwald issued a temporary injunction restraining President Donald Trump's niece, Mary L. Trump, and her publisher, Simon & Schuster, from publishing her book *Too Much and Never Enough, How My Family Created the World's Most Dangerous Man. Robert S. Trump v. Mary L. Trump and Simon & Schuster*, Inc., 69 Misc. 3d 285, 128 N.Y.S.3d 801 (N.Y. Sup. Ct. 2020). (In New York, the state Supreme Courts are the lowest courts of record.) The plaintiff, Robert S. Trump, President's Trump's brother, sought the injunction arguing that the book was produced in violation of a nondisclosure agreement that Mary L. Trump had signed to resolve an earlier family dispute. A state appeals court subsequently vacated the temporary injunction against Simon & Schuster but upheld the temporary injunction against Mary L. Trump pending a hearing on whether to grant the preliminary injunction. On July 13, Greenwald vacated the temporary injunction against Mary L. Trump, and declined to issue a preliminary injunction against Mary L. Trump and Simon & Schuster.

In the initial ruling in the case, Greenwald issued a temporary injunction restraining Mary L. Trump and Simon & Schuster from "publishing, printing or distributing" the book or any portions of it that contained "descriptions or accounts of Mary L. Trump's relationship with Robert S. Trump, Donald Trump, or Maryanne Trump Barry." The temporary injunction was scheduled to last until a hearing could be held on the matter on July 10. Mary L. Trump and Simon & Schuster appealed the temporary injunction and sought to have it vacated or modified. On July 1, the New York Supreme Court, Appellate Division, the state's intermediate appellate court, issued a decision and order invalidating the temporary injunction against Simon & Schuster, but the appeals court kept the temporary injunction against Mary L. Trump intact. Presiding Justice Alan D. Scheinkman was the sole author of the decision. Although panels of justices typically review appeals, this case was reviewed by just one justice because Mary L. Trump and Simon & Schuster appealed pursuant to a state statute that allows for review by a single justice. C.P.L.R. 5704(a).

At issue in the suit was a 2001 settlement agreement between members of the Trump family over the probate of wills of Fred and Mary Anne Trump, who are the parents of Donald Trump and grandparents of Mary L. Trump. As part of the settlement, the parties agreed to seal records from the case, "agreeing that the public had no interest in the particular information involved in their resolution of their differences and that confidentiality was required in order to protect the litigants and encourage a fair resolution of the matters in controversy." The "settlement agreement contains reciprocal provisions essentially barring each side from disclosing the terms of the settlement or publishing any description of the litigation or their relationships

Prior Restraint, *continued on page 38*

Prior Restraint, *continued from page 37*

without the consent of all parties on the other side," according to court documents. A relevant portion of the agreement states that Mary L. Trump "shall not disclose any of the terms of this Agreement and Stipulation, and in addition shall not directly or indirectly publish or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the 'Proponents/ Defendants' or their litigation . . . or assist or provide information to others in connection therewith." The excerpt also states that "In the event such breach occurs, 'Objectants/Plaintiffs', as well as their 'counsel', hereby consent to the granting of a temporary or permanent injunction against them (or against any agent acting in their behalf) by any court of competent jurisdiction prohibiting them (or their agent) from violating the terms of this Paragraph."

In his lawsuit seeking to block publication of Mary L. Trump's book, her uncle, Robert S. Trump, alleged that while he had not seen the book, he believed that "a major topic of the book" would be her "relationship with the plaintiff, Donald J. Trump, and [their sister,] Maryanne Trump Barry." At the time, Mary L. Trump had said publicly that the book would contain an "insider's perspective" of "countless holiday meals," "family interactions," and "family events." Robert S. Trump argued to the court that he, Donald J. Trump, and Maryanne Trump Barry did not give their consent to the book's publication. The lawsuit sought performance of the settlement agreement to enforce the nondisclosure provision, a declaratory judgment that the book violates the settlement agreement, a permanent injunction, and money damages for breach of contract.

Mary L. Trump and Simon & Schuster responded in court filings "that the temporary restraining order should not have been issued, and should be vacated, as there is a heavy presumption against prior restraint on expression . . . which the plaintiff has not overcome." Simon & Schuster also argued that Mary L. Trump was entitled under the First Amendment to "participate in the electoral debate by writing and publishing a work concerning the character and fitness for public office of her uncle, the President of the United States . . . and that the United States Constitution independently protects the right of [Simon & Schuster] to publish the work."

The appeals court agreed in part and disagreed in part. First, the court said Mary L. Trump was free to relinquish her First Amendment rights in a contract. "While Ms. Trump unquestionably possess the same First Amendment expressive rights belonging to all Americans, she also possesses the right to enter into contracts, including the right to contract away her First Amendment rights. Parties are free to limit their First Amendment rights by contract," Scheinkman wrote. "Here, the plaintiff has presented evidence that Ms. Trump, in exchange for valuable consideration, voluntarily entered into a settlement agreement to resolve contested litigation. In that settlement agreement, she agreed not to publish a book concerning the litigation or her relationship with the adverse parties, the plaintiff, Donald J. Trump, and Maryanne Trump Barry, without their consent.. . . While the contents of the proposed book are unknown, from the title and from the statements attributed to Ms. Trump it appears that the content of the book touches upon subjects that may be within the reach of the confidentiality provision of the settlement agreement."

The appeals court then said although it was not required to enforce confidentiality agreements, courts can issue injunctions as "matter[s] of equity," or courts impose money damages for breach of contracts. "The balancing concept takes into account whether the provisions of the confidentiality agreement are temporally and geographically reasonable and the extent to which the provisions are necessary to protect the plaintiff's legitimate interests.. . . The passage of time and changes in circumstances may have rendered at least some of the restrained information less significant than it was at the time and, conversely, whatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and current candidate for re-election," Scheinkman wrote.

The appeals court held that "[t]here is no compelling need for the material at issue to be published by Ms. Trump prior to the return date of the motion for a preliminary injunction, which is less than 10 days away. At this preliminary stage of the proceedings, this Court is of the view that it is appropriate, in view of the confidentiality provision of the settlement agreement and the showing made in the plaintiff's papers, for a temporary restraining order to issue as against Ms. Trump to temporarily enforce its terms pending a hearing on the preliminary injunction."

However, the appeals court vacated the temporary injunction against Simon & Schuster because it was not a party to the settlement agreement and was not acting as Mary L. Trump's agent. "While the plaintiff has alleged, in effect, that [Simon & Schuster] is Ms. Trump's agent, the evidence submitted is insufficient for this Court to determine whether the plaintiff is likely to succeed in establishing that claim. So, while the plaintiff is entitled to have the temporary restraining order bind any agent of the plaintiff, this Court will not name [Simon & Schuster] as being such an agent," the court wrote. A copy of the appellate court's decision is available online at: https://z.umn.edu/62ma.

On July 13, with the case back in the trial court, Greenwald vacated the temporary injunction against Mary L. Trump, and declined to issue a preliminary injunction against Mary L. Trump or Simon & Schuster. In a 20-page opinion, Greenwald found that the nondisclosure provision in the settlement agreement between members of the Trump family to be "so overly broad[] as to be ineffective," and that Simon & Schuster was not acting as an agent for Mary L. Trump. "The mere fact that [Simon & Schuster] entered into a publishing agreement to publish [Mary L. Trump's] memoir — does not establish agent-principal relationship," the court wrote. Simon & Schuster had argued that not only was it not an agent of Mary L. Trump, but that enjoining it from publishing her book amounted to an unconstitutional prior restraint. "[Simon & Schuster] argues that as such, restraining a publication in this instance equates to a prior restraint of expression on a matter of public interest and would be unconstitutional, as it infringes upon its First Amendment protected speech," the court wrote. "[Simon & Schuster] purports that there

is a heavy presumption to overcome to allow this type of restraint, and plaintiff must show in the record, that the matter sought to be restrained would immediately and irreparably create public injury, which plaintiff has not demonstrated."

Greenwald also rejected various other arguments asserted by Robert S. Trump. The president's brother had claimed that Simon & Schuster "does not get the benefit of protections afforded to journalists or newspapers, in being able to publish unlawfully obtained information, because [Simon & Schuster] did not passively receive the information but [is] involved in the improper activity of obtaining the information." He further alleged that Simon & Schuster and Mary L. Trump have a relationship that is "distinguishable from a journalist and its source, as they have more than an arm's length relationship, and both fare to gain a lucrative benefit from this publication, therefore it is a collaborative effort to evade the terms of the Agreement." Robert S. Trump also argued that the injunction was not attempting to enjoin Mary L. Trump's "political speech, akin to a prior restraint[,] but [instead was seeking] more of a content neutral application of contract law, similar to a copyright injunction."

However, Greenwald found that a literary agent for Mary L. Trump had approached Simon & Schuster and other publishers about the book, and that Simon & Schuster won the bid for the contract. "There is also no evidence that [Simon & Schuster] enticed [Mary L. Trump] to provide unlawful information, which would be more similar to the unethical practice of paying a source for information rather than merely entering into a contract. It is well settled that if a newspaper lawfully obtains truthful information of great public concern, even when stolen from a third party, the Courts will uphold the right of the press to publish such information, and restraint of such may be deemed unconstitutional," Greenwald wrote, citing *Bartnicki v. Vopper*, 532 U.S. 514, (2001). "Plaintiff has not demonstrated any impropriety on behalf of [Simon & Schuster] in obtaining the publishing rights to [Mary L. Trump's] memoir or that [Simon & Schuster] did not lawfully obtain the information."

Greenwald then recited the standard for granting a preliminary injunction. "It is well settled that for a preliminary injunction to be granted there are three required elements that must be established: (1) likelihood of success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of the equities in the movant's favor." The court found that none of those requirements were met for the requested injunction against Simon & Schuster. First, Robert S. Trump would be unlikely to succeed on the merits of his claim. Second, the court found that Robert S. Trump would not incur irreparable injury, in part when considering that a court found irreparable injury would not flow from John Bolton's book, which was about national security, whereas Mary L. Trump's book is about family matters. In fact, Greenwald said that Simon & Schuster and the public would be irreparably harmed by blocking publication. Third, Greenwald found that the balance of equities favored Simon & Schuster. "The Court further finds that the balancing of the equities, where there is no privity of contract and no likelihood of success, plus there has been no evidence of irreparable harm, and in light of the number of books already published and distributed and information already discussed by media and members of the Trump family, tilts in favor of [Simon & Schuster]," the court wrote.

As to Mary L. Trump, the court also found that the standard for a preliminary injunction was not met. Greenwald wrote Robert S. Trump did not meet the burden of "demonstrating imminent, irreparable harm" to himself because the allegations were "unsupported and conclusory" and "without any specifics as to [whether] he . . . will suffer irreparable harm." With respect to the balance of equities, Greenwald concluded that the balance tipped in favor of Mary L. Trump because an injunction would amount to a prior restraint in violation of the First Amendment. Also significant was that at the time of the ruling, the book had already received extensive attention from the public and press. "Comparing the potential enormous cost and logistical nightmare of stopping the publication, recalling and removing hundreds of thousands of books from all types of booksellers, brick and mortar and virtual, libraries and private citizens, is an insurmountable task at this time," the court wrote. A copy of Greenwald's decision is available online at: https://z.umn.edu/62m9.

The court thus vacated the temporary injunction against Mary L. Trump and denied Robert S. Trump's request for preliminary injunctions against Mary L. Trump and Simon & Schuster.

In response to the ruling, attorney Theodore Boutrous Jr., who represented Mary L. Trump, issued a written statement. "The court got it right in rejecting the Trump family's effort to squelch Mary Trump's core political speech on important issues of public concern," Boutrous said. "The First Amendment forbids prior restraints because they are intolerable infringements on the right to participate in democracy. Tomorrow, the American public will be able to read Mary's important words for themselves." (Boutrous delivered the 2018 Silha Lecture. For more information on his presentation, "The First Amendment and #MeToo," see "33rd Annual Silha Lecture Addresses the Free Speech Implications of the #MeToo Movement" in the Fall 2018 Silha *Bulletin*.)

