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Federal Prosecutors Charge Julian Assange With Seventeen Counts Under the Espionage Act, Prompting Renewed Concern for Journalists

On May 23, 2019, several media outlets reported that the U.S. Department of Justice (DOJ) had released an indictment alleging 17 additional charges against WikiLeaks founder Julian Assange, all of which were under the Espionage Act, 18 U.S.C. § 793. The charges prompted significant concern from journalists and press advocates that the indictment was the next step in prosecuting traditional journalists under the statute. Meanwhile, on July 30, 2019, a federal judge dismissed a lawsuit filed by the Democratic National Committee (DNC) against WikiLeaks and Assange, finding that their publication of stolen DNC emails and documents was protected by the First Amendment.

WikiLeaks gained notoriety in 2010 after publishing thousands of classified U.S. military documents on its website, including a video from a U.S. military helicopter as it shot and killed a Reuters photographer in Baghdad in July 2007, as well as operating manuals for the Guantanamo Bay prison. (For more background on WikiLeaks, see "WikiLeaks' Document Dump Sparks Debate" in the summer 2010 issue of the Silha *Bulletin*.)

On Aug. 21, 2013, then-Army Pvt. Bradley Manning was sentenced to 35 years in prison for violating the Espionage Act. On Jan. 17, 2017, then-President Barack Obama commuted Manning's sentence to seven years. In 2013, Manning publicly announced she is a transgender woman and changed her name to Chelsea. (For more information on Manning, see "President Obama Commutes Chelsea Manning's Sentence, Pardons Gen. James E. Cartwright, Takes No Action on Edward Snowden" in the Winter/Spring 2017 issue of the Silha *Bulletin* and "Manning Sentenced to 35 Years in Prison for Leaks" in the Winter/Spring 2015 issue.)

On April 11, 2019, British police arrested Assange after Ecuador's President Lenin Moreno revoked political asylum and evicted Assange for "repeated violations [of] international conventions and daily-life protocols." Assange had been granted diplomatic asylum in the Ecuadorian embassy in 2012 after losing an appeal against extradition to Sweden, where he faced two sexual assault allegations. Assange was also found guilty in Westminster Magistrates' Court of breaching his 2012 bail conditions. On May 1, 2019, he was sentenced to 50 weeks in prison on the breached bail charges, and on July 18, he dropped his appeal against the jail term.

Following Assange's arrest by British officials, U.S. prosecutors unsealed charges of conspiracy to "access a [government] computer without authorization" under the Computer Fraud and Abuse Act (CFAA). 18 U.S.C. § 1030. The charges alleged that Assange assisted Manning in cracking a password to gain access to the classified documents published by WikiLeaks. The indictment was filed on March 6, 2018 in the U.S. District Court for the Eastern District of Virginia and was kept secret until prosecutors mistakenly mentioned charges in an unrelated case's court filings.

Following the charges under the CFAA, some observers attempted to differentiate Assange from traditional journalists. David A. Schulz, a First Amendment lawyer who advised *The Guardian* when it published documents leaked by Edward Snowden, told *Vice News* on April 11, "If you break into someone's home to get information, you don't have legal protection under the guise of sharing the news." (Schulz delivered the 29th Annual Silha Lecture, titled "See No Evil: Why We Need a New Approach to Government Transparency" on Oct. 16, 2014. For more information on the lecture, see "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 of the Silha *Bulletin*.)

However, other observers still expressed concern. In an article for *Harper* magazine's April issue, James Goodale, former defense counsel for *The New York Times* in *New York Times v. United States*, 403 U.S. 713 (1971), which arose after the *Times* published excerpts from the Pentagon Papers, highlighted how investigative reporters often obtain classified information through a process of encouraging sources and helping them remain anonymous. If they are no longer allowed to use such techniques, Goodale asserted, "investigative reporting based on classified information will be given a near death blow." In an April 12 op-ed for *The Hill*, Goodale added, "Can a journalist instruct his source in a manner which will permit the source to escape identification? The answer is, generally speaking, yes — but whether it applies to news-gathering in the Digital Age, using the computer, will be the question in this case." (Goodale was the 2013 Silha lecturer. For more information on the lecture titled "The Lessons of the Pentagon Papers: Has Obama Learned Them?," see "Silha Lecturer Links Pentagon

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Silha Center Staff

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Papers and Obama Administration's Treatment of Linkers" in the Fall 2013 issue of the Silha *Bulletin*.)

In an April 11 interview with the *HuffPost*, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley warned that the CFAA charges could be an "incremental step" towards charging journalists under the Espionage Act. (For more information on the arrest of Assange and indictment under the CFAA, see "WikiLeaks Founder Julian Assange Arrested on Computer Hacking Charges, Fueling Concerns Over Press Freedom" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

On May 23, 2019, U.S. prosecutors announced 17 additional charges against Assange under the Espionage Act. The 37-page indictment filed in the Eastern District of Virginia first argued that Assange and WikiLeaks had "repeatedly sought, obtained, and disseminated information that the United States classified due to the serious risk that unauthorized disclosure could harm the national security of the United States." The indictment further asserted that Assange "encourage[d] [sources] with access to protected information, including classified information, to provide it to WikiLeaks for public disclosure." One way Assange did so, according to the indictment, was creating a "Most Wanted Leaks of 2009" list, which sought documents that were "likely to have political, diplomatic, ethical or historical impact on release . . . and be plausibly obtainable to a well-motivated insider or outsider."

COVER STORY

Second, the indictment contended that Manning had responded to Assange's "solicitation," namely the "Most Wanted Leaks" list, in disclosing the classified military documents to WikiLeaks in 2010. Third, the indictment alleged that Assange had continued to "encourage Manning to steal classified documents from the United States and unlawfully disclose that information to WikiLeaks." The indictment then contended, like the charges under the CFAA, that Assange had "agreed to assist Manning in cracking a password hash stored on United States Department of Defense [(DOD)] computers connected to the Secret Internet Protocol Network, a United States government network used for classified documents and communications." The indictment added that because Assange had assisted Manning in creating the password, he "knowingly receiv[ed] such classified records from Manning for the purpose of publicly disclosing them on the WikiLeaks website."

Fourth, the indictment argued that Assange, WikiLeaks and its affiliates, and Manning had "shared the objective . . . to subvert lawful measures imposed by the United States government to safeguard and secure classified information, in order to disclose that information to the public and inspire others with access to do the same." The indictment further argued that, in doing so, Assange had published the names of the U.S. military's "human sources," including "local Afghans and Iraqis who had provided information to U.S. and coalition forces," as well as "persons throughout the world who provided information to the U.S. government in circumstances in which they could reasonably expect that their identities would be kept confidential," including journalists.

The indictment claimed that by publishing the names, Assange knowingly "created a grave and imminent risk that the innocent people he named would suffer serious physical harm and/or arbitrary detention." The indictment further claimed that during the U.S. armed forces' 2011 raid of the compound of Osama bin Laden in Abbottabad, Pakistan, they collected items such as "Department of State information provided by Manning to WikiLeaks and released by WikiLeaks."

Finally, the indictment alleged 17 counts under the Espionage Act, including multiple counts of "Conspiracy to Obtain, Receive, and Disclose National Defense Information," "Unauthorized Obtaining and Receiving of National Defense Information," and "Unauthorized Disclosure of National Defense Information." The 18th count against Assange in the indictment was the original charge under the CFAA. The full indictment is available online at: https://assets.documentcloud.org/documents/6024848/5-23-19-US-Assange-Superseding-Indictment.pdf.

According to *Vice News* on May 24, 2019, Assange remained in a high-security prison in London, noting that on May 13, Swedish authorities had reopened its investigation into sexual assault accusations against Assange and wanted him extradited to Sweden. As the *Bulletin* went to press, it was unclear whether Assange would be extradited to the United States or Sweden, or remain in the United Kingdom (UK).

Following the release of the Espionage Act charges against Assange, several media law experts expressed deep concern regarding the DOJ's indictment. In a May 24 interview with *HuffPost*, Kirtley said, "This is serious.. . . Everybody in the news business and frankly everybody who is a consumer of information needs to be paying attention to this." She continued, "Whatever happens to Julian Assange could potentially happen to any journalist, anywhere — including someone who the government would acknowledge has a more traditional journalistic role."

Kirtley added in a May 24 interview with *Vice News* that the DOJ "upped the ante now." She argued that although the government had been "dancing around this issue for many years," the selection of Assange "is a very deliberate step by the administration."

Jameel Jaffer, director of the Knight First Amendment Institute at Columbia University (Knight Institute) told *Vice News*, "I don't think there's any way to understand this indictment except as a frontal attack on press freedom." Jonathan Peters, a media law professor at the University of Georgia, agreed, calling the charges under the Espionage Act a "five-alarm fire for the First Amendment."

Several observers also discussed the implications of Assange potentially being defined or characterized as a journalist. The *HuffPost* noted that Assange's legal team would likely argue that he "fulfilled a press-like role in disseminating the Manning documents" and would "base their defense around First Amendment issues and press freedom." The *HuffPost* added that since 1917, when the Espionage Act was passed, no journalist had been charged under the statute.

Kirtley explained in a May 23 interview with CNN Business that it is a "dangerous question" to ask whether a request for tips constitutes "solicitation" because it could implicate news outlets that have tip lines or encrypted messaging systems. "In traditional legal principles governing the way the press obtains information like this is that, if it's dropped in your lap, you're free to publish," Kirtley said. "But lots of websites have tip solicitations. Is that kind of solicitation now going to be deemed [equal] to what Assange did?" She added, "That's a very dangerous line to draw. I don't like government deciding who journalists are or what journalism is."

Peters similarly argued that President Donald Trump's administration "has no credibility to decide who's a journalist." In a May 23 statement, *Washington Post* executive editor Marty Baron said, "The [Trump] administration has gone from denigrating journalists as 'enemies of the people' to now criminalizing common practices in journalism that have long served the public interest."

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Reporters Committee for Freedom of the Press (RCFP) executive director Bruce Brown said in a May 23 statement that "irrespective of the Justice Department's assertion that Assange is not a journalist," any "government use of the Espionage Act to criminalize the receipt and publication of classified information poses a dire threat to journalists seeking to publish such information in the public interest."

Dean Baquet, executive editor of *The New York Times*, echoed Brown's assertion, contending in a statement that "[o]btaining and publishing information that the government would prefer to keep secret is vital to journalism and democracy." He added, "The new indictment is a deeply troubling step toward giving the government greater control over what Americans are allowed to know."

Legal scholars and journalists have previously noted the important distinction between active participation and passive reception of documents and the corresponding protections granted by the First Amendment. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the U.S. Supreme 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.

Committee to Protect Journalists (CPJ) executive director Joel Simon said in a separate May 23 statement, "The indictment of [Assange] for publishing classified information is an attack on the First Amendment and a threat to all journalists everywhere who publish information that governments would like to keep secret." He added, "Press freedom in the United States and around the world is imperiled by this prosecution."

Meanwhile, on July 30, 2019, U.S. District Court for the Southern District of New York Judge John G. Koeltl dismissed a lawsuit brought by the DNC against Assange and WikiLeaks, among others, including the Russian Federation (Russia). He held that the First Amendment protected WikiLeaks' publication of DNC emails and documents that were obtained by Russia through unlawful hacking.

During the 2016 U.S. presidential election, WikiLeaks published thousands of emails and documents that Russian hackers had stolen from the DNC servers. WikiLeaks published the stolen documents on July 22, 2016, one day prior to the start of the Democratic National Convention. Experts argued that WikiLeaks' timing suggested that the organization was deliberately trying to influence the U.S. presidential election. Additionally, several of the emails contained information that was embarrassing to Democratic presidential candidate Hillary Clinton's campaign and the DNC. The DNC sued WikiLeaks and Assange under the CFAA, the Stored Communications Act, 18 U.S.C. §§ 2510-22, and several other federal and state statutes.

(For more information about the DNC hacks and lawsuit, see *U.S. Government Officials Push Back Against WikiLeaks, Announce Intentions to Arrest Assange* in "WikiLeaks Publishes Documents Revealing CIA Hacking Tools, Faces Government Blowback" in the Winter/Spring 2017 issue of the Silha *Bulletin* and *Cyberattacks Target U.S. Political Campaigns and Organizations During Election Year* in "Data Breaches Continue to Plague Social Networking Websites, Government Agencies, and News Organizations" in the Summer 2016 issue.)

Koeltl held that the First Amendment protected WikiLeaks and Assange, as well as several former aides and advisers to President Donald Trump, from liability for disseminating the stolen materials "in the same way [the First Amendment] would preclude liability for press outlets that publish materials of public interest despite defects in the way the materials were obtained so long as the disseminator did not participate in any wrongdoing in obtaining the materials in the first place," citing *Bartnicki*. He explained that the DNC did not "allege any facts to show [that WikiLeaks and Assange] participated in the theft of the DNC's information" and that, therefore, "the First Amendment protects the publication of those stolen documents."

Koeltl also found that it was "irrelevant that WikiLeaks [had] solicited the stolen documents from the Russian agents." He reasoned that an individual is "entitled [to] publish stolen documents that the publisher requested from a source so long as the publisher did not participate in the theft." Koeltl cited *Jean v. Massachusetts State Police*, 492 F.3d, 31 (1st Cir. 2007), in which the U.S. Court of Appeals for the First Circuit held that the First Amendment protected an individual who had posted a video online that was illegally recorded, even though she had "actively collaborat[ed]" with the source in disclosing the recording.

Koeltl further reasoned that the DNC's argument that WikiLeaks could "be held liable for the theft as an after-the-fact coconspirator . . . would eviscerate *Bartnicki*" because it would "render any journalist who publishes an article based on stolen information a coconspirator in the theft." He added that "[t]his was not a solicitation to steal documents but a request for material that had been stolen. Journalists are allowed to request documents that have been stolen and to publish those documents."

Koeltl also rejected the DNC's claim that the publishers had violated trade secrets laws. Again citing *Bartnicki*, Koeltl explained that the Supreme Court "did not say that its holding 'did not permit' the disclosure of trade secrets." Instead, according to Koeltl, the Court recognized that important privacy interests are served by the Electronic Communications Privacy Act, 18 U.S.C. § 2511(c), the federal wiretap law prohibiting any individual or organization from "intentionally intercept[ing], endeavor[ing] to intercept, or procur[ing] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication," among other provisions. However, the Court ultimately concluded that it did not need to decide "whether [the First Amendment interest in allowing the publication of truthful information on a matter of public concern was] strong enough to justify the application of the [Electronic Communications Privacy Act] to disclosures of trade secrets . . . of purely private concern."

Koeltl held that he did not need to determine "what protection trade secrets should receive in matters of purely private concern." Koeltl concluded that it was "sufficient for this case" to hold that the DNC's privacy interest in "donor lists" and "fundraising strategies," which it called "trade secrets," was "insufficient . . . to overcome the strong public interest in the publication of matters of paramount public concern."

Koeltl added, "[I]t is plain that the DNC's conclusory allegations that 'donor lists' and 'fundraising strategies' were among those documents published by WikiLeaks does not provide a basis to overcome the First Amendment." He continued, "If Wikileaks could be held liable for publishing documents concerning the DNC's political financial and voter-engagement strategies simply because the DNC labels them 'secret' and trade secrets, then so could any newspaper or other media outlet. But that would impermissibly elevate a purely private privacy interest to override the First Amendment interest in the publication of matters of the highest public concern."

The full ruling is available online at: https://www.courtlistener.com/

recap/gov.uscourts.nysd.492363/gov.uscourts.nysd.492363.266.0.pdf. As the *Bulletin* went to press, the DNC had not announced whether it would appeal the ruling.

In two July 30 tweets, President Trump praised the ruling, calling it a "total & complete vindication & exoneration from the Russian, WikiLeaks and every other form of HOAX perpetrated by the DNC, Radical Democrats and others."

DNC spokesperson Xochitl Hinojosa pushed back against President Trump's claims in a July 30 statement. "We are still reviewing the decision. At first glance, this opinion raises serious concerns about our protections from foreign election interference and the theft of private property to advance the interests of our enemies," she said. "At a time when the Trump administration and Republican leaders in Congress are ignoring warnings from the president's own intelligence officials about foreign interference in the 2020 election, this should be of concern to anyone who cares about our democracy and the sanctity of our elections."

Previously, on March 13, 2019, RCFP, the Knight Institute, and the American Civil Liberties Union (ACLU) filed an *amici* brief supporting WikiLeaks' motion to dismiss. The brief explained that the Supreme Court "has recognized broad protection for the publication of truthful information of public concern" and that the press "has relied on this protection to report on major stories . . . that inform the public and hold the powerful to account."

The brief provided the example of the "Panama Papers," a collection of 11.5 million files, totaling 2.6 terabytes of data involving offshore accounts linked to prominent figures and criminals around the world. Beginning on April 3, 2016, a team of over 300 journalists and 100 media partners, working under the umbrella of the International Consortium of Investigative Journalists (ICIJ), sifted through the documents, which revealed that more than 214,000 offshore companies were connected to people in more than 200 countries and territories. (For more information on the Panama Papers, see "Special Report: Silha Center Interview with Panama Papers Journalist Kevin Hall" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

The brief cited *Bartnicki*, as well as *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 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. The brief also cited *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102-103 (1979), particularly the Court's emphasis that "state action to punish the publication of truthful information seldom can satisfy constitutional standards . . . absent a need to further a state interest of the highest order." In *Daily Mail*, 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. Finally, the brief cited *New York Times v. United States*, 403 U.S. 713 (1971), also known as the "Pentagon Papers" case. The Court held that the federal government could not enjoin the *Times* and the *Post* from publishing portions of the top-secret study, despite the government's purported national security interest.

The full brief is available online at: https://www.rcfp.org/wp-content/uploads/2019/03/DNCvRussianFederationEtAlBrief.pdf.

Scott Memmel
Silha *Bulletin* Editor

Police Raid Freelance Journalist's Home and Office, Prompting Criticism and Legal Action

On May 10, 2019, the *San Francisco Chronicle* reported that officers from the San Francisco Police Department (SFPD) had raided the home and office of freelance journalist Bryan Carmody, seizing documents and electronic devices. The raid occurred after Carmody provided three local television stations with a copy of a police report related to the death of Jeff Adachi, a public defender in San Francisco, Calif. The actions by the SFPD prompted significant criticism from observers, who contended that the search warrants had probably violated federal and state constitutional and statutory law. The raid also prompted motions by Carmody to quash the search warrants in the case and to have the police return his seized materials and devices, as well as a motion by three media advocacy organizations seeking to unseal the search and arrest warrants, among other documents.

SEARCHES AND SEIZURES

Carmody, who worked in the Bay Area for nearly three decades as a freelance journalist, told the *Chronicle* on May 10 that he had sold the police report to three TV news stations, a practice he had done several times before to generate income, working as a "stringer." The report appeared on evening newscasts and in print stories on February 22 within hours after Adachi collapsed at a Telegraph Hill apartment with a "mysterious woman" who was not his wife, according to the *Chronicle*. National Public Radio (NPR) reported on May 13 that there were several "salacious" details in the police report, suggesting that "perhaps one or more members of the police department were trying to tarnish the reputation of Adachi, who was known as a police watchdog and fierce advocate for criminal justice reform." On March 22, the *Los Angeles Times* reported that Adachi had died from an accidental overdose of cocaine and alcohol.

Following the release of the report and media coverage, SFPD officials began two internal investigations to determine the source of the leak, calling the release of the report "totally inappropriate," according to the *San Francisco Chronicle* on May 10. On April 11, SFPD's Internal Affairs Bureau had asked for Carmody's source on the police report, but he declined to provide the person's name, according to the *Chronicle*. Carmody also insisted that he did not pay his source for the report.

At 8:30 a.m. on May 10, around 10 officers "banged" on the outer gate of Carmody's home, attempting to break the gate with a sledgehammer and crowbar. A video of the SFPD officers at the gate is available online at: https://twitter.com/bryanccarmody/status/1130631788802404352. According to Carmody, when he "willingly" opened the gate, the SFPD executed a search warrant on his home, which was located in the Outer Richmond District. The police later executed a second warrant at his office located in the Western Addition neighborhood. Carmody said the police officers seized his computers, cell phones, and other electronic devices, as well as his confidential work materials. He added that the police "[broke his] door down," which he said he "[didn't] think was right." Carmody was detained until 3 p.m. before being released.

> "[Journalists] have to be able to perform their work without fear of being compelled to explain to the state or show the state how they went about their business.. . . They have to be free from state compulsion to give them their sources of information."
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> **— David Snyder, First Amendment Coalition executive director**

Following the raid, David Stevenson, an SFPD spokesperson, defended the department's actions. "The search warrant executed today was granted by a judge and conducted as part of a criminal investigation into the leak of the Adachi police report," he said. "[The] actions are one step in the process of investigating a potential case of obstruction of justice along with the illegal distribution of a confidential police report." The warrants were signed by California Superior Court Judges Victor Hwang and Gail Dekreon.

On May 15, the *San Francisco Chronicle* reported that SFPD Chief Bill Scott also stood by the raid. "We have to do our jobs and make sure reports are not released when they are not supposed to be released," he said. "If there's criminal activity that's proven, we want to get to the bottom of that." He added in a May 21 press conference that Carmody was a criminal suspect in an ongoing investigation, according to independent California news and culture outlet *48hills* on the same day.

However, on May 24, 2019, Scott apologized for the raid of Carmody's home and office. In an interview with the *Chronicle*, Scott said SFPD "should have done a better job." He added, "I'm sorry that this happened. I'm sorry to the people of San Francisco. I'm sorry to the mayor. We have to fix it. We know there were some concerns in that investigation and we know we have to fix it." Scott acknowledged that the search warrants did not adequately identify Carmody as a journalist.

Nevertheless, the raid and subsequent defense of the actions by SFPD officials prompted significant criticism from free press advocates. In a series of tweets on May 12, Electronic Frontier Foundation (EFF) Civil Liberties Director David Greene cited Cal. Penal Code § 1524(g), which states that "[n]o warrant shall [be issued] for any item or items described in" the statutory version of the California Shield Law, which appears verbatim in the state's constitution. The shield law provides that a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication," as well as "a radio or television news reporter or other person connected with or employed by a radio or television station" cannot be "adjudged in contempt by a judicial, legislative, administrative body . . . for refusing to disclose . . . the source of any information procured while so connected or employed." Cal. Evid. Code § 1070. Greene noted that in *People v. Von Villas*, the California Court of Appeals for the Second District had held that the "constitutional provision

plainly encompasse[d] . . . a freelance writer . . . within its protective shield." 10 Cal. App. 4th 213 (Cal Ct. App. 1992).

David Snyder, executive director of the First Amendment Coalition (FAC), a free-speech and media support group, told the *Chronicle* on May 15 that journalists "have to be able to perform their work without fear of being compelled to explain to the state or show the state how they went about their business." He continued, "They have to be free from state compulsion to give them their sources of information."

Snyder also agreed with Greene that Carmody would be protected by the California Shield Law. "Carmody is in the business of selling stories to news outlets. That's what freelancers do, how they put food on the table," Snyder said. "You don't have to be on salary to a news organization to be entitled to the privileges of the shield law."

In a May 13 statement, the Committee to Protect Journalists' (CPJ) North America program coordinator Alexandra Ellerbeck also criticized the search. "The police raid on [Carmody's] home sends a chilling message to all local media," she said. "Authorities should immediately return his equipment, stop pressuring him to reveal the identity of his sources, and pledge to follow California's shield law."

In a May 14 interview with the *Columbia Journalism Review* (*CJR*), Carmody's attorney, Thomas Burke of Davis Wright Tremaine LLP in San Francisco, contended that "[s]earch warrants for journalists are very, very rare." He added, "They just don't happen, and they shouldn't happen."

On May 16, Carmody tweeted that his lawyers, Burke and Ben Berkowitz, a partner at Keker, Van Nest & Peters LLP, had filed a motion to quash the search warrants in the case, as well as a motion to return Carmody's property, including 68 items of his work materials and electronic devices. According to Greg Hill & Associates in Los Angeles, Calif., under California Penal Code § 1538.5(a)(1), quashing a search warrant would not only challenge the lawfulness of the warrant, but also suppress evidence that was gathered by executing the warrant.

Also on May 16, the Reporters Committee for Freedom of the Press (RCFP) and 59 other media organizations filed an *amicus* letter in San Francisco County Superior Court in support of Carmody's motions. The letter first stated that the media organizations were "deeply concerned by the SFPD's treatment of Mr. Carmody, and the Department's possible disregard for the federal and state constitutional and statutory protections that strictly limit when law enforcement may search for, or seek to compel a journalist to produce, confidential work product or documentary materials, or attempt to force a reporter to identify a confidential source." The letter added that these protections "are vital to journalists' ability to effectively gather and report news of importance to the public" and that the mass seizure of Carmody's work, documents, and electronic devices "effectively shut down [his] newsgathering activities."

> "[F]ederal and state constitutional and statutory protections that strictly limit when law enforcement may search for, or seek to compel a journalist to produce, confidential work product or documentary materials . . . are vital to journalists' ability to effectively gather and report news of importance to the public."
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> **— Reporters Committee for Freedom of the Press and 59 other media organizations *amicus* letter**

The letter cited Cal. Penal Code § 1524(g) and the state shield law, contending that both would apply to a freelance writer. The letter also cited Privacy Protection Act of 1980 (PPA), which "protects the flow of confidential information to journalists by limiting when law enforcement . . . may search for or seize journalistic work product of documentary materials. 42 U.S.C. §§ 2000aa *et seq*. The PPA makes it "unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication," but provides exceptions in situations when a journalist is specifically under investigation or a search is needed to "prevent the death of, or serious bodily injury to, a human being." The PPA also prohibits the seizure of "documentary materials," which include information that is "recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs." However, the PPA does not protect "contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use or which is or has been used, as a means of committing a criminal offense."

Finally, the letter explained that RCFP and the media organizations were "continuing to explore how" U.S. Department of Justice (DOJ) guidelines regarding the obtaining of journalists' records by law enforcement "govern federal involvement in this case." 28 CFR § 50.10. The letter added that the protections in the guidelines "underscore the appropriate sensitivity with which journalists' work product and documentary materials are treated under federal and state laws and regulations."

The guidelines, titled "Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media," were first instituted in 1970 by Attorney General John Mitchell in response to press uproar about the growing number of subpoenas seeking to compel journalists to reveal confidential news sources, according to RCFP on Nov. 9, 2018.

In 2013, the DOJ amended the guidelines amidst growing criticism after the department obtained Associated Press (AP) telephone records listing incoming and outgoing numbers of individual AP reporters and several AP offices. The same year, the DOJ named Fox News reporter James Rosen as a co-conspirator during a leak investigation of a State Department official in order to obtain e-mails from Rosen's Google account, further raising criticism of DOJ practices. (For more information on the secret subpoenas of the AP, see "Justice Department Secretly Subpoenas Associated Press Phone Records" in the Winter/Spring

Raid, *continued on page 8*

Raid, *continued from page 7*

2013 issue of the Silha *Bulletin* and "Department of Justice Revises Guidelines for Investigating Journalists" in the Summer 2013 issue. For more information on the targeting of Rosen, see "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberty" in the Fall 2014 issue of the Silha *Bulletin*. For more on the Obama administration's prosecution of individuals under the Espionage Act, see "President Barack Obama Leaves Mixed Legacy on Government Transparency" in the Fall 2016 issue of the Silha *Bulletin*, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, "Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror" in the Winter/Spring 2013 issue, "Leaks: New Policies Emerge; Congress Gets Involved" in the Summer 2012 issue, "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue, "Judge Rebukes Government on Leak Prosecutions" in the Summer 2011 issue, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, and "The Media and the Military: Guantanamo Access Rules Loosened; Other Guidelines Set to Limit Leaks" in the Fall 2010 issue.)