Judge Rules Government Retaliated Against Ex-Trump Lawyer Michael Cohen for Planned Book About the President

On July 23, 2020, *The New York Times* reported that federal authorities had unconstitutionally retaliated against President Donald Trump's former lawyer, Michael Cohen, by sending him back to prison in solitary confinement because he was writing a book about the president. Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York subsequently ordered that Cohen be released from prison again so he could continue serve the remainder of his sentence under home confinement. "I make the finding that the purpose of transferring Mr. Cohen from furlough and home confinement to jail is retaliatory," Hellerstein said during a hearing, according to the newspaper. "And it's retaliatory because of his desire to exercise his First Amendment rights to publish a book and to discuss anything about the book or anything else he wants on social media and with others." *Michael D. Cohen v. William*

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Prior Restraint, *continued from page 39*

Barr, et al., No. 20-CV-05614 (S.D.N.Y. July 20, 2020).

A Bureau of Prisons spokesperson disputed that the decision to send Cohen back to prison was retaliation for the book. Rather, authorities attributed Cohen's confinement to his acting in a "combative" manner, according to the *Times*. The probation officer working with Cohen testified that he drafted the conditions for supervised release, that he did so without input from supervisors at the Bureau of Prisons or anyone in the Executive Branch, and that the document was not intended to gag Cohen's speech. But Hellerstein said in the court hearing that the terms of the supervised released were highly unusual. "In 21 years of being a judge and sentencing people and looking at the terms and conditions of supervised release. I have never seen such a clause," Hellerstein said, according to the newspaper. Hellerstein added: "Why would [the probation officer] ask for something like this unless there was a purpose to it, unless there was a retaliatory purpose saying, 'You toe the line about giving up your First Amendment rights or we will send you to jail.'"

The ruling came days after Cohen, represented by the American Civil Liberties Union (ACLU), sued the government on July 20 alleging that it was trying to stifle publication of the book, which was expected to be critical of Trump and reveal "the president's behavior behind closed doors," according to the newspaper. "The narrative describes pointedly certain anti-Semitic remarks against prominent Jewish people and virulently racist remarks against such Black leaders as President Barack Obama and Nelson Mandela," the ACLU's court filing states. The action was a verified petition for writ of *habeas corpus*, which is available online at: https://z.umn.edu/62md.

> "[T]he government cannot jail an outspoken critic of the President because he exercised and refused to relinquish his freedom of speech."
>
> **— *Amicus curiae* brief by First Amendment Scholars, including Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

On July 21, a group of First Amendment scholars filed with the court an *amicus curiae* brief calling Cohen's confinement "a blatant violation" of the First Amendment. Among the scholars who signed onto the brief was Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley. "If the allegations in Mr. Cohen's petition are true, this is a straightforward First Amendment case: the government cannot jail an outspoken critic of the President because he exercised and refused to relinquish his freedom of speech," the brief reads. "Furthermore, in considering Mr. Cohen's claims, the Court may take notice of this Administration's disparate treatment of its allies and prior attempts to silence or retaliate against critics of the President. Not only does that context make more plausible Mr. Cohen's contention that he is being punished because of his intent to speak, but it also highlights the need for immediate redress for such a blatant and public violation of the First Amendment. Absent such redress, Mr. Cohen's jailing is likely to have an outsized chilling effect on other critics of the President."

In a statement, Ben Wizner, director of the ACLU's Speech, Privacy, and Technology Project, said the government's action against Cohen was an example of how the Trump administration has sought to silence critics of the president. "The government cannot imprison Michael Cohen for writing a book about President Trump," Wizner said in the statement. "The gag order that the government sought to impose on Mr. Cohen was an unconstitutional prior restraint, and his continued imprisonment is part of a dangerous pattern of retaliation against Trump critics."

— Jonathan Anderson
Silha *Bulletin* Editor

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Developments in Two Defamation Lawsuits Against Minnesota News Media

In the second half of 2020, two major developments occurred in libel lawsuits involving Minnesota news media. On Oct. 13, 2020, the U.S. Supreme Court declined to review the Minnesota Supreme Court's decision in *Larson v. Gannett*. Although the state high court held that the fair report privilege protects fair and accurate reporting of information about matters of public concern derived from official law enforcement press conferences and press releases, the court also ordered a new trial as to whether the privilege applied to certain statements. The media defendants in that case argued to the U.S. Supreme Court that requiring such a trial when a jury already found the statements substantially true violated the First Amendment. The Court chose not to accept the case.

DEFAMATION

In the other libel lawsuit, Ethiopian Airlines, the largest airline in Africa, sued *Ze Habesha*, a Minnesota-based newspaper, for $25 million for publishing allegedly defamatory statements about the airline and its leadership. The newspaper denied the allegations in court filings, but the parties reached a tentative settlement in October 2020.

U.S. Supreme Court Declines to Hear *Larson v. Gannett*

On Oct. 13, 2020, the U.S. Supreme Court declined to review the Minnesota Supreme Court's decision in *Larson v. Gannett*, 940 N.W.2d 120 (Minn. 2020), in which the state's high court held that the fair report privilege protects fair and accurate reporting of information about matters of public concern derived from official law enforcement press conferences and press releases. As is customary with most decisions to deny review, the U.S. Supreme Court did not explain why it chose not to hear the case. However, the lawsuit remained active as the *Bulletin* went to press because a majority of the Minnesota Supreme Court ordered a new trial, which is scheduled to begin in February 2021.

The case arose after a 2012 fatal shooting of a police officer in Cold Spring, Minn. Law enforcement initially identified the plaintiff, Ryan Larson, as the accused shooter, writing in a press release that Larson "was booked into the Stearns County Jail on murder charges." Based on that information, multiple news organizations, including Twin Cities television station KARE 11 and the *St. Cloud Times* newspaper, produced stories about the fatal shooting, investigation, and arrest of Larson. However, days after his arrest, police released Larson because authorities lacked enough evidence to charge him, and he was formally eliminated as a suspect in August 2013. In the wake of his arrest, Larson quit his job, dropped out of school, and moved away so he could avoid further "embarrassment and humiliation," according to the Minneapolis *Star Tribune* on Feb. 23, 2020.

On May 28, 2015, Larson sued KARE 11 and the *St. Cloud Times* in Hennepin County District Court, alleging they published 11 defamatory statements about his arrest. Five of the statements were attributed to law enforcement, three statements were general descriptions of law enforcement's accusations against Larson but without explicitly referencing law enforcement, and three additional statements discussed his criminal history or community members' opinions about the case. Of the five statements attributed to law enforcement, KARE 11 published four statements ("Police say that man — identified as 34-year-old Ryan Larson — ambushed officer Decker and shot him twice — killing him"; "Investigators say 34-year-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody"; "He [Officer Decker] was the good guy last night going to check on someone who needed help. That someone was 34-year-old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom"; and "Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death") and the *St. Cloud Times* published the fifth statement ("Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker"). Larson also sued KSTP-TV and WCCO's TV and radio stations, each of which settled.

On May 19, 2016, the district court partly granted summary judgment in favor of KARE 11 and the *St. Cloud Times*, ruling that "to the extent the news conference and news release only communicated the fact of Mr. Larson's arrest or the charge of crime made by the officer in making or returning his arrest, these sources are entitled to the [fair report] privilege." The fair report privilege generally immunizes individuals who publish false, defamatory information so long as the individual relied on an official public document or a statement by a public official, made clear that the document or statement was their source, and summarized the source material fairly and accurately. However, on Nov. 10, 2016, the district court amended the May ruling, finding that the fair report privilege did not cover the five statements attributed to law enforcement and that the three statements referencing accusations against Larson were not substantially accurate. The court dismissed only the last three statements at issue, which discussed Larson's criminal history and community members' opinions about the case, because the court found they were not capable of a defamatory meaning.

On Nov. 21, 2016, a jury found that that the eight remaining statements were defamatory, but that the news organizations were immunized from liability because the information came from law enforcement. Larson moved for a new trial following the jury verdict, asserting that the jury did not properly apply the law. The district court granted Larson a new trial for all 11 statements, finding that the statements exceeded "the mere fact of arrest or charge" and were false and defamatory as a matter of law.

On May 7, 2018, a three-judge panel of the Minnesota Court of Appeals reversed the district court, ruling that the fair report privilege applies to "fair and accurate reports of statements by law enforcement during an official press conference and in a news release." *Larson v. Gannett Co., Inc.*, 915 N.W.2d 485 (Minn. Ct. App. 2018). The panel held that the district court incorrectly concluded that the fair report privilege did not apply, writing that Minnesota "has recognized the privilege for over a

Libel, *continued on page 42*

Libel, *continued from page 41*

century." (For more information on the background of *Larson* and the lower court rulings, see *Minnesota Court of Appeals Says Fair Report Privilege Extends to Cover Law Enforcement Press Conferences and News Releases* in "Minnesota and Federal Courts Grapple with Defamation Questions; Right-Wing Radio Host Faces Several Defamation Lawsuits" in the Summer 2018 issue of the Silha *Bulletin*.)

On Feb. 26, 2020, the Minnesota Supreme Court affirmed the Court of Appeals in part, reversed in part, and remanded the case back to the district court for a new trial. In the majority opinion, written by Justice Margaret Chutich, the Court concluded that the privilege applied to seven statements the media published based on the press conference and press release, that the jury instructions and a special verdict form failed to sufficiently inform the jury of the factors that should be used to assess whether the privilege can be defeated, and that four statements were covered by the privilege, but were not actionable.

The Court ruled that the fair report privilege protects "news reports that accurately and fairly summarize statements about a matter of public concern made by law enforcement officers during an official press release and in an official news release." A report is fair and accurate when it "simply relay[s] information to the reader that she would have seen or heard herself were she present" at the official proceeding. The press conference and press release were "an official action or proceeding" and thus covered by the privilege, the Court said, because they were organized and disseminated by senior officials of law enforcement agencies.

However, the majority explained that because the district court erroneously held that the privilege did not apply, the district court did not tell the jury how to assess whether the privilege had been defeated. The district court's jury instructions were therefore not adequate because they focused only on whether the statements were substantially accurate and did not assess fairness. A report may not be fair if it omits or misplaces information or adds context that changes the meaning of the statements in a material way, according to the Court. Thus, the majority ordered a new trial to decide whether the privilege can apply to the five statements attributed to law enforcement. The full ruling by the Minnesota Supreme Court is available online at: https://z.umn.edu/6ihk. (For more information about the Minnesota Supreme Court's decision, see *Minnesota Supreme Court Applies Fair Report Privilege to Law Enforcement Press Conferences and Press Releases* in "High-Profile Defamation Lawsuits Target National and Local Media Outlets" in the Spring 2020 issue of the *Bulletin*.)

> "[The Minnesota Supreme Court's decision in *Larson v. Gannett*] threatens to chill constitutional speech when reporting on government investigations and statements."
>
> **— Petition for a writ of *certiorari* filed by the *St. Cloud Times* and KARE 11 with the U.S. Supreme Court**

Following the Minnesota Supreme Court decision, KARE 11 and the *St. Cloud Times* took steps to avoid a new trial. On March 11, 2020, the media outlets petitioned the state high court for a rehearing, but the Court denied the petition on March 30, 2020. Then on Aug. 27, 2020 the media outlets filed a petition for a writ of *certiorari* with the U.S. Supreme Court. The petition said the case raised an important First Amendment question: "In a defamation case, where a jury finds that media defendants' reporting on what law enforcement said in a news release and news conference was substantially accurate and thus not false, does the First Amendment permit a state court to require the jury to consider whether such reports met the fair report privilege's requirements, thereby displacing the falsity element of defamation?".

The answer, the petition said, should be "no" for three reasons. First, the media outlets argued that the Minnesota Supreme Court's decision conflicts with key First Amendment precedents. The media outlets cited *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which provides that private-figure plaintiffs should not be able to recover damages on speech about a matter of public concern unless they show the statements were false. The outlets also pointed to *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which the U.S. Supreme Court held that government punishment of publishing "truthful information can seldom satisfy constitutional standards." And the media outlets argued that when a defamation plaintiff has failed to establish that statements are false, the speaker should not be required to establish that the statements are privileged; for this proposition the outlets cited *Time, Inc. v. Pape*, 401 U.S. 279 (1970), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Second, the petition argued that the "Minnesota Supreme Court's decision highlights the deep division and confusion among lower courts as to how to address defamation claims based on press reports of government officials' statements regarding government investigations." In this case, the petition said, the Minnesota Supreme Court exceeded the flexibility provided to states to define defamation law and that the order for a new trial is "flatly prohibit[ed]" by the First Amendment." Third, the petition argued that the Minnesota Supreme Court decision "threatens to chill constitutional speech when reporting on government investigations and statements." The petition for a writ of *certiorari* is available online at: https://z.umn.edu/6iku.

On Sept. 14, 2020, Larson waived his right to respond to the petition. Justices considered the petition at a conference on October 9, and the Court denied the petition on October 13, according to the Court's public docket for the case. *Gannett Co., Inc., et al., Petitioners v. Ryan Larson*, 592 U.S. ___ (2020). A jury trial is scheduled to begin Feb. 8, 2021 in Hennepin County District Court, according to court records.

Minnesota Newspaper, Ethiopian Airlines Reach Tentative Settlement

In 2020, Ethiopian Airlines sued Minnesota-based journalist Henok Alemayehu Degfu and his newspaper, *Ze Habesha*, in U.S. District Court for the District of Minnesota. Ethiopian Airlines, one of the largest airlines in Africa and an arm of the Ethiopian government, alleged that Degfu and *Ze Habesha*

defamed the company in several videos posted to the Internet on YouTube. After the defendants moved to dismiss the suit, the airline filed an amended complaint, prompting Judge Eric C. Tostrud to deny the motion to dismiss because it was based on the original complaint and thus rendered moot. The parties subsequently notified the Court that they had reached a tentative settlement.

On and after April 15, 2020, the defendants had posted to YouTube three videotaped interviews entitled "The Hidden Secrets of Ethiopian Airlines," according to the airline's complaint. The videos were narrated in the Amharic language.

On April 18, 2020, United States counsel for the airline sent defendants a letter requesting that they remove two of the YouTube videos within 48 hours. The letter listed the allegedly defamatory statements and concluded by saying that failure to remove the videos "will result in legal proceedings in [the] appropriate jurisdiction to accomplish these objectives and to hold you responsible for all damages." On April 22, 2020, counsel for the airline sent YouTube a request to have the videos removed and further threatened legal action against the website. The same day, legal counsel for Degfu and *Ze Habesha* also wrote to YouTube asking the company to deny the airline's request. "Ze Habesha is a leading news organization with [a] reputation for integrity and providing credible information focused on Ethiopian politics and civic affairs. The organization stands by its reporting and the information contained in the above two reports are based on publicly available reports and sources with personal knowledge. Ze Habesha disputes the assertion that it contains information that is false or defamatory per se as alleged," a lawyer for the defendants wrote to YouTube. The letter continued: "Ze Habesha has extended an open invitation to Ethiopian Airlines through its attorney to provide 'any information that contradicts, explains, or puts in context any of the information contained in the reports you found objectionable.' Ze Habesha has expressed its willingness to report any information or rebuttal provided by Ethiopian Airlines." YouTube removed one of the videos, but two still remained available as the *Bulletin* went to press. Copies of the letters are available online at: https://z.umn.edu/6ivb.

On May 28, 2020, the airline filed suit against Degfu and *Ze Habesha*. The airline alleged that the videos contained 16 false and defamatory statements, according to the complaint, which included general descriptions and verbatim transcripts of the allegedly defamatory statements translated into English. The allegedly defamatory statements claimed that the airline intentionally transmitted the COVID-19 virus into Africa and laid off employees because of the pandemic; accused the airline and its management of corruption, misconduct, and ineptitude, such as purchasing defective planes, attempting to steal Ethiopian currency, and deleting the black box of a plane that crashed; and asserted that the airline's chief executive officer improperly enriched himself, made business decisions for personal reasons, and mistreated employees.

> "[Ethiopian Airlines' lawsuit] reads not as a good-faith attempt to recover for real reputational damage to Plaintiff arising from allegedly false statements of fact, but as an attempt to harass Defendants in hopes that the expense of fighting a behemoth such as Plaintiff will force them to stop publishing critical videos about Plaintiff's CEO."
>
> **— *Ze Habesha* and Alemayehu Degfu's memorandum in support of their motion to dismiss**

More generally, the lawsuit alleged that the "[d]efendants failed to exercise due care in making, publishing, and distributing" the statements and did so with actual malice — that is, that the defendants published the statements knowing they were false or did so "with reckless disregard for the truth." The complaint further alleged that the statements were "defamatory *per se*," although the complaint did not elaborate on this claim. The complaint sought compensatory damages in excess of $25 million, claiming that the statements injured Ethiopian Airlines' "business and business reputation," including sales and revenue. The complaint is available online at: https://z.umn.edu/6ikw.

On Aug. 18, 2020, the defendants filed a motion to dismiss the complaint. In a supporting memorandum, the defendants made multiple arguments for dismissal. First, defendants argued that most of the statements did not concern Ethiopian Airlines, but rather its chief executive officer. Thus, the defendants said that the complaint "reads not as a good-faith attempt to recover for real reputational damage to Plaintiff arising from allegedly false statements of fact, but as an attempt to harass Defendants in hopes that the expense of fighting a behemoth such as Plaintiff will force them to stop publishing critical videos about Plaintiff's CEO."

Second, defendants argued that the airline was a public figure because it was "the largest airline in Africa"; the defendants cited case law in which courts have found that corporations and especially heavily-regulated corporations are public figures for purposes of actual malice, including *Nw. Airlines*, *Inc. v. Astraea Aviation Servs.*, *Inc.*, 111 F.3d 1386, 1393 (8th Cir. 1997). Although Ethiopian Airlines is also "an instrumentality of the Federal Democratic Republic of Ethiopia," the defendants did not assert that the governmental nature of the airline required the actual malice standard to apply.

The defendants further alleged that the airline did not plausibly plead actual malice. "Thus, if Plaintiff's lawsuit against Defendants is to move forward, it must plead facts sufficient to give rise to a reasonable inference that Defendants were aware of their video reports' probable falsity when they published those video reports in April 2020. Nothing in the Complaint comes even close to meeting this standard. Rather, the Complaint merely alleges that Defendants 'published and distributed these false and defamatory statements with knowledge that the statements were false, or with a reckless disregard for the truth,'" the defendants' memorandum read.

Third, the defendants raised various additional arguments that many of the challenged statements could not be actionable: the statements did not identify the plaintiff, were true, were

Libel, *continued on page 44*

Libel, *continued from page 43*

based on government records, "simply repeat[ed] accusations already reported by other reputable news organizations," and were opinion or hyperbole. The defendants further argued that the airline failed to provide any basis for the alleged $25 million in compensatory damages.

Notably, the defendants also argued that the airline failed to demand a retraction of the third video and did not properly plead special damages, which the defendants said should preclude the airline from recovering damages from any of the challenged statements in the third video. The defendants invoked Minnesota's libel retraction statute, Minn. Stat. § 548.06, which states: "In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. The plaintiff shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. If a retraction thereof be not published on the same page and in the same type and the statement headed in 18-point type or larger 'RETRACTION,' as were the statements complained of, in a regular issue thereof published within one week after such service, the plaintiff may allege such notice, demand, and failure to retract in the complaint and recover both special and general damages, if the cause of action be maintained. If such retraction be so published, the plaintiff may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published on the same page and in the same type and the statement headed in 18-point type or larger 'RETRACTION,' as were the statements complained of, in a regular issue thereof published within one week after such service and in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election. This section shall not apply to any libel imputing unchastity."

Defendants argued that the retraction statute applied because *Ze Habesha* met the definition of "newspaper" in the statute as construed by the Minnesota Supreme Court in *Soderberg v. Halver*, 150 N.W.2d 27, 28-30 (Minn. 1967). In *Soderberg*, the Court "considered a mimeograph circular's purpose, the topics covered in the articles, and the circular's regular distribution in its determination that the publication was covered by the statute." The defendants argued that those same factors were present here: "Ze Habesha publishes and distributes 10,000 copies of a print newspaper on a periodic basis and has done so since December 2008. Its stated purpose is to 'provide balanced news, perspectives, and issues across the political spectrum to the Ethiopian community.' The topics discussed in the [c]hallenged [s]tatements — Ethiopian Airlines' business operations and treatment of employees during the pandemic, as well as possible corruption among top officials at the company — are clearly 'newsworthy and topical.'" The defendants further argued that because Degfu operates the news outlet from his home in Minnesota, "[i]t would be impossible for Ze Habesha to timely deliver all of its video reports to that global audience on actual newsprint. So, like most newspapers and other media outlets today, Ze Habesha also publishes articles and videos online." The online nature of the content does not preclude application of the retraction statute, the defendants argued, citing *Adams v. Schiffer*, No. 27-cv-16-10257 (Minn. Dist. Ct. Henn. Cty., Dec. 8, 2016), in which a court applied the retraction statute to material published on the Minneapolis *Star Tribune*'s website. The defendants' memorandum in support of the motion to dismiss is available online at: https://z.umn.edu/6ikx.

On Sept. 8, 2020, the airline filed an amended complaint. Among the major changes, the amended complaint argued that many of the claims made by the defendants came from a fugitive accused of embezzling from Ethiopian Airlines who was biased and "motivated to cause harm" to the airline. The amended complaint also alleged the defendants did not "attempt to test the credibility" of this source and "purposefully ignored discovering the truth by failing to interview informed sources," including the airline, and failing to examine "relevant documents." The amended complaint further alleged that the challenged statements "were so inherently improbable that a reasonable person would have known they were false." The amended complaint also asserted that it "sustained special damages" because ticket sales "dramatically decreased causing a substantial loss of revenues." The amended complaint is available online at: https://z.umn.edu/6iky.

Also on September 8, the airline filed a memorandum of law opposing dismissal. The memorandum argued that the airline's complaint as amended included facts sufficient to infer actual malice, that the alleged defamatory statements identified the airline, and that the amended complaint alleged special damages. In response to the defendants' arguments about the Minnesota libel retraction statute, the airline argued that the statute covers only "a libel in a newspaper" and did not apply in this case because the alleged defamatory statements were spoken slander in YouTube videos. "The statute could not be applied to slanders published on YouTube because it would be impossible to comply with the Retraction requirements," the plaintiff's memorandum read, referring to the statute's publication rules for retractions, such as the page, font size, timeframe of the retraction statement. Therefore, the plaintiff argued, it was not required to plead or prove special damages. The plaintiff also argued the court in *Soderberg* relied on a definition of "newspaper" that was repealed in 1984. Minn. Stat. §§ 331.01-331.08. Repealed by Laws 1984, c. 543, § 69. The plaintiff's memorandum of law opposing dismissal is available online at: https://z.umn.edu/6ikz.

On September 9, Tostrud denied the defendants' motion to dismiss because the airline had filed the amended complaint, which Tostrud said rendered the motion to dismiss moot. The Court left open an opportunity for the defendants to "file a motion regarding the amended complaint." Tostrud's order is available online at: https://z.umn.edu/6il0.

On October 19, a lawyer for the airline notified the Court by letter that the parties had "reached a tentative settlement agreement," and that pleadings to close the case would likely be filed within 60 days. As the *Bulletin* went to press, the parties had not filed a stipulation for dismissal with the Court. The letter notifying the Court of a tentative settlement is available online at: https://z.umn.edu/6il1.

— Jonathan Anderson
Silha *Bulletin* Editor

Courts Rule on Defamation Lawsuits Against *The New York Times*, Fox News, President Donald Trump

In the second half of 2020, courts issued rulings in several high-profile libel lawsuits: Sarah Palin's lawsuit against *The New York Times*, Karen McDougal's lawsuit against Fox News, and E. Jean Carroll's lawsuit against President Donald Trump.