In 2014 and 2015, the DOJ further revised the guidelines, strengthening protections for reporters, according to RCFP. The DOJ guidelines were most recently brought into question on June 7, 2018 when *The New York Times* reported that during an FBI investigation into alleged classified leaks by former U.S. Senate Select Committee on Intelligence (SSCI) director of security James A. Wolfe, who was charged and arrested in early June on three counts of lying to federal authorities, prosecutors secretly seized phone and email records of *Times* reporter Ali Watkins. (For more information on the confiscating of Watkins' records, see *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 of the Silha *Bulletin*. For more information on the DOJ guidelines, see *DOJ Reviews Guidelines Regarding Issuing Subpoenas, Court Orders, and Search Warrants Against Journalists* in "Department of Justice Continues Mulling Policies Regarding Jailing, Subpoenaing, and Searching U.S. Journalists" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

The letter therefore called on the court to order the immediate release of Carmody's protected work product, documentary materials, and newsgathering equipment that had been seized on May 10. The full letter is available online at: https://www.dropbox.com/s/0cxabooctxlcjlq/RCFP%20Amicus%20Motion%20for%20Filing%20Brief.pdf?dl=0.

Additionally, on May 20, 2019, a "Media Coalition" comprised of the FAC, RCFP, and the Northern California Chapter of the Society of Professional Journalists (SPJ) filed a motion in California Superior Court to unseal the SFPD's applications for search warrants used pursuant to the search of Carmody's home and office, as well as the warrants themselves, "arrest warrants, probable cause statements submitted to the Court in support of issuance of those warrants, returns, and lists of inventory seized."

The motion was made on two independent grounds: first, that under Cal. Penal Code § 1534(a), executed and returned search warrant materials "shall be open to the public as a judicial record." Second, the motion contended that the First Amendment, as well as the "California Constitution, Article I, § 2(a) and § 2(b), California Code of Civil Procedure § 1904, California Rule of Court 2.550, and the common law" all provided that "judicial records are presumptively open, and cannot be sealed absent specific, on-the-record findings that there is an overriding interest that overcomes the right of public access."

In a memorandum supporting the motion, the Media Coalition further argued that the "public's presumptive First Amendment right of access to court [proceedings and] records applied in this case and "require[d] greater transparency," citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1226 (Cal. 1999), in which the California Supreme Court determined that court records "cannot be maintained under seal unless a court specifically finds that: (1) there is an overriding interest that overcomes the public's right of access; (2) there is a substantial probability that sealing will promote that interest; (3) the sealing order is narrowly tailored to serve the overriding interest; and (4) that there are no less restrictive alternatives to sealing." The memorandum also cited *Press-Enterprise v. Superior Court*, 478 U.S. 1, 13-14 (1986), in which the U.S. Supreme Court found that a court "may not base its decision [to seal court records or proceedings] on conclusory assertions alone, but must make specific factual findings."

The memorandum argued that because the case did not implicate Carmody's Sixth Amendment right to a fair trial or other "prosecutorial interests sufficient to outweigh the public's right of access," the government could not justify the "blanket sealing" of the warrant materials, which, therefore needed to be unsealed.

The memorandum also contended that the "public's right of access to court records authorizing police action to arrest an individual or search his personal property is particularly important where, as here, serious questions are raised about the propriety of those actions." The memorandum continued, "Here, the press and the public have a powerful interest in knowing what law enforcement agencies knew, at the time the warrants were issued, about Mr. Carmody's status as a journalist[,] . . . what information law enforcement provided to the Court about Mr. Carmody's status as a journalist . . ., and whether law enforcement and the Court followed proper procedures in approving and executing the warrants." The memorandum cited *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984), in which the Supreme Court held that the public has a "strong interest" in overseeing police misconduct.

Finally, in a footnote, the Media Coalition argued that Carmody's disclosure of the police report "was not prohibited under California law," citing Cal. Gov't Code § 6254(f), which "authorizes, but does not mandate, an agency's withholding of 'records of . . . investigations conducted by . . . any state or local police agency[.]'" The memorandum further argued that although the disclosure of the report "may have violated internal procedures or department protocol," such disclosure of a public record could not constitute a criminal act.

The memorandum contended that even if the disclosure was unlawful, "well-established law protects Carmody's receipt and publication of the report," citing *Bartnicki v. Vopper*, 532 U.S. 514, 529-535 (2001), in which the Supreme Court held that "liability for broadcasting recorded conversation

lawfully obtained from one known to have illegally intercepted the call where information related to a matter of public concern violated the First Amendment." The memorandum also cited *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838, 841 (1978), in which the Court held that it was contrary to the First Amendment to convict a newspaper for publishing confidential complaints against a state judge.

The full motion and memorandum are available online at: https://drive.google.com/file/d/0B3FfCyQy-Cb9QkNNckVFejFxVU9SSF85enFjbnZRY1BlVUR3/view.

On May 23, Carmody tweeted that although a judge had not yet ruled on his motions, most of his electronic devices, notes, and other property were returned to him by the SFPD, though he noted that some items had not yet been returned. As the *Bulletin* went to press, Carmody had not announced whether he had received all of his materials and equipment.

On May 28, the *San Francisco Chronicle* reported that the SFPD had executed at least five search warrants against Carmody, and perhaps as many as seven, more than was previously acknowledged or revealed. Carmody summarily expanded his motion to quash to include three additional search warrants in the case. In an interview with the *Chronicle*, Scott acknowledged the existence of the previously undisclosed warrants. "We served warrants on officers and a number of warrants on Mr. Carmody, including a warrant on a very specific time for his phones, and one of the issues that I saw in this is in the initial warrants," Scott said.

Berkowitz told the *Chronicle* that "[i]t would be deeply troubling to learn that the SFPD not only obtained an illegal search warrant for Mr. Carmody's home and office, but that they also illegally obtained a search warrant for his phone records." He added, "If that is true, not only is it illegal, but it clearly violated the First Amendment and the California shield law and they need to be held accountable for it."

On May 31, 2019, ABC 7 in San Francisco reported that the SFPD had, in fact, requested and received a search warrant for "information from Carmody's cell phone for the day after Adachi died," including "subscriber information, call detail records, SMS Usage, Mobile Data usage, cell tower data." The warrant, which was released on May 31, also allowed SFPD to "conduct remote monitoring of the Subject Telephone Number device, day or night, including those signals produced in public, or locations not open to public or visual surveillance." According to the warrant, Carmody was not informed of the surveillance as it "would seriously jeopardize this investigation." The search warrant is available online at: https://www.dropbox.com/s/czlyt7esf3te2w2/SFPD%20Certified%20Letter%20recd%205-31-19%20REDACTED%20by%20Bryan%20Carmody.pdf?dl=0.

On June 1, Carmody tweeted that five search warrants had been released. One warrant allowed the SFPD to search "the person of [Carmody]," as well as his home. The warrant is available online at: https://californiaglobe.com/legal/exclusive-warrant-details-search-of-journalists-home-in-adachi-leak-probe/.

On June 14, Superior Court Judge Samuel Feng declined to rule on Carmody's motions, holding that the motions to quash and unseal needed to be heard by each of the judges who signed off on the individual warrants.

The *San Francisco Chronicle* reported on July 19 that San Francisco County Superior Court Judge Rochelle East had quashed the search warrant she signed that was used by SFPD to search Carmody's phone, calling the searches against Carmody "breathtakingly overbroad." The order barred investigators from using any evidence that was obtained under the order, according to the *Chronicle*. According to Carmody in a July 18 tweet, the warrant was the first issued against him and was dated March 1, 2019. A copy of the warrant is available online at: https://twitter.com/bryanccarmody/status/1151990974723186689.

East also ordered that any sealed documents related to the warrant, including the application filed by SFPD, be released, minus one redacted paragraph. According to an FAC press release on the same day, East said during the hearing that SFPD did not tell her that Carmody was a journalist, suggesting the department did not tell the other judges as well.

In a July 23, 2019 press release, the FAC reported that the documents unsealed by East revealed that the SFPD had only told East that Carmody's LinkedIn page "listed him as a 'Freelance Videographer/Communications Manager.'" The SFPD did not tell East that Carmody was "well-known in the police department and beyond for covering police activities on a daily basis" and had a valid press pass issued by SFPD, according to the FAC.

Snyder said in the press release, "The police department knew that Carmody has a press pass, and they knew he was a journalist — but failed to tell Judge East that fact." He continued, "The more we learn about the police department's extreme overreach here, the more the city's violation of California and federal law becomes obvious. There must be accountability, at the highest levels of San Francisco government, for this trampling on journalists' rights.

Following East's ruling, Burke contended that her decision could signal that the other judges would rule the same way. The FAC press release noted that four other judges in the case had deferred ruling until East had done so on the merits of the Media Coalition's motion to unseal the initial search warrant.

In an August 5 press release, the FAC reported that three additional judges had ordered the release of applications for three search warrants executed against Carmody. According to the FAC, the orders by Superior Court Judges Dekreon, Hwang, and Christopher Hite, were similar to East's. Dekreon said police did not inform her Carmody was a journalist when she authorized a search warrant of his home, according to the press release, which also noted that all three judges had quashed the warrants they had previously signed.

On August 16, *48hills* reported that Superior Court Judge Joseph Quinn quashed the final search warrant, which also targeted Carmody's cell phone records. However, Quinn did not order the warrant to be unsealed because of a pending request to redact police officers' names. As the *Bulletin* went to press, Quinn had not ruled on the motion to unseal the warrant.

Scott Memmel
Silha *Bulletin* Editor

Second Circuit Rules President Trump Violated the First Amendment By Blocking Twitter Users

On July 9, 2019, the U.S. Court of Appeals for the Second Circuit ruled that President Donald Trump could not block Twitter users from his Twitter account, reasoning that he had created a public forum and that blocking users that criticized him or his policies constituted viewpoint-based discrimination in violation of the First Amendment. *Knight First Amendment Institute v. Trump*, 2019 WL 2932440 (2nd Cir. 2019). The Second Circuit upheld the ruling by the U.S. District Court for the Southern District of New York, which also found that President Trump, as well as then-White House Director of Social Media and Assistant to the President Daniel Scavino, had violated the First Amendment by blocking Twitter users who had criticized the president. *Knight First Amendment Institute v. Trump*, 2018 WL 2327290 (S.D.N.Y. 2018).

FIRST AMENDMENT

The case arose in 2017 when President Trump blocked several Twitter users from his account, @realDonaldTrump, after they had criticized him and his policies. On June 6, 2017, First Amendment lawyers at the Knight First Amendment Institute (Knight Institute), a non-profit organization funded by the Knight Foundation and based at Columbia University, sent President Trump a letter asking him to unblock two Twitter users. The letter contended that blocking Twitter users "suppresses speech in a number of ways" including that the users cannot follow President Trump on Twitter, are limited in their ability to see and find his tweets, and cannot identify which accounts follow the president. The letter also argued that President Trump's Twitter account is a public forum and that by blocking users from that forum, President Trump had violated the First Amendment through viewpoint-based discrimination.

On July 11, the Knight Institute filed a complaint seeking declaratory and injunctive relief in the Southern District of New York after President Trump or his aides failed to unblock several Twitter users. The individual plaintiffs included Twitter users Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas, all of whom had criticized President Trump or his policies before being blocked.

On May 23, 2018, Southern District of New York Judge Naomi Reice Buchwald ruled in favor of the Knight Institute, finding that President Trump and Scavino, by blocking Twitter users who criticized the president or his policies, had engaged in viewpoint-based discrimination. She wrote, "While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him."

Buchwald also addressed whether President Trump's Twitter account represented a public forum, which required that the space "be owned or controlled by the government." Buchwald found that "[although] Twitter is a private . . . company that is not government-owned, the President and Scavino nonetheless exercise control over various aspects of the @realDonaldTrump account," particularly "the content of tweets, the timeline comprised of the account's tweets, and the interactive space of each tweet."

Furthermore, Buchwald found that "the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account" (interactive space) was a "designated public forum" because it is "generally accessible to the public . . . regard[less] of political affiliation" and is "designed to allow users 'to interact with other [users.]'" The U.S. Department of Justice (DOJ), which represented President Trump and Scavino, summarily appealed the case to the Second Circuit. (For more information on the background of the case and Buchwald's ruling, see *Federal Judge Rules President Trump Cannot Block Twitter Users, Violated First Amendment* in "Federal Courts and State Governors Deal with First Amendment Implications of Politicians Blocking Social Media Users" in the Summer 2018 issue of the Silha *Bulletin*.)

Second Circuit Judge Barrington D. Parker, Jr. wrote the opinion of the unanimous three-judge panel. Because the government had conceded that President Trump blocked the plaintiffs because they posted tweets that criticized him or his policies, and that such criticism was protected speech, Parker first addressed whether the president had acted in a "governmental capacity or as a private citizen." He noted that President Trump claimed that his account was "not a space owned or controlled by the government," but instead was a "platform for his own private speech and not one for the private expression of others."

However, Parker held that President Trump's account was a "government account" and that he had "excluded the Individual Plaintiffs from government-controlled property when he used the blocking function of the Account to exclude disfavored voices." Parker cited "uncontested evidence in the record of substantial and pervasive government involvement with, and control over, the Account," including that the account was presented by President Trump and his administration as belonging to, and operated by, the president. This was evident in several ways, including that the account was registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C'" and that the White House's official account, @WhiteHouse, "directs Twitter users to 'Follow for the latest from @POTUS @realDonaldTrump and his Administration.'"

Parker wrote that President Trump had frequently used the account "on almost a daily basis 'as a channel for communicating and interacting with the public about his administration' . . . [and] official government business." Additionally, according to Parker, President Trump had used the account "as an important tool of governance and executive outreach," including "to engage with foreign leaders and to announce foreign policy decisions and initiatives."

Although Parker ruled that the evidence demonstrated that President Trump's account was a "government account," he wrote that this may not be the case for every social media account operated by a public official. Therefore, he concluded that the determination of whether First Amendment concerns are raised by such an account relies on a "fact-specific inquiry."

Second, Parker turned to whether President Trump's Twitter account constituted a public forum. Parker explained that the government creates a public forum when it "[o]pen[s] an instrumentality of communication 'for indiscriminate use by the general public,'" citing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983). Parker concluded that because the account was

"intentionally opened for public discussion when the President . . . repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation," the conduct created a public forum.

Third, Parker concluded that President Trump committed viewpoint-based discrimination by blocking and, therefore, excluding from the public forum users who criticized him or his policies, "something the First Amendment prohibits." He rejected the government's argument that the plaintiffs were not prevented from speaking because they could express themselves elsewhere beyond the interactive space of President Trump's account. Parker reasoned that although the plaintiffs did not have a right to require the president to listen to their speech, they did have the right to speak to the other Twitter users who were speaking to or about President Trump via his account.

Parker further found that different "workarounds" such as creating new accounts, logging out to view President Trump's tweets, and using Twitter's search functions, still burdened the blocked users' speech, which also "run[s] afoul of the First Amendment." Ultimately, Parker concluded that "once [President Trump] open[ed] up the interactive features of his account to the public at large he is not entitled to censor selected users because they express views with which he disagrees."

Fourth, Parker turned to the government's argument that the account contained government speech, which would mean that "[t]he Free Speech Clause does not require government to maintain viewpoint neutrality[.]" Parker wrote that President Trump's initial tweets that he produced himself were, in fact, government speech. However, he argued that the case turned on more than these initial tweets, but instead on President Trump's "supervision of the interactive features" of his Twitter account. Because President Trump did not exercise any control over the messages of others tied to his account, "any retweets, replies, and likes of other users in response to the president's tweets [were] not government speech."

Finally, Parker concluded by writing that the "irony in all of this is that we [are] at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate," which includes an "extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen." Parker contended that this debate, "as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing." He therefore "remind[ed] the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."

The full ruling is available online at: https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2019.07.09_Opinion.pdf. .

Following the Second Circuit's decision, Knight Institute executive director Jameel Jaffer, who argued the case before the Second Circuit, praised the ruling. "Public officials' social media accounts are now among the most significant forums for discussion of government policy," he said in a July 9 statement. "This decision will ensure that people aren't excluded from these forums simply because of their viewpoints, and that public officials aren't insulated from their constituents' criticism.. . . The decision will help ensure the integrity and vitality of digital spaces that are increasingly important to our democracy."

In a July 15 opinion piece for *The Gainesville Sun*, University of Florida professor and Marion B. Brechner First Amendment Project director Clay Calvert praised the ruling as a "victory for the First Amendment right of citizens to speak to and disagree with government officials in the social media era." He argued that the ruling was "grounded in the well-established principles of protecting political speech and barring government discrimination against people engaged in public discourse based on their viewpoints.. . . This decision brings the Supreme Court's longstanding free speech doctrine into the social media era."

In a July 11 interview with *The Verge*, Cornell Law School professor James Grimmelmann contended that interpreting the Second Circuit's ruling in other cases may be difficult. "[President Trump] made this a very easy case," he said. "It's a harder question if a politician is using it to interact with the public but is not claiming to use it for official business."

On Aug. 23, 2019, the Associated Press (AP) reported that the DOJ had requested an *en banc* hearing by the full Second Circuit. The DOJ wrote in a court filing, "If the panel is correct, public officials who address matters relating to their public office on personal accounts will run the risk that every action taken on that account will be state action subject to constitutional scrutiny.. . . [President Trump's] ability to exclude others from this personal property is likewise independent of his office. That authority was conferred on him by Twitter, not by the government."

In an August 23 email to the AP, Jaffer wrote, "The panel's opinion was thorough and well-reasoned, and the arguments the White House [made] in its petition for rehearing are ones the panel appropriately rejected. We hope . . . that the petition will be denied." As the *Bulletin* went to press, the Second Circuit had not announced whether it would rehear the case.

The Second Circuit was not the first federal appeals court to rule that a public official had violated the First Amendment by blocking a social media user with whom they disagreed. On Jan. 7, 2019, the Fourth Circuit held that defendant Phyllis Randall, Chair of the Loudoun County (Va.) Board of Supervisors, engaged in viewpoint-based discrimination by blocking plaintiff Brian Davison, a community activist, from a public Facebook page, violating his First Amendment rights. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

Judge James Wynn wrote the majority opinion of the Fourth Circuit, holding that Randall's official Facebook page, particularly the interactive component of the page where any Facebook user could post comments, constituted a public forum. Wynn reasoned that Randall's official Facebook page "[bore] the hallmarks of a public forum," including that she opened the public comment section for "public discourse" for "ANY Loudoun citizen" and "on ANY issues, request, criticism, [or] complement [*sic*]" (emphasis in original). Wynn also ruled that Randall's ban of Davison amounted to viewpoint-based discrimination because Randall had blocked Davison due to the allegations he posted about conflicts of interest and corruption by Loudoun County's School Board members, which Randall said were "slanderous" and that she "didn't want [them] on the site." Wynn called the case an example of "black-letter viewpoint discrimination." (For more information on the Fourth Circuit's ruling and the facts of the case, see *Fourth Circuit Holds Local Official Violated the First Amendment By Blocking a Facebook User from an Official Page* in "Fourth Circuit and Western District of Wisconsin Rule Public Officials Violated the First Amendment By Blocking Social Media Users" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

Scott Memmel
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White House Revokes and Suspends Hard Press Passes Under New Rules

ACCESS

In a May 8, 2019 *Washington Post* opinion piece, Dana Milbank, the *Post*'s op-ed columnist covering national politics, wrote that he had received an email from the White House Press Office stating that his hard press pass, a physical press credential granting him access to the White House, had been revoked. Milbank reported that he was "not the only one" and was "part of a mass purge of 'hard pass' holders" after the White House changed its rules regarding distributing hard passes. Meanwhile, on August 2, *Playboy* magazine senior White House reporter and CNN political analyst Brian Karem tweeted that the White House had suspended his press pass for 30 days. According to Karem, whose reporting at times criticized President Donald Trump and his administration, the White House cited a confrontation he had had with a radio show host in the White House Rose Garden several weeks earlier.

According to *Politico* on March 19, 2019, White House reporters received an email on the weekend of March 16 from the White House Press Office informing them that the rules for distributing hard passes had changed. The email stated that in order to qualify for a hard pass, a reporter needed "to be physically present at the White House for [their] job 90 or more days in a 180-day window of time." The email added that journalists could apply for six-month passes if they covered the White House at least 60 of 180 days and that the White House would grant exceptions to "senior journalists" who are "consistently engaged in covering the White House" and for those with "special circumstances."

On May 8, Milbank wrote in his opinion piece, titled "The White House revoked my press pass. It's not just me — it's curtailing access for all journalists," that his hard pass was revoked under the new rules, along with seven of his colleagues at *The Washington Post*. However, according to Milbank, the *Post* requested "exceptions" for himself and the other reporters, with the White House granting exceptions to the other seven, but not Milbank, who wrote that he "strongly suspect[ed]" it was because he was a critic of President Trump.

Milbank's revelations and the White House's new rules prompted significant criticism from observers. In a May 8, 2019 tweet, Sen. Patrick Leahy (D-Vt.) cited Milbank's May 8 commentary and wrote "This is what dictators do." *Washington Post* columnist Glenn Kessler tweeted on the same day, "Revolting behavior by this administration."

In a May 9 statement, the Society of Professional Journalists (SPJ) wrote that it "continue[d] to be dismayed and concerned with the White House's treatment of the press after the revoking of press credentials from several journalists who regularly cover it, including [Milbank]." National President J. Alex Tarquinio was quoted as saying "This administration needs to stop playing games with White House press credentials." He added, "By changing the criteria and selectively applying the new rules, their actions fly in the face of the widely-accepted principles of press freedom and the Fourth Estate as a necessary watchdog of government." The full statement is available online at: https://www.spj.org/news.asp?REF=1649.

In a May 9 opinion piece for CNN, Joe Lockhart, the White House Press Secretary from October 5, 1998 to September 29, 2000 during President Bill Clinton's presidency, argued that under the new rules, "deciding on a daily basis whether to grant press access to those whose permanent credentials have been revoked offers a strong a temptation to deny access based on a reporter's latest story." He continued, "Essentially, that's the slippery slope [then-White House Press Secretary] Sarah Sanders and the White House have started down. A significant number of White House reporters have lost their permanent daily access based on the new policy.. . . There is no evidence yet that any of them will be denied access to do their jobs, but the combination of the new rules and this administration's attitude toward the press make it almost inevitable."

Milbank similarly argued that under the new policy, "virtually the entire White House press corps is credentialed under 'exceptions,' which means, in a sense, that they all serve at the pleasure of [Sanders] because they all fail to meet credentialing requirements — and therefore, in theory, can have their credentials revoked any time they annoy Trump or his aides[.]" Milbank's full opinion piece is available online at: https://www.washingtonpost.com/opinions/the-white-house-has-revoked-my-press-pass-its-not-just-me--its-curtailing-access-for-all-journalists/2019/05/08/bb9794b4-71c0-11e9-8be0-ca575670e91c_story.html?noredirect=on&utm_term=.90a4a91fea52.

Columbia Journalism Review (*CJR*) chief digital writer Mathew Ingram agreed in a May 9, 2019 commentary, writing that with "most of the press corps holding passes that have only been issued as 'exceptions,' the White House has a structure in place that could allow it to remove whoever it wishes to remove.. . . [I]n the short term it gives the Trump administration new levers with which to control the press corps." Ingram added that the new rules could be "an attempt exert more direct control over the White House press corps."

On June 26, 2019, *The Washington Post* noted that former communications director for first lady Melania Trump Stephanie Grisham, who replaced Sanders as White House Press Secretary on June 25, 2019, had previously threatened to revoke the press pass of Hank Stephenson, then a reporter for the *Arizona Capital Times*, in her capacity as press secretary for the Republican majority in the Arizona House of Representatives. Grisham had instituted a policy, according to the *Post*, requiring that reporters undergo an "invasive" background check into their addresses, driving records, and criminal and civil histories. Reporters who did not consent to the background check would have their credential revoked, meaning they would be denied access to the state's House floor. The *Post* wrote that although the policy was rescinded days later after every member of the Phoenix, Ariz. press corps refused to sign the form, it marked "the most high-profile controversy to define [Grisham's] tenure in Arizona.

Meanwhile, on Aug. 2, 2019, Karem, who observers noted was known for his criticism of President Trump, tweeted that his White House hard pass had been suspended for 30 days. CNN reported on the same day that the White House cited Karem's July 11 confrontation with radio host Sebastian Gorka. While waiting for a presidential press conference in the Rose Garden, Karem called the attendees of the preceding social media summit, which observers contended was largely meant for President Trump's supporters, "a group of people eager for demonic possession." Karem and Gorka then shouted at each other, including Gorka yelling "You're a punk, you're not a journalist, you're

a punk," to which Karem responded by urging Gorka to "get a job," according to Fox News on August 2.

In an August 2 interview with *The Washington Post*, Karem explained that the White House told him that he "failed to abide by basic norms of decorum" and that he had been rude to "a guest of the president." He added, "They're claiming [the reason is] something that happened 21 days ago. I'm there every day. If this was an issue, it should've been brought to my attention long before now.. . . As a matter of record, they never spoke to me once about it."

In an August 2 tweet, *Playboy* wrote that the "[s]uspension of credentialed press by the government is incredibly concerning." The publication added, "We are working with our lawyers to appeal the decision to suspend @briankarem. Since 1953, Playboy has fought to protect First Amendment rights, and the fight must continue today." The tweet linked to the account of Gibson, Dunn & Crutcher LLP attorney Theodore J. Boutrous. (Boutrous delivered the 33rd Annual Silha Lecture, titled "Confidential Sources of Journalists: Protection or Prohibition?" on Oct. 17, 2018. For more on the lecture, see "33rd Annual Silha Lecture Addresses the Free Speech Implications of the #MeToo Movement" in the Fall 2018 issue of the Silha *Bulletin*.)

Karem also tweeted that he would appeal the decision. On August 5, Boutrous sent a letter to Grisham formally responding to and appealing the suspension of Karem's press credentials. The letter began by stating, "[T]his Administration's unprecedented and unconstitutional attempts to convert the hard pass system into a means of censoring and penalizing the press charts a dangerous path that we hope [Grisham and the White House] will reconsider."

Second, the letter argued that the White House had violated Karem's First Amendment due process rights. The letter contended that the White House had not issued any "explicit rules . . . to govern behavior by members of the press at White House press events," such as the July 11 social media summit. The letter cited *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), in which the U.S. Court of Appeals for the D.C. Circuit held that due process in this context requires that the government "*articulate and publish* an explicit and meaningful standard" (emphasis in original) regarding the revoking or suspending of White House press passes. Therefore, according to the letter, the White House's reliance on a "widely shared understanding" as the basis of its decisions to suspend Karem's press pass did not satisfy the requirements under *Sherrill*.

The letter further argued that Karem was provided "*no* process before [the White House] reached [its] 'preliminary decision,' which was revealed to Mr. Karem after the fact, limiting Mr. Karem to an 'appeal' on short notice of a decision already made" (emphasis in original).

Third, the letter asserted that the White House's decision was content- and viewpoint-based discrimination, reasoning that the Trump administration singled out Karem rather than the social media summit attendees who "behaved far worse." The letter further argued that the White House's decision to wait 22 days before suspending Karem's pass, during which time President Trump answered several of Karem's questions, suggested that "the decision [was] less about protecting safety or decorum than silencing a journalist known for tough questioning of the President."

Finally, the letter argued that the White House provided "no explanation as to why suspending Mr. Karem's hard pass [was] a sufficiently tailored restriction on his First Amendment liberty interests where several less severe restrictions [were] available." The letter cited *Sherrill*, which required "compelling" reasons for revoking a hard pass.

The letter added, "Hard passes are not meant to be weaponized as a means of penalizing reporters for coverage with which the administration disagrees based on amorphous and subjective standards. Such actions unconstitutionally chill the free press." The letter therefore called for Grisham to fully restore Karem's hard pass. The full letter is available online at: https://www.gibsondunn.com/wp-content/uploads/2019/08/Karem-White-House-Letter.pdf.

On August 16, Karem tweeted that he had "[j]ust received word from the [White House]" in a letter that the suspension of his hard pass for 30 days was "finalized." Citing Boutrous' Twitter account, Karem stated, "We will now go to court and sue."