DEFAMATION

On Aug. 28, 2020, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York found that a libel lawsuit filed by former Vice Presidential candidate Sarah Palin against *The New York Times* could proceed to a jury trial. Although Rakoff denied motions for summary judgment from both Palin and the *Times*, Rakoff held that a jury could conclude that the *Times* acted with actual malice in publishing an editorial that Palin has alleged was false and defamatory.

On Sept. 24, 2020, Judge Mary Kay Vyskocil of the U.S. District Court for the Southern District of New York dismissed a lawsuit brought by former *Playboy* model Karen McDougal against Fox News. McDougal alleged that Fox News host Tucker Carlson defamed her when he accused her of "extorting now-President Donald J. Trump out of approximately $150,000 in exchange for her silence about an alleged affair" she had with Trump. Vyskocil concluded that Carlson's statements were rhetorical hyperbole and that the context of his show made clear he was not asserting actual facts.

On Oct. 27, 2020, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York ruled that the United States government may not be substituted as a defendant for Trump in a libel lawsuit brought by journalist E. Jean Carroll. Had Kaplan allowed the substitution, Carroll's lawsuit might have been foreclosed because of sovereign immunity. The Justice Department has appealed Kaplan's ruling to the U.S. Court of Appeals for the Second Circuit.

Jury Trial Ordered in Sarah Palin's Lawsuit Against *The New York Times*

On Aug. 28, 2020, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York ruled that former Vice Presidential candidate Sarah Palin can proceed with her libel lawsuit against *The New York Times*. *Palin v. The New York Times Company*, 264 F.Supp.3d 527 (S.D.N.Y. 2017). Rakoff dismissed motions for summary judgment from both Palin and the *Times*, but still found that at this point in the litigation, when drawing inferences in favor of Palin, a jury could conclude that the *Times* acted with actual malice. A copy of the ruling is available online at: https://z.umn.edu/6ih8.

The lawsuit stems from a June 14, 2017 editorial the *Times* published that alleged a 2010 map issued by Palin's political action committee, SarahPAC, helped inspire the 2011 mass shooting by Jared Lee Loughner in Tucson, Ariz., that killed six people and severely wounded then-Congresswoman Gabrielle Giffords. The editorial asserted that the map "put Ms. Giffords and 19 other Democrats under stylized cross hairs." The newspaper printed the editorial after the June 14, 2017 mass shooting in which James Hodgkinson, a left-wing activist, opened fire on a baseball practice for Republican members of Congress in Alexandria, Va.

The *Times* issued a correction within a day of publication, clarifying that there was no established link between Palin and the 2011 shooting. Additionally, the revised editorial clarified that Palin's map had not printed the faces of Gifford and the other Democrats under cross hairs. Instead, the map "showed the targeted electoral districts of Ms. Giffords and 19 other Democrats under stylized cross hairs."

On Aug. 29, 2017, Rakoff dismissed Palin's lawsuit, concluding that she had failed to show that the *Times* published any inaccurate statements with actual malice. Rakoff held that because Palin was a public figure, she had the burden of establishing that the *Times* acted with "actual malice," a standard established by the U.S. Supreme Court in *New York Times v. Sullivan* that public officials have to show that news organizations knowingly published false information or acted with reckless disregard for the truth. 376 U.S. 254 (1964). (For more information on the background of the case and Rakoff's ruling, see *District Court Judge Dismisses Sarah Palin's Lawsuit Against* The New York Times in "News Organizations and Journalists Face High-Profile Defamation Lawsuits" in the Fall 2017 issue of the Silha *Bulletin*.)

On Aug. 6, 2019, the U.S. Court of Appeals for the Second Circuit revived Palin's lawsuit, finding that Palin had plausibly alleged a defamation claim and that the case should proceed to the discovery phase, paving the way for depositions and other collection of evidence. The Second Circuit said that although Palin had made "sufficient allegations of actual malice," the ruling should not "be construed to cast doubt on the First Amendment's crucial constitutional protections." (For more information on the Second Circuit's ruling, see *Second Circuit Revives Lawsuit Brought by Sarah Palin Against* The New York Times in "Minnesota Supreme Court, Sixth Circuit, and Eastern District of Kentucky Rule in Notable Defamation Cases" in the Summer 2019 issue of the Silha *Bulletin*.)

In support of its petition for rehearing, the *Times* argued that the panel misunderstood "two bedrock First Amendment protections." First, the *Times* said that the panel applied the wrong standard for what constitutes a plausible allegation of actual malice. The panel, according to the *Times*, had relied on an improper definition of "recklessness" that was rooted in tort law and characterized as political animus. The *Times* contended that the U.S. Supreme Court and the Second Circuit had both rejected such definitions in the context of defamation allegations, with the former holding that it is "legally irrelevant" and the latter ruling that the definition insufficiently proved actual malice. The *Times* argued instead that demonstrating actual malice must focus solely on a speaker's state of mind and, at the very least, requires a plaintiff to show that the speaker published the allegedly defamatory material with a "high degree of awareness" that it is probably false.

The *Times*' second argument was that the wrong standard was applied for evaluating when statements are protected opinion. The Second Circuit's ruling, the *Times* contended, was an "unprecedented reliance on an author's alleged political views and resulting ill will as the predicate for a finding of

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Defamation, *continued from page 45*

actual malice." The Second Circuit panel held that Palin only needed to show that a "reasonable reader" would see the statements at issue as factual, but the *Times* argued that the Supreme Court and the Second Circuit have previously ruled that a more demanding standard is needed: the statement must be "provably false."

A coalition of news outlets and journalistic organizations filed an *amici curiae* brief supporting the *Times*' petition for *en banc* review. The brief argued that the panel's decision contradicted the central holding of *Sullivan*. The brief further argued that the definition of "reckless disregard" the Court used in *Sullivan* was different from a dictionary definition of recklessness.

The brief cited several Supreme Court rulings, including *Garrison v. Louisiana*, 379 U.S. 64 (1964), in which the Court held that the standard required a "high degree of awareness of . . . probable falsity." The brief also cited *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), in which the Court found that "reckless disregard" does not mean "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhere to by responsible publishers." The panel's decision, the brief contended, "is at such variance with *Sullivan* itself that, if followed, it could lead to significant limitations of speech about public figures that has long been protected by the First Amendment."

On Nov. 7, 2019, several media outlets reported that the Second Circuit had denied a petition by the *Times* for a panel rehearing or a rehearing *en banc*. The short decision read in part, "The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing.. . . [T]he petition is denied." A copy of the Second Circuit's order is available online at: https://z.umn.edu/6ikt.

On Aug. 28, 2020, Rakoff denied summary judgment motions from both Palin and the *Times*. Rakoff rejected Palin's arguments that *Sullivan* should be overruled or, alternatively, that the actual malice standard should not apply. Rakoff wrote that he was bound by precedent set in *Sullivan*, and that Palin's suit was not sufficiently distinguishable from *Sullivan* not to apply it. "[P]laintiff's argument is that the actual malice rule, which was first articulated more than half a century ago in the days before the Internet and social media, has run its course and should no longer govern our contemporary media landscape. Binding precedent does not, however, come with an expiration date," Rakoff wrote. "To the extent plaintiff believes the actual malice requirement ought to be abolished, she could make that argument to the appropriate court — the Supreme Court. Until then, public figures, like plaintiff, must establish actual malice before collecting damages for defamation. Plaintiff's motion for partial summary judgment is therefore denied."

Rakoff also rejected the *Times*'s position that "no reasonable jury could find that the statements at issue were published with actual malice." In making this determination, the Court examined each of the newspaper's arguments, the first of which asserted that Palin can't prove the newspaper's editorial page editor, James Bennet, was aware the statements had a defamatory meaning. Rakoff wrote that the key legal question was "whether the First Amendment requires that plaintiff prove that Bennet 'was aware of, or recklessly blinded himself to, the defamatory import of his words.'" Rakoff found that other courts have adopted an awareness requirement on plaintiffs to "show that a jury could reasonably find by clear and convincing evidence that [a defendant] intended to convey the defamatory impression." *Dodds v. American Broad. Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998). Such a requirement is premised on the notion that "defendants should not be liable 'for what was not intended to be said;'" otherwise the First Amendment protections established by *Sullivan* would be "eviscerated." *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990). The Court looked to the "values underlying *Sullivan*" and echoed the California Supreme Court in *Good Government Group of Seal Beach, Inc. v. Sup. Court*, 22 Cal.3d 672 (1978), which "explained that failure to impose an awareness requirement 'would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid.'" To support this proposition, the Court also cited a decision from the Seventh Circuit, which held that "requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern." *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988).

Palin argued these authorities were inapposite because they were limited to claims of libel by implication, whereas in this case, the statements in the *Times* were allegedly "explicit and facially defamatory" and there was "'substantial evidence' showing what the speaker meant and intended to say." However, Rakoff disagreed. "The purpose of the awareness element is to ensure that liability is not imposed upon a defendant who acted without fault. This must hold true regardless of whether the defendant's statement is directly or indirectly libelous," the Court wrote, citing *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1361-63 (N.D. Cal. 1993), *aff'd on other grounds*, 85 F.3d 1394 (9th Cir. 1996). Palin also asserted that the *Times* had already argued, and the Second Circuit had previously rejected, an awareness requirement, but Rakoff wrote that neither he nor the Second Circuit had "squarely addressed" or resolved the issue of whether Palin "must establish actual malice with respect to meaning as well as falsity." Thus, Rakoff wrote, "[f]or the above-discussed reasons, the Court now holds that she must."

The Court then discussed whether Palin could conceivably prove actual malice about the statement's meaning, as distinguished from whether she must prove it. "Where a plaintiff's defamation case depends on a statement that is capable of multiple meanings — one defamatory, the other innocuous — the plaintiff must prove that the defendant acted with actual malice not only with respect to the statement's falsity but also to its meaning," Rakoff wrote. The court cited *Saenz* for the proposition that "evidence of defamatory meaning and recklessness regarding potential falsity does not alone establish the defendant's intent." Instead, Rakoff said, the plaintiff must show that the defendant "either deliberately cast its statements in an equivocal fashion in the hope of insinuating a false import to the reader or that it knew and acted with reckless disregard of whether its words would be interpreted by the average reader as a false statement." *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1084 (9th

Cir. 2002). Rakoff noted that Bennet had sworn to the Court multiple times that he did not intend to suggest there was a link between Palin's map and the attack on Giffords. Bennet told the Court that he had not realized readers would understand the editorial as "suggesting that Loughner himself was directly inspired or motivated by the [Map] to engage in the shooting," and that he had not intended for readers to make such an inference. Rather, Bennet argued that his intention was to "advance the idea that overheated political rhetoric can create a climate inducive to violent acts, and [he] mentioned the [Map] as an example of the kind of 'political incitement' that contributes to this atmosphere." Bennet further pointed to an email he wrote shortly after publication of the editorial that he argues is evidence he did not intend for the piece to "convey the idea that the Map directly caused Loughner's shooting, which is the heart of what [Palin] says was libelous."