In an August 16 statement, Boutrous also wrote that they "intend[ed] to seek immediate relief in federal court." Boutrous added, "The White House press secretary's arbitrary decision to suspend [Karem's] press pass credential violates the First Amendment and due process and is yet another example of this administration's unconstitutional campaign to punish reporters and press coverage that President Trump doesn't like. The president and his administration are fostering an atmosphere of hostility and violence towards journalists that cannot be tolerated and they are illegally using the credential process to stifle freedom of the press and to disrupt the flow of vital information to the American people."

As the *Bulletin* went to press, Karem had not officially filed a lawsuit in federal court.

Observers noted that several of the arguments raised in Karem's and Boutrous' letter were those made by Boutrous after the White House attempted to revoke CNN reporter Jim Acosta's credential in November 2018. The conflict arose on Nov. 7, 2018 when President Trump called Acosta "a rude, terrible person" after he asked the president repeated questions about his characterization of the Central American migrant caravan as "an invasion" during a press conference following the 2018 midterm elections. As Acosta continued trying to question President Trump about the migrant caravan and the Special Counsel investigation by Robert Mueller, President Trump repeated "That's enough" and told Acosta to "put down the mic" as a White House intern reached to grab it. Hours later, several media outlets reported that the White House had revoked Acosta's hard pass.

On November 13, CNN and Acosta filed a lawsuit in the U.S. District Court for the District of Columbia against President Trump and several members of his administration, arguing that Acosta's First and Fifth Amendment rights had been violated, and that President Trump's administration failed to follow the proper protocols, therefore violating the Administrative Procedure Act, 5 U.S.C. § 706. Boutrous signed the complaint, which was accompanied by a motion for a temporary restraining order (TRO). Boutrous represented CNN at a November 14 hearing regarding the motion for the TRO.

On November 16, Judge Timothy J. Kelly, who was appointed to the District of Columbia by President Trump in 2017, ruled that the White House was wrong to revoke Acosta's credentials and must immediately return them, granting the plaintiffs' request for a TRO. Although Kelly did not officially rule on the underlying case regarding the First and Fifth Amendments, he found that the White House did not provide Acosta with the due process required to legally revoke his press pass, therefore causing Acosta "irreparable harm." Kelly reasoned that the decision to revoke Acosta's hard

White House, *continued on page 14*

White House, *continued from page 13*

pass was "so shrouded in mystery that the government could not tell me . . . who made the decision."

On November 19, the White House reached a "final determination" and told CNN that it would restore Acosta's press credentials, so long as he abided by new rules at presidential press conferences, which included: "(1) a journalist called upon to ask a question will ask a single question and then will yield the floor to other journalists; (2) At the discretion of the President or other White House official . . . a follow-up question or questions may be permitted . . . (3) 'Yielding the floor' includes, when applicable, physically surrendering the microphone to White House staff for use by the next questioner." Failure to abide by these rules could "result in suspension or revocation of the journalist's hard pass."

(For more information on the White House's attempt to revoke Acosta's hard pass, the ensuing legal battle, and the new rules for presidential press conferences, see *President Trump Calls CNN Reporter "Rude, Terrible Person," Revokes His Press Credentials; Federal Judge Requires Trump Administration Reinstate Credentials* in "President Trump Continues Anti-Press Rhetoric and Actions" in the Fall 2018 issue of the Silha *Bulletin*.)

The White House's attempt to revoke Acosta's hard pass was not the first instance of the Trump administration excluding reporters from an event. In February 2017, several media outlets, including *The New York Times*, CNN, and others, were banned from attending a "gaggle," a press briefing that took place in then-White House Press Secretary Sean Spicer's office instead of the televised session typically held in the White House briefing room. *Time* magazine and the Associated Press (AP) boycotted the briefing to show support for the banned media. Conversely, overtly conservative news organizations *The Washington Times*, One America News Network, and *Breitbart News* were invited to attend the meeting. (For more information on the exclusion of the media outlets from the press briefing, see *President Trump Continues Longstanding Battles with the Press* in "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

On July 25, 2018, the Trump administration "banned" CNN reporter Kaitlan Collins from a press availability with President Trump and Jean-Claude Juncker, the president of the European Commission, who were meeting in the Rose Garden of the White House. Earlier that day, Collins represented all television networks as the "pool reporter" and had asked several questions about President Trump's former lawyer, Michael Cohen, at a photo op of the two leaders in the Oval Office. (For more information on the White House banning Collins, see *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" in the Summer 2018 issue of the Silha *Bulletin*.)

In October 2018, literary and human rights group PEN American Center, Inc. (PEN America) filed a lawsuit in the U.S. District Court for the Southern District of New York against President Trump, arguing that he had "us[ed] the machinery of government to retaliate or threaten reprisals against journalists and media outlets for coverage he dislikes." PEN America's complaint included several examples, including the Trump administration's efforts to ban Collins from the Rose Garden press conference. (For more information on PEN America's lawsuit, see *PEN America Files First Amendment Lawsuit Against President Trump, Alleges He Retaliated Against Media Outlets and Journalists* 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*.)

On Feb. 7, 2019, PEN America filed an amended complaint, which included additional examples of "the President's threatened and actual revocations of security clearances of media commentators and White House press credentials, including of Acosta. The amended complaint also cited President Trump's Nov. 9, 2018 threat to revoke the credentials of other journalists who failed to show him "respect." According to the amended complaint, President Trump singled out April Ryan, White House correspondent for the American Urban Radio Networks, calling her "a loser" who "doesn't know what the hell she is doing."

The full amended complaint is available online at: https://pen.org/wp-content/uploads/2019/02/PEN-America-v-Trump-Amended-Complaint-2.6.19.pdf. As the *Bulletin* went to press, the Southern District of New York had not announced a ruling in the case.

Scott Memmel
Silha *Bulletin* Editor

Director's Note

The Summer 2019 issue of the Silha *Bulletin* includes several articles adapted from "Privacy and Data Protection," a chapter published in the course handbook for the Practising Law Institute's Communications Law in the Digital Age conference, which will take place in New York City in November 2019. Professor Kirtley gratefully acknowledges the contributions of Silha research assistants Sarah Wiley, Eric Arch, and Scott Memmel.

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FTC Reaches $5 Billion Settlement with Facebook, Prompting Praise and Criticism

DATA PRIVACY

On July 24, 2019, the Federal Trade Commission (FTC) announced in a press release that it was imposing a $5 billion fine against Facebook, as well as instituting several new "privacy restrictions" on the social media company. The FTC previously voted 3-2 along party lines on July 12 to approve the fine, which marked the largest penalty ever assessed against a technology company by the FTC for violations of consumers' privacy, as reported by *The Washington Post* and *Wired* magazine, among other publications. The fine stemmed from the Cambridge Analytica scandal in which the political data firm connected to President Donald Trump's 2016 campaign harvested personal data from more than 50 million Facebook users without permission. Although some observers praised the FTC's settlement with Facebook, others criticized the fine as not going far enough to punish the social media company.

Previously, in November 2011, the FTC announced that Facebook had agreed to a settlement after the agency filed an eight-count complaint against the social media company for "deceiv[ing] consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public." Under the proposed settlement (2011 consent decree), Facebook was "barred from making misrepresentations about the privacy or security of consumers' personal information" and was "required to obtain consumers' affirmative express consent before enacting changes that override their privacy preferences," among other provisions. The full consent decree is available online at: https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf.

In August 2012, the FTC reached a final settlement with Facebook (2012 order), which required the company to "take several steps to make sure it lives up to its promises in the future, including by giving consumers clear and prominent notice and obtaining their express consent before sharing their information beyond their privacy settings, by maintaining a comprehensive privacy program to protect consumers' information, and by obtaining biennial privacy audits from an independent third party," according to an Aug. 10, 2012 press release. The FTC further ordered that Facebook "shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains the privacy or security of covered information," among other requirements. The full decision and order is available online at: https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf. The full press release is available online at: https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook.

In March 2018, *The New York Times* and *The Observer* of London reported that Cambridge Analytica, a subsidiary of the British-based political data analysis company SCL Group, had gained unauthorized access to personal information of millions of Facebook users in 2015. Cambridge Analytica obtained the data from a Facebook app called "thisisyourdigitallife," which was developed by Cambridge University researcher Aleksander Kogan. The app paid Facebook users to complete a personality quiz and informed them that user profile data would be collected. When data collection began in 2014, only about 270,000 Facebook users consented to sharing their information.

However, the app also harvested data from profiles of the users' friends, even though the friends had not consented to data collection. Ultimately, Kogan shared more than 50 million raw data profiles with Cambridge Analytica. The newspapers reported that Cambridge Analytica planned to use the data to develop comprehensive psychographic profiles of individuals in order to influence voting behaviors in the 2016 presidential election and Brexit referendum.

On March 26, 2018, the FTC formally announced that it was investigating whether Facebook's failure to secure users' data from unauthorized collection violated the 2011 consent decree and 2012 order. In the March 26 press release, FTC Bureau of Consumer Protection (BCP) Acting Director Tom Pahl said, "The FTC is firmly and fully committed to using all of its tools to protect the privacy of consumers. Foremost among these tools is enforcement action against companies that fail to honor their privacy promises." He continued, "Companies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements. Accordingly, the FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook. Today, the FTC is confirming that it has an open non-public investigation into these practices." (For more information on the Cambridge Analytica scandal, see "Facebook Faces Continued Scrutiny Over Data Privacy and Cambridge Analytica Scandal" in the Winer/Spring 2019 issue of the Silha *Bulletin* and "Facebook, Google Fail to Protect Users' Data; Tech Companies and Federal Government Pursue Federal Data Privacy Frameworks" in the Fall 2018 issue.)

During the investigation, on April 19, 2019, *The Washington Post* and NBC News reported that FTC officials were debating whether to hold Facebook CEO Mark Zuckerberg personally accountable as part of the ongoing secret negotiations between the agency and social media company. However, it was not disclosed what specific measures were being considered.

On July 12, 2019, the FTC voted 3-2 along party lines to approve a $5 billion fine against Facebook, as well as heightened privacy and security requirements providing accountability "at the board of directors" and "individual" levels. On July 24, 2019, the FTC formally announced that after "a yearlong investigation . . . the [U.S. Department of Justice (DOJ)] will file a complaint on behalf of the Commission alleging that Facebook repeatedly used deceptive disclosures and settings to undermine users' privacy preferences in violation of its 2012 FTC order."

The DOJ's complaint for civil penalties, injunction, and other relief, which was filed in the U.S. District Court for the District of Columbia on July 24, 2019, outlined several ways in which Facebook had violated the 2012 order, including that Facebook "did not disclose to users . . . that sharing their personal information with Friends would allow Facebook to share that information with third-party developers of Friends' apps." The complaint also alleged that Facebook "failed to implement and maintain appropriate safeguards and controls over third-party developers' access to user

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Facebook, *continued from page 15*

data," including related to the Cambridge Analytica scandal.

The complaint alleged five counts against Facebook for violating the 2012 order, including that the company misrepresented "the extent to which a consumer can control the privacy of any covered information maintained by [Facebook] and the steps a consumer must take to implement such controls" and the "extent to which Facebook made user data accessible to third parties," among other claims. The complaint also alleged one count in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce." The complaint claimed that Facebook "failed to disclose, or failed to disclose adequately, that [it] would . . . use phone numbers provided by users for two-factor authentication for targeting advertisements to those users." The full complaint is available online at: https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf.

In a stipulated order also filed on July 24, 2019, the FTC and Facebook "resolved the claims for civil penalties and injunctive relief set forth in the Complaint." The order included the $5 billion monetary judgment for the civil penalty. In an attached decision and order, the FTC imposed several requirements and prohibitions on Facebook regarding consumers' privacy and "Covered Information," which included "(a) a first or last name; (b) geolocation information sufficient to identify a street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging User identifier or a screen name; (d) a mobile or other telephone number; (e) photos and videos; (f) Internet Protocol ("IP") address, User ID, or other persistent identifier that can be used to recognize a User over time and across different devices, websites or online services; (g) a Social Security number; (h) a driver's license or other government issued identification number; (i) financial account number; (j) credit or debit information; (k) date of birth; (l) biometric information; [and more.]"

First, the decision and order prohibited Facebook from "misrepresent[ing] in any manner, expressly or by implication, the extent to which [it] maintains the privacy or security of Covered Information." This meant that Facebook could not misrepresent its "collection, use, and disclosure" of private information and data, as well as the "extent to which a consumer can control the privacy of any Covered Information . . . and the steps a consumer must take to implement such controls," among other provisions.

Second, the FTC included changes to prior rules regarding sharing of "nonpublic user information," meaning "User profile information (i.e., information that a User adds to or is listed on a User's Facebook profile), or User-generated content (e.g., status updates, photos), that is restricted by one or more Privacy Setting(s)." The FTC now required that Facebook "[c]learly and [c]onspicuously disclose . . . to [Facebook users], separate and apart from any 'privacy policy,' 'data use policy,' 'statement of rights and responsibilities' page, or other similar document: (1) the categories of Nonpublic User Information that will be disclosed to [third parties], (2) the identity . . . of [third parties], and (3) that such sharing exceeds the restrictions imposed by the Privacy Setting(s) in effect for the User." The rules further required that Facebook obtain users' "affirmative express consent" to disclose such information.

Third, the decision and order required that Facebook ensure that Covered Information could not be accessed by a third-party within 30 days of the time that a Facebook user deletes such information or terminates their account. Facebook was also required to delete such information within 120 days of a user deleting the information or terminating their account. Fourth, the FTC prohibited Facebook from using and sharing user's telephone numbers, which were generally meant to provide account security, for the purpose of selling advertisements. Fifth, the FTC also prohibited Facebook from using facial recognition technology unless the company provides "clear and conspicuous notice of its use of [such] technology, and obtain[s] affirmative express user consent prior to any use that materially exceeds its prior disclosures to users."

Sixth, the decision and order required that Facebook "implement . . . a comprehensive information security program that is designed to protect the security of Covered Information," including safeguards related to the "collection, storage, transit, or use" of Facebook users' passwords and login credentials.

Seventh, the FTC required Facebook to create a "comprehensive privacy program . . . that protects the privacy, confidentiality, and Integrity of the Covered Information collected, used, or shared by [Facebook]." In addition to documenting the creation of risk management programs, security safeguards, training, and other provisions under the decision and order, Facebook was required to "[d]esignate a qualified employee or employees to coordinate and be responsible for the Privacy Program," as well as assess "internal and external risks in each area of its operation." The FTC further required that Facebook "[d]esign, implement, maintain, and document" safeguards created based on the internal and external risks identified by Facebook. The decision and order went on to provide several specific requirements for how such safeguards would be created and documented.

Eighth, the FTC required that an independent privacy committee be created. According to the FTC's July 24 press release, the committee was meant to provide "greater accountability at the board of directors level[,] . . . removing unfettered control by Facebook's CEO Mark Zuckerberg over decisions affecting user privacy." The press release added, "Members of the privacy committee must be independent and will be appointed by an independent nominating committee. Members can only be fired by a supermajority of the Facebook board of directors."

Finally, the decision and order included several additional requirements, including the creation and use of privacy program assessments, incident reports, compliance reporting and officers, among other requirements. The full stipulated order and the decision and order are available online at: https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf.

On July 14, Facebook filed a consent motion for entry of the stipulated order, meaning that Facebook "consent[ed] to the request for the [District Court for the District of Columbia] to enter the Stipulated Order." The motion read, "The proposed settlement memorialized in the Stipulated Order is fair, adequate, reasonable, and appropriate. The proposed settlement has two main components: a civil penalty award and injunctive relief imposing new compliance terms on Facebook. Each component secures strong, pro-consumer relief and reflects months of intense negotiations following a detailed investigation of Facebook's conduct."

The motion added that it "addresses the issues that gave rise to the FTC investigation in an effective and efficient manner, obtaining immediate relief and a massive civil penalty. The injunctive provisions of the settlement also are carefully calibrated to ensure the privacy of Facebook users' data over the course of the next two decades, to prevent further incidents of unauthorized data sharing as much as possible, and to allow for the taking of speedy and adequate measures if user data is inadvertently compromised." The full consent motion is available online at: https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_consent_motion_filed_7-24-19.pdf.

In its July 24, 2019 press release, the FTC explained why the fine and privacy requirements were important. "The settlement order announced today also imposes unprecedented new restrictions on Facebook's business operations and creates multiple channels of compliance," the press release read. "The order requires Facebook to restructure its approach to privacy from the corporate board-level down, and establishes strong new mechanisms to ensure that Facebook executives are accountable for the decisions they make about privacy, and that those decisions are subject to meaningful oversight." The press release noted that the order also applied to WhatsApp, Instagram, and other properties owned by Facebook.

FTC Chairman Joseph Simons praised the settlement in the press release, writing, "Despite repeated promises to its billions of users worldwide that they could control how their personal information is shared, Facebook undermined consumers' choices." He continued, "The magnitude of the $5 billion penalty and sweeping conduct relief are unprecedented in the history of the FTC. The relief is designed not only to punish future violations but, more importantly, to change Facebook's entire privacy culture to decrease the likelihood of continued violations. The Commission takes consumer privacy seriously, and will enforce FTC orders to the fullest extent of the law."

Assistant Attorney General Jody Hunt for the DOJ's Civil Division agreed, stating that the DOJ was "committed to protecting consumer data privacy and ensuring that social media companies like Facebook do not mislead individuals about the use of their personal information." He called the settlement an "historic penalty . . . [that] will benefit American consumers, and the Department expects Facebook to treat its privacy obligations with the utmost seriousness." The FTC's full press release is available online at: https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

In a July 24 post on the FTC's "Business Blog," BCP senior attorney Lesley Fair posed the question of whether "the FTC [could] have won a bigger civil penalty by going to court?" Answering her own question, she stated, "Probably not. Judges tend to evaluate financial remedies in comparison with cases that have gone before it. That's why we think the financial settlement is in the public interest. It has the added benefit of establishing a new benchmark when the FTC challenges privacy violations in the future."

However, several observers argued that the FTC's settlement with Facebook did not go far enough. In a July 12 interview with *The Washington Post*, Rep. David Cicilline (D-R.I.) called the settlement a "slap on the wrist." In a series of tweets on July 12, Cicilline wrote, "The FTC just gave Facebook a Christmas present five months early.. . . This fine is a fraction of Facebook's annual revenue. It won't make them think twice about their responsibility to protect user data. If the FTC won't protect consumers, Congress surely must."

Sen. Richard Blumenthal (D-Conn.) similarly argued in a July 12 statement that "[r]ather than deter misconduct, the signal here is that the fines or monetary penalties will be a fraction of what they should be." He added, "There is no reason for optimism, let alone confidence, that the structural or conduct reforms will be strong enough to really change Facebook's ongoing practices."

Sen. Ron Wyden (D-Ore.) agreed. "Despite Republicans' promises to hold big tech accountable, the FTC appears to have failed miserably at its best opportunity to do so," Wyden said in a statement. "No level of corporate fine can replace the necessity to hold Mark Zuckerberg personally responsible for the flagrant, repeated violations of Americans' privacy. That said, this reported fine is a mosquito bite to a corporation the size of Facebook."

Ashkan Soltani, who previously served as a chief technologist at the FTC, told the *Post*, "Democrats appear to want stronger accountability, both at the [corporate level] of the company and processes internally."

In a July 26 statement, Edmund Mierzwinski, Senior Director for Federal Consumer Programs at the U.S. Public Interest Research Group (PIRG), also criticized the proposed settlement. "This laughable $5 billion settlement with the category-killer social media giant Facebook makes the much smaller Equifax settlement for sloppy security look harsh," he said. "Facebook intentionally collects and shares an ever-growing matrix of information about consumers, their friends and their interests in a mass surveillance business model. It routinely changes its previous privacy promises without consent. It doesn't adequately audit its myriad business partners." He added, "Not changing those practices will come back to haunt the FTC, consumers and the world."

On July 26, 2019, the Electronic Privacy Information Center (EPIC) announced that it had filed a motion to intervene in the proposed settlement. In a memorandum attached to the motion, EPIC asserted that had previously filed five detailed complaints since 2012 with the FTC "regarding Facebook's business practices, alleging violations of the [2012 order]." However, EPIC argued that under the FTC's July 2019 settlement with Facebook, "[a]ll of these complaints, as well as many similar complaints brought to the Commission by consumer and privacy organizations representing the interests of Facebook users, would be extinguished," meaning the organization should be allowed to intervene and have "a voice in the decision."

The memorandum further argued that the dismissal of EPIC's complaint by the proposed settlement would "wipe[] Facebook's slate clean without Facebook even having to admit guilt for its privacy violations." EPIC added that it had a "track record of disagreeing with the FTC's approach to privacy issues," meaning the FTC could not "claim to represent the interests of EPIC." EPIC argued that if the court did not allow the organization to intervene, it should permit EPIC to file an *amicus* brief. The full motion and memorandum are available online at: https://epic.org/privacy/facebook/EPIC-Motion-to-Intervene-FTC-Facebook-Settlement.pdf.

As the *Bulletin* went to press, the FTC had not reached a final settlement with Facebook, nor had the District Court for the District of Columbia ruled on EPIC's motion.

Scott Memmel
Silha *Bulletin* Editor

Debates Continue Over a Federal Data Privacy Law or Framework

DATA PRIVACY

In the spring and summer of 2019, momentum for federal data privacy legislation intensified during the 116th Congress, which saw several data privacy bills introduced in the U.S. Senate and House of Representatives. Meanwhile, two Congressional committees held hearings regarding different topics and questions related to a federal data privacy framework. On Feb. 26, 2019, the House Consumer Protection and Commerce Subcommittee of the House Energy and Commerce Committee held a hearing titled "Protecting Consumer Privacy in the Era of Big Data," during which representatives and witnesses discussed a number of issues, including federal preemption of state laws, objectives for a federal privacy framework, concerns over increased regulation, and the authority for the Federal Trade Commission (FTC). One day later, the Senate Commerce, Science, and Transportation Committee held a hearing titled "Policy Principles for a Federal Data Privacy Framework in the United States," which aimed to address concerns over a potential federal data privacy framework. Meanwhile, in February 2019, the U.S. Government Accountability Office (GAO) released a report, which reviewed federal oversight of internet privacy, and recommended comprehensive data privacy legislation.

Previously, in fall 2018, technology companies, President Donald Trump's administration, and Congress each took actions towards a new federal law or framework protecting internet users' privacy and security online. On Sept. 26, 2018, executives from companies including Google, Amazon, and Apple, among others, appeared before the Senate Committee on Commerce, Science and Transportation to discuss and advocate for a potential federal privacy law. President Trump's administration, as well as the National Telecommunications and Information Administration (NTIA), each published different proposals for new approaches to protecting consumer data privacy.

On April 10, 2018, Sens. Edward Markey (D-Mass.) and Richard Blumenthal (D-Conn.) introduced the Customer Online Notification for Stopping Edge-Provider Network Transgressions Act, or the CONSENT Act, which would place responsibility on the FTC to promulgate "regulations to protect the privacy of customers of edge providers." Finally, in October 2018, U.S. Rep. Ro Khanna (D-Calif.) announced that he had introduced an "Internet Bill of Rights," which sought to protect internet users' data privacy and security through six key principles. (For more information on the actions by the tech companies, President Trump, the NTIA, the CONSENT Act, and the "Internet Bill of Rights," see *Tech Companies, Trump Administration, and Congress Push for Federal Strategies or Frameworks Regarding Data Privacy and Cybersecurity* in "Facebook, Google Fail to Protect Users' Data; Tech Companies and Federal Government Pursue Federal Data Privacy Frameworks" in the Fall 2018 issue of the Silha *Bulletin*.)

The calls for a federal data privacy law or framework grew out of actions by technology companies like Facebook and Google failing to protect their user's personal data. Perhaps the most notable example was the Cambridge Analytica scandal in which Cambridge Analytica, a political data firm connected to President Donald Trump's 2016 campaign, harvested personal data from more than 50 million Facebook users without permission. In March 2018, several news outlets reported that Facebook was aware that Cambridge Analytica, the subsidiary of the British-based political data analysis company SCL Group, had gained unauthorized access. (For more information on Cambridge Analytica, as well as other actions by Facebook and Google that put users' data at risk, see "Google Faces Renewed Concerns Regarding Data Privacy in the U.S. and Abroad" and "Facebook Faces Continued Scrutiny Over Data Privacy and Cambridge Analytica Scandal" in the Winter/Spring 2019 issue of the Silha *Bulletin* and "Facebook, Google Fail to Protect Users' Data; Tech Companies and Federal Government Pursue Federal Data Privacy Frameworks" in the Fall 2018 issue.)

Several U.S. Senators Introduce Bills Related to Data Privacy

Throughout 2019, several U.S. senators and representatives introduced legislation aimed at protecting individuals' personal data online. First, on Jan. 16, 2019, Sen. Marco Rubio (R-Fla.) introduced the American Data Dissemination Act, S. 142, which would regulate "covered provider[s]," meaning "a person that . . . provides a service that uses the internet" and in providing that service "collects records." The Act would require the Federal Trade Commission (FTC), within 180 days after the enactment of the bill, to "submit to the appropriate committees of Congress detailed recommendations for privacy requirements that Congress could impose on covered providers that would be substantially similar… to the requirements applicable to agencies under the Privacy Act of 1974."

The Privacy Act, 5 U.S.C. § 552a(e), set requirements for agencies maintaining a system of records. For example, it required that agencies only retain information in their records "relevant and necessary to accomplish" the agency's purpose, collect information directly from the subject individual whenever practicable, and inform individuals of the reason for collection. Violations would be considered "unfair or deceptive acts or practices" under Section 5 of the FTC Act, 15 U.S.C. § 45, and would be enforced by the FTC. As initially written, the American Data Dissemination Act would preempt state laws.

Second, the Social Media Privacy Protection and Consumer Rights Act of 2019, S. 189, was introduced by Sen. Amy Klobuchar (D-Minn.) on Jan. 17, 2019. The Act would regulate online platform[s] "that collect personal data during the online behavior of a user of the online platform." It would set up a system where "operators" of services must inform users that their "personal data" and "online behavior . . . will be collected and used by the operator and third parties," unless the user "makes an election . . . to specify . . . privacy preferences." The user could "prohibit the collection and use of personal data," although "the operator of the online platform may deny certain services or completely deny access to the user."

S. 189 would require that operators provide users with terms of service in an "easily accessible" form of "reasonable length" using "language that is clear, concise, and well organized." The Act would also require operators to "establish and maintain a privacy or security program" for platforms and provide users with details of how their information will be used, "how the operator will address privacy risks," and "details of the access that employees and contractors of the operator have" to the data. Additionally, the bill would enable users to withdraw consent to the use of their

data, and operators would have to obtain "affirmative express consent" upon the introduction of a new product of change of service. Users would also be able to obtain a copy of their personal data collected free of charge." Violations would be treated as unfair or deceptive acts or practices under the FTC Act, and the proposed Act would grant enforcement to the FTC and state attorneys general.

Third, on April 1, 2019, Rep. Suzan DelBene (D-Wash.) introduced the Information Transparency & Personal Data Control Act, H.R. 2013. The Act would regulate "any controller that provides services to the public involving the collection, storage, processing, sale, sharing with third parties, or other use of sensitive personal information." Controllers would have to provide notice to users and obtain "affirmative, express, and opt-in consent" to collect, store, process, sell, and share sensitive personal information. Controllers would have to provide users with a "transparent privacy, security, and data use policy" which is "concise and intelligible," "clear and prominent in appearance," "uses clear and plain language," and "uses visualizations where appropriate to make complex information understandable by the ordinary user," and is "provided free of charge."

Under H.R. 2013, controllers would also be required to provide users with contact information, the purpose for the collection, any third parties with whom the information will be shared, the storage period of the information, how consent for its use may be withdrawn, how a user can view the information collected, what kind of "sensitive personal information" is collected and shared, whether that information will be used to create profiles about users, and how sensitive information is protected from theft. Users would have the ability to opt out of any "collection, storage, processing, selling, sharing, or other use" of their data at any time. The Act contained several exemptions, including for small businesses that collect or use information of 5,000 or fewer individuals. The FTC and state attorneys general would be tasked with enforcement of the Act.

Fourth, on April 10, 2019, the Algorithmic Accountability Act of 2019, S. 1108, was introduced by Sens. Ron Wyden (D-Ore.) and Cory Booker (D-N.J.) with a House equivalent sponsored by Rep. Yvette Clarke (D-N.Y.). Under the Act, large companies would have to assess whether the algorithms they employ are biased or discriminatory, as well as whether they pose a privacy or security risk to consumers.

The Act would regulate any entity with more than $50,000,000 in revenue that "possesses or controls personal information on more than 1,000,000 consumers." The Act would require the FTC, within two years of its passage, to promulgate regulations that "require each covered entity to conduct automated decision system impact assessments," as well as "data protection impact assessments" of any "high-risk information systems," as frequently as the FTC finds necessary. Those assessments would be, "if reasonably possible, in consultation with external third parties, including independent auditors and . . . technology experts." However, publication of the assessments by the covered entity is optional. In addition to FTC enforcement, the Act provided for enforcement by the states, through attorneys general, subject to a requirement that they notify the FTC. Lastly, the bill contains a unique provision disclaiming any federal preemption of state law: "[n]othing in this Act may be construed to preempt any State law."

Also on April 10, the Balancing the Rights of Web Surfers Equally and Responsibly Act of 2019 was introduced by Sen. Marsha Blackburn (R-Tenn.). S. 1116 regulates "broadband internet access service[s]" or "an edge service" and would require that covered entities provide users with "clear and conspicuous" notice of privacy policies, either at the point of sale or before use of the service. Those covered under the bill would be required to obtain "opt-in approval" to "use, disclose, or permit access to" sensitive user information and "opt-out approval" for non-sensitive user information, subject to a list of exceptions. Such exceptions include disclosure for providing the service itself, billing, and protecting the provider or users from "fraudulent, abusive, or unlawful use of the service," to disclose location information for public safety reasons.

S. 1116 would task the FTC with enforcement, treating a violation of the Act as an "unfair or deceptive act or practice" under the FTC Act. S. 1116 also contained an explicit preemption provision, requiring no state to "adopt, maintain, enforce, or impose . . . any law, rule, regulation, duty, requirement, standard, or other provision having the force and effect of law relating to or with respect to the privacy of user information."

Sixth, on April 11, 2019, Sen. Edward Markey (D-Mass.) introduced the "Privacy Bill of Rights," S. 1214, which would regulate "any person that collects or otherwise obtains personal information." The bill would require that those covered provide "short-form notice" about data collection, use, and retention policies, including what and how personal information was being collected, used, or retained, which third parties the information is shared with or sold to, and how an individual may access, correct or delete that information. The notice must be "clear, concise, well-organized, understandably written, and complete" in a "prominent and easily accessible" format "of reasonable length" at point of sale or "before the individual uses the product or service."

The bill would also require covered entities to obtain opt-in approval for use of an individual's personal information, subject to certain exceptions, such as if the use is necessary to provide the requested product or service. Additionally, the FTC would have the power to grant exemptions to specific entities, after taking into account factors such as the privacy risks posed by the exemption, costs and benefits, and the nature of the personal information. The bill would also require the FTC to promulgate regulations to ensure users a right to access, correct, delete, and move their data.

Section 11 of the "Privacy Bill of Rights" contains limitations on use of personal information, including restrictions on "profiting from an individual's biometric information," disseminating that information without permission, and using personal information for discriminatory advertising. Section 13 would require covered entities "to establish and maintain reasonable data security practices to protect the confidentiality, integrity, and availability of personal information" and disclose certain information to the public about those practices. The Act would largely be enforced by the FTC, with violations treated as unfair or deceptive acts or practices under the FTC Act. State attorneys general could also bring civil actions on behalf of citizens in their states, subject to notice requirements.

Importantly, the bill provides a private right of action to individuals alleging a violation. The bill stipulates that a violation constitutes "with respect to the personal information of an individual constitutes an injury in fact to that individual." Plaintiffs could recover "actual damages," "punitive damages," "reasonable attorney's fees and costs," and "any other relief, including an injunction, that the court determines appropriate."

Gaurav Laroia, policy counsel for Free Press Action, a media rights advocacy group, praised the bill in an April 12 interview with *The Daily Dot*. "Senator Markey's bill will help enable people to use

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the internet without fear of exploitation or discrimination from companies intent on mining their private data," he said. "People must have the right to safely choose who they give their personal information to and need enforceable rules over how it can be used."

The seventh bill was the Do Not Track Act, S. 1578, introduced by Sen. Josh Hawley (R-Mo.) on May 21, 2019. The Act, which would apply to websites, services, or applications operating for commercial purposes in interstate commerce, would require the FTC to "implement and enforce a Do Not Track system . . . to protect consumers from unwanted online data harvesting and targeted advertising." In essence, individuals could download a free program from the FTC's website, which would send a "Do Not Track" signal to every website, online service, or online application the individual decides. Websites or services on the individual's list would be prohibited from collecting data unnecessary to the operation of the website, using that data for a secondary purpose, or sharing it with a third party absent express consent, among other provisions. The Act would be enforced by the FTC.

Marc Rotenberg, president of the Electronic Privacy Information Center (EPIC), a nonprofit that worked on Do Not Call legislation, was skeptical, suggesting that voluntary opt-outs for data collection have not worked. "The companies can ignore voluntary participation, and oftentimes it's the biggest offenders who will," Rotenberg said in a May 21 interview with the Associated Press (AP). Rotenberg also suggested that an opt-out program for the internet would be more difficult, contending that although phone numbers could easily be added to a list, internet programs would need to cover emails and potential IP addresses.

Finally, on June 25, 2019, Sens. Mark Warner (D-Va.) and Josh Hawley (R-Mo.) introduced the Designing Accounting Safeguards to Help Broaden Oversight and Regulations on Data (DASHBOARD) Act. S. 1578 covers "commercial data operator[s]," which it defined as "an entity acting in its capacity as a consumer online services provider or data broker that" generates revenue "from the use, collection, processing, sale, or sharing of the user data." The bill took a different approach to data protection from the other introduced legislation, requiring "commercial data operators" to "provide each user . . . with an assessment of the economic value that the commercial data operator places on the data of that user," in addition to what kind of data it collects, by whom it is collected, and how it is used if not for a use "directly or exclusively related to the online service" provided.

Operators would be required to provide users a way to "delete all data, in the aggregate and for an individual field," that an operator possesses or maintains, unless legally prohibited or necessary to prevent other security incidents. The bill would grant the FTC primary enforcement powers.

In a June 23, 2019 interview with Axios, Sen. Mark Warner (D-Va.) explained some of the motivation behind the bill, including that "[tech and social media] companies take enormous, enormous amounts of data about us." He continued, "If you're an avid Facebook user, chances are Facebook knows more about you than the U.S. government knows about you. People don't realize one, how much data is being collected; and two, they don't realize how much that data is worth."

Charlie Warzel, a privacy advocate and opinion writer for *The New York Times*, criticized the Act. "[A]ny effort to assign a dollar value to our millions of data points scattered across the internet is inherently flawed," Warzel wrote in a June 25 *Times* story. "[T]he problem isn't that most of us don't care about our privacy; it's that we don't always act in our own interests when it comes to our data."

As the *Bulletin* went to press, none of the bills had been passed by the Senate or House of Representatives.

House Consumer Protection and Commerce Subcommittee Holds Hearing on Protecting Consumer Privacy in the Era of Big Data

On Feb. 26, 2019, the U.S. House of Representatives Consumer Protection and Commerce Subcommittee of the House Energy and Commerce Committee held a hearing titled "Protecting Consumer Privacy in the Era of Big Data" to discuss ideas and concerns regarding a potential federal data privacy framework.

According to a transcript of the hearing, several witnesses testified, including Brandi Collins-Dexter, senior campaign director for Color of Change, an online civil rights organization; Dave Grimaldi, Executive Vice President for Public Policy at the Interactive Advertising Bureau; Dr. Roslyn Layton, visiting scholar at the American Enterprise Institute; Nuala O'Connor, president and CEO of the Center for Democracy and Technology, a non-profit dedicated to online civil liberties and human rights; and Denise Zheng, Vice President for Technology and Innovation at the Business Roundtable. Although each witness agreed on the need for a federal framework to add clarity for businesses and consumers, they differed on whether such a framework should preempt state law. Several witnesses also emphasized that policymakers should consider business costs and anti-competitive effects stemming from any proposed regulation. Witnesses also proposed differing areas of focus for a federal framework.

Federal preemption was a key area of inquiry during the hearing as representatives and witnesses noted the difficulty businesses face with having to comply with numerous state privacy laws. Rep. Cathy McMorris Rodgers (R-Wash.) said in her opening statement, "Many recognize the burdens multiple state laws would create. But what would it mean for someone in Washington State who buys something online from a small business in Oregon to ship to their family in Idaho? This is a regulatory minefield that will force businesses to raise prices on their customers. Setting one national standard makes common sense, and it's the right approach to give people certainty."

Zheng agreed, adding that the assumption that preemption would weaken existing protections is false. "Devices, data, people, they constantly move across borders, across states," Zheng emphasized. "A state by state approach just simply doesn't work for this type of domain." Layton also agreed. "[I]f you are a retailer in Maine and you have to send your products to 50 different states and you have to set up 50 different ways to do it, I don't see why you'd start that business," Layton said.

Grimaldi also supported federal preemption. "Without a consistent federal privacy standard, a patchwork of state privacy laws will create consumer confusion, present substantial challenges for businesses trying to comply with these laws, and fail to meet consumers' expectations about their digital privacy," he said.

Not all witnesses agreed, however. Collins-Dexter contended that any federal legislation should "offer a baseline that does not preempt innovative state policy" especially when state laws regulate manipulative or exclusionary marketing practices.

Witnesses also highlighted differing objectives for a federal privacy framework. Collins-Dexter emphasized that a framework should focus on regulating discriminatory advertising. "[U]ltimately, we would like to see bipartisan legislation written through an anti-discrimination lens that prevents manipulative or exclusionary marketing practices that exacerbate poverty," Collins-Dexter said in her opening statement. In response

to a question from Rep. Jerry McNerney (D-Calif.) about what challenges companies face with respect to algorithms, Collins-Dexter explained that "there's a lot of presumptions that algorithms can't be biased or that tech is neutral. And what we find as history — a long history of systemic inequities are actually being inputted from our data points and then replicating models of discrimination free from accountability."

Other witnesses stressed that policymakers focus on limiting any anti-competitive or industry effects stemming from increased regulation. Layton asserted that since the enactment of the European Union's (EU) General Data Protection Regulation (GDPR), "Google, Facebook and Amazon have increased their market share," an outcome Layton criticized as "perverse . . . for a policy promised to level the playing field." The GDPR took effect in May 2018 after being adopted by the EU in Spring 2016 to harmonize data privacy laws across Europe and to protect EU citizen's data privacy rights. (For more information on the GDPR, see "The United States, the European Union, and the Irish High Court Wrangle Data Privacy Concerns" in the Fall 2017 issue of the Silha *Bulletin* and *Adopted EU General Data Protection Regulation Establishes 'Right to Erasure'* in "Right to Be Forgotten Continues to Create Challenges for Online Entities" in the Summer 2016 issue.)

Layton ultimately urged Congress to "review the empirical research that the Europeans ignored, namely, how privacy enhancement technologies and user knowledge will promote online trust" and to "incentivize the development of such technologies through grants and competitions, and provide safe harbors for their research, development and practice."

Zheng also emphasized the value of data in the economy both to businesses and to the customers of those businesses, stating that "[d]ata enables companies to deliver more relevant and valuable user experiences to consumers. It allows the companies to detect and prevent fraud on user accounts and combat cybersecurity attacks."

In discussing costs of compliance for businesses, Rep. Ben Ray Lujan (D-N.M) asked about the usefulness of risk assessments as a regulatory measure and how requiring them may impact the marketplace. O'Connor responded that legislators should be mindful of the burden it places on small businesses and that Congress should require a privacy protection officer at companies which process large amounts of data. She also noted that consumers frequently give companies consent without fully understanding how the data will be used. "More check boxes will provide the appearance of choice, but not real options for consumers," O' Connor argued. "[A]ny meaningful privacy legislation must first prohibit unfair data practices, particularly the repurchasing or secondary use of sensitive data with carefully scoped exceptions."

With regard to enforcement of privacy regulations, many representatives called for additional authority for the Federal Trade Commission (FTC). Rep. Greg Walden (R-Ore.), ranking member of the House Energy and Commerce Committee, said in his opening statement that "[w]e can write bill after bill, and the FTC could publish rule after rule. But if we do not have effective enforcement, they are just words on paper."

Senate Commerce, Science, and Technology Committee Holds Hearing on Policy Principles for a Federal Data Privacy Framework in the United States

On Feb. 27, 2019, the U.S. Senate Commerce, Science, and Transportation Committee held a hearing titled "Policy Principles for a Federal Data Privacy Framework in the United States," aimed at addressing concerns over a potential federal data privacy framework.

According to a March 1 Wilmer Cutler Pickering Hale and Dorr LLP commentary, the Senate committee heard testimony from Michael Beckerman, president and CEO of the Internet Association, a lobbying group that represents several global internet companies; Brian Dodge, COO of the Retail Industry Leaders Association; Jon Leibowitz, a former Federal Trade Commission (FTC) chairman and co-chair of the 21st Century Privacy Coalition; Randall Rothenberg, CEO of the Interactive Advertising Bureau, which represents digital advertising companies; Victoria Espinel, president and CEO of the Software Alliance; and Woody Hartzog, Professor of Law and Computer Science at Northeastern University School of Law. The witnesses all agreed on the need for federal legislation and largely agreed that it should preempt state law, with the exception of Hartzog. Other topics of discussion included FTC enforcement authority, user consent, and the potential effects of regulation on the economy.

The committee members' questions mainly concerned how to maintain a competitive marketplace while protecting users. According to a commentary by Jonathan Cederbaum, D. Reed Freeman, Jr., and Lydia Lichlyter, attorneys specializing in privacy and cybersecurity matters at Wilmer Hale, an international law firm, there was broad consensus in the hearing that "while the [California Consumer Privacy Act (CCPA)] and the [General Data Protection Regulation (GDPR)] provide important points of reference for federal privacy standards, those models also reflect overly prescriptive approaches that [could] harm innovation and competition."

The CCPA, 2018 Cal. Legis. Serv. Ch. 55 (A.B. 375) (West), which was set to take effect on Jan. 1, 2020, grants California residents more control over how certain businesses use their personal information, including that California consumers to demand that businesses disclose any personal information they have collected, delete that information, and refrain from selling or transferring it third parties. The GDPR, which took effect in May 2018, was adopted to harmonize data privacy laws across Europe and to protect EU citizen's data privacy rights. (For more information on the GDPR, see "The United States, the European Union, and the Irish High Court Wrangle Data Privacy Concerns" in the Fall 2017 issue of the Silha *Bulletin* and *Adopted EU General Data Protection Regulation Establishes 'Right to Erasure'* in "Right to Be Forgotten Continues to Create Challenges for Online Entities" in the Summer 2016 issue.)

In regard to federal preemption, Democrat and Republican senators generally disagreed about whether a federal framework should preempt state law. Many Republicans stressed the importance of preemption, including Committee chairman Sen. Roger Wicker (R-Miss.) and Sen. Marsha Blackburn (R-Tenn.). Wicker contended that federal preemption would provide greater certainty for users and stressed that preemption would not mean weaker protections. He said, "It is important to note that a national framework does not mean a weaker framework.. . . Instead, it means a preemptive framework that provides consumers with certainty that they will have the same set of robust data protections, no matter where they are in the United States."

By contrast, Sen. Maria Cantwell (D-Wash.) called the focus on preemption "disturbing" and suggested that companies were attempting to erode the CCPA through federal preemption. She said, "I mean, are we here just because we don't like the California law, and we just want a federal preemption law to shut it

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down? Or, do people think you can have meaningful federal privacy legislation without that?"

Senators also asked witnesses about their views on federal preemption. Hartzog responded that federal legislation should act "as a floor, not a ceiling for privacy rules." However, the other witnesses largely favored federal preemption of state privacy laws. Rothenberg suggested that federal preemption would promote "consistency over chaos" but that the states should still have a role to play in enforcement. Leibowitz argued in his opening statement that "enacting federal privacy legislation is necessary in light of the patchwork of privacy bills being produced in legislatures around the country. That's because what makes the Internet magical is also what makes it a poor subject for state legislation. It connects individuals across state lines."

Witnesses also expressed concerns that regulation would stifle business. Dodge noted that retailers rely heavily on personal information, which "helps retailers decide how much merchandise to buy, where it needs to be, and when." Rothenberg also stressed the importance of data collection to businesses while acknowledging that "data exchanges . . . can also be used to violate consumer security and privacy."

Additionally, committee members and witnesses addressed FTC authority. Leibowitz agreed that the FTC should have primary enforcement power with increased authority to issue fines for first-time violations. In her opening statement, Espinel argued that the "FTC should continue to be the primary federal enforcer, but it needs new tools and the resources to carry out its mission effectively." Leibowitz added that "strong protections should be backed up by strong enforcement authority for the FTC," including "the ability to impose civil penalties for violators for first [offenses.]"

The hearing also involved discussion of how to obtain informed individual consent. Hartzog argued that more notice would not necessarily be helpful, stating that "[s]econd helpings of 'I agree' buttons, intrepid . . . unreadable Terms of Use would not have prevented . . . the epidemic of data breaches, nor will they prevent the problems of manipulation, discrimination, and oppressive surveillance that we face in the future of automation." Hartzog contended that companies' "demand for personal information is negatively affecting our attention, how we spend our time, how we become informed citizens, and how we relate to each other."

Some privacy advocates were not impressed with the lack of ideological diversity of those called to testify at both the Senate and House hearings. Privacy advocates India McKinney and Katharine Trendacosta at the Electronic Frontier Foundation (EFF), a privacy rights organization, wrote in a February 25 commentary that "both the House and the Senate are holding hearings on this topic, but unfortunately, instead of hearing a variety of voices and perspectives on this topic, once again, Congress decided to hear mostly from tech companies." They urged Congress to provide a private right of action, avoid preemption of state law, create "information fiduciaries," and "empower users by giving back control over their data."

U.S. Government Accountability Office Report Calls for Comprehensive Legislation Addressing Internet Privacy

In February 2019, the U.S. Government Accountability Office (GAO) publicly released a report to the U.S. House of Representatives Committee on Energy and Commerce reviewing the state of federal oversight of internet privacy. The report was requested by Rep. Frank Pallone Jr. (D-N.J.), the House Energy and Commerce chairman, according to *The Washington Post* on Feb. 14, 2019.

The report was prompted by Facebook's Cambridge Analytica Scandal in April 2018. (For more information on the Cambridge Analytica Scandal, see "Google Faces Renewed Concerns Regarding Data Privacy in the U.S. and Abroad" and "Facebook Faces Continued Scrutiny Over Data Privacy and Cambridge Analytica Scandal" in the Winter/Spring 2019 issue of the Silha *Bulletin* and "Facebook, Google Fail to Protect Users' Data; Tech Companies and Federal Government Pursue Federal Data Privacy Frameworks" in the Fall 2018 issue.)

Following expert commentary and interviews, including by University of Minnesota Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, the GAO concluded that the United States "does not have a comprehensive Internet privacy law governing the collection, use, and sale or other disclosure of consumers' personal information." The report acknowledged that the FTC "has the lead in overseeing Internet privacy," but that the agency "ha[d] not issued regulations for Internet privacy other than those protecting financial privacy and the Internet privacy of children, which were required by law."

The report identified three main areas in which Internet privacy oversight could be enhanced, including:

- "Statute. Some stakeholders told GAO that an overarching Internet privacy statute could enhance consumer protection by clearly articulating to consumers, industry, and agencies what behaviors are prohibited.
- Rulemaking. Some stakeholders said that regulations can provide clarity, enforcement fairness, and flexibility. Officials from two other consumer protection agencies said their rulemaking authority assists in their oversight efforts and works together with enforcement actions.
- Civil penalty authority. Some stakeholders said FTC's Internet privacy enforcement could be more effective with authority to levy civil penalties for first-time violations of the FTC Act."

The report therefore concluded that it was "an appropriate time for Congress to consider comprehensive Internet privacy legislation." The report continued, "Although [the] FTC has been addressing Internet privacy through its unfair and deceptive practices authority, among other statutes, and other agencies have been addressing this issue using industry-specific statutes, there is no comprehensive federal privacy statute with specific standards."

The report added, "Comprehensive legislation addressing Internet privacy that establishes specific standards . . . could help enhance the federal government's ability to protect consumer privacy, provide more certainty in the marketplace as companies innovate and develop new products using consumer data, and provide better assurance to consumers that their privacy will be protected."

The full report is available online at: https://www.gao.gov/assets/700/696437.pdf. As the *Bulletin* went to press, Congress had not passed a federal data privacy law or framework.

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Supreme Court Rulings Address First Amendment and FOIA Questions

In the summer of 2019, the U.S. Supreme Court ruled in three separate cases related to the First Amendment and Freedom of Information Act (FOIA), 5 U.S.C. § 552. On June 17, 2019, the Court determined that a private nonprofit corporation designated by New York City, N.Y. to operate public access television channels was a private actor, meaning the corporation was not subject to First Amendment constraints on its editorial discretion. *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019). On June 24, 2019, the Court ruled that a provision of the Lanham Act of 1946, 15 U.S.C. § 1052(a), prohibiting the registration of "immoral[] or scandalous" trademarks constituted viewpoint-based discrimination in violation of the First Amendment. *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019). Finally, on the same day, the Court held that Exemption 4 of FOIA allows a federal agency to withhold "confidential" financial information when it is "customarily and actually" treated as private by the owner of the information and is provided to the government under an assurance of privacy. *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019).

SUPREME COURT NEWS

Supreme Court Rules Private Operator of New York Public Access Television Channels are Not Subject to First Amendment

On June 17, 2019, the U.S. Supreme Court ruled in a 5-4 vote along party lines that Manhattan Neighborhood Network (MNN), a private nonprofit corporation designated by New York City, N.Y. to operate public access television channels on the local cable system, was a private actor and, therefore, not subject to First Amendment constraints on its editorial discretion. *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019). In a dissenting opinion, Justice Sonia Sotomayor argued that MNN qualified as a state actor, and was, as a result, subject to the First Amendment, because it administered a public forum opened by New York City.

The case arose after MNN aired a film produced by DeeDee Halleck and Jesus Papoleto Melendez regarding MNN's alleged neglect of the East Harlem community. The film was aired on public access channels owned by Time Warner Entertainment Company, which was acquired in May 2015 by Charter Communications for $78.7 billion. After televising the film, MNN received multiple complaints about the film's content, prompting MNN to temporarily suspend Halleck from using the public access channels. Following a separate dispute between MNN and the two producers, the network suspended Halleck and Melendez from using all MNN services and facilities.

Halleck and Melendez summarily sued MNN in the U.S. District Court for the Southern District of New York under 42 U.S.C. § 1983, alleging that MNN had violated their First Amendment free speech rights by restricting their access to the public access channels due to the content of their film. MNN moved to dismiss, arguing that it was not a state actor and, therefore, was not subject to First Amendment restrictions on its editorial discretion. Although the district court agreed and dismissed Halleck's and Melendez's First Amendment claim, the U.S. Court of Appeals for the Second Circuit reversed, finding that public access channels in Manhattan were a public forum for the purposes of the First Amendment. *Manhattan Community Access Corp. v. Halleck*, 882 F.3d 300 (2nd Cir. 2018). The question before the Supreme Court was whether "private operators of public access cable channels are state actors subject to the First Amendment."

Justice Brett Kavanaugh wrote the Court's majority opinion. He first cited the Cable Communications Policy Act of 1984, which authorized state and local governments to require cable operators to set aside channels on their cable systems for public access. 47 U.S.C. § 531(b). In New York State, the Public Service Commission requires cable operators to set aside channels on their cable systems for public access, according to Kavanaugh. He added that a cable operator operates the public access channels unless the local government in the area chooses to do so itself.

Second, Justice Kavanaugh explained that the First Amendment and Supreme Court precedent establish that the Free Speech Clause prohibits only abridgement of speech by the government, not by private actors. The Court's "state-action doctrine" therefore differentiates the government from individuals and private entities.

Justice Kavanaugh wrote that under this doctrine, a private entity can qualify as a state actor in a few limited circumstances, including: "(i) when the private entity performs a traditional, exclusive public function, . . . (ii) when the government compels the private entity to take a particular action, . . . or (iii) when the government acts jointly with the private entity." Halleck's and Melendez' claim largely fell into the first category in that they argued that MNN "exercises a traditional, exclusive public function when it operates the public access channels on Time Warner's cable system in Manhattan," according to Justice Kavanaugh.

He further explained that a private entity does not qualify as a state actor if "the federal, state, or local government [merely] exercised the function in the past, or still does." He added that it is also "not enough that the function serves the public good or the public interest in some way." Instead, the government must have "traditionally *and* exclusively performed the function" (emphasis in original), with "very few" functions falling into this category. Justice Kavanaugh held that the operation of public access channels on a cable system "has not traditionally and exclusively been performed by government," asserting that since the 1970s, "a variety of private and public actors have operated public access channels."

Third, Justice Kavanaugh addressed the producers' argument that the relevant function at issue was not only the operation of public access channels on a cable system, but instead the more general function of operating a public forum for speech, which would qualify as a "traditional, exclusive public function." Justice Kavanaugh rejected this argument, finding that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First

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Amendment constraints." He reasoned that when a private entity provides a forum for speech, it is "not ordinarily constrained by the First Amendment because the private entity is not a state actor," in contrast to the government being restrained from viewpoint-based discrimination when providing a public forum. The result is that the private entity may exercise editorial discretion over the speech and speakers in the forum, according to Justice Kavanaugh, who cited several cases, including *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256 (1974), in which the Court struck down a Florida law requiring newspapers to allow equal space for political candidates' replies to political coverage, reasoning that it was an "intrusion into the function of editors." The Court found that "press responsibility is not mandated by the Constitution and . . . cannot be legislated."

Fourth, Justice Kavanaugh held that New York's "heavy regulation" of MNN does not establish the network as a state actor. He wrote that "[n]umerous private entities in America obtain government licenses, government contracts, or government-granted monopolies." If such regulation sufficed to transform these entities into private actors, according to Justice Kavanaugh, "a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities."

Finally, Justice Kavanaugh addressed Halleck's and Melendez' final argument that the public access channels were the property of New York City, rather than Time Warner or MNN. He found that "[n]othing in the record" suggested that any level of government owned or leased the cable system or public access channels. However, Justice Kavanaugh noted that in instances where the local government decides to operate public access channels, they may be subject to First Amendment constraints.

In a dissenting opinion joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan, Justice Sotomayor wrote that the majority "[told] a very reasonable story about a case that is not before us. I write to address the one that is." She contended that the case was not about a "private property owner that simply opened up its property to others," but instead about an "organization appointed by the government to administer a constitutional public forum."

More specifically, Justice Sotomayor argued that the public access channels were "clearly a public forum" because New York City "ha[d] a property interest in them" and that New York State regulations "require[d] that access to those channels be kept open to all." She concluded that the public access channels constituted a "designated" public forum, meaning one that exists where "the government has deliberately opened up the setting for speech by at least a subset of the public."

Therefore, because MNN took on the responsibility of administering the forum, it became a state actor subject to the First Amendment, according to Justice Sotomayor. She added that because New York City "(1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum," those obligations did not disappear when the City delegated the administration and operation of that forum to a private entity. She continued, "Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation."