However, despite the *Times*'s arguments, the Court found that when considering the evidence in the light most favorable to Palin — who was the nonmoving party in response to the newspaper's motion for summary judgment — a rational jury could conclude "that Bennet either knew, or was reckless not to know, that his words would carry the defamatory meaning." The Court said four pieces of evidence support such a conclusion. First, the text of the editorial expressly referred to the map as "a 'direct' form of 'incitement' to Loughner's shooting." Bennet's claim that he "did not mean to suggest a direct link between the Map and the shooting [] may be 'so inherently improbable that only a reckless man would have' chosen the words he chose to convey the meaning he (allegedly) sought to convey." Second, Bennet admitted to being aware that he knew the term "incitement" might be interpreted as a "call to violence." This is further evidence of actual malice because "knowledge 'that the average reader . . . would be familiar with both' the defamatory and nondefamatory meanings of the word at issue counts in favor of finding actual malice," the Court wrote, citing *Sprague v. American Bar Ass'n*, No. Civ. A 01-382, 2003 WL 22110574 (E.D. Penn July 21, 2003). Third, the Court wrote that a jury could find Bennet's edits to the initial version of the article to be further evidence of actual malice because the initial version did not contain the allegedly defamatory material. Fourth, the Court said that corrections made after publication of the editorial "stand as further circumstantial evidence that Bennet was aware that the Editorial carried the defamatory meaning." The correction stated, in relevant part: "An earlier version of this editorial incorrectly stated that a link existed between political incitement and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established." The Court said the wording of the correction could be seen as consistent with actual malice: "If, as Bennet now contends, it was all simply a misunderstanding, the result of a poor choice of words, it is reasonable to conclude that the ultimate correction would have reflected as much and simply clarified the Editorial's intended meaning," the Court wrote. "Ultimately, while much of plaintiff's evidence is circumstantial, as is often the case when actual malice is at issue, and while there is arguably contrary evidence as well, the Court finds that, taking the evidence in light most favorable to plaintiff, she has sufficiently pointed to enough triable issues of fact that would enable a jury to find by clear and convincing evidence that Bennet knew, or was reckless not to know, that his words could convey the meaning in the minds of the readers that plaintiff asserts was libelous, to wit, that she bore direct responsibility for inciting the Loughner shooting."

Rakoff then addressed the newspaper's second argument: that even if Bennet knew the statements had a defamatory meaning, Palin cannot prove Bennet knew the statements were false. However, the Court rejected this argument and found that Palin had enough evidentiary support "to preclude a grant of summary judgment" in favor of the *Times*. The Court wrote that a juror could conclude that Bennet knew there was no link between the map and the shooting but wrote it anyway to conform to a narrative he had already crafted. In support of this, the Court pointed to evidence that Bennet had asked a subordinate to research whether there was a link between the map and the shooting, and that the subordinate determined there was no such link. The Court also found that a juror could conclude that Bennet purposefully avoided the truth by failing to click on a hyperlink in the editorial linking to an ABC News story that contradicted the editorial's claim of a connection between the map and the shooting; Bennet has said he simply had not clicked on the link. The Court further noted that a researcher had sent Bennet an earlier *Times* editorial that quoted former President Barack Obama "saying Loughner's shooting cannot be blamed on 'a simple lack of civility.'" The Court recognized that the *Times* has compelling arguments in defense, but that at this stage in litigation, Palin has made a satisfactory showing allowing the suit to proceed. "Once again," the Court wrote, "there is considerable evidence that defendants mount to support the notion that Bennet simply drew the innocent inference that a political circular showing crosshairs over a Congressperson's district might well invite an increased climate of violence with respect to her. But, taken in the light most favorable to plaintiff, the evidence shows Bennet came up with an angle for the Editorial, ignored the articles brought to his attention that were inconsistent with his angle, disregarded the results [of the] research that he commissioned, and ultimately made the point he set out to make in reckless disregard of the truth." Therefore, the Court wrote, "there is sufficient evidence to allow a rational finder of fact to find actual malice by clear and convincing evidence." A trial in the case is scheduled to begin Feb. 1, 2021.

Judge Dismisses Lawsuit Against Fox News, Finds Show Was Not 'Stating Actual Facts'

On Sept. 24, 2020, Judge Mary Kay Vyskocil of the U.S. District Court for the Southern District of New York issued an opinion and order granting a motion to dismiss from Fox News Network, LLC in a lawsuit brought by former *Playboy* model Karen McDougal. *Karen McDougal v. Fox News Network, LLC*, 19-CV-11161-MKV (S.D.N.Y Sept 24, 2020). McDougal alleged that Fox News host Tucker Carlson defamed her when he accused her of "extorting now-President Donald J. Trump out of approximately $150,000 in exchange for her silence about an alleged affair between Ms. McDougal and President Trump." McDougal alleged that Carlson defamed her in at least two statements on his program, "Tucker Carlson Tonight," on December 10, 2018. Carlson said McDougal "approached Donald Trump and threatened to ruin his career and humiliate his family if he doesn't give them money," and also suggested that

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Defamation, *continued from page 47*

McDougal's actions were "a classic case of extortion."

Fox News moved to dismiss the lawsuit. The cable channel argued that Carlson's statements "are constitutionally protected opinion commentary on matters of public importance and are not reasonably understood as being factual." Fox News cited "a litany of cases which hold that accusing a person of 'extortion' or 'blackmail' simply is 'rhetorical hyperbole,' incapable of being defamatory." McDougal countered that the accusation of "extortion" along with a description of her alleged actions "constitute provably false factual assertions that [she] committed a crime."

First, Vyskocil's analysis began by discussing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in which the U.S. Supreme Court "emphasized that statements, whether presented as fact or opinion, may be defamatory only where they state or imply a provably false assertion of fact." Vyskocil wrote that "simply invoking a criminal act or accusing a person of a crime does not transform an otherwise nonfactual statement into a factual assertion if the accusation, in light of the surrounding context, is 'rhetorical hyperbole' or where the record is 'devoid of evidence' that anyone thought a crime was actually committed." The Court then noted that accusing someone of extortion as Carlson did is "often construed as merely rhetorical hyperbole when [the accusation is] not accompanied by additional specifics of the actions purportedly constituting the crime."

Vyskocil further wrote that "[s]uch accusations of crimes also are unlikely to be defamatory when, as here, they are made in connection with debates on a matter of public or political importance" — a form of political hyperbole that is "normally associated with politics and public discourse in the United States." Such statements, the Court said, constitute rhetorical hyperbole, especially "in the context of commentary talk shows like the one at issue here, which often use 'increasingly barbed' language to address issues in the news."

Specifically, the Court noted that the context surrounding the statements "made it abundantly clear" that Carlson was not asserting McDougal had committed a crime. Therefore, his statements could not be actionable. "Mr. Carlson's statements were in response to contemporaneous suggestions that President Trump could be impeached due to campaign finance violations stemming from the payments to Ms. McDougal, an issue that attracted significant public and political concern and led to sustained debate across media platforms.. . . When the statements are read in context, it is apparent that Mr. Carlson is remarking on hypocrisy he perceives, i.e., that [the President's personal lawyer, Michael] Cohen could be prosecuted, and the President impeached, for actions falling short of the conduct Ms. McDougal purportedly engaged in during the president's campaign." Therefore, the Court reasoned, Carlson's statements were on matters of public concern and thus deserving of the highest degree of protection.

> The "general tenor" of Tucker Carlson's program on Fox News "should inform a viewer that he is not 'stating actual facts.'"
>
> **— Judge Mary Kay Vyskocil, U.S. District Court for the Southern District of New York**

Vyskocil also cited various decisions from other courts that have similarly rendered nonactionable "accusations of extortion or blackmail, especially as related to political issues." Those cases were *Greenbelt Coop. Pub. Ass'n v. Bressler*, 398 U.S. 6 (1970); *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001); *Brodkorb v. Minnesota*, No. 12-cv-1958 (SRN) (AJB), 2013 WL 588231; and *Automated Transactions, LLC v. Am. Bankers Ass'n*, 216 A.3d 71 (N.H. 2019).

In light of that precedent and in the context of Carlson's show, the Court found that Carlson's claim of "extortion" was "nonactionable hyperbole." The Court also recognized Carlson's stated objective was to "challenge[] political correctness and media bias." And, the Court said, the "general tenor" of Carlson's program "should inform a viewer that he is not 'stating actual facts' about the topics he discusses and is instead engaging in 'exaggeration' and 'non-literal commentary.'" Indeed, the Court wrote: "[G]iven Mr. Carlson's reputation, any reasonable viewer 'arrive[s] with an appropriate amount of skepticism' about the statements he makes." The Court therefore concluded: "Fox News has convincingly argued that Mr. Carlson was motivated to speak about a timely political cause and that, in this context, it is clear that his charge of "extortion" should not be interpreted as an accusation of an actual crime. Plaintiff's interpretation of Mr. Carlson's accusations is strained and, the Court finds, not reasonable when the entire segment is viewed in context. It is true that Mr. Carlson added color to his unsubstantiated rhetorical claim of extortion when he narrated that Ms. McDougal 'approached' Mr. Trump and threatened his career and family. But this overheated rhetoric is precisely the kind of pitched commentary that one expects when tuning in to talk shows like *Tucker Carlson Tonight*, with pundits debating the latest political controversies."

Next, the Court said McDougal was too focused on specific words Carlson used that were taken out of context. Although Carlson did remind viewers to "remember the facts of the story," which he said were "undisputed" — that two women allegedly threatened Trump if he did not pay them — the Court noted that Carlson had previously said he was "stipulating" to the assertions "for the sake of argument." Thus, the Court found that "Carlson's statements viewed in context are not factual representations and, therefore, cannot give rise to a claim for defamation."

The Court then found that even if the statements were actionable, McDougal's complaint would have to be dismissed because it did not "plausibly plead actual malice." McDougal argued that she had sufficiently pleaded actual malice by alleging that Carlson was "personally and politically biased in favor of President Trump, and, thus, would ignore the truth to publish the story supporting him." McDougal specifically invoked *Palin v. N.Y. Times Co.*, 940 F.3d 804 (2d Cir. 2019), in which the U.S. Court of Appeals for the Second Circuit held that former Vice Presidential candidate Sarah Palin had adequately alleged actual malice in her suit against *The New York Times* after it published an unsigned editorial alleging that a map distributed by Palin's political action committee incited a 2011 mass shooting that left six people dead

and then-Congresswoman Gabrielle Giffords severely wounded. "In sum," Vyskocil wrote, "the Second Circuit found that actual malice adequately was alleged where (1) the speaker of defamatory statements possessed an editorial and political advocacy background sufficient to suggest he published the statements with deliberate or reckless disregard for their truth, (2) the drafting and editorial process of the statements in question permitted an inference of deliberate or reckless falsification, and (3) the newspaper's subsequent correction to the allegedly defamatory article did not undermine the plausibility of that inference." (For more information on the background of the *Palin* case, see *District Court Judge Dismisses Sarah Palin's Lawsuit Against* The New York Times in "News Organizations and Journalists Face High-Profile Defamation Lawsuits" in the Fall 2017 issue of the Silha *Bulletin*; *Second Circuit Revives Lawsuit Brought by Sarah Palin Against* The New York Times in "Minnesota Supreme Court, Sixth Circuit, and Eastern District of Kentucky Rule in Notable Defamation Cases" in the Summer 2019 issue; *Second Circuit Denies Rehearing in Palin Defamation Lawsuit Against* The New York Times in "News Organizations and Journalists Face High-Profile Defamation Cases Brought by Public Officials, Figures" in the Fall 2019 issue, and *Jury Trial Ordered in Sarah Palin's Lawsuit Against* The New York Times in "Courts Rule on Defamation Lawsuits Against *The New York Times*, Fox News, President Donald Trump" on page 45 of this issue of the Silha *Bulletin*.)