Finally, Justice Sotomayor addressed several of the majority's arguments, including that "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment." Although she acknowledged that this assertion was "surely correct," Justice Sotomayor contended that the case involved a "constitutional forum," rather than spaces where private entities simply invite others to speak. She first provided the example of a comedy club being able to decide to "open its doors as wide as it wants" versus MNN, which was asked by the government to administer a "constitutional responsibility" on its behalf.

Justice Sotomayor then provided a second example in which a state college runs a comedy showcase each year. As part of the showcase, the college rents a local theater and mandates "open access" to student activities pursuant to state regulations. However, within a few years, the college decides to hire a performing-arts nonprofit to run the show, with the nonprofit summarily deciding to only allow humor that targets "a certain political party," restricting access to student groups that share different views from the company. Justice Sotomayor argued that the nonprofit in the example was indistinguishable from MNN and that the First Amendment should not have been rendered irrelevant in this case. She therefore concluded that "as long as MNN continues to wield the power it was given by the government, it stands in the government's shoes and must abide by the First Amendment like any other government actor."

The full majority and dissenting opinions are available online at: https://www.supremecourt.gov/opinions/18pdf/17-1702_h315.pdf.

In a June 17 commentary, Gibson, Dunn & Crutcher LLP argued that the case was significant in that it determined that "[m]erely operating a public forum does not make a private entity into a state actor under the traditional test for state action because operating a public speech forum is not a traditional, exclusive public function."

In a June 24 press release, Nora Benavidez, director of U.S. Free Expression Programs at PEN America Center, Inc. (PEN America), argued that the ruling "could have broader consequences if applied in other contexts," including the internet. "Although this case does not reference social media explicitly, like the Manhattan Community Access Corporation, YouTube, Facebook, and Twitter are private companies that provide essentially public forums," he said. "This ruling could therefore have implications for questions of company liability for the content shared on their platforms. At a moment when proliferating hate speech and abuse online are causing many to question how and to what degree social media companies should be held accountable, this ruling puts down a marker on questions of liability of private actors for First Amendment violations in one of the great debates of our time."

Previously, on Dec. 13, 2018, Reuters reported that the Electronic Frontier Foundation (EFF), among several other companies and organizations, had filed an *amicus* brief in the case. In its brief, EFF urged the Supreme Court to "rule narrowly" because internet companies could be implicated by the Court's ruling, potentially leading to a "very different" internet.

EFF contended that "private operators of online platforms should remain exactly that, private operators" so that they can continue to have "a

First Amendment right to edit and curate their sites, and thus exclude whatever other private speakers or speech they choose." The brief further argued that "reversing the application of the First Amendment — that is, to make online platforms no longer *protected* by the First Amendment but instead *bound* by it as if they were government entities — would undermine Internet users' interests" (emphasis in original) in two ways, including first that online platforms would no longer be able to moderate their own content. Second, the creation of new online platforms would be limited due to the legal uncertainty of operating a public forum.

The brief ultimately argued that there can, and should, only be state action if there is "some significant governmental connection to the operation or use of that forum." The full brief is available online at: https://z.umn.edu/EFFamicusbrief.

During a "First Amendment Roundup" hosted by the Los Angeles County Bar Association on June 20, University of California, Berkeley School of Law Dean Erwin Chemerinsky argued that the Supreme Court ruling meant that internet companies remained private entities. "Had the case come out differently, it might have led strength to the argument that large companies like Facebook, YouTube and Google should have to comply with the First Amendment," Chemerinsky said. "I think it's a court that very much sees a bright line between government conduct and private conduct. So long as it's a private entity, the First Amendment doesn't apply."

Technology information blog "TechDecisions" agreed in a July 3, 2019 commentary, contending that under the Supreme Court's ruling, "Facebook, Twitter, and other social platforms would not qualify as a state actor as they do not traditionally and exclusively perform a public function. Thus, they are free to regulate speech on their platforms."

Provision of the Lanham Act Prohibiting "Immoral or Scandalous" Trademarks Struck Down by Supreme Court

On June 24, 2019, the U.S. Supreme Court held that a provision of the Lanham Act of 1946, 15 U.S.C. § 1052(a), prohibiting the registration of "immoral[] or scandalous" trademarks constituted viewpoint-based discrimination in violation of the First Amendment. *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019). The ruling followed similar reasoning by the Court in *Matal v. Tam*, 137 S.Ct. 1744 (2017), in which the provision of the Lanham Act prohibiting "disparag[ing]" trademarks was also struck down. However, in *Iancu*, three justices wrote opinions concurring in part and dissenting in part that suggested ways in which a portion of the provision could be constitutional under the First Amendment.

> "Had [*Manhattan Community Access Corp. v. Halleck*] come out differently, it might have led strength to the argument that large companies like Facebook, YouTube and Google should have to comply with the First Amendment.. . . I think it's a court that very much sees a bright line between government conduct and private conduct. So long as it's a private entity, the First Amendment doesn't apply."
>
> **— Erwin Chemerinsky, University of California, Berkeley School of Law Dean**

The case revolved around artist and entrepreneur Erik Brunetti's use of the trademark "FUCT" for the name of his clothing line. According to Brunetti, the mark is pronounced as four letters, one after the other: F-U-C-T. However, as Justice Elena Kagan wrote in her majority opinion, the name could also be read as "the equivalent of [the] past participle form of a well-known word of profanity."

The Lanham Act allows the U.S. Patent and Trademark Office (PTO) to administer a federal registration system for trademarks. Although registering a trademark is not mandatory, it comes with several benefits, including serving as a "constructive notice of the registrant's claim of ownership." At issue was a provision that prohibited registration of trademarks that "[c]onsist[] of or comprise[] immoral[] or scandalous matter." The PTO determines whether a trademark fits into the ban on "immoral or scandalous" marks by asking whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar."

The PTO examining attorney and the PTO's Trademark Trial and Appeal Board held that Bruentti's trademark had failed the test, finding that the FUCT trademark was "a total vulgar[ity]" and "therefore[] unregistrable." The Board, on review, further stated that the trademark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations," adding that imagery on Brunetti's website also demonstrated that the name communicated "misogyny, depravity, [and] violence."

Brunetti brought a facial challenge to the "immoral or scandalous" bar in the U.S. Court of Appeals for the Federal Circuit. In April 2015, a three-judge panel for the Federal Circuit initially affirmed the PTO's decision. *In re Tam*, 758 F.3d 567 (Fed. Cir. 2015). However, the full Federal Circuit voted to rehear the case *en banc* and found that the prohibition violated the First Amendment. *In Re: Brunetti*, 877 F.3d 1330 (2017).

Justice Kagan first turned to the Supreme Court's 2017 ruling in *Tam*, which revolved around Simon Shiao Tam's naming his all-Asian American dance rock band "The Slants" in order to "reclaim" and "take ownership" of Asian stereotypes. In this case, the PTO denied a trademark because the name "would likely be disparaging towards 'persons of Asian descent,'" in violation of the "Disparagement Clause" of the Lanham Act. The clause prohibited trademarks that "[consist] of or [comprise] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." (For more information on the facts of the case, the Federal Circuit

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en banc decision, and the Supreme Court granting *certiorari*, see "United States Supreme Court Set to Hear Oral Arguments on Disparaging Trademarks" in the Fall 2016 issue of the Silha *Bulletin*.)

The Court ultimately held in an 8-0 ruling that the Disparagement Clause "violate[d] the Free Speech Clause of the First Amendment [because it] offend[ed] a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." The Court further held that the clause constituted viewpoint-based discrimination and that the government's interest in "preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate,'" citing Justice Oliver Wendell Holmes' famous dissenting opinion in *United States v. Schwimmer*, 279 U. S. 644, 655 (1929). (For more information on the Supreme Court's ruling in *Tam*, see *Individuals and Organizations Have The Right to Utilize Potentially Disparaging Terms as Trademarked Names* in "U.S. Supreme Court Rules in Two Significant First Amendment Cases" in the Summer 2017 issue of the Silha *Bulletin*.)

Second, Justice Kagan turned to the present case, writing that "[i]f the 'immoral or scandalous' bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine." She explained that the government did not challenge that the provision amounted to viewpoint-based discrimination and further found that the Lanham Act "allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety," resulting in "facial viewpoint bias in the law."

Justice Kagan provided several examples of trademarks that had been denied by the PTO under the immoral or scandalous bar, including because they discussed drug use. However, Justice Kagan also provided the example of the PTO registering trademarks with sayings such as "D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE," demonstrating that the restriction on speech was viewpoint-based.

Third, Justice Kagan addressed the government's argument that the bar should be narrowed to only include "marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express" (emphasis on original). She explained that the government had explained during oral arguments that "this reinterpretation would mostly restrict the PTO to refusing marks that are 'vulgar' — meaning 'lewd,' 'sexually explicit or profane.'"

Justice Kagan dismissed the proposal, reasoning that the statutory language "d[id] not draw the line at lewd, sexually explicit, or profane marks" and, furthermore, did not "refer only to marks whose 'mode of expression,' independent of viewpoint, [are] particularly offensive."

Finally, Justice Kagan concluded that the "immoral or scandalous" bar was "substantially overbroad," contending that "[t]here are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment."

In a short concurring opinion, Justice Samuel Alito, who wrote the majority opinion in *Tam*, agreed with the court that the "immoral or scandalous" clause violated the First Amendment. He wrote that viewpoint-based discrimination "is poison to a free society" and that "[a]t a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination."

Justice Alito added that the Court's decision would not "prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas," but emphasized that the justices "are not legislators and cannot substitute a new statute for the one now in force."

In an opinion concurring in part and dissenting in part, Justice Sonia Sotomayor, joined by Justice Stephen Breyer, argued that the majority opinion would mean the PTO would have "no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable."

Justice Sotomayor agreed with the majority that there was "no tenable way" to read the term "immoral" that would change it from a viewpoint-based restriction on speech. However, although she acknowledged that "scandalous" could mean similar things to "immoral," it could also just be read to mean trademarks that are "simply indecent, shocking, or generally offensive," meaning that it would cover only "offensive *modes* of expression, rather than also implicating offensive *ideas*" (emphasis added). Justice Sotomayor further contended that the portion of the clause addressing "scandalous" trademarks could be read to only address "obscenity, vulgarity, and profanity." She added that Congress "meant for 'scandalous' to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea" and, therefore, disagreed with the majority's collapsing of "scandalous" and "immoral."

Justice Sotomayor clarified that by "obscenity, vulgarity, and profanity," she meant the "small group of lewd words or 'swear' words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings," though she declined to "offer a list." She cited 18 U.S.C. § 1464, which prohibits "obscene, indecent, or profane language" in radio communications.

Justice Sotomayor concluded that this interpretation of "scandalous" would be a "viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system." She provided several examples in which the Court had held that restrictions on particular modes of expression do not inherently qualify as viewpoint-based discrimination, though they may be "content-based." One example she provided was that a ban on setting fires in a town square "does not facially violate the First Amendment simply because it makes it marginally harder for would-be flag-burners to express their views in that place," citing *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). Another example provided by Justice Sotomayor was that "'fighting words are categorically excluded from the protection of the First Amendment' not because they have no content or

express no viewpoint . . ., but because 'their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.'" Thus, although a restriction on trademarks containing obscenity, vulgarity, or profanity may be content-based, it is not a viewpoint-based restriction on speech, according to Justice Sotomayor, because the government has an interest in "not promoting certain kinds of speech."

Finally, Justice Sotomayor contended that the First Amendment protects Brunetti's right to use words like "FUCT," but does not require or force the PTO to grant his trademark and provide "the ancillary benefit of trademark registration."

Justice Breyer also wrote an opinion concurring in part and dissenting in part in which he largely agreed with Justice Sotomayor, though he wrote that his reasons "differ[ed] slightly from hers." Justice Breyer argued that he would "place less emphasis on trying to decide whether the statute at issue should be categorized as an example of 'viewpoint discrimination,' 'content discrimination,' 'commercial speech,' 'government speech,' or the like" and instead treat the Supreme Court's "speech-related categories not as outcome-determinative rules, but instead as rules of thumb." He explained that in the present case, the restriction on speech did not fit easily into any of these existing categories.

Justice Breyer further explained that in some cases, such as *Morse v. Frederick*, 551 U.S. 393, 397 (2007), the Court found that the regulation of speech, even when it constituted viewpoint-based discrimination, was constitutional under the strict scrutiny standard. In *Morse*, the Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."

Justice Breyer contended that in a "number of cases," the Court had struck down "ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects." He would, as a result, instead ask "whether the regulation at issue 'works speech-related harm that is out of proportion to its justifications,'" citing his concurring opinion in *United States v. Alvarez*, 567 U.S. 709, 730 (2012), in which the Court struck down a federal law known as the "Stolen Valor Act," 18 U.S.C.§§ 704 (b)(c), that made lying about receiving military awards or medals, especially the Congressional Medal of Honor, a crime punishable by a fine and up to a year in jail. The Court held that "the remedy for speech that is false is speech that is true," not government suppression, even when the speech "can disparage, or attempt to steal, honor that belongs to those who fought for this nation in battle." (For more information on *Alvarez*, see "Supreme Court Strikes Down Stolen Valor Act" in the Summer 2012 issue of the Silha *Bulletin*.)

Applying this reasoning, Justice Breyer held that the Lanham Act did not violate the First Amendment. He reasoned that the harm to First Amendment interests by declining to register vulgar or obscene trademarks was minimal, adding that the Lanham Act "leaves businesses free to use highly vulgar or obscene words on their products, and even to use such words directly next to other registered marks." Justice Breyer also found that "a business owner might even use a vulgar word as a trademark, provided that he or she is willing to forgo the benefits of registration." He contended that the PTO had at least a "reasonable interest" in barring the registration of such trademarks, citing "scientific evidence [that] suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words." Justice Breyer therefore supported Justice Sotomayor's construction of the statute.

Also in an opinion concurring in part and dissenting in part, Chief Justice John Roberts agreed with the majority that the "immoral" portion of clause was "not susceptible of a narrowing construction that would eliminate its viewpoint bias." However, Chief Justice Roberts also agreed with Justice Sotomayor, arguing that the term "scandalous," standing alone, "need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression — marks that are obscene, vulgar, or profane."

He further argued that refusing obscene, vulgar, or profane trademarks would not offend the First Amendment, reasoning that whether such trademarks could be registered "does not affect the extent to which their owners may use them in commerce to identify goods." Chief Justice Roberts continued, "No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration."

The full ruling by the Supreme Court is available online at: https://www.supremecourt.gov/opinions/18pdf/18-302_e29g.pdf.

On June 24, *Ars Technica* noted that the Court "left open the possibility that Congress could ban a narrower class of trademarks that are lewd, sexually explicit, or profane. If Congress chose to pass such a law, then trademarks using the F-word might once again be excluded from registration."

In an opinion analysis for "SCOTUSblog" on the same day, University of New Hampshire School of Law dean and professor Megan Carpenter argued that the outcome was "the most likely one" in light of *Tam*. She wrote, "To hold otherwise could have produced an anomalous situation in which the only types of 'offensive' trademarks that could be registered are ones that disparage particular individuals or groups of people." Carpenter added, "[W]hether or not Congress steps in at this point remains to be seen."

As the *Bulletin* went to press, Congress had not introduced or passed legislation addressing immoral or scandalous trademarks.

Supreme Court Holds FOIA Exemption 4 Protects Confidential Financial Information "Customarily and Actually" Treated as Private

On June 24, 2019, the U.S. Supreme Court held in a 6-3 ruling that Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), allows a federal agency to withhold "confidential" commercial or financial information when it is "customarily and actually" treated as private by the owner of the information and is provided to the government under an assurance of privacy. *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019). In an opinion concurring in part and dissenting in part, Justice Stephen Breyer contended that Exemption 4 should require a showing of at least some harm.

The case arose when the *Argus Leader*, a newspaper in South Dakota, filed a FOIA request for data

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collected by the U.S. Department of Agriculture (USDA) regarding the national food-stamp program titled "Supplemental Nutrition Assistance Program" (SNAP). The FOIA request sought names and addresses of all retail stores that participated in SNAP, as well as each store's "redemption data" from 2005 to 2010, referred to as "store-level SNAP data."

The USDA released the names and addresses, but refused to disclose the store-level SNAP data. The USDA cited Exemption 4, which, according to the U.S. Department of Justice (DOJ) website, protects "trade secrets and commercial or financial information obtained from a person [that is] *privileged* or *confidential*" (emphasis added). The exemption covers "two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential," according to the DOJ.

In 2016, the U.S. District Court for the District of South Dakota held a two-day bench trial to determine whether disclosure of the store-level SNAP data would cause substantial competitive harm to participating stores and retailers. During the trial, the USDA testified that "retailers closely guard store-level SNAP data and that disclosure would threaten stores' competitive positions," including because store-level SNAP data "could create a windfall for competitors" for three reasons:

1. retailers with high SNAP redemptions could see increased competition for SNAP customers from existing competitors
2. new market entrants could use SNAP data to determine where to build their stores
3. competitors could use SNAP data to determine a rival retailer's overall sales and to develop strategies to win some of that business.

The *Argus Leader* countered that such harm would not be "substantial," to which the district court agreed. *Argus Leader Media* v. *United States Dept. of Agriculture*, 224 F. Supp. 3d 827, 833-835 (D.S.D. 2016).

The Food Marketing Institute (Institute), a trade association representing grocery retailers, intervened in the case and appealed the decision to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court. *Argus Leader Media v. United States Dept. of Agriculture*, 889 F. 3d 914, 915 (8th Cir. 2018).

Justice Neil Gorsuch delivered the majority opinion of the Supreme Court. He first explained that the Eighth Circuit had "engrafted onto Exemption 4 a so-called 'competitive harm' test, under which commercial information cannot be deemed 'confidential' unless disclosure is 'likely . . . to cause *substantial* harm to the competitive position of the person from whom the information was obtained'" (emphasis added).

Second, Justice Gorsuch held that the Institute had Article III standing under the U.S. Constitution to pursue the appeal, reasoning that although the issue before the Court was whether its member retailers would suffer "substantial competitive harm," there was no doubt that the disclosure of the SNAP data would cause "*some* financial injury" (emphasis in original).

Third, Justice Gorsuch concluded that because FOIA does not define the term "confidential," the Court must determine what the term's "ordinary, contemporary, common meaning" was when Congress enacted FOIA in 1966, citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Justice Gorsuch concluded that the term meant "private" or "secret" and must meet two conditions, including that the information "communicated to another remains confidential whenever it is customarily kept private . . . by the person imparting it" and that the information "might be considered confidential only if the party receiving it provides some assurance that it will remain secret." Taken together, the two conditions posit that the financial information is "customarily and actually" treated as private.

Justice Gorsuch found that the Institute had met the first condition because its retailers "customarily do not disclose store-level SNAP data or make it publicly available 'in any way.'" However, it was less clear whether the Institute needed to meet the second condition, namely whether "privately held information [can] *lose* its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will keep it private," (emphasis in original). However, Justice Gorsuch held that the Institute had "clearly" satisfied this condition, whether or not it was necessary, reasoning that the government, in order to induce retailers to participate in SNAP and provide to the USDA store-level information, "has long promised them that it will keep their information private." Therefore, Justice Gorsuch concluded that the data at issue qualified as "confidential" data under Exemption 4.

Fourth, Justice Gorsuch turned to the "substantial competitive harm" requirement, which, according to Justice Gorsuch, arose in 1974 when the D.C. Circuit ruled that, in addition to the requirements actually set forth in Exemption 4, a "court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 767 (9th Cir. 1974). Several additional federal circuit courts, including the Eighth Circuit, adopted the two-part test, which provided that "commercial or financial matter is 'confidential' [only] if disclosure of the information is likely . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

Justice Gorsuch wrote that the Court could not "approve such a casual disregard of the rules of statutory interpretation" and refused to "alter FOIA's plain terms on the strength only of arguments from legislative history." He called the D.C. Circuit's approach a "relic from a 'bygone era of statutory construction,'" including because the court had "relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law."

Finally, Justice Gorsuch rejected several arguments by the *Argus Leader* to salvage the reasoning of the D.C. Circuit, including that Congress had "effectively ratified its understanding of the term 'confidential' by enacting similar phrases in other statutes in the years since that case was decided." Justice Gorsuch held that although "the ratification canon can sometimes prove a useful interpretive tool," Congress had never "reenacted" Exemption 4, meaning its use of similar language in other statutes after the D.C. Circuit's ruling "tells us nothing about Congress's understanding of the language it enacted in Exemption 4 in 1966."

The *Argus Leader* further argued that the "substantial competitive harm"

requirement should be adopted because FOIA exemptions are to be "narrowly construed." Justice Gorsuch rejected this argument as well, reasoning that the Court had "no license to give [statutory] exemption[s] anything but a fair reading."

Thus, Justice Gorsuch concluded that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy," the information is "confidential" within the meaning of Exemption 4. He continued, "Because the store-level SNAP data at issue here is confidential under that construction, the judgment of the court of appeals is reversed and the case is remanded for further proceedings consistent with this opinion."

In an opinion concurring in part and dissenting in part, Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, agreed with the two conditions set out by Justice Gorsuch, but added that "there is a third: Release of such information must also cause genuine harm to the owner's economic or business interests."

Justice Breyer wrote that he agreed that the D.C. Circuit's test in *National Parks* "[went] too far," reasoning that he could "find nothing in FOIA's language, purposes, or history that imposes so stringent a requirement," which would create several problems, including "long, onerous court proceedings" to determine whether something qualifies as "substantial." However, Justice Breyer disagreed "with the majority's decision to jump to the opposite conclusion, namely, that Exemption 4 imposes no 'harm' requirement whatsoever."

Justice Breyer provided several reasons, including first that the word "confidential" sometimes referred to, "at least in the national security context, . . . information the disclosure of which would cause harm." Second, Justice Breyer contended that the majority's reading of Exemption 4 was "at odds with [the] principles" of FOIA, including that the mandate of the statute is the "broad disclosure of Government records," citing *CIA* v. *Sims*, 471 U. S. 159, 166 (1985). He continued, "The whole point of FOIA is to give the public access to information it cannot otherwise obtain. So the fact that private actors have 'customarily and actually treated' commercial information as secret . . . cannot be enough to justify nondisclosure." Justice Breyer added, "[A] statute designed to take from the government the power to unilaterally decide what information the public can view . . . put such determinative weight on the government's preference for secrecy.. . . I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia."

Therefore, Justice Breyer concluded that "Exemption 4 can be satisfied where, in addition to the conditions set out by the majority, release of commercial or financial information will cause genuine harm to an owner's economic or business interests."

The full ruling by the Supreme Court is available online at: https://www.supremecourt.gov/opinions/18pdf/18-481_5426.pdf.

Following the decision, several observers expressed concern with the majority's ruling, particularly its impact on the news media's ability to cover matters of public interest. *Argus Leader* news director Cory Myers said in a June 17 statement that he was "disappointed" in the outcome of the case. "This is a massive blow to the public's right to know how its tax dollars are being spent, and who is benefiting," Myers said. "Regardless, we will continue to fight for government openness and transparency, as always."

Maribel Perez Wadsworth, president of the USA Today Network, also expressed disappointment in the ruling. "The court's decision effectively gives businesses relying on taxpayer dollars the ability to decide for themselves what data the public will see about how that money is spent," she said in a statement. "This is a step backward for openness and a misreading of the very purpose of the Freedom of Information Act."

In a June 24, 2019 "SCOTUSblog" post, Mark Fenster, the Stephen C. O'Connell Chair at the Levin College of Law at the University of Florida, predicted that the ruling would "frustrate news media, watchdogs and competitors who will be less likely to have their FOIA requests met." Fenster added that the majority "never explained that the Argus Leader submitted its FOIA request as part of its investigation into SNAP-related fraud" and that the investigation would "now have to proceed without access to the SNAP data."

In a June 24 tweet, Reporters Committee for Freedom of the Press (RCFP) attorney Adam A. Marshall also criticized the ruling, writing that the Supreme Court had "wiped out" 45 years of precedent related to Exemption 4, citing the D.C. Circuit's ruling in *National Parks*.

In a tweet on the same day, *Argus Leader* reporter Jonathan Ellis agreed. "This was never an exemption 4 case. Period. But today six members of the U.S. Supreme Court used it as a vehicle to wipe out more than 40 years of established #FOIA precedent," he wrote.

On July 23, 2019, several media outlets reported that U.S. Sens Chuck Grassley (R-Iowa.), Patrick Leahy (D-Vt.), John Cornyn (R-Texas), and Dianne Feinstein (D-Calif.) had introduced "The Open and Responsive Government Act of 2019," S.2220, which would add language to Exemption 4 to require that the term "confidential" include "information that, if disclosed, would likely cause substantial harm to the competitive position of the person from whom the information was obtained."

The bill also provided that Exemption 4 would "not authorize the withholding of a portion of an otherwise responsive record on the basis that the portion is non-responsive[.]" *The Hill* had previously reported on June 25, 2019 that the Environmental Protection Agency (EPA) had approved a new rule without a public comment period that allowed EPA officials to review all materials that fit a FOIA request criteria, known as "responsive documents," and then decide "whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses," prompting concern from observers, who called for Congress to intervene.

S.2220 is available online at: https://www.grassley.senate.gov/sites/default/files/documents/116.S.2220%20-%20Open%20and%20Responsive%20Government%20Act.pdf. As the *Bulletin* went to press, the bill had not been passed by the U.S. Senate.

Scott Memmel
Silha *Bulletin* Editor

Former Supreme Court Justice John Paul Stevens Passes Away; Authored Notable First Amendment Majority and Dissenting Opinions

On July 16, 2019, former U.S. Supreme Court Justice John Paul Stevens died of complications following a stroke. Stevens, who was 99 years old, was appointed to the Supreme Court by President Gerald Ford in 1975 and served for 34 years before retiring in 2010. While on the Court, Justice Stevens authored several majority and dissenting opinions in key media law and free speech cases, prompting some observers to praise his jurisprudence on First Amendment issues, while others called his legacy more "mixed."

SUPREME COURT NEWS

One such majority opinion was in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which the Supreme Court held in a 6-3 ruling 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. The case arose when an unknown party surreptitiously recorded the telephone conversation of two Pennsylvania teachers' union leaders, including Gloria Bartnicki, the union's chief negotiator, who were discussing a possible strike and the need to "blow off [opponents'] front porches" to attract attention to their cause. The unknown party anonymously delivered the tape to the head of a local taxpayer association, who then gave it to a local radio host, Fredrick Vopper. The host summarily played the tape during his radio show.

Citing federal and Pennsylvania wiretap laws, 18 U.S.C. §§ 2510, 2520; 18 Pa. Con. Stat. Ann. § 5701 *et seq.*, the union leaders sued Vopper. Justice Stevens, in his majority opinion, held that "[w]here the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully" the government cannot punish publication of information of "public concern." He added, "If a newspaper lawfully obtains truthful information about a matter of public significance . . . [the government] may not constitutionally punish publication . . . absent a need . . . of the highest order."

(For more on *Bartnicki v. Vopper*, see "Hack of Sony Pictures Raises Legal, Ethical Questions for Reporting Stolen Information" in the Winter/Spring 2015 issue of the Silha *Bulletin*, "U.S. Supreme Court Rules in Historic *Bartnicki* Case" in the Summer 2001 issue, and "*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue. Attorney Lee Levine, who served as counsel for Vopper, delivered the 16th Annual Silha Lecture, titled "Newsgathering on Trial: The Supreme Court and the Press in the 21st Century.")

> "[It is] not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.. . . [I]nformation gathering is entitled to some measure of constitutional protection."
>
> **— Justice John Paul Stevens, dissenting in *Houchins v. KQED* (1978)**

Justice Stevens also authored the influential majority opinion in *Reno v. ACLU*, 521 U.S. 844 (1997). In this case, the Court was tasked with whether two portions of the Communications Decency Act of 1996 (CDA), 47 U.S.C.A. § 223 *et seq.*, seeking to protect minors from harmful content on the internet violated the First Amendment. One provision criminalized the "'knowing' transmission of 'obscene or indecent' messages to any recipient under 18 years of age," while the other prohibited the "'knowin[g]' sending or displaying to a person under 18 of any message 'that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'"

The Court ultimately held that the two provisions violated the First Amendment. Justice Stevens wrote, "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." Justice Stevens also emphasized the importance of the First Amendment and the free flow of ideas. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it," he wrote. "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."

Justice Steven's opinion in *Reno* was a departure from his stance in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which he held that the Federal Communication Commission (FCC) could regulate "indecent speech" aired on the radio or television. Indecent speech includes language or material that "portrays sexual or excretory organs or activities in a way that does not" qualify as obscenity, according to the FCC's website.

Justice Stevens also authored notable dissenting opinions in three additional media law cases. In *Houchins v. KQED*, KQED, a public television station, asked to visit the Greystone facility at a county jail where maltreatment and suicides had occurred. 438 U.S. 1 (1978). The sheriff denied access, instead setting up preplanned tours for the public and the press on a first-come-first-serve basis. The tours would not have passed through the Greystone facility. The Court was

asked to determine whether members of the press have a First Amendment right of access to a county jail greater than that of members of the public. The Court held that the press did not have such a right of access, even if reporters sought to "interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television."

Justice Stevens argued in his dissenting opinion that newsgathering should receive constitutional protection against government intrusion. He contended that the First Amendment protects "not only the dissemination but also the receipt of information and ideas." He added that it is "not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." Therefore, Justice Stevens held that "information gathering is entitled to some measure of constitutional protection."

Second, in *Zurcher v. Stanford Daily*, the Supreme Court held that the press does not have special protection from newsroom searches under the First Amendment. 436 U.S. 547 (1978). The case arose after police executed a search warrant of the *Stanford Daily*'s newsroom, searching the student newspaper's laboratories, filing cabinets, desks, and wastepaper baskets, finding notes and correspondence. The police had sought "negatives, film, and pictures" related to a violent demonstration the day before in which several officers were injured after being attacked by demonstrators.

In his dissenting opinion, Justice Stevens first explained that the Fourth Amendment "contains two [c]lauses, one protecting 'persons, houses, papers, and effects, against unreasonable searches and seizures,' the other regulating the issuance of warrants[.]" Justice Stevens argued that the police's application for the search warrant used against the *Daily* "set forth no facts suggesting that respondents were involved in any wrongdoing or would destroy the desired evidence if given notice of what the police desired." He therefore held that the warrant "did not comply with the Warrant Clause and that the search was unreasonable within the meaning of the first Clause of the Fourth Amendment."

Finally, in *Wilson v. Layne*, a reporter and photographer for *The Washington Post* accompanied the United States Marshals Service and the Montgomery County (Md.) Police Department on a ride-along with the intent to execute three arrest warrants against Dominic Wilson, who had violated his probation on three previous felony charges. 526 U.S. 606 (1999). Officers entered the home of Dominic Wilson's father, Charles Wilson, who ran into the living room to investigate. The officers, thinking Charles was his son Dominic, wrestled him to the floor as his wife, Geraldine, entered the room wearing only a nightgown. The *Post* reporter and photographer were in the Wilsons' living room during the confrontation. The Wilsons filed suit, challenging the entry as unreasonable under the Fourth Amendment.

The Supreme Court ruled in favor of the Wilsons, finding that the presence of the *Post* reporter and photographer violated the Wilsons' rights, because, among other reasons, the media members did not assist in the execution of the warrant. The majority further held that the police officers in the case were entitled to qualified immunity.

In an opinion concurring in part and dissenting in part, Justice Stevens agreed with the majority that the presence of the *Post* reporter and photographer violated the Wilsons' Fourth Amendment rights, because they had not consented to the media presence and the media members did not assist in the execution of the warrant. However, he held that the majority should not have granted the police qualified immunity, reasoning that the principle that "[p]olice action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion" was "clearly established long before [1992]." He asserted that the principle was the "confluence of two important sources: our English forefathers' traditional respect for the sanctity of the private home and the American colonists' hatred of the general warrant." Therefore, according to Justice Stevens, it "should have been perfectly obvious to the officers that their 'invitation to the media exceeded the scope of the search authorized by the warrant.'"

During his tenure on the Supreme Court, Justice Stevens also authored majority and dissenting opinions in other areas of First Amendment jurisprudence. One of his more notable dissenting opinions was in *Citizens United v. FEC*, in which the Court 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. 58 U.S. 310 (2010). 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 Stevens 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. "At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt," he wrote. "It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

Additionally, Justice Stevens contended 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*, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue of the Silha *Bulletin*.)

In the area of student speech, Justice Stevens also filed a notable dissenting opinion. 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 not extend to pro-drug messages that may undermine the school's mission of discouraging drug use. The case arose

Justice Stevens, *continued on page 32*

Justice Stevens, *continued from page 31*

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.

In his dissenting opinion, Justice Stevens 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*, see "In *Morse v. Frederick*, Court Places Limits on Student Expression" in the Summer 2007 issue of the Silha *Bulletin*.)

Justice Stevens also wrote the majority opinion in two cases that upheld First Amendment protection for commercial speech. In *44 Liquormart Inc. v. Rhode Island*, 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). Justice Stevens reaffirmed that the First Amendment "protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services."

Similarly, in *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), Justice Stevens held that advertising restrictions prohibiting the Greater New Orleans Broadcasting Association from running radio and television advertisements regarding lawful private casino gambling were unconstitutional. He reasoned that the commercial messages would "convey information — whether taken favorably or unfavorably by the audience — about an activity that is the subject of intense public debate in many communities." He further asserted that the advertisements would include "accurate information as to the operation of market competitors, such as pay-out ratios, which [could] benefit listeners by informing their consumption choices and fostering price competition."

Finally, Justice Stevens also authored significant opinions in key Freedom of Information Act (FOIA), 5 U.S.C. § 552, cases. In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), the Court was tasked with determining whether notes that were taken from former Secretary of State Henry Kissinger's office in the U.S. State Department and moved to a private residence before being donated to the Library of Congress were subject to disclosure under FOIA. The Court ultimately held in a 5-2 ruling that the district court did not have the authority to order the transfer of the notes back to the State Department. The Court further held that the documents, because the State Department no longer had "custody or control" in order to withhold the records, did not fall under the purview of FOIA.

In his dissenting opinion, Justice Stevens disagreed with the majority's conclusion that "custody" and "control" require physical possession of the records. He wrote that this conclusion "seem[ed] . . . wholly inconsistent with the [C]ongressional purpose underlying [FOIA]." Justice Stevens continued, "The decision today exempts documents that have been wrongfully removed from the agency's files from any scrutiny whatsoever under FOIA. It thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests."

However, in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), Justice Stevens, writing the majority opinion, held that it was an "unwarranted invasion of privacy," as defined by Exemption 7(C) of FOIA, to make electronic "rap sheets" compiled by the Federal Bureau of Investigation (FBI) available under the statute. He further found that the privacy interest of Charles Medico, who was suspected with the rest of his family of being involved in organized crime, was the "sort of 'personal privacy' interest that Congress intended [Exemption 7(C)] to protect."

Justice Stevens reasoned that although the information in the rap sheets was available in hard copy elsewhere, such as in local courthouses, it would be hard to find all of the records, which he referred to as "practical obscurity." Ultimately, Justice Stevens ruled that the privacy interests in the case weighed more heavily than the public's interest in knowing more about the Medico family and organized crime.

Following Justice Stevens' retirement in 2010, the Electronic Privacy Information Center (EPIC) noted that Justice Stevens had often "maintained an individual's right to privacy," including under the Fourth Amendment by "reigning in warrantless searches [and seizures.]" EPIC provided the example of *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), in which Justice Stevens, writing for the majority, held that a state hospital's policy of using maternity patients' urine tests as a means of testing for drugs was a violation of their Fourth Amendment rights. EPIC also cited *Arizona v. Gant*, 556 U.S. 332 (2009), in which Justice Stevens held in the majority opinion that a police search of the passenger compartment of a vehicle while the owner was handcuffed in a patrol car was unreasonable and violated the Fourth Amendment.

Following Justice Stevens' death, several observers reached different conclusions about his First Amendment legacy. On July 17, 2019, David L. Hudson Jr., First Amendment Fellow at the Freedom Forum Institute and a law professor at Belmont University, wrote that Justice Stevens "left an indelible mark on many areas of First Amendment jurisprudence," including because he "forcefully argued for significant protection for commercial speech, which was often relegated to second-class status in the First Amendment family."

In a June 2017 post for *The First Amendment Encyclopedia*, Hudson had quoted a lecture Justice Stevens delivered at Yale Law School in October 1992, in which he emphasized the importance of freedom of speech. "Let us hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance — a value protected by every clause in the single sentence called the First Amendment," Justice Stevens said.

Conversely, in a July 17 commentary for WGBH in Boston, Mass., Dan Kennedy, an associate professor of journalism at Northeastern University, contended that Justice Stevens had more of a mixed legacy on the First Amendment. He cited Justice Stevens' dissent in *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Supreme Court held that burning the flag was protected expression under the First Amendment. Justice Stevens disagreed, writing, "Sanctioning the public desecration of the flag will tarnish its value . . . both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it."

Scott Memmel
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Minnesota Supreme Court, Sixth Circuit, and Eastern District of Kentucky Rule in Notable Defamation Cases

In the summer of 2019, the Minnesota Supreme Court, the U.S. Courts of Appeals for the Second and Sixth Circuits, and the U.S. District Court for the Eastern District of Kentucky ruled in four notable defamation cases. On June 26, 2019, Minnesota's high court held that private plaintiffs in defamation cases involving a matter of public concern are required to prove "actual malice" in order to recover presumed damages. Observers noted that the Court had therefore revised earlier precedent that found that some First Amendment protections against defamation liability only applied to members of the news media.

DEFAMATION

On July 17, the Sixth Circuit dismissed a defamation lawsuit brought against *The New York Times* and four of its employees by an award-winning cancer researcher. The court held that a *Times* article detailing allegations of scientific misconduct against the professor would be a "standard piece of investigative journalism" in the eyes of "reasonable readers." On August 6, the Second Circuit revived a lawsuit brought by former Alaska Gov. Sarah Palin against *The New York Times*, holding that the former vice-presidential candidate had plausibly alleged that the *Times* had published an editorial with actual malice connecting her to a 2011 mass shooting.

Finally, on July 26, Eastern District of Kentucky Judge William Bertelsman dismissed a $250 million lawsuit against *The Washington Post*. The suit was filed by the family of Nicholas Sandmann, the Covington Catholic High School student involved in a January 2019 confrontation with Nathan Phillips, a Native American man, at the Lincoln Memorial.

Minnesota Supreme Court Rules First Amendment Protection Applies to Nonmedia Speakers in Defamation Cases Involving a Matter of Public Concern

On June 26, 2019, the Minnesota Supreme Court held in a 2-1 ruling that a private plaintiff is required to show "actual malice," meaning that the alleged defamatory statements were made with knowledge of falsity or reckless disregard for the truth, in order to recover presumed damages when the underlying statements involve a matter of public concern. *Maethner v. Someplace Safe, Inc.*, 2019 WL 2608470 (Minn. 2019). Observers noted that the Court had therefore revised its holding in *Stuempges v. Parke, Davis & Co.*, that some First Amendment protections against defamation liability only applied to media speakers. 297 N.W.2d 252, 255 (Minn. 1980).

Maethner arose in October 2010 after plaintiff Kurt Maethner and defendant Jaquelin Jorud ended their 15-year marriage. Although Jorud made no accusations of domestic abuse during the marriage, she sought assistance from defendant Someplace Safe, an advocacy group that offers services to victims and survivors of domestic abuse, during the divorce proceedings. In May 2014, Someplace Safe awarded Jorud a "Survivor Award" as a "survivor of domestic abuse" at a fundraising banquet. Someplace Safe issued a press release about the banquet and award recipients, and published statements and photographs of the event on its Facebook page. Jorud also posted about the banquet and award on her personal Facebook page. Additionally, she wrote a one-page story about her experience "surviving domestic violence" and "thriving through recovery" for Someplace Safe's newsletter. Someplace Safe said that it did not attempt to investigate her claims, which did not mention Maethner by name.

In October 2015, Maethner filed a complaint in the Otter Tail County (Minn.) District Court alleging that Someplace Safe and Jorud had defamed him in the Facebook posts, press release, and newsletter article. The district court granted summary judgement to the defendants, finding that the allegedly defamatory statements were protected by a "conditional or qualified privilege." Under Minnesota law, an individual "who makes a defamatory statement is not liable if a qualified privilege applies and the privilege is not abused." If a statement is protected by the privilege, the plaintiff, as part of the defamation claim, must "show that the allegedly defamatory statements were made with [common law] malice," meaning "ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff," as defined by the Minnesota Supreme Court in *Stuempges*. However, the district court found that Maethner had failed to establish that there was "a genuine issue of material fact" on common law malice. The court also held that Someplace Safe had no legal duty to investigate the statements before publishing them in its newsletter, and that Maethner had not shown sufficient evidence of actual damages.

On Feb. 12, 2018, the Minnesota Court of Appeals ruled that Maethner had demonstrated that statements about him regarding domestic violence constituted defamation *per se*, meaning statements that accuse an individual of crimes or immoral acts and are presumed to be harmful to their reputation. 907 N.W.2d 665 (Minn. Ct. App. 2018). The court held that Maethner could therefore recover presumed damages without having to prove actual damages or demonstrating that the defendants had made the statements with common law malice.

The court further held that Someplace Safe owed a duty to exercise "reasonable care" before publishing the statements and "[w]hether Someplace Safe breached its duty of reasonable care raised a fact question for the jury." Additionally, the court ruled that "case law requires Maethner to prove negligence as one element of his defamation claim against Someplace Safe and Maethner does not have a separate negligence claim." The court therefore dismissed Count III of Maethner's complaint alleging negligence because it was separate from his defamation claim.

(For more information on the background of *Maethner*, the Minnesota Court of Appeals ruling, and *Stuempges*, see *Minnesota Court of Appeals Holds Plaintiff Can Recover Damages without Showing of Malice; Minnesota Supreme Court Agrees to Hear Case* 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*.)

Chief Justice Lorie Skjerven Gildea wrote the majority opinion of the Minnesota Supreme Court. She first explained that under common law, a plaintiff pursuing a defamation claim "must prove that the defendant made:

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Defamation, *continued from page 33*

(a) a false and defamatory statement about the plaintiff; (b) in [an] unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community," citing *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). According to Chief Justice Gildea, under common law, qualified privileges can defeat a defamation claim, but the privilege can be overcome if the plaintiff demonstrates that the defendant made the alleged defamatory statement with common law malice.

Second, Chief Justice Gildea explained that the U.S. Supreme Court, in order to avoid the chilling of constitutionally protected speech, "imposed prerequisites to recovery in certain types of defamation actions," including that public figures and public officials must prove actual malice, as required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-280 (1964) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

Third, Chief Justice Gildea considered whether Maethner had produced sufficient evidence of damages to survive summary judgment. She held that Maethner had not offered sufficient proof that the statements at issue had "any impact on his reputation," failing the third prong of a defamation claim. According to Chief Justice Gildea, Maethner therefore needed to prove he could recover presumed damages, which are awarded for "[a]ccusations of criminal behavior or moral turpitude, like those made here." These claims constitute defamation *per se*, under which "common law allowed harm to reputation to be presumed," Chief Justice Gildea wrote, because such statements are "virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove."

Fourth, Chief Justice Gildea held that although the statements at issue did involve criminal behavior, that "[did] not end the analysis," reasoning that the "doctrine of defamation *per se* cannot offend the constitutional guarantees of the First Amendment." She cited the Minnesota Supreme Court's ruling in *Richie v. Paramount Pictures Corporation*, 544 N.W.2d 21, 26, 28 (Minn. 1996), in which the Court held that "damages cannot be presumed" and that "a showing of actual harm to reputation" is required "where the defamatory statements were made by the media, involved a matter of public concern, and there have been no allegations of actual malice."

Chief Justice Gildea ruled that the proper focus "regarding the availability of presumed damages . . . is whether the matter at issue is one of public concern." She found that the dispositive inquiry was not whether the defendant was a member of the media or not, though such a consideration may be relevant in "determining whether a matter is one of public concern." Chief Justice Gildea continued, "[I]t is the private or public concern of the statements at issue — not the identity of the speaker — that provides the First Amendment touchstone for determining whether a private plaintiff may rely on presumed damages in a defamation action."

Chief Justice Gildea cited the U.S. Supreme Court's finding in *Sullivan* that the First Amendment recognizes "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," demonstrating the importance of protecting speech on public issues. She also cited *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Supreme Court required proof of actual malice before a private individual may recover presumed damages. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-761 (1985), the Court limited the *Gertz* ruling to instances where the alleged defamatory statements involved matters of public concern.

Fifth, Chief Justice Gildea turned to whether the defamatory statements at issue involved matters of public concern. She remanded to the district court "to decide in the first instance whether the challenged statements involve a matter of public or private concern." However, Chief Justice Gildea provided several reasons why the statements probably did not involve matters of public concern, including that the Court would need to consider "the totality of the circumstances" around the statements, citing *Snyder v. Phelps*, 562 U.S. 443 (2011), in which the U.S. Supreme Court considered "the context of the speech" at issue, not just the content of the messages. That case revolved around picketing of military funerals by the Westboro (Kan.) Baptist Church, which the Court held was protected by the First Amendment despite the sensitive context and the pain inflicted by the picketers' speech on the family of the fallen Marine. (For more information on *Snyder v. Phelps*, see "Supreme Court Ruling Protects Funeral Picketers" in the Winter/Spring 2011 issue of the Silha *Bulletin*.)

Chief Justice Gildea further reasoned that although the subject of domestic violence is a matter of public concern "as a general proposition," the statements made by Jorud and Someplace Safe "[were] related to a private matter between former spouses." She also pointed out that Someplace Safe's publication, as acknowledged by Maethner, was 'within a fairly small area, in and around Otter Tail County' — and that the statements were made by an individual and organization that do 'not engage in mass media communications.'"

Finally, Chief Justice Gildea turned to whether Someplace Safe had a duty to investigate Jorud's statements before publishing them. Although Maethner did not appeal the dismissal of his negligence claim by the Minnesota Court of Appeals, the issue was still relevant because Someplace Safe challenged the court's holding that there was a jury issue on negligence.

Chief Justice Gildea held that the "record indicate[d] that Someplace Safe believed Jorud's statements to be true based on its interactions with her" and that there was "no evidence that Someplace Safe had reason to question Jorud's honesty or credibility." She therefore held that Maethner could not "survive summary judgment by simply resting on his assertions that there was a duty to investigate." She continued, "To create an issue for trial on the breach question, Maethner needed to submit evidence to support the conclusion that a reasonable person in the position of Someplace Safe would have investigated or had reason to doubt Jorud's credibility. Maethner offered no such evidence." Therefore, Chief Justice Gildea held that the Minnesota Court of Appeals "erred in concluding that there [was] 'a fact question for the jury' on whether Someplace Safe breached its duty of reasonable care." As a result, the Minnesota Supreme Court reversed the appellate court and "reinstate[d] the district court's dismissal of Maethner's defamation claim against Someplace Safe."

In an opinion concurring in part and dissenting in part, Justice Paul Thissen wrote that he agreed that the case should be remanded to the district court to determine whether the alleged defamatory statements involved a matter of public concern. However, he disagreed with the majority's decision that "no material factual questions exist about whether [Someplace Safe] acted with reasonable

care before publishing the allegedly defamatory statements." Justice Thissen wrote that he would remand to the district court to allow a jury to resolve the issue.

Justice Thissen disagreed with the majority's holding that "no reasonable juror could conclude that Someplace Safe should have made some effort to check on the accuracy of Jorud's . . . statements[.]" He instead contended that "[d]isputes over whether a breach of a duty of care occurred are typically questions we leave for a jury to resolve" and that in instances where reasonable persons are likely to disagree on "whether a duty of care was breached, summary judgment is appropriate." Justice Thissen also pointed out that "Someplace Safe employees [had] stated that the organization did not care whether Jorud's claims of abuse were true, accurate, or complete."

Additionally, Justice Thissen rejected Someplace Safe's argument that it was protected by a qualified privilege. He listed several ways in which past defendants had asserted such a privilege, including that alleged defamatory statements were made to "prevent future criminal behavior" or to "facilitate the provision of services to a domestic violence victim." Justice Thissen argued that the alleged defamatory statements at issue were not made "on a 'proper occasion' as our qualified privilege precedent requires."

In a concurring opinion, Justice G. Barry Anderson wrote that he "join[ed], in full, the court's opinion on this matter." However, he wrote separately to note his agreement with Justice Thissen's "reject[ion of] the applicability of a qualified privilege protecting the statements at issue in this dispute."

The full ruling is available online at: https://cases.justia.com/minnesota/supreme-court/2019-a17-0998.pdf?ts=1561743171. As the *Bulletin* went to press, the district court had not ruled on the issues remanded by the Minnesota Supreme Court.

In a June 26, 2019 post on his blog, "The Volokh Conspiracy," Eugene Volokh, the Gary T. Schwartz Professor of Law at the UCLA School of Law, praised the ruling and added that "[a]s best [he could] tell, only a small handful of states" took the view that the First Amendment only "secur[es] special rights for the institutional press." He also noted that the Minnesota Supreme Court had held that nonmedia speakers were "fully protected by the First Amendment," a departure from the Court's precedent that said "some First Amendment protections against defamation liability applied only to media speakers."

In a June 29 email to the Minneapolis *Star Tribune*, Margaret Skelton, an attorney for Someplace Safe, called the ruling a victory for nonprofit organizations representing domestic abuse victims. "Victims of domestic violence often do not have police records, witnesses or photographs that verify their abuse," she wrote. "The Court determined that Someplace Safe acted as any reasonable, nonprofit victims' advocacy group would act by referring to its client as a 'survivor' and by publishing a client's statements about her personal experiences. Further, the court found that Someplace Safe had no reason to question the accuracy of its client's accounting of her history of suffering domestic abuse."

Marshall Tanick, an attorney for Maethner, told the *Star Tribune* he would consider an appeal to the U.S. Supreme Court. "The decision will pose new challenges for people who claim their reputation has been damaged in some respects," Tanick said. "But it also provides some opportunities for those claims to be successful in matters deemed to be private rather than public."

As the *Bulletin* went to press, Tanick had not yet filed a petition for *certiorari* to the Supreme Court.

Sixth Circuit Dismisses Defamation Lawsuit Against *The New York Times*

On July 17, 2019, the U.S. Court of Appeals for the Sixth Circuit dismissed a defamation lawsuit brought against *The New York Times* and four of its employees by award-winning cancer researcher Carlo Croce, finding that the *Times* article detailing allegations of scientific misconduct against Croce would be seen by "reasonable readers" as "a standard piece of investigative journalism." *Croce v. The New York Times Co.*, No. 18-4158, 2019 WL 3214077 (6th Cir. 2019).

The case arose on Sept. 14, 2016 when Croce, a professor and the Chair of Human Cancer Genetics at The Ohio State University (OSU), received an email from *New York Times* reporter James Glanz about an interview regarding "promising anti-cancer results." In November 2016, Glanz followed up, but let Croce know "that the scope of [*The New York Times*'] reporting ha[d] broadened, and [that Glanz had] made a few records requests at OSU and other institutions." Three weeks later, Glanz also sent a letter to Croce and OSU stating that he "had questions he wanted to 'put urgently' to Dr. Croce and OSU 'as part of an article' Glanz was preparing." The letter listed several questions that "followed allegations made by others against Dr. Croce," which he denied in a March 2017 letter responding to Glanz.

On March 8, 2017, *The New York Times* published an article by Glanz and Agustin Armendariz, another reporter, titled, "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass." The article included several allegations, including that Croce "[for] several years . . . [had] been fending off a tide of allegations of data falsification and other scientific misconduct, according to federal and state records, whistle-blower complaints and correspondence with scientific journals[.]" One such accusation was in 2013 in which an "anonymous critic contacted Ohio State and the federal authorities with allegations of falsified data in more than 30 of Dr. Croce's papers." The article also reported that David A. Sanders, a virologist at Purdue University, had "made claims of falsified data and plagiarism directly to scientific journals where more than 20 of Dr. Croce's papers have been published." The article acknowledged that Croce had "never been penalized for misconduct." The full article is available online at: https://www.nytimes.com/2017/03/08/science/cancer-carlo-croce.html.

On May 10, 2017, Croce sued the New York Times Company and four of its employees — Glanz, Armendariz, Arthur Ochs Sulzberger Jr., the publisher of *The New York Times*, and Dean Baquet, the executive editor of the *Times* — for defamation, false light, and intentional infliction of emotional distress (IIED) in the U.S. District Court for the Southern District of Ohio. The district court granted the defendants' motion to dismiss, except for one statement in the letter Glanz sent to Croce and OSU, namely "Dr. Croce reviewed and awarded countless grants using CTR money, often in cases with clear conflicts of interest involving grantees at his own institution (Thomas Jefferson University at the time)." *Croce v. The New York Times Co.*, 345 F.Supp.3d 961 (S.D. Ohio 2018). The court found that this particular statement survived the motion to dismiss because it "carrie[d] defamatory potential: a statement to Dr. Croce's current employer about Dr. Croce's ethical misconduct at a previous place of employment."

On appeal, Sixth Circuit Judge Karen Nelson Moore delivered the unanimous opinion of the three-judge panel. She first explained that under Ohio law, a plaintiff, in order to state a defamation claim, must show "(1) that a false statement of fact was made, (2) that the statement was

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Defamation, *continued from page 35*

defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement." At issue in the present case was the second element, which required that the court "decide as a matter of law whether certain statements alleged to be defamatory are actionable or not," according to Moore.

Second, Moore wrote that in order to make such a determination, the court must apply the Ohio Supreme Court's "reasonable reader" standard, which provides that if "a reasonable reader, reading a statement in the context of the entire publication, would interpret the statement as defamatory, then the plaintiff has an actionable claim." At issue in the appeal were the *Times* article, its headline and subheadline, and several additional alleged defamatory statements within the article. Moore noted that Croce had forfeited his claims related to the Glanz's letter and a later radio interview of Glanz "by failing to develop any argument on them in his briefs."

Applying the "reasonable reader" standard, Moore concluded that the article, its headline, its subheadline, and the statements within it were not defamatory, finding that "a reasonable reader would construe the article as a standard piece of investigative journalism that presents newsworthy allegations made by others, with appropriate qualifying language."

Moore provided several reasons, including that although the article "quotes several of [Croce's] critics" and "raises concerns about various errors in [Croce's] papers, as well as concerns about OSU's ability to investigate effectively allegations against him," such allegations did "not necessarily imply guilt." Furthermore, the article did not suggest that these allegations were true, according to Moore.

Additionally, Moore noted that the article was "not entirely unfavorable" because it acknowledged Croce had not been punished in relation to the allegations. Moore added that the article included a quote defending Croce and also gave a "mixed portrayal of one of Dr. Croce's critics, 'Clare Francis,' who [was] described as a 'digital vigilante[],' 'both legendary and loathed,' 'a scientific gadfly,' and as having a 'high-strung style.'" Moore therefore concluded that a "reasonable reader would . . . interpret the article as presenting two sides of this controversy."

Moore also addressed Croce's argument that the *Times* had published the article with actual malice — knowledge that the statement was false or reckless disregard for the truth — as defined by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964). Croce alleged that publishing the statements by Sanders constituted actual malice because Sanders had "disavowed his criticisms." However, Moore found that "[i]n actuality, [Sanders did] not deny that he made the statements that appear in the article, but rather, he denies that they are defamatory."

Third, Moore turned to Croce's claim that "a reasonable reader *could* attribute a defamatory meaning to the article" (emphasis in original). Moore applied the "innocent-construction rule," which provides that "if allegedly defamatory words are susceptible to *two meanings*, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted" (emphasis in original).