However, Vyskocil rejected McDougal's attempt to allege actual malice in the same manner as Palin. One key difference was that Fox News had not issued any corrections concerning Carlson's statements. "Thus," the Court wrote, "any bad intent that could be inferred in *Palin* from a decision to publish and (one day later) then to issue a correction cannot be analogized to this case." And the Court said McDougal's other allegations were "conclusory or speculative" and could not be used to "establish a plausible inference of actual malice." McDougal suggested that Fox News had previously reported on the Cohen criminal prosecution and payments to McDougal without alleging extortion, but the Court observed that Carlson himself had not been involved in that previous reporting. "[A] speaker is not otherwise required to seek out contrary evidence," the Court wrote. "Indeed, in *New York Times v. Sullivan*, the Supreme Court rejected a claim identical to the one Ms. McDougal makes here, that because the *New York Times* had previously reported on an issue while stating the facts differently, the publication had demonstrated actual malice.. . . In this case, simply because Fox News had reported on the Cohen case (and the payments to McDougal) without reference to extortion does not mean that Mr. Carlson acted with actual malice when he linked the concepts. Mr. Carlson did not have any duty to seek out these earlier publications, and it is instead Plaintiff's obligations to 'bring home' an existing connection between Mr. Carlson and these earlier publications." *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Vyskocil also said that McDougal did not sufficiently provide evidence of political or personal bias to allege actual malice. While the Second Circuit allowed a "bias" theory premised on factual assertions of bias in the context that the speaker had knowledge of falsity, Vyskocil said that "McDougal's arguments rest only on speculative allegations of a personal friendship between Mr. Carlson and President Trump and a purported political agreement/alignment between them." McDougal had cited 47 tweets in which Carlson had written positively about President Trump, and further made a "conclusory allegation that Mr. Carlson is driven to help the President politically and that defaming her was part of that effort." But Vyskocil said that was not enough. "The Court is unaware of any law — and Plaintiff has not provided any — that establishes any number of social media posts by someone else as indicative of a close personal relationship sufficient to establish actual malice. Instead, although the posts might indicate that the President follows or even admires Mr. Carlson, it is pure speculation to assume the reverse, and the tweets alone certainly do not establish any kind of personal relationship. As a result, the Amended Complaint alleges only 'sheer political bias' as a basis for inferring actual malice, which is not enough. This is consistent with other post-*Palin* cases that require specific factual allegations about the speaker's bias and the reasons a speaker has to lie." *Nelson Auto Center*, *Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952 (8th Cir. 2020); *Oakley v. Dolan*, No. 17-CV-6903, 2020 WL 818920 (S.D.N.Y. Feb. 19, 2020). Therefore, Vyskocil wrote, because McDougal had not identified specific facts about Carlson's alleged biases and failed to otherwise "provide a permissible theory supporting a finding of actual malice, the Court cannot find a plausible inference that actual malice exists."

In conclusion, Vyskocil wrote that although Carlson accused McDougal of extortion, McDougal did not offer a "plausible interpretation" that the accusation was a statement of fact when read in context. Rather, Vyskocil said, Carlson's accusation was "rhetorical hyperbole and opinion commentary intended to frame a political debate." Further, Vyskocil wrote, McDougal as a public figure failed to "raise a plausible inference of actual malice" because she offered "only conclusory allegations about Mr. Carlson's alleged biases and otherwise pursue[d] theories that [were] pre-empted by long-standing precedent." Vyskocil thus granted Fox News's motion to dismiss McDougal's complaint.

In response to the ruling, McDougal told the Associated Press on September 24, "I believe reporting something you know is a lie as 'news' or 'undisputed facts' is the very definition of malicious." Fox News told *The New York Times* on September 24 in a written statement: "Karen McDougal's lawsuit attempted to silence spirited opinion commentary on matters of public concern. The court today held that the First Amendment plainly prohibits such efforts to stifle free speech."

The ruling comes after a $10 million libel lawsuit against MSNBC's Rachel Maddow was dismissed in May 2020. The suit, filed by the owner of One America News Network (OAN), alleged that Maddow had defamed the news channel in a July 22, 2019 broadcast. At issue was Maddow's statement that "the most obsequiously pro-Trump right wing news outlet in America really literally is paid Russian propaganda." The court found Maddow's statement was not an assertion of fact: "The context of Maddow's statement shows reasonable viewers would consider the contested statement be opinion," the court wrote. *Herring Networks*, *Inc.*, *v. Rachel Maddow*, *et al.*, No. 19-cv-1713-BAS-AHG (S.D. Cal. May 22, 2020).

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District Court Rejects Government Bid to Replace Trump as Defendant in E. Jean Carroll Lawsuit

On Oct. 27, 2020, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York ruled that President Donald Trump may not substitute the United States government as a defendant in a libel lawsuit brought by journalist E. Jean Carroll. *E. Jean Carroll v. Donald J. Trump*, 20-CV-7311-LAK (S.D.N.Y Sept. 8, 2020). After Carroll alleged that Trump sexually assaulted her, he asserted that she made up the story. Carroll then sued alleging that Trump's denial defamed her. Kaplan held that the U.S. government could not be substituted as a defendant in the lawsuit because Trump was not an "employee of the government" and even if he was an employee, the statements at issue do not concern activity that would be in the scope of his employment. A copy of the decision is available online at: https://z.umn.edu/6ih6.

The lawsuit arose after *New York* magazine on June 21, 2019 published an excerpt from a book Carroll wrote in which she claimed that Trump had sexually assaulted her in the 1990s at a department store in New York City. Shortly after the allegation was made public, Trump refuted it, said Carroll had made up the story, and called her "a liar and stated that he never met her." On Nov. 4, 2019, Carroll sued Trump in his personal capacity in New York state court alleging that he defamed her by calling her a liar in response to her sexual assault claim. *E. Jean Carroll v. Donald J. Trump*, Sup. Ct. New York County, Sept. 8, 2019, Saunders, J. index No. 160694/2019. On Sept. 8, 2020, the U.S. Department of Justice filed a notice of removal in the case, seeking to transfer the lawsuit to federal court and replace Trump with the federal government as the defendant. The Justice Department asserted that Trump was acting in his official capacity as President when he denied the sexual assault allegation. The import of such a claim is that, if true, Carroll's lawsuit would almost assuredly fail because of governmental immunity, according to the *New York Law Journal* on October 27.

Kaplan wrote that the United States as a sovereign nation has sovereign immunity, meaning the U.S. cannot be sued unless it consents to being sued. Under the Federal Tort Claims Act (FTCA), the federal government has "authorize[d] damages claims for negligence and certain other civil wrongs committed by government employees within the scope of their employment." However, the FTCA specifically excepts libel and slander cases from the United States's consent to be sued." Thus, Kaplan wrote, two legal questions must be answered to determine whether the federal government can replace Trump as defendant: (1) Is Trump an "employee of the Government" under the FTCA? (2) If Trump is an "employee of the Government," were his allegedly defamatory statements within the scope of his governmental employment? Kaplan answered "no" as to both questions.

First, Kaplan found that Trump is not an "employee of the Government" for purposes of the FTCA for several reasons. Kaplan looked to the statutory text and found that the Presidency, as a constitutional office, is not covered under any statutory definition of "employee of the Government." 28 U.S.C. § 2671. Kaplan also pointed to legislative history. The U.S. Supreme Court ruled in 1982 that the President "is entitled to absolute immunity from damages liability predicated on his official acts." *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Six years later, in *Westfall v. Erwin*, 484 U.S. 292 (1988), the Supreme Court held that "federal officials are not absolutely immune from state-law tort liability for all actions committed within the outer perimeter of their duties." Kaplan wrote that the Supreme Court in *Westfall* "clearly was not referring to the president." In 1988, Congress passed a statutory override of the Supreme Court's decision in *Westfall*. The legislation, called the Westfall Act, "bars tort claims against government employees acting within the scope of their employment," and requires that the Attorney General defend civil actions and proceedings brought against governmental employees. "There was no need to extend the protections of the Westfall Act to the president, whom the Supreme Court evidently recognized was not a 'federal employee,' for the very good reason that the president already had 'absolute immunity from damages liability predicated on his official acts' by virtue of *Nixon v. Fitzgerald*," Kaplan wrote. Furthermore, Kaplan said, the Court is precluded from assuming the President is covered under the FTCA "absent an express statement by Congress." *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Finally, Kaplan said, construing "employee of the Government" to cover the President "could ignite a significant expansion of federal tort exposure — without any evidence of a congressional intent to do so — by authorizing lawsuits that could involve review of the president's job performance."

Second, Kaplan held that even if Trump was considered an "employee of the Government," the allegedly defamatory statements would not be within the scope of his governmental employment. That decision was based on Kaplan's analysis of five factors that courts use to determine the nature of an employer-employee relationship. Among the key considerations Kaplan identified were (1) that "[n]o one, inside or outside of the executive branch, has 'the power to control the [president's] conduct' — a factor Kaplan said was "decisive" — and (2) "while commenting on the operation of government is part of the regular business of the United States, commenting on sexual assault allegations unrelated to the operation of government is not."

In sum, Kaplan wrote, the federal government cannot be substituted as a defendant for Trump in Carroll's lawsuit. "[T]he undisputed facts demonstrate that President Trump was not acting in furtherance of any duties owed to any arguable employer when he made the statements at issue. His comments concerned an alleged sexual assault that took place several decades before he took office, and the allegations have no relationship to the official business of the United States," Kaplan wrote. "To conclude otherwise would require the Court to adopt a view that virtually everything the president does is within the public interest by virtue of his office. The government has provided no support for that theory, and the Court rejects it as too expansive."

On November 27, the Associated Press (AP) reported that the Justice Department appealed Kaplan's ruling. At the time the Silha *Bulletin* went to press, the U.S. Court of Appeals for the Second Circuit had not issued a decision.

— Jonathan Anderson
Silha *Bulletin* Editor

Ninth Circuit Rules NSA Surveillance Program Violated FISA and Potentially the Fourth Amendment

On Sept. 2, 2020, the U.S. Court of Appeals for the Ninth Circuit held that the National Security Agency's (NSA) warrantless mass surveillance of American's telephone metadata violated the Foreign Intelligence Surveillance Act (FISA) and may have violated the Fourth Amendment. *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020). However, the court upheld the convictions of the defendants in the case on charges of sending money to Somalia in support of a foreign terrorist organization.

PRIVACY

The case arose between October 2010 and June 2012 when the federal government charged the defendants — Basaaly Saeed Moalin, Mohamed Mohamed Mohamud, Issa Doreh, and Ahmed Nasir Taalil Mohamud — with conspiring to send $15,900 to Somalia in 2008 to support al-Shabaab, a foreign terrorist organization. According to the Ninth Circuit, "[s]hortly after filing the initial indictment, the government filed notice that it intended to use or disclose in the proceedings "information obtained or derived from electronic surveillance conducted pursuant to the authority of [FISA]."

During the ensuing trial, the government's primary evidence was a series of recorded phone calls between the defendants that was obtained through a wiretap of Moalin's phone. The government gained access to the phone calls "after receiving a court order under FISA Subchapter I, 50 U.S.C. §§ 1801–1812." In February 2013, the jury convicted defendants on all counts. In September 2013, the defendants filed a motion for a new trial, arguing that the information obtained through the interceptions conducted pursuant to FISA "may have been 'generated by illegal means' — that is, that the government may have violated the Fourth Amendment or its statutory authority under FISA in collecting information supporting the FISA warrants."

In the months following the trial, former NSA contractor Edward Snowden revealed the existence of NSA data collection programs, including "the bulk collection of phone records, known as telephony metadata, from telecommunications providers." (For more information on Snowden's disclosures, see "Snowden Leaks Reveal Extensive National Security Agency Monitoring of Telephone and Internet Communication" in the Summer 2013 issue of the Silha *Bulletin*, "Snowden Leaks Continue to Reveal NSA Surveillance Programs, Drive U.S. and International Protests and Reforms" in the Fall 2013 issue, "NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches" in the Winter/Spring 2014 issue, "Fallout from NSA Surveillance Continues One Year After Snowden Revelations" in the Summer 2014 issue, "Government Surveillance Critics Target Broad Authority of Executive Order 12333" and "29th Annual Silha Lecture Examines the Right to Access Government Information in the Wake of National Security and Privacy Concerns" in the Fall 2014 issue, "Two Years After Snowden Revelations, National Security Surveillance Issues Still Loom" in the Summer 2015 issue, and "NSA Telephony Metadata Collection Program Remains Controversial Even After It Ends" in the Fall 2015 issue.)

In June 2015, Congress passed the USA FREEDOM Act, which "effectively ended" the NSA's bulk telephony metadata collection program and prohibited further bulk collection of such records after Nov. 28, 2015.