Moore concluded that the article and alleged defamatory statements "comfortably [fell] within the contours of the innocent-construction rule." She explained that an innocent reading was easily found in the article, namely that Croce had been the subject of criticism and allegations, but that there were "no findings of deliberate misconduct have been made against him," he had denied the allegations, and the he was "otherwise a successful cancer researcher."

Finally, Moore concluded that Croce's remaining false light and IIED claims could "be disposed of quickly because their success rests on the defamation claims" and that "no arguments remain to support" these claims.

The full ruling is available online at: https://www.ballardspahr.com/-/media/files/sixth-circuit-opinion-in-croce.pdf. As the *Bulletin* went to press, Croce had not announced whether he would appeal the ruling to the Supreme Court or request an *en banc* hearing by the Sixth Circuit.

In a July 19 commentary, Ballard Spahr LLP attorneys Jay Ward Brown, Michael D. Sullivan, and Matthew E. Kelley, who represented the *Times* in the case, wrote that the Sixth Circuit's ruling "solidifies legal protections for balanced news reports about controversial people and issues by recognizing that, when a report presents the positions of both sides to a conflict, reasonable members of the audience do not interpret it as damaging the reputation of the individuals involved in the dispute."

Second Circuit Revives Lawsuit Brought by Sarah Palin Against *The New York Times*

On Aug. 6, 2019, several media outlets reported that the U.S. Court of Appeals for the Second Circuit had revived a lawsuit against *The New York Times* brought by former vice-presidential candidate Sarah Palin in which she claimed that the newspaper had published a statement about her in an editorial that it "knew to be false." *Palin v. The New York Times Co.*, No. 17-3801-cv (2nd Cir. 2019). The Second Circuit held that Palin had plausibly alleged a defamation claim and that the case should proceed to the discovery phase, meaning both parties would take depositions and collect evidence. The Second Circuit noted 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."

On June 14, 2017, *The New York Times* published an editorial connecting the 2011 mass shooting by Jared Lee Loughner in Tucson, Ariz. that killed six people and severely wounded then-Congresswoman Gabrielle Giffords with a map distributed by Palin's political action committee (SarahPAC) in 2010. The editorial said that the map "put Ms. Giffords and 19 other Democrats under stylized cross hairs." The editorial was prompted by the June 14, 2017 mass shooting in which left-wing activist James Hodgkinson opened fire on a baseball practice for Republican members of Congress in Alexandria, Va.

The *Times* issued a correction within a day, clarifying that there was no established link between Palin and the 2011 shooting. Additionally, the revised editorial clarified that Palin's map had never put the *faces* of Gifford and the other democrats under cross hairs, but instead that the map "showed the targeted *electoral districts* of Ms. Giffords and 19 other Democrats under stylized cross hairs" (emphasis added). CNN Business reported on June 15, 2017 that the editorial also added a note explaining the change, which read, "The editorial has . . . been updated to clarify that in [the map] . . ., electoral districts, not Democratic lawmakers, were depicted beneath stylized cross hairs." Nevertheless, Palin asserted in her complaint that the *Times*' response "did not approach the degree of the retraction and apology necessary and warranted by [the *Times*'] false assertion that Mrs. Palin incited murder."

On Aug. 29, 2017, U.S. District Court for the Southern District of New York

Judge Jed S. Rakoff dismissed Palin's lawsuit, finding that her complaint failed to show that the *Times* published inaccurate statements maliciously. *Palin v. The New York Times Company*, 264 F.Supp.3d 527 (S.D.N.Y. 2017). He explained that because Palin was a public figure, she had the burden of "establish[ing] by clear and convincing evidence 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). Rakoff ultimately held that because the complaint "fail[ed] to identify any individual who possessed the requisite knowledge and intent and, instead, attributes it to the Times in general," the complaint "fail[ed] on its face" to adequately allege actual malice.

However, Rakoff also concluded that because the alleged defamatory statements in the editorial referenced a particular member of SarahPAC — Palin herself — the statements were "of and concerning" her. Additionally, Rakoff held that the linking of Palin to the 2011 shooting was a factual statement that could be proven false, such as if there is no evidence that Loughner ever saw the map. Rakoff added that "although the offending paragraphs . . . contain[ed] various assertions of opinion, a reasonable reader could well view them as a factual statement asserting that there was a 'direct link'" between the SarahPAC Map and the Loughner shooting.

(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, Second Circuit Judge John M. Walker Jr. wrote the opinion of the unanimous three-judge panel. He first stated that under New York law, a defamation plaintiff must "establish five elements: (1) a written defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." If the plaintiff is a public figure, they must prove that the defendant acted with actual malice. Walker concluded that it was "undisputed" that Palin was a public figure.

Second, Walker observed that Rakoff took an "unusual" step by holding an evidentiary hearing on the *Times*' motion to dismiss Palin's lawsuit. According to Walker, Rakoff had justified the hearing as necessary to "assess the plausibility of the '[o]ne close question' presented by the *Times*' motion to dismiss: whether Palin had sufficiently pled the actual malice element of her defamation claim." During the Aug. 16, 2017 hearing, *Times* editorial page editor James Bennet, the author of the editorial, testified that he did not intend to blame Palin for the 2011 mass shooting, but was trying to make a point about the heated political environment. In his ruling in favor of the *Times*, Rakoff used evidence collected at the hearing, which neither party objected to, according to Walker.

Walker agreed with Palin's argument that Rakoff's reliance on the hearing "offend[ed] the Federal Rules of Civil Procedure." Walker wrote that Rakoff had invoked Rule 43(c), which addresses witness testimony during a trial, including that such testimony "must be taken in open court" unless a statute or other rules "provide otherwise." Walker held that Rakoff's use of Rule 43(c) "was misplaced" because the rule "has nothing to do with the proceedings at the motion-to-dismiss stage."

Walker further explained that the *Times*' motion to dismiss for failure to state a claim was filed under Rule 12(b)(6). According to Walker, Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6), . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment." Walker held that Rakoff had, in fact, "relied on matters outside the pleadings to decide the motion to dismiss" when basing his ruling on Bennet's testimony, but "did not convert the motion into one for summary judgment." Walker reasoned that the "material that came to light at the hearing did considerably more than elaborate on the allegations of the complaint" and that Palin "could not have 'relie[d] heavily' on Bennet's testimony when drafting her complaint because she had no idea what Bennet would say."

Third, Walker held that even if Rakoff had converted the motion to one for summary judgment, the Second Circuit "would still have to vacate because the district court's opinion relied on credibility determinations not permissible at any stage before trial."

Fourth, Walker held that Palin's proposed amended complaint, which included material from Bennet's testimony, "contain[ed] allegations that paint a plausible picture" of "Palin's overarching theory of actual malice," namely that Bennet had a "pre-determined" argument he wanted to make in the editorial. Specifically, Walker found that:

1. "Bennet's background as an editor and [left-leaning] political advocate provided sufficient evidence to permit a jury to find that he published the editorial with deliberate or reckless disregard for its truth,
2. the drafting and editorial process also permitted an inference of deliberate or reckless falsification, and
3. the Times' subsequent correction to the editorial did not undermine the plausibility of that inference."

Regarding the first claim, Walker acknowledged Palin's argument that Bennet "was more likely than the average editor-in-chief to know the truth about the Loughner shooting because he had reason to be personally hostile toward Palin, her political party, and her pro-gun stance." Walker explained that Sen. Michael Bennet (D-Colo.) is Bennet's brother and that two days before the Loughner shooting, a man had threated to open fire on Sen. Bennet's offices, leading the senator and his brother to become "outspoken advocate[s] for gun control." Walker wrote that although "political opposition alone does not constitute actual malice . . . these allegations could indicate more than sheer political bias — they arguably show that Bennet had a personal connection to a potential shooting that animated his hostility to pro-gun positions at the time of the Loughner shooting in 2011."

Walker wrote that Rakoff had determined that Bennet's "behavior [was] much more plausibly consistent with making an unintended mistake and then correcting it than with acting with actual malice." However, Walker ruled that it was not "the district court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory." Instead, such a determination is up to a jury. Walker therefore concluded that Palin had "met her burden to plead facts giving rise to the plausible inference that Bennet published the allegedly defamatory editorial with actual malice."

Fifth, Walker found that Palin had plausibly alleged that the alleged defamatory statements in the editorial were "of and concerning" her. Walker reasoned, like Rakoff, that Palin's name was included in the editorial and that a reader could conclude that SarahPAC was associated with Palin. Sixth, Walker also agreed with the district court that

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Defamation, *continued from page 37*

a reasonable reader could find that the alleged defamatory statements "[were] factual, namely that Palin, through her political action committee, was directly linked to the Loughner shooting."

Finally, Walker wrote that the court "recogniz[ed] that First Amendment protections are essential to provide 'breathing' space for freedom of expression," citing *Sullivan*. He added that although the issue before the court was "how district courts evaluate pleadings . . . [n]othing in this opinion should therefore be construed to cast doubt on the First Amendment's crucial constitutional protections." Walker continued, "Indeed, this protection is precisely why Palin's evidentiary burden at trial — to show by clear and convincing evidence that Bennet acted with actual malice — is high," in contrast to Palin's "hurdle" before the Second Circuit, which was only whether she had plausibly stated a claim for defamation necessary to proceed to full discovery. Walker therefore vacated the district court's ruling and remanded the case for further proceedings.

The full ruling is available online at: http://www.ca2.uscourts.gov/decisions/isysquery/f022b471-8853-4b35-be76-ce33eebf6092/1/doc/17-3801_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f022b471-8853-4b35-be76-ce33eebf6092/1/hilite/. As the *Bulletin* went to press, no further announcements were made in the case.

In an August 6 emailed statement to CNBC, Palin's lawyers, Elizabeth Locke and Ken Turkel, wrote, "This is — and has always been — a case about media accountability. We are pleased with the Court's decision, and we look forward to starting discovery and ultimately proceeding to trial."

In a separate statement, *New York Times* spokesperson Danielle Rhoades Ha wrote, "We are disappointed in the decision and intend to continue to defend the action vigorously."

Federal Judge Dismisses $250 Million Lawsuit Against *The Washington Post*

On July 26, 2019, the *Cincinnati Enquirer* reported that the U.S. District Court for the Eastern District of Kentucky had dismissed the $250 million lawsuit filed against *The Washington Post* by the family of Nicholas Sandmann, the Covington Catholic High School student involved in a January 2019 confrontation with Nathan Phillips, a Native American man, at the Lincoln Memorial in Washington, D.C. *Sandmann v. Washington Post Company LLC*, No. 2:19-00019 (E.D. Ky. 2019). Eastern District of Kentucky Judge William Bertelsman held that several of the alleged defamatory statements by the *Post* were "protected opinion" under the First Amendment. He also found that other alleged defamatory statements were not "about" or "concerning" Sandmann, or did not constitute defamation *per se*, meaning statements that accuse an individual of crimes or immoral acts and are presumed to be harmful.

The case arose on Jan. 18, 2019 when several media outlets, as well as numerous social media accounts, circulated photos and videos of an alleged confrontation between Sandmann and Phillips during two separate rallies taking place at the National Mall in Washington, D.C. The Native American marchers were attending the Indigenous Peoples March. The Covington Catholic High School students were attending a pro-life March for Life rally. One photo depicted Sandmann staring at Phillips, prompting some observers to criticize Sandmann for appearing to mock or taunt Phillips. *The Washington Post* first reported on the incident after a video of the encounter, which was recorded by a participant in the Indigenous Peoples March, as well as several photos, were posted by the Twitter account @2020fight.

On Feb. 19, 2019, Sandmann's family filed a lawsuit alleging that the video was "selectively edited" in order to show Sandmann as the aggressor and that "the *Post* actively, negligently and recklessly participated in making the [video] go viral on social media," without investigating the validity of the video or the Twitter account. The complaint further asserted that the *Post* ignored journalistic standards when interpreting the incident as Sandmann engaging in "acts of racism by 'swarming' Phillips, 'blocking' his exit away from the students, and otherwise engaging in racist misconduct," despite a "plethora" of other evidence was available online to give a more accurate view of the incident. The complaint claimed that the *Post* did this in order to "advance its well-known and easily documented, biased agenda against President Donald J. Trump," and requested $250 million in damages.

Following the filing of the lawsuit, several media experts argued that Sandmann would face challenges in winning the case. In a January 18 interview with Sinclair Broadcast Group (Sinclair), Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley argued that much of the rhetoric in the complaint was "legally irrelevant," although the central claims that the *Post*'s reporting was negligent could hold legal weight. "I can't say out of hand there would be no legal basis for these claims," she said. "There is an argument to be made . . . it could certainly have been harmful to Nick Sandmann's reputation." Kirtley added, "I think some of the stuff in the complaint probably won't withstand a motion to dismiss because the issue of the *Washington Post* being liable for what other news organizations might pick up and repeat, that's just not sound."

Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida, agreed with Kirtley, adding "The underlying theme of the whole lawsuit is that this is the liberal news media making a story fit its preconceived narrative of white male students who support Donald Trump being racist.. . . What is the objective standard for if someone is or is not racist?"

The Sandmann family filed similar $250 million lawsuits against CNN and NBC. As the *Bulletin* went to press, those cases remained pending. (For more information on the confrontation, lawsuit, and commentary from media experts, see *Covington Catholic High School Student Sues* Washington Post *and CNN for Defamation* in "Federal Judge Dismisses Defamation Lawsuit Against *BuzzFeed News*; News Organizations Face Significant Defamation Lawsuits and Settlements" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

On July 26, 2019, Judge Bertelsman dismissed the complaint "in its entirety." He explained that under Kentucky law, a defamation claim requires "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Bertelsman wrote that the issue before the court was whether the statements at issue were "about" and "concerning" Sandmann, whether they were fact or opinion, and whether they constituted defamation *per se*.

Bertelsman then turned to the 33 alleged defamatory statements raised in Sandmann's complaint. Bertelsman primarily focused on the first article published by *The Washington Post* regarding the confrontation between Sandmann and Phillips, titled "'It was getting ugly': Native American drummer speaks on the MAGA-hat wearing teens who surrounded him" (Article One). He first held that several of the statements in the article did not mention Sandmann by

name, nor did they provide a description of him. Instead, several of the statements referred to the entire group of high school students participating in the rally. As a result, many of the alleged defamatory statements were not "about" and "concerning" Sandmann, according to Bertelsman.

Second, Bertelsman wrote that "[f]ew principles of law are as well-established as the rule that statements of opinion are not actionable in libel actions.. . . [T]his rule is based on the right to freedom of speech in the First Amendment." Bertelsman concluded that under the First Amendment, Kentucky law, and Eastern District of Kentucky court precedent, "the statements that Sandmann challenges constitute protected opinion," which could not "form the basis for a defamation claim." He reasoned that many of the terms used by the *Post* in Article One were "inherently subjective" and did not convey "actual, objectively verifiable facts." Bertelsman added that although Sandmann argued that his intent was to diffuse the confrontation, Phillips reached a different conclusion and "interpreted Sandmann's action (or lack thereof) as blocking him and not allowing him to retreat."

Finally, Bertelsman held that because Sandmann had not alleged special damages, he had to prove that the challenged statements amounted to defamation *per se*. Bertelsman ruled that Article One could not "reasonably be read as charging Sandmann with" committing a crime. He added that Sandmann's assertion that Article One insinuated that he had "assaulted" or "physically intimidated Phillips" was "not supported by the plain language in the article, which states no such thing." Furthermore, the article could not be construed to mean that Sandmann "engaged in racist conduct" or yelled "racist taunts." Therefore, according to Bertelsman, the article would not "tend to expose [Sandmann] to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people."

Regarding Article Two, Bertelsman held that the challenged statements were largely repeated from the first article, except for a quote from a joint statement released by Covington Catholic High School and the Diocese of Covington, which "[did] not mention Sandmann," but only spoke of "students" generally. Similarly, the headline of Article Three, "Marcher's accost by boys in MAGA caps draws ire," also did not refer to Sandmann.

Bertelsman then turned to Articles Four, Five, Six, and Seven, as well as tweets about Sandmann by *The Washington Post*. He held that the articles and tweets "contain[ed] substantially the same statements" and, therefore, the same analysis provided for Articles One, Two, and Three applied. However, Bertelsman noted that Articles Six and Seven named Sandmann, meaning they were "about" him. However, Bertelsman wrote that the rest of the analysis applied because the statements were largely opinion and did not constitute defamation *per se*.

Bertelsman concluded by writing that Phillips "did not see" his confrontation with Sandmann the same way Sandmann did and "passed these conclusions on to [the *Post*]." Bertelsman continued, "They may have been erroneous, but, as discussed above, they are opinion protected by the First Amendment." He therefore dismissed Sandmann's motion. The fulling ruling is available online at: https://www.dropbox.com/sh/vtdrvruh3b453gm/AACIXLWpIHFbQ6Tvt67jrVm2a?dl=0&preview=90726.SANDMANN.WaPo.Order+granting+MTD.EFS.Doc+47.pdf.

In a July 26 statement, the Sandmann family wrote that they were "disappointed" that the complaint was dismissed. In the statement, Ted Sandmann, Nicholas' father, was quoted as saying, "I believe fighting for justice for my son and family is of vital national importance. If what was done to Nicholas is not legally actionable, then no one is safe."

Lin Wood, who represented Sandmann, said in the statement that the family would appeal the ruling. "We look forward to having an appellate court take a fresh look at the issues in this Important case," Wood said.

Shani George, *The Washington Post*'s communications director, said in a July 26 email to *The Washington Times* that the newspaper was "pleased" by the decision. "From our first story on this incident to our last, we sought to report fairly and accurately the facts that could be established from available evidence, the perspectives of all of the participants, and the comments of the responsible church and school officials," she wrote. "We are pleased that the case has been dismissed."

Meanwhile, on Aug. 2, 2019, several media outlets reported that eight Covington Catholic High School students had filed a defamation lawsuit in the Kenton County (Ky.) Circuit Court against 12 individuals, including *New York Times* White House correspondent Maggie Haberman, CNN contributor Anna Navarro, former CNN personality Reza Aslan, ABC News chief political analyst Matthew Dowd, *Mother Jones* editor-in-chief Clara Jeffery, and presidential candidate Sen. Elizabeth Warren (D-Mass.), among others. The complaint alleged that the defendants, by tweeting links to the video and photos of the alleged confrontation between the Covington Catholic students and the Native American Activists, "circulated false statements about [the students] to millions of people around the world." The complaint further alleged that "[s]everal of our Senators, most-famous celebrities, and widely read journalists, collectively used their large social media platforms, perceived higher credibility and public followings to lie and libel minors they never met, based on an event they never witnessed." The complaint added that the defendants had "the opportunity to correct, delete, and/or apologize for their false statements, but each refused[.]"

The complaint argued that the students were private figures, meaning they did not need to prove "actual malice," meaning that the alleged defamatory statements were made with knowledge of falsity or reckless disregard for the truth, as required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-80 (1964). The complaint alleged defamation *per se* against each defendant, contending that the alleged defamatory statements "disgraced and degraded the plaintiffs and held them up to public hatred, contempt, ridicule, and/or caused them to be shunned and avoided." The complaint sought damages ranging between $15,000 to $50,000 for each student from each of the defendants, totaling at least $1.44 million and at most $4.8 million.

The full complaint is available online at: http://juryverdicts.net/SandmannKenton.PDF?fbclid=IwAR3joDM4C3ilk7VCCOgTApeAqpp62D0tXlamnB5H2waCS3OLKiXMRTXV-Xc. As the *Bulletin* went to press, a judge had not ruled in the case.

In an August 2 interview with the *Cincinnati Enquirer*, David Marburger, a Cleveland-based First Amendment attorney, argued the students would face challenges in winning the case. "Assuming politics don't intervene in the judicial system, this is exceedingly weak," he said. "I can't see anything that is colorably actionable as defamation." Marburger added that many of the alleged defamatory statements at issue were "loose, figurative" or "rhetorical hyperbole," which the U.S. Supreme Court ruled are protected by the First Amendment in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Scott Memmel
Silha *Bulletin* Editor

Judge Allows Media and Public to Make Copies of Evidence from Trial of Former Minneapolis Police Officer, Restricts Live Streaming of Noor Sentencing Hearing

ACCESS

On May 22, 2019, Hennepin County, Minn. Fourth Judicial District Court Judge Kathryn Quaintance ordered that members of the media and public be allowed not only to view, but also to make copies of, key evidence from the trial of former Minneapolis Police Officer Mohamed Noor. Noor was found guilty on April 30 of third-degree murder and second-degree manslaughter for shooting and killing 40-year-old personal health coach Justine Damond in 2017. *Minnesota v. Noor*, No. 27-CR-18-6859 (2019). However, Quaintance ordered that five graphic police body-worn camera (BWC) videos depicting Damond receiving medical treatment be edited to blur her face and exposed body, as well as mute some noises made by Damond.

The events around the shooting of Damond began shortly after 11:30 p.m. on July 15, 2017 when Noor and fellow officer Matthew Harrity responded to a 911 call by Damond, who was reporting a possible assault in an alley in Minneapolis. Within minutes, Noor and Harrity arrived in a police car outside Damond's home, after which Damond walked towards the vehicle in her pajamas, approaching the driver's side door.

Harrity later told investigators that he was startled by a "loud sound," which, allegedly, was Damond slapping or thumping the back of the police SUV, though prosecutors refuted this allegation during the ensuing jury trial, which began on April 1, 2019. Moments later, Noor, who was in the passenger seat, allegedly pulled his gun and shot across Harrity, who was in the driver's seat, through the driver's side window, hitting Damond in the abdomen. Damond, who was not carrying a weapon, died at the scene.

The Associated Press (AP) reported on Sept. 18, 2017 that although Noor and Harrity had eventually turned on their BWCs after the shooting, they had missed the most pivotal moments, despite the Minneapolis Police Department's (MPD) BWC policy requiring the officers to activate the cameras in a "critical incident," such as "the use of deadly force by or against a Minneapolis police officer." Responding Officers Scott Aikins' and Thomas Fahey's BWCs recorded part of the aftermath of the shooting. MPD changed its BWC policy in the days following the shooting, listing additional circumstances in which officers were required to turn on their BWCs.

On April 30, 2019, Noor was found guilty on the third-degree murder and second-degree manslaughter charges, and was acquitted on the second-degree murder charge. Noor was sentenced to 12.5 years in prison on June 7. Additionally, according to court documents, the City of Minneapolis reached a $20 million settlement with Damond's family after the verdict.

The legal battle around access to the courtroom and trial evidence began on Sept. 19, 2018 when Hennepin County prosecutors filed a motion asking the Fourth Judicial District Court to prohibit the disclosure of some evidence in the case, including grand jury testimony, performance review documents, and BWC video of the aftermath of the shooting, reasoning that it was confidential data under the Minnesota Government Data Practices Act (MGDPA). Minn. Stat. § 13.01 *et seq.*

During a March 29, 2019 pretrial hearing, Quaintance and Fourth Judicial District Chief Judge Ivy Bernhardson, citing the need to preserve "order and decorum," ordered that the trial remain in a courtroom containing about two dozen seats, about half the size of other courtrooms in the same building. Quaintance also banned electronic devices, including cellphones, laptops, and recording devices from the courtroom, as well as from an overflow room that provided additional seating. Additionally, Quaintance announced that the public and reporters would not be provided access to the BWC video recorded after the shooting of Damond, nor to additional photos from the medical examiner's office. Quaintance ruled that only jurors would be able to see the footage, citing privacy concerns over the public seeing the video that shows Damond in "extremely compromising situations."

In response to Quaintance's order, on March 29, Ballard Spahr LLP attorney Leita Walker wrote a letter to Bernhardson on behalf of a coalition of media organizations (Coalition), which included Star Tribune Media Company, LLC, CBS Broadcasting Inc., MPR, TEGNA, Inc., Fox/UTV Holdings, LLC, the AP, Hubbard Broadcasting, and the Minnesota Coalition on Government Information (MNCOGI). The letter argued that the First Amendment and common law guarantee press and public access to criminal proceedings, citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), in which the U.S. Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment." The letter also cited *Nebraska Press Association v. Stuart*, in which the U.S. Supreme Court held that restricting the media's freedom to communicate with trial participants and to report what they say would constitute a prior restraint, "the most serious and least tolerable infringement on First Amendment rights." 427 U.S. 539, 559 (1976).

Although Quaintance filed an amended order easing some of the restrictions on the public's and the press' access to the trial, she did not address the BWC footage or the restriction of courtroom sketch artists from recording what transpired at the trial. The Coalition summarily filed an additional motion and memorandum objecting to the "anticipated *de facto* closure of the courtroom when certain evidence — including, but not limited to, video footage and photographs — are permitted to be viewed only by the jury and other trial participants," as well as "any gag order barring the courtroom sketch artist from depicting trial participants [including jurors] or otherwise barring members of the press from reporting on what transpires during the trial and/or on statements trial participants make outside the courtroom."

On April 9, Quaintance announced during a hearing that she would make the trial evidence available, as well as allow sketch artists to draw jurors, citing the "need to follow court precedent" and that there "is no role of victim privacy in the First Amendment."

On May 13, Quaintance issued a written order requiring the Hennepin County District Court Public Affairs Communications Specialist and the court's criminal administrative staff to "allow media representatives access to and the opportunity to view the trial exhibits in this case." However, she did not rule on whether members of the media or public could copy the exhibits.

(For more information on the shooting of Damond, the Noor trial, and the legal battle over access to the courtroom and trial evidence, see "Media Coalition Wins Legal Victory to Access Body Camera Video in Trial of Former Minneapolis Police Officer" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

On May 16, 2019, the Coalition filed a motion calling on Quaintance to allow members of the media and public to make copies of trial exhibits. The motion first explained that "[a]lthough the question of Mr. Noor's guilt or innocence may be resolved, there remain many open questions" about the shooting. As a result, the motion argued that thorough, accurate reporting of those questions required "a full understanding of the evidence presented at trial" and that such understanding could "only be achieved if members of the Coalition are able to view and copy that evidence so that they can study and refer back to it over the coming weeks, months, and even years as they continue to report on these issues of utmost pubic interest and concern."

The Coalition added that not being able to make copies of the evidence "would greatly diminish the breadth, quality, and usefulness of the news reporting on one of the most important issues of our time — gun violence, particularly that perpetrated by police, and the possibility that the race of both victim and perpetrator may impact the prosecution and punishment of such violence."

Second, the motion argued that the "State ha[d] not met its burden to overcome the press and public's First Amendment right to access and copy trial exhibits." The motion cited *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 203 (Minn. 1986), in which the Minnesota Supreme Court held that the First Amendment right to access trials extends not only to the trial itself, but also to judicial records. The motion concluded that the First Amendment right therefore extends to "the right to copy those records."

The Coalition then applied the four-part test articulated in *Richmond Newspapers* and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986), which would allow a judge to restrict access to the trial and trial evidence. The four-part test requires:

- The party seeking to restrict access must demonstrate a substantial probability of prejudice to a compelling interest.
- The party seeking to restrict access must demonstrate that there is no alternative to adequately protect the threatened interest.
- Any restriction on access must be narrowly tailored.
- Any restriction imposed on access must be effective in protecting the threatened interest for which the limitation is imposed.

The motion argued that the State had not met this high bar, including because it had not provided a compelling interest for prohibiting copying of evidence. The Coalition asserted that the prosecution's claim that the evidence could impact post-trial proceedings or any appeals was a "speculative, conclusory argument." The motion also argued that alternatives to a blanket prohibition of copying evidence were available, including restricting copying for only certain exhibits. Additionally, the motion contended that "prohibiting copying of the trial exhibits would not be effective" because members of the Coalition were "pursuing copies of the trial exhibits in the possession of various government agencies, and the MGDPA is clear that all 'investigative data presented as evidence in court shall be public.'" Minn. Stat. § 13.82, subd. 7.

Third, the Coalition argued that the State had also not met its burden under "the press and public's common law right to access and copy trial exhibits." The motion cited several federal circuit court cases, including *In re NBC*, 635 F.2d 945, 952 (2nd Cir. 1980), in which the Second Circuit held that there "is [a common law] presumption in favor of public inspection *and copying* of any item entered into evidence at public session of trial. Once the evidence has become known to the members of the public, including representatives of the press . . . it would take the most extraordinary circumstances to justify restrictions on the opportunity . . . to see and hear the evidence, when it is in form that readily permits sight and sound reproduction" (emphasis in original).

The motion added that although the common law right is not absolute, the "'most extraordinary circumstances' have typically been limited to those involving intimate privacy rights of living victims where no public officials or servants were involved, and the copying could impact the ability to conduct a fair and impartial trial."

Fourth, the motion cited the Minnesota Rules of Public Access to Records of the Judicial Branch, which stated that "[r]ecords of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection *or copying* at all times during the regular office hours of the custodian of the records" (emphasis in original).

Finally, the Coalition argued that access to and copies of the trial evidence "should be granted immediately" because, under First Amendment jurisprudence, "any delays are in effect denials of access, even though they may be limited in time." The motion cited *Nebraska Press Association*, in which the Supreme Court found that "[d]elays imposed by governmental authority" are inconsistent with the media's "traditional function of bringing news to the public promptly."

The motion therefore requested that Quaintance "enter an order rejecting the State's position and authorizing its staff to make copies of all trial exhibits that are able to be copied (i.e., documents, photographs, video and audio recordings and the like) available to the press and public upon request" and that such actions should be taken "immediately." The full motion is available online at: https://z.umn.edu/NoorMediaCoalitionResponse.

On May 22, 2019, Quaintance released a written order allowing "copy access to trial exhibits." The order first acknowledged that there was a "presumption in favor of copying exhibits received in the course of criminal trial" under a "common-law right of access." The order cited

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Evidence, *continued from page 41*

Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-599 (1978), in which the Supreme Court found that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." The order added that the Court held in *Nixon* that there was no First Amendment right to copy trial exhibits, though it acknowledged that later cases, including *Richmond Newspapers*, had "held otherwise."

Quaintance concluded that "[a]t the end of the day, the common-law standard is all that is required for the Court to grant, in large part, the Media Coalition's request to copy the trial exhibits in this case." She added, "The State's position opposing the copying of any trial exhibits is overbroad. The State does not cite, nor is the Court aware of, any case where copy access to all of the trial exhibits has been denied by the trial court." Quaintance therefore ordered that members of the media and the public be allowed "access to and the opportunity to view and copy the exhibits in this case."

However, the order contended that "images of the decedent's bare breasts, of her face in distress, as well as the sounds of her gasping for breath, moaning, and vomiting, are of limited value for the accurate reporting purposes for which the Media Coalition seeks to copy the trial exhibits" and that such graphic evidence could be exploited "for improper purposes should it be released." Quaintance therefore ordered that five BWC videos containing such images could only be viewed by the public and the media after copies of the exhibits were redacted by the prosecution, including blurring Damond's face and exposed body, as well as muting some of her vocalizations. According to the *Star Tribune* on May 24, the five videos were recorded by Noor, Harrity, and three other officers responding to the scene.

Finally, the order explained the administrative process for viewing and copying of exhibits, including that the Fourth Judicial District's bench policy relating to public requests for viewing and obtaining copies of trial evidence provides that "[e]xhibits will be made available for viewing within reasonable timeframe after they have been deposited with court administration at the conclusion of a trial." Quaintance ordered some additional administrative procedures, including that "all arrangements to view or obtain copies of exhibits must be referred to the Hennepin County District Court Public Affairs Communications Specialist." The full order is available online at: https://z.umn.edu/NoorTrialExhibitMotion.

> "The State's position opposing the copying of any trial exhibits is overbroad. The State does not cite, nor is the Court aware of, any case where copy access to all of the trial exhibits has been denied by the trial court."
>
> **— Judge Kathryn Quaintance, Hennepin Country, Minn. Fourth Judicial District Court**

On May 24, the *Star Tribune* and MPR reported that about 36 pieces of evidence from the Noor trial were made public, including recordings of Damond's 911 calls, a video recorded by a bicyclist immediately after the shooting, and BWC videos recorded by responding officers. One such video was recorded by officer Jesse Lopez's BWC and depicted him telling Noor "Just keep to yourself.. . . Keep your mouth shut until you have to say anything to anybody." Some of the released evidence is available online at: http://www.startribune.com/evidence-in-noor-trial-released-thursday/510332962/?refresh=true.

On June 11, KMSP-TV, Minneapolis' Fox affiliate, and WCCO-TV, Minneapolis' CBS affiliate, reported that the five redacted BWC videos had been released to those who had requested copies. Fox 9's report and portions of the footage are available online at: https://www.fox9.com/news/412111261-video.

One additional question related to media access to the Noor trial arose on June 6, 2019, the day before the sentencing of Noor, when Walker, on behalf of MPR, emailed Quaintance after learning that she had "prohibited live streaming and real-time reporting of [the] sentencing hearing[.]" Walker explained that Quaintance had earlier issued an order "granting various media organizations' requests to cover the sentencing proceedings by audio and visual means. Although that order placed certain limitations on what could be recorded, nothing in that order restricted the media's use of the feed."

In a series of emails between court and MPR staff, it became clear, according to Walker, that the court had prohibited live streaming and real-time reporting of the hearing. Walker contended that "once a court finds that cameras must be permitted at the sentencing — which is what the Court found here — any restriction on how the feed is used would be an unconstitutional prior restraint under the First Amendment." MPR therefore requested that Quaintance "lift any oral or written restriction on use of the audio/video feed and that [she] clarify before the sentencing hearing begins that the Court is not prohibiting live streaming of the feed or real-time reporting about the hearing, in whatever form the newsrooms, in the exercise of their editorial discretion, deem appropriate (e.g., on their websites, through social media, etc.)."

However, in a June 17 email to Silha *Bulletin* Editor Scott Memmel, Walker stated that Quaintance "did not offer [her] an opportunity to elaborate on the prior restraint issue," even though Walker was present in the courtroom. Walker added that Quaintance had neither responded to her June 6 email, nor an additional email sent before the hearing on June 7. According to Walker, no media outlet live streamed the sentencing hearing, though videos were posted after the fact, including by MPR.

Scott Memmel
Silha *Bulletin* Editor

U.S. Customs and Border Protection Continues to Raise Privacy Issues Amid Data Breach, Searches and Seizures of Electronic Devices

In the summer of 2019, U.S. Customs and Border Protection (CBP) continued to raise legal questions and concerns related to a data breach exposing thousands of photographs of travelers, vehicles, and license plates, as well as the agency's continued practice of searching and seizing journalists' electronic devices at U.S. borders. On June 10, 2019, CBP announced that a data breach of a subcontractor had exposed the photos of thousands of travelers and vehicles crossing U.S. borders. The revelation prompted concern from observers, including regarding the scope of federal agencies' collection of sensitive data, including biometric information, as well as the extensive authority of CBP to conduct surveillance of travelers and the American public. Meanwhile, in a June 22, 2019 story for *The Intercept*, *Rolling Stone* magazine contributor Seth Harp documented his experience of having his electronic devices searched during a secondary screening by CBP agents, providing an additional example of the agency's practice of conducting such searches without a warrant.

SEARCHES AND SEIZURES

For several years, CBP's practice of warrantless searches and seizures of electronic devices has prompted lawsuits by travelers asserting their First and Fourth Amendment rights. For example, on Sept. 13, 2017, the American Civil Liberties Union (ACLU), the Electronic Frontier Foundation (EFF), and the ACLU of Massachusetts filed a complaint on behalf of 11 travelers, whose electronic devices were searched and, in some cases, seized by CBP agents. Among the travelers were two journalists, a journalism student, and an independent filmmaker, raising heightened First Amendment concerns about their "journalistic work product[s]." On May 9, 2018, U.S. District Court for the District of Massachusetts Judge Denise J. Casper denied a motion by CBP, the U.S. Department of Homeland Security (DHS), and Immigration and Customs Enforcement (ICE) to dismiss the case, finding that the plaintiffs had plausibly alleged First and Fourth Amendment claims. *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 WL 2170323 (D. Mass. 2018).

In October 2018, a report by the Committee to Protect Journalists (CPJ) and Reporters Without Borders (RSF) indicated that journalists were periodically the target of warrantless searches and seizures against journalists at U.S. borders. In March 2019, NBC 7 in San Diego reported that the U.S. government had created a secret database of journalists and activists tied to the "migrant caravan," a group of over 5,000 migrants seeking asylum at the U.S.-Mexico border in November 2018, further demonstrating that journalists can be the target of border agents. (For more information on the CPJ report and the revelations by NBC 7, see "Journalists and Others Targeted at U.S. Borders, Creating More Confusion and Lawsuits" in the Winter/Spring 2019 issue of the Silha *Bulletin*.)

Although some federal courts, including the U.S. Courts of Appeals for the Fourth and Ninth Circuits, have ruled in favor of travelers' First and Fourth Amendment rights, generally finding that seizures of electronic devices require "reasonable suspicion," the Eleventh Circuit has ruled otherwise, finding that "reasonable suspicion" is not necessary. CBP's actions have also prompted legislative efforts by the U.S. Senate.

(For more information on lawsuits by travelers against CBP, as well as federal court rulings, including Casper's, regarding warrantless searches and seizures of electronic devices at U.S. borders, see "Journalists and Others Targeted at U.S. Borders, Creating More Confusion and Lawsuits" in the Winter/Spring 2019 issue of the Silha *Bulletin*, "Ninth Circuit Ruling and Federal Lawsuit Target U.S. Customs and Border Protection for First and Fourth Amendment Violations" in the Fall 2018 issue, "U.S. Customs and Border Protection Actions Continue to Raise First and Fourth Amendment Questions" in the Summer 2018 issue, "Civil Rights Organizations, Federal Agency, and House of Representatives Raise Different Issues Regarding Searches at U.S. Borders" in the Fall 2017 issue, and "U.S. Customs and Border Protection Searches of Electronic Devices, Data at U.S. Borders Raise Privacy and Legal Concerns" in the Summer 2017 issue.)

Data Breach of CBP Subcontractor Raises Questions About Federal Agencies' Collection of Sensitive Information and Surveillance of Americans

On June 10, 2019, U.S. Customs and Border Protection (CBP) confirmed in an emailed statement to reporters that a data breach exposed the photos of travelers and vehicles crossing the U.S. border, as reported by *The Washington Post* on the same day. The announcement prompted criticism from observers who raised concerns about federal agencies' collection of sensitive data, as well as CBP's extensive authority and surveillance of Americans.

In its June 10 emailed statement, CBP announced that "[i]n violation of [its] policies and without [its] authorization or knowledge, [a subcontractor] transferred copies of license plate images and traveler images collected by CBP to the subcontractor's company network.. . . The subcontractor's network was subsequently compromised by a malicious cyberattack." The statement added that CBP had removed from service all of the subcontractor's equipment and that no CBP systems were impacted. A spokesperson added later the same day that fewer than 100,000 people were impacted, based on "initial reports" and that "[n]o passport or other travel document photographs were compromised and no images of airline passengers from the air entry/exit process were involved."

According to *The Washington Post* on June 10, although CBP did not disclose what subcontractor was involved, "a Microsoft Word document of CBP's public statement, sent . . . to [*Post*] reporters, included the name 'Perceptics' in the title: 'CBP Perceptics Public Statement.'" The *Post* therefore determined that it was Perceptics LLC, a Tennessee-based company that makes automated license-plate-reading technology and connected database storage. An anonymous U.S. official who spoke with the *Post* alleged that Perceptics was "attempting to use the data to refine its algorithms to match license plates with the faces of a car's occupants, which the official said was outside of CBP's sanctioned use." The source called the data

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breach a "major incident," though it did not involve a foreign nation. Perceptics was the subcontractor under information-technology giant Unisys, which was awarded a contract in 2016 by CBP to upgrade license-plate scanners and other automated-screening equipment along U.S. borders.

Previously, on May 23, 2019, *The Register* reported that Perceptics "ha[d] been hacked" and that its "internal files were pilfered, and [were] being offered for free on the dark web to download." *The Register* reported that an individual using the pseudonym "Boris Bullet-Dodger" had contacted the publication to disclose the hack, providing "a list of files exfiltrated from Perceptics' corporate network as proof." Among the files that were hacked and posted were "files named for locations and zip codes [and] .jpg files with names that refer to 'driver' and 'scene,'" among others. *TechCrunch* reported on June 10 that it was initially unclear whether the two incidents were linked, noting that although the *Post* implicated Perceptics, CBP had said that "none of the image data ha[d] been identified on the Dark Web or internet."

However, *The Washington Post* reported on July 10 that during a hearing before the U.S. House of Representatives Homeland Security Committee on the same day, CBP acknowledged that it was not informed of the data breach until nearly three weeks after the cyberattack was first discovered. Observers noted that the revelation demonstrated a "clear symptom of the dangers of the government's mass gathering of data on the general public using facial-recognition cameras, license-plate scanners and other surveillance equipment."

Furthermore, on July 3, 2019, *The Washington Post* and CNN reported that Perceptics had been found "preliminarily ineligible" to conduct business with the federal government, meaning federal agencies could not solicit new offers to or extend contracts with the company. According to government contracting records published on July 2, the company was found ineligible due to "adequate evidence of conduct indicating a lack of business honesty or integrity, or a lack of business integrity."

Nevertheless, Perceptics spokesperson Casey Self defended the company's record in working with the federal government. "Perceptics and its management categorically denies any illegal or unethical behavior, and we stand ready to meet to discuss this with the government in any setting and to demonstrate our support of the CBP mission," she said in a July 3 statement.

Additionally, *FCW*, a publication covering federal technology news, reported that in a July 9 hearing before the Homeland Security Committee, John Wagner, deputy executive assistant commissioner for CBP's Office of Field Operations, defended the agency's use of facial recognition and biometric technologies, calling the data breach an "isolated incident." Wagner also downplayed CBP's use of the technology, stating, "What we're doing is absolutely not a surveillance program." He added that CBP's programs were not set up to easily segregate foreign visitors to the United States.

> "It is outrageous that [the U.S. Department of Homeland Security] allowed individuals' sensitive data to be compromised, but this case also highlights the risks of collecting this information in the first place.. . . This personal, sensitive [data] becomes a gold mine for bad actors, and the effects could be devastating for the victims of a breach."
>
> **— Sen. Ed Markey (D-Mass.)**

On July 10, *Gizmodo* reported that in a hearing the same day, CBP had also argued that it did not exceed its legal authority by utilizing facial recognition technology. CBP was "permitted only to collect the biometric information of foreign nationals through what's known as the Biometric Exit Program," according to *Gizmodo*. However, the agency still "scan[ned] the faces of Americans at ports of entry in a pilot program designed to determine whether travelers are or are not foreign nationals." During the hearing, Wagner argued that such practices were allowed because CBP deleted the photos after 12 hours and that Americans could opt out of participating in the facial comparison process. Wagner added, "U.S. citizens are clearly outside the scope of the biometric entry-exit tracking. The technology we're using for the entry-exit program we're also using to validate the identity of the U.S. citizen.. . . Someone has to do that."

BuzzFeed News previously reported on March 11, 2019 that CBP was "rushing" and "scrambling" to implement a new facial recognition program. According to U.S. Department of Homeland Security (DHS) and CBP documents obtained by the Electronic Privacy Information Center (EPIC) and shared with *BuzzFeed News*, CBP's goal was to use facial recognition on "100 percent of all international passengers" in the top 20 U.S. airports by 2021.

BuzzFeed News' revelations prompted a March 12, 2019 statement by Sens. Ed Markey (D-Mass.) and Mike Lee (R-Utah), in which they called on DHS to "pause their efforts until American travelers fully understand exactly who has access to their facial recognition data, how long their data will be held, how their information will be safeguarded, and how they can opt out of the program altogether." The statement noted that Sens. Markey and Lee had previously raised questions about DHS's use of facial recognition software in December 2017 and May 2018. The full statement is available online at: https://www.markey.senate.gov/news/press-releases/senators-markey-and-lee-call-for-transparency-on-dhs-use-of-facial-recognition-technology.

Similarly, in a June 13 letter to Kevin McAleenan, the acting DHS Secretary, 23 U.S. senators "express[ed] concerns about reports that [CBP was] using facial recognition technology to scan American citizens under the Biometric Exit Program," calling it an "unprecedented and unauthorized expansion of the agency's authority." The letter added that the senators "were stunned to learn of reports that the agency . . . use[d] facial recognition technology on American citizens" and that it was "unclear under what authority CBP [was] carrying out this program on Americans." The full letter is available online at: https://wild.house.gov/sites/wild.house.gov/files/CBP%20Facial%20Recognition%20Ltr.%20final.%20.pdf.

The statement by Sens. Markey and Lee and the letter to McAleenan were not the only instances of public

officials and other observers questioning CBP's practices. Following the data breach, several observers expressed concern with CBP and other agencies expanding their use of technology collecting sensitive and biometric data from travelers and Americans. American Civil Liberties Union (ACLU) senior legislative counsel Neema Singh Guliani said in a June 10 statement, "This breach comes just as CBP seeks to expand its massive face recognition apparatus and collection of sensitive information from travelers, including license plate information and social media identifiers." She continued, "This incident further underscores the need to put the brakes on these efforts and for Congress to investigate the agency's data practices.. . . The best way to avoid breaches of sensitive personal data is not to collect and retain such data in the first place."

Rachel Levinson-Waldman, senior counsel at New York University (NYU) Law School's Brennan Center for Justice, contended that the data breach demonstrated the possible consequences of increased government monitoring of travelers and use of biometric information and technology. "This kind of breach highlights the dangers of mass collection of sensitive data. And it should not come as a surprise," Levinson-Waldman said in a June 21 interview with *The Washington Post*. "Large-scale collection of personal information is not costless. Congress must exercise vigorous oversight and demand that agencies limit the sensitive information they collect and safeguard the data in their possession."

Dave Maass, a senior investigative researcher at the Electronic Frontier Foundation (EFF) agreed. "The reasons for surveillance end up being driven by profit, as opposed to the needs for public safety," he told the *Post*. "[Federal] agencies shouldn't be collecting more data than they absolutely need . . . or can absolutely protect."

Sen. Ron Wyden (D-Ore.) emphasized the need for federal agencies to take measure to protect personal data. "If the government collects sensitive information about Americans, it is responsible for protecting it — and that's just as true if it contracts with a private company," he said in a June 10 statement to *The Washington Post*. "Anyone whose information was compromised should be notified by Customs, and the government needs to explain exactly how it intends to prevent this kind of breach from happening in the future."

Sen. Markey said in a June 21 statement, "It is outrageous that DHS allowed individuals' sensitive data to be compromised, but this case also highlights the risks of collecting this information in the first place.. . . This personal, sensitive [data] becomes a gold mine for bad actors, and the effects could be devastating for the victims of a breach."

In a June 21 article, *Washington Post* reporter Drew Harwell wrote that the data breach did more than "just [expose] the faces and license plates of thousands of U.S. travelers. It also revealed the inner workings of a complex surveillance network that border authorities have long sought to keep secret." Harwell contended that the data breach exposed more than just photos of travelers and vehicles, but actually included "so much material, totaling hundreds of gigabytes, that *The Washington Post* required several days of computer time to capture it all."

> "If the government collects sensitive information about Americans, it is responsible for protecting it — and that's just as true if it contracts with a private company."
>
> **— Sen. Ron Wyden (D-Ore.)**

According to Harwell, the hacked documents "offer an unusually intimate glimpse of the machinery that U.S. officials depend on for the constant monitoring of legal immigration through the border," including "detailed schematics, confidential agreements, equipment lists, budget spreadsheets, internal photos and hardware blueprints for security systems." Harwell wrote that the documents also provided insight into President Donald Trump's administration's "plans for expanding its use of license plate readers and facial-recognition cameras, including such details as how many cameras are focused on which traffic lanes at some of the busiest border crossings in the world." Among the documents were "financial statements, project budgets, internal passwords, sales and marketing material, and information about employees' performance reviews, insurance coverage[,] and pay."

Additionally, Harwell cited the *Post*'s July 7 report in which it revealed that Federal Bureau of Investigation (FBI) and Immigration and Customs Enforcement (ICE) agents had "turned state driver's license databases into a facial-recognition gold mine, scanning through millions of Americans' photos without their knowledge or consent." The practice was revealed by "thousands of facial-recognition requests, internal documents, and emails" obtained through public-records requests by Georgetown Law's Center on Privacy and Technology and provided to the *Post*. Neither Congress nor state legislatures had authorized such a system, though 21 states did allow the FBI to scan driver's license photos as of July 2019, according to the *Post*.

Journalist Details Searches of His Electronic Devices

In a June 22, 2019 story for *The Intercept*, Seth Harp, a contributing editor at *Rolling Stone* magazine, reported his own experience of having his electronic devices searched by U.S. Customs and Border Protection (CBP) agents, providing an additional example of the expansive practice by border agents.

Harp asserted that upon returning from a seven-day trip to Mexico for work and showing his passport to a CBP agent, the officer repeatedly asked about the substance of the story Harp had been working on. When Harp refused to provide any details, the agent asked that he follow him to a secondary screening area where Harp eventually revealed that his story was an "investigative journalism project to determine which restaurant has the best guacamole in all of Mexico."

Harp alleged that two agents then searched his luggage, with a third agent reading his "2019 journal, including copious notes to self on work, relationships, friends, family, and all sorts of private reflections I had happened to write down." However, Harp wrote that the "real abuse of power" was a subsequent "warrantless search of [his] phone and laptop." Harp explained that although the U.S. Supreme Court in *Riley v. California* had required that law enforcement get a warrant to search electronic devices, the Court had not extended the ruling to U.S. borders. (For more information on the *Riley* decision, see "Supreme Court

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Borders, *continued from page 45*

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*.)

Harp also cited CBP's 2018 policy, Directive No. 3340-049A, titled "Border Searches of Electronic Devices," which revised its 2009 directive on searches and seizures of electronic devices at U.S. borders. The policy allows CBP agents, when searching an electronic device, to examine only information "that is resident upon the device and accessible through the device's operating system or through other software, tools, or applications," meaning agents may not "intentionally use the device to access information that is solely stored remotely."

The policy differentiates a "basic search" from an "advanced search." A basic or "manual" search is one in which an agent, "with or without suspicion, . . . examine[s] an electronic device" including reviewing and analyzing information. Conversely, an advanced or "forensic" search occurs when an agent "connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents." The policy requires that an agent have "reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern" in order to conduct an advanced search. The policy allows CBP agents to request that an individual unlock portions of their electronic device and to detain a device "for a brief, reasonable period of time" if the agent cannot access the device.

Finally, like the 2009 directive, the new policy includes some exceptions, including when the device contains "possibly sensitive information, such as . . . work-related information carried by journalists." In such cases, the information "shall be handled in accordance with any applicable federal law and CBP policy." The policy is available online at: https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

According to Harp, when he asked to speak to an attorney, an agent told him he could not because he was not under arrest, but was simply not allowed to enter the United States. Sophia Cope, an attorney for the Electronic Frontier Foundation (EFF), later told Harp in an interview that "They've been pretty consistent. You don't get a lawyer" when going through secondary screening.

Harp reported that one CBP agent "spent three hours reviewing hundreds of photos and videos and emails and calls and texts, including encrypted messages on WhatsApp, Signal, and Telegram," and also read Harp's "communications with friends, family, and loved ones, [as well as . . . correspondence with colleagues, editors, and sources." Another agent searched Harp's laptop, during which he looked through emails, internet history, financial spreadsheets, property records, and business correspondence. After three hours, Harp was allowed to leave, though not before the agents copied his laptop's serial number, as well as alphanumeric sequences within his phone's settings.

In an interview with Harp, Alexandra Ellerbeck, the Committee to Protect Journalists' (CPJ) North America program coordinator, contended that Harp's experience was not an isolated one. "There's an opportunistic element to it. It seems to be targeted towards general intelligence-gathering," she said. "[CBP] take[s] a broad view of their mandate to ask these questions, and there can be repercussions if you refuse to answer. They'll hold you for longer, search your devices, or flag you in the future." She added, "We don't think this should be happening at all."

Harp's full report is available online at: https://theintercept.com/2019/06/22/cbp-border-searches-journalists/.

Scott Memmel
Silha *Bulletin* Editor

The New York Times Discontinues Editorial Cartoons in Its International Edition; Canadian Publisher Ends Contract with Editorial Cartoonist

In the summer of 2019, two editorial cartoons depicting President Donald Trump garnered worldwide criticism, leading to controversial responses by *The New York Times* and Canadian publisher Brunswick News Inc. (BNI). On April 29, the *Times* announced that its international edition would no longer publish syndicated editorial cartoons after a cartoon that appeared in its international edition on April 25 was criticized as being anti-Semitic by readers around the world. On June 10, the *Times* announced its international version would also no longer carry daily political cartoons and therefore terminated the contracts of its two contract cartoonists. On July 1, BNI announced it was ending its contract with editorial cartoonist Michael de Adder following his cartoon depicting President Trump playing golf and asking two dead migrants, "Do you mind if I play through?" The actions by both media organizations drew criticism from observers around the world who emphasized the important role of editorial cartoons in holding powerful individuals and institutions accountable.

EDITORIAL CONTROL

The Silha Center for the Study of Media Ethics and Law, together with the Association of American Editorial Cartoonists (AAEC), the Hubbard School of Journalism and Mass Communication, the Minnesota Journalism Center, and the Herb Block Foundation, sponsored a symposium in April 2018 marking the 30th anniversary of the U.S. Supreme Court's ruling in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), which affirmed the First Amendment right of editorial cartoonists and satirists to lampoon public figures. The symposium, titled "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30," included six panels and two speeches in which political cartoonists and First Amendment scholars discussed different aspects of the Hustler case, including threats to satire in the United States and abroad, among other topics. (For more information on the symposium, see "Spring Symposium Marks the 30th Anniversary of *Hustler Magazine, Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons" in the Winter/Spring 2018 issue of the Silha *Bulletin*. A website dedicated to the coverage of this event is available online at: http://stateofoursatiricalunion.dl.umn.edu/.)

The New York Times Ends Publication of Editorial Cartoons in Its International Edition

On April 29, 2019, *The New York Times* announced that the *Times*' international edition would no longer publish syndicated editorial cartoons following criticism of a cartoon that appeared on April 25. On June 10, 2019, the *Times* announced that it would also no longer publish daily political cartoons in its international edition and ended its relationship with its two contract cartoonists. Observers criticized the *Times*' actions, contending that that they were an "overreaction" and "horrible decision[s]."

The April 25 cartoon was drawn by Portuguese artist Antonio Moreira Antunes and depicted Isreali Prime Minister Benjamin Netanyahu as a guide dog with a Star of David dog tag around his neck, leading a blind President Donald Trump, who wore a yarmulke, according to *The Washington Post* on June 11, 2019. The cartoon was distributed through CartoonArts International, a company characterized in the April 29 *Times* article as "a New York-based company whose licensing deal with The Times is several decades old." The *Times* did not indicate whether its contract with CartoonArts International had been cancelled. The cartoon is available online at: https://twitter.com/yashar/status/1122164007316725760?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1122164007316725760&ref_url=https%3A%2F%2Fwww.thedailybeast.com%2Fnew-york-times-apologizes-for-anti-semitic-cartoon.

On April 29, the *Times* reported that it received significant criticism from readers around the world, who called the cartoon anti-Semitic. The *Times* also reported that Bret Stephens, a *Times* Opinion columnist, denounced the cartoon and asked the paper "to reflect deeply on how it came to publish anti-Semitic propaganda." In the same article, an unidentified *New York Times* spokesperson similarly said, "The cartoon that ran [on April 25] was clearly anti-Semitic and we apologize for its publication." In addition to the *Times*, the Anti-Defamation League, the American Jewish Committee, several members of Congress, President Trump, Vice President Mike Pence, and others denounced Antunes's cartoon as anti-Semitic