Judge Marsha S. Berzon wrote the unanimous opinion for the Ninth Circuit. She first addressed Moalin's Fourth Amendment claim, namely that "the metadata collection violated his Fourth Amendment "right . . . to be secure . . . against unreasonable searches and seizures." According to Berzon, the U.S. District Court for the Southern District of California held that the present case was controlled by *Smith v. Maryland*, 442 U.S. 735, 742–43 (1979), in which the U.S. Supreme Court held that the "government'' use of a pen register to record the numbers the defendant dialed from his home telephone did not constitute a Fourth Amendment search, because individuals have no reasonable expectation of privacy in information they voluntarily convey to the telephone company." *United States v. Moalin*, No. 10cr4246 JM, 2013 WL 6079518 (S.D. Cal. 2013). In so doing, the Court established the "third-party doctrine," which was upheld in *United States v. Miller*, 425 U.S. 435, (1976), in which the Court held that defendants had no legitimate expectation of privacy in their bank records.

Berzon held that there were "strong reasons to doubt that *Smith* applies here." She continued, "Advances in technology since 1979 have enabled the government to collect and analyze information about its citizens on an unprecedented scale." Berzon cited *Carpenter v. United States*, 138 S. Ct. 2206 (2018), in which the Supreme Court "[c]onfront[ed] these changes, and[,] recognizing that a 'central aim' of the Fourth Amendment was 'to place obstacles in the way of a too permeating police surveillance[,]' . . . declined to 'extend' the third-party doctrine to information whose collection was enabled by new technology," namely historical cell site location information. (For more information on *Carpenter*, see "U.S. Supreme Court Rules Law Enforcement Must Obtain Warrant To Access Individuals' Historical Cell Site Records" in the Summer 2018 issue of the Silha *Bulletin*.)

Berzon concluded that the "distinctions between *Smith* and this case are legion and most probably constitutionally significant" and provided several reasons why this was the case, including that "the information recorded in *Smith* was 'limited' and of a less 'revealing nature' than the telephony metadata at issue here." She added that the large amount of people whose telephony data were collected was also problematic because it "enable[ed] the data to be aggregated and analyzed in bulk."

Although Berzon concluded that the "defendants' Fourth Amendment argument has considerable force," the court "[did] not come to rest as to whether the discontinued metadata program violated the Fourth Amendment because even if it did, suppression would not be warranted on the facts of this case." She reasoned that "[h]aving carefully reviewed the classified FISA applications and all related classified information, we are convinced that under established Fourth Amendment

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Privacy, *continued from page 51*

standards, the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial."

Second, Berzon turned to the defendants' argument that "the metadata collection program violated FISA Subchapter IV, under which the FISA Court authorized it." According to Berzon, "Section 1861 of FISA Subchapter IV authorizes the government to apply to the FISA Court for an 'order requiring the production of any tangible things (including . . . records . . .) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.'" She continued, "At the time relevant to this case, the statute required the government to include in its application 'a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment).'"

Berzon held that "the telephony metadata collection program exceeded the scope of Congress's authorization in section 1861 and therefore violated that section of FISA." She cited the Second Circuit's ruling in *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 821 (2nd Cir. 2015), in which the court held that the text of section 1861 "cannot bear the weight the government asks us to assign to it, and . . . does not authorize the telephone metadata program."

Third, Berzon held that because Subchapter IV did not include a "suppression remedy," there was no statutory basis to suppress Moalin's metadata. She further ruled that "[b]ecause the wiretap evidence was not 'unlawfully acquired,' suppression is not warranted." She provided several reasons, including that the court agreed with the government "that Moalin's metadata 'did not and was not necessary to support the requisite probable cause showing' for the [FISA] Subchapter I application in this case." Berzon explained that the government had "obtained an order from the FISA Court under Subchapter I authorizing a wiretap of Moalin's phone" and that, in doing so, the government included other evidence in the application, including "a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power."

Fourth, Berzon held that "assuming without deciding that the government should have provided notice of the metadata collection to defendants, the government's failure to do so did not prejudice defendants." She wrote, in part, "At a minimum, then, the Fourth Amendment requires notice to a criminal defendant when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from surveillance of that defendant conducted pursuant to the government's foreign intelligence authorities."

In a Sept. 9, 2020 commentary for *Lawfare*, Orin Kerr, a professor at the University of California, Berkeley School of Law, argued that the Ninth Circuit "appears to articulate a new Fourth Amendment notice requirement. It suggests that defendants charged with crimes must be notified about surveillance practices that led to evidence that may be used in their case." Kerr explained that the Fourth Amendment "traditionally has only one notice requirement. When the government executes a search warrant, the government has to give notice — even if delayed notice — that the warrant was executed," citing *Dalia v. United States*, 441 U.S. 238, 247-48 (1979).

However, Kerr contended that the Ninth Circuit "imagines a different kind of notice requirement, though. Instead of a notice requirement that a warrant was executed, flowing from the warrant itself, this is a notice requirement that appears to be triggered only if and when criminal charges are filed providing notice that evidence about a person was collected using a surveillance practice that may or may not be a search." He added, "In effect, it's a notice to criminal defendants to consider filing a motion to suppress to challenge the investigation and vindicate any Fourth Amendment rights that may or may not have been at stake.. . . This strikes me as a very different kind of constitutional notice requirement than what courts have recognized before." The full commentary is available online at: https://www.lawfareblog.com/did-ninth-circuit-create-new-fourth-amendment-notice-requirement-surveillance-practices.

Berzon also addressed several evidentiary arguments by the defendants, and ultimately upheld the convictions of each defendant. The full ruling is available online at: https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.aclu.org%2Fsites%2Fdefault%2Ffiles%2Ffield_document%2F85-1._opinion_9.2.20.pdf#page=1&zoom=auto,-12,798.

In a statement following the ruling, the American Civil Liberties Union (ACLU) praised the decision. "Today's ruling is a victory for our privacy rights.. . . [I]t makes plain that the NSA's bulk collection of Americans' phone records violated the Constitution."

Joshua L. Dratel, a lawyer for Moalin, said in a statement, "We're disappointed in the result, especially since more recent disclosures regarding misconduct regarding FISA has further revealed how the lack of transparency in the entire process compromises individual rights of those charged with crimes as well as those never charged — including those Americans whose telephone metadata was collected and retained." He added, "In this case, we believe that the lack of transparency was prejudicial to our ability to challenge the FISA surveillance."

As the *Bulletin* went to press, Moalin's defense team was "evaluating the options for further appeal," according to the ACLU and *Politico*.

Meanwhile, on Oct. 28, 2020, Reuters reported that the NSA was "rebuffing efforts by [Sen. Ron Wyden (D-Ore.)] to determine whether it is continuing to place so-called back doors into commercial technology products." More specifically, the back doors, according to Reuters, "enable the NSA and other agencies to scan large amounts of traffic without a warrant." Following the Snowden revelations, the NSA developed new rules around such practices. However, aides to Wyden told Reuters that the agency "has stonewalled on providing even the gist of the new guidelines."

"Secret encryption back doors are a threat to national security and the safety of our families — it's only a matter of time before foreign hackers or criminals exploit them in ways that undermine American national security," Wyden told Reuters. "The government shouldn't have any role in planting secret back doors in encryption technology used by Americans."

— Scott Memmel
Postdoctoral Associate

35th Annual Silha Lecture Addresses the Importance of Documentaries and the Need for U.S. Law to Protect Them

On Oct. 19, 2020, Dale Cohen, the director and founder of the UCLA Documentary Film Legal Clinic and Special Counsel to FRONTLINE, the award-winning PBS documentary series, contended during the 35th Annual Silha Lecture that "[d]ocumentaries provide a brilliant platform for filmmakers to tell us important stories and give voice to perspectives that are often overlooked. Some of them are straight up news. Some are advocacy.. . . Some are designed primarily to make us laugh or to intrigue or entertain. Whatever form they take, films provide us with a vivid and entertaining medium for understanding our world. It's time for the law and our institutions to treat documentaries as an essential and equal part of our journalism universe."

SILHA CENTER EVENTS

Cohen's lecture, titled "Inconvenient Truths and Tiger Kings: The Vital Role of Documentaries Today," attracted approximately 200 attendees from a variety of locations in the United States and abroad, marking the first Silha Lecture held in a virtual format due to the ongoing COVID-19 pandemic.

Cohen began his lecture by discussing "the importance of documentaries in our culture today." He explained that "[t]housands of documentaries are available for streaming and viewing these days" and that in the first half of 2020, Netflix had announced that 150 million viewers worldwide had watched at least one of its documentaries in the last year.

Cohen also described the "incredible power of documentaries," citing the value of "news video," including the footage depicting the May 2020 death of George Floyd while in the custody of the Minneapolis Police Department (MPD). (For more information on the Floyd's death; ensuing arrests, attacks, and threats against journalists by police; and litigation, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy," on page 10 and "Court Access and Medical Privacy Issues Arise in Wake of George Floyd Killing," on page 18 of this issue of the Silha *Bulletin*; "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue.)

Cohen also cited several "powerful documentaries," in which "documentary filmmakers get to add their skills, their tools, and their talents to enhance and contextualize that footage." He continued, "They use music, sound, lighting, graphics, effects, and cinematography, and use these tools . . . in documentaries to grab our attention to make us think to tug at your heartstrings just as much as any Hollywood blockbuster does.. . . [T]hese elements can be used to educate, to challenge, and to entertain us." Cohen cited several examples, including *An Inconvenient Truth* — a 2006 documentary film about former U.S. Vice President Al Gore's efforts to inform the American public about global warming — and *Tiger King: Murder, Mayhem and Madness* — a 2020 documentary miniseries about the life of zookeeper Joseph Maldonado-Passage, better known as "Joe Exotic."

Cohen noted "the skill of the filmmakers who have borrowed the storytelling techniques of the finest filmmakers from around the world." He also credited smartphones, which he described as "powerful high-resolution filmmaking tools" that have "all of the necessary equipment for making a documentary." This technology, he said, is "much more accessible than it had been in the past." He also cited the "tremendous amount of shelf space for documentaries" because of the rise of 24/7 cable news channels and streaming services that "all need lots of content and documentaries, [which] are generally cheaper to buy or to make than scripted films and programs." Finally, Cohen pointed to "the declining financial support for traditional news sources that tell in-depth stories . . . leav[ing] many storytellers . . . looking for new channels of communication."

Cohen then considered the legal landscape around documentaries in the United States, asserting "the surprising fact that our legal system does not treat doc filmmakers with the same constitutional deference as we provide the journalists operating in other media." He explained first that "[t]his isn't a new phenomenon" and that the U.S. Supreme Court first considered motion pictures in *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915). In this case, the Court held in a 9-0 vote that the free speech protection under the Ohio Constitution did not extend to motion pictures. According to Cohen, the Court provided three main reasons why it did not extend First Amendment protections to motion pictures, including that motion pictures "were capable of causing harm, given their 'attractiveness and manner of exhibition.'" The second reason was that films, according to the Court, were for entertainment, not the conveyance of opinion. The final reason was that films were created as part of business to make a profit.

Cohen argued that "[t]oday, of course, we recognize how wrongheaded these rationales are," for three reasons. First, Cohen said "the fact that the particular media might be utilized for insidious purposes is not a justification for eliminating protection for all works and that media category."

Second, Cohen also contended that "the line between entertainment and opinion can't really be effectively drawn," citing the Supreme Court's ruling in *Brown v. Electronic Merchants Association*, 564 U.S. 786 (2011), in which the Court struck down a California law that prohibited the sale or rental of violent video games to minors, declaring video games to be protected speech under the First Amendment. (For more information on *Brown*, see "U.S. Supreme Court Strikes Down Ban on Violent Video Game Sales to Minors" in the Summer 2011 issue of the Silha *Bulletin*. Brown was also the

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Cohen, *continued from page 53*
topic of the 2010 Silha Lecture featuring attorney Paul Smith, who later argued the case before the Supreme Court. For more information on his lecture, which was a rehearsal for Smith's arguments before the Court, see "U.S. Supreme Court Weighs California's Ban on Violent Video Game Sales" in the Fall 2010 issue of the Silha *Bulletin*).

Finally, Cohen argued "that operation for profit has never excluded speech from the First Amendment protection." He cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Supreme Court applied the First Amendment to an advertisement published by *The New York Times* seeking donations for the legal defense of Martin Luther King, Jr. on perjury charges. The Court ultimately established the "actual malice" standard, which requires proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

Cohen next cited the U.S. Supreme Court's ruling in *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952), in which the Court "reversed course" and held that "[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.. . . [W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."

Cohen noted that "one might be able to draw a line from the [*Burstyn*] case to one of the most important and controversial First Amendment decisions of recent times: the *Citizens United* case," in which "[i]t was a documentary film about Hillary Clinton produced by a conservative nonprofit organization that led to that decision and all of the controversy that followed." In *Citizens United v. FEC*, 58 U.S. 310 (2010), the Court ultimately struck down portions of the Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U.S.C. § 441b, a federal campaign finance law, because it impermissibly discriminated against the First Amendment rights of corporations to expressly support political candidates." (For more information on *Citizens United*, see "Justice Ginsburg Passes Away; Authored and Joined Key First and Fourth Amendment Majority and Dissenting Opinions" on page 22 of this issue of the Silha *Bulletin*, and "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue. Campaign finance was also the topic of the 2003 Silha Lecture, featuring attorney Ken Starr. For more information on his lecture, "Political Liberty: Campaign Finance and the Freedoms of Speech and Association" see "Ken Starr Presents 18th Annual Silha Lecture" in the Fall 2003 issue of the Silha *Bulletin*, which is available online at: https://conservancy.umn.edu/bitstream/handle/11299/150038/BulletinFall2003.pdf?sequence=1&isAllowed=y.)

However, Cohen argued that despite the *Burstyn* ruling, there has still been "a lingering bias against film and documentary films, in particular in the field of newsgathering." He contended that although the Supreme Court held in *Branzburg v. Hayes* that "news gathering is not without its First Amendment protections," 408 U.S. 665, 681, 707 (1972), the "application of that principle has been spotty at best."

Cohen provided examples, including that the Supreme Court "still doesn't allow [cameras in the courtroom] and [that] most courts still disfavor them." He explained that "[e]ven in the states that allow cameras, there's generally a process that requires specific court approval." Conversely, according to Cohen, there is "no similar process or bias against reporters attending trial and in other situations." He added, "In fact, the rules regarding cameras are strange, given that the Supreme Court has emphatically pressed for courts and their proceedings to be open to the public, but apparently [not] through one of the most effective communications media and the one that our youngest generations have come to rely upon the most."

On the other hand, Cohen explained that "courts are increasingly protective of video and photography," and that "[a] majority of the federal Circuit Courts have now held there is a First Amendment right to record police in public places in the course of their [official] duties." (For more information on such rulings, see "Third Circuit Declares a First Amendment Right to Record On-Duty Police Officers" in the Summer 2017 issue of the Silha *Bulletin*.) However, Cohen argued that despite such rulings, as well as those "recognizing a right to record governmental activities and other matters of public interest, . . . a number of federal agencies and state and local governments [have continued] to discriminate against documentary filmmakers."

He cited *Price v. Barr*, 1:19-cv-03672, a case before the U.S. District Court for the District of Columbia centering on the National Park Service's policy requiring a permit and fees for commercial filming in national parks. According to Cohen, the regulation "requires a permit and payment for 'recording a moving image with the intent of generating income.'" He explained that although the regulation "specifically exempts newsgathering, the Park Service contended that [Gordon Price, a documentary filmmaker,] making a film [in Yorktown, Va. honoring our victory in the Revolutionary War] . . . didn't qualify."

Cohen continued, "In other words, a still photographer working for a magazine or a newspaper would have no problem under the regulation and would not need a permit or would have to pay or not have to pay a fee. Similarly, an amateur photographer or videographer . . . would be okay taking endless amounts of video of the family in the National Park. And there's no evidence that the Park Service has ever applied this law to a TV news program.. . . Treating Mr. Price differently than all of those people is irrational and it does not comport with the First Amendment." As the *Bulletin* went to press, the National Park Service (NPS) was still defending the policy before the federal District Court for the District of Columbia, although NPS had dropped the charges it had filed against Price for violation of the regulation.

Third, Cohen argued that the "federal government's bias against documentarians plays out in other ways as well," including in a U.S. Department of Homeland Security (DHS) policy that "requires documentary filmmakers to agree to a special form of agreement when they access DHS property or facilities." According to Cohen, DHS

"use[s] that as a precondition for that access for not only documentary filmmakers, but scripted films, fiction programs, television programs, etc." However, other print and television journalists, according to Cohen, "don't receive that agreement and it's not a precondition for access."

He added, "Among the many requirements of the multimedia agreement [is that] DHS requires doc filmmakers to submit both the rough cut and the final cut of their films to give DHS the opportunity to comment upon and, if they deem necessary, demand changes to meet concerns about accuracy, safety, and security.. . . Again, there is no similar provision for TV news or for newspapers and there's no basis for subjecting documentaries to these requirements, which obviously raise concerns about potential censorship."

Finally, Cohen cited *Ness v. City of Bloomington*, a case pending before the U.S. Court of Appeals for the Eighth Circuit challenging the constitutionality of a Bloomington, Minn. ordinance prohibiting intentionally taking a photograph or otherwise recording a minor in a city park without the consent of the parent or guardian. Sally Ness, a Bloomington resident, claimed that the law was unconstitutional under the First Amendment. Cohen asserted that in July 2020, the District of Minnesota "dismissed the claim incorrectly, in my view, largely based on the misunderstanding of First Amendment law." *Ness v. City of Bloomington*, No. 19-2882 ADM/DTS, 2020 WL 4227156 (July 23, 2020).

Cohen argued that the trial court misinterpreted First Amendment law because the ordinance is not "content-neutral" and "the City Council and the court both improperly ignored the constitutionally salient truth that there is no reasonable expectation of privacy in a public park." As the *Bulletin* went to press, the Eighth Circuit had not ruled in *Ness*.

Cohen drew a parallel to the "same erroneous judgment that many in the film industry make when they insist that documentary filmmakers must have releases from everyone who appears in their films." He explained that such releases "certify that an interviewee consents to an interview and its use in a documentary and . . . may include other provisions, including the release of other tort claims." Furthermore, insurance companies, according to Cohen, "press filmmakers for assurances about such releases from their subjects [and] others who appear in the documentary before they will provide errors and omissions policies.. . . [D]istributors of films insist on that insurance before they will agree to distribute a documentary."

He added, "Here again documentarians are being treated differently than other journalists. *The New York Times* doesn't ask interviewees to sign a release. And their insurance company certainly doesn't require that. '60 minutes' correspondents and local television news people do not ask for releases when they interview people or when they film them on the street for their news stories." Cohen therefore asked, "Why then should documentarians be expected to meet this standard? Their interviewees [and people filmed in public] do not have any reasonable expectation of privacy.. . . [Interviewees] know they're being filmed and they typically know what the interviewer knows and intends to do with the recording."

> "[T]he First Amendment doesn't require objectivity to qualify for protection. Thomas Paine and John Peter Zenger didn't follow a set of editorial guidelines when they became free speech heroes in colonial times. The First Amendment protects a marketplace of ideas — opinion and advocacy are welcome. And as the Supreme Court has often reminded us, the First Amendment protects a robust, uninhibited, and wide open discussion of matters of public interest."
>
> **— Dale Cohen, Special Counsel to PBS's FRONTLINE**

Cohen asserted that the "only reason that's been articulated in case law that [he could] identify "has been the contention that documentarians are often times, acting as advocates, not as journalists." He cited the Second Circuit's 2011 ruling in *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2011), in which the court declined to extend the reporter's privilege not to disclose confidential sources and information to Joseph Berlinger, a documentary filmmaker. The court reasoned that Berlinger was not acting as an independent journalist because the film was solicited by the plaintiffs.

Cohen argued that there were multiple problems with the ruling, including that "the First Amendment doesn't require objectivity to qualify for protection." He continued, "Thomas Paine and John Peter Zenger didn't follow a set of editorial guidelines when they became free speech heroes in colonial times. The First Amendment protects a marketplace of ideas — opinion and advocacy are welcome. And as the Supreme Court has often reminded us, the First Amendment protects a robust, uninhibited, and wide open discussion of matters of public interest," citing *Sullivan*. He therefore called for U.S. law and institutions to better recognize the importance of documentaries and treat them equally with traditional journalism.

During a Q&A session moderated by Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, Cohen responded to several questions from webinar attendees, including a question by prominent First Amendment attorney Lee Levine, who asked, "In a world when many documentarians come to their subjects with a story they want to tell, how do you counsel your clients about mitigating the risks of defamation liability from plaintiffs who will argue that such preconceived narratives are actually evidence of actual malice?" (Levine delivered the 16th Annual Silha Lecture, titled "Newsgathering on Trial: The Supreme Court And the Press In the 21st Century" on Oct. 2, 2001. For more information on the lecture, see "*Bartnicki v. Vopper* Topic of Sixteenth

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Cohen, *continued from page 55*

Annual Silha Lecture" in the Fall 2001 issue of the Silha *Bulletin*.)

Cohen responded that he advises his clients "to follow good journalistic practice, which means that they report things based on multiple solid sources that that that are independently confirming the facts." He added that PBS — like other traditional outlets such as *The New York Times*, *The Washington Post*, and the BBC — has guidelines ensuring a "right of reply," meaning that if a filmmaker criticizes someone, such as alleging unethical or criminal conduct, they provide "them the opportunity to respond."

Such conversations allow PBS, according to Cohen, to "lay out for them the things that our sources have told us or what we found in the course of our investigation and ask them to respond to it." Cohen continued, "And very often, they introduce us to new information and it changes the way we tell the story.. . . That's good journalistic practice."

In response to another question from Kirtley, Cohen discussed the 1967 documentary *Titicut Follies*, which was directed by Frederick Wiseman and focused on "the horrendous treatment" of the patient-inmates of Bridgewater State Hospital for the criminally insane in Massachusetts. According to Cohen, a legal dispute over the film arose when "the State of Massachusetts decided that the film had not quite turned out the way they thought it would and that it did not cast prison officials or the state in a very good light. So they ran to court in New York to try to get an injunction against the showing at the [New York Film] Festival. Happily, the court in New York allowed them to do the one showing."

However, Cohen explained that Massachusetts officials were granted an injunction against the film in their state, requiring Wiseman to pull back whatever copies he had and to destroy those copies. The Massachusetts Supreme Court, in *Commonwealth v. Wiseman*, ultimately balanced the First Amendment and privacy interests in the case, ruling that the film could not be shown to the general public, but instead only to a select group of doctors, lawyers, medical professionals, and educators. 356 Mass. 251 (1969). The full ruling is available online at: https://law.justia.com/cases/massachusetts/supreme-court/1969/356-mass-251-2.html.

In 1991, Massachusetts Superior Court Judge Andrew Meyer ruled that the restrictions on the documentary constituted a prior restraint, clearing the way for PBS to air the film in 1992. Meyer wrote, "As each year passes, the privacy issue of this case is of less concern to the court than the [First Amendment] issue. I am now convinced that the scales have tipped in favor of an unrestricted showing."

In response to another audience question, Cohen remarked that he believes "the First Amendment protects all of these documentarians . . . [and] people across the political spectrum." However, he added, "I think we can all agree that we would like the social media platforms that have such an incredible impact on our world to exercise reasonable discretion." He cited Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (2020), which provides protection for social media platforms and others from liability based on most content posted by their users.

Cohen argued that although the debate over whether social media platforms can and do suppress certain political opinions "rocks our faith in the First Amendment," he still "[felt] better prohibiting the government for making decisions about what can and can't appear for the public and what ideas, they can and can't see." He added, "I believe, like [Justice Louis Brandeis] said when he was on the [Supreme Court], that that counter speech is really the best solution to false speech and sunlight is the best disinfectant. I've lived by that for a long time."

A link to a video of the lecture is available online at: https://www.youtube.com/watch?v=OlFpX90AZBU. Silha Center activities, including the annual Silha Lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

— Scott Memmel
Postdoctoral Associate

The 35th Annual Silha Lecture

Inconvenient Truths and Tiger Kings:
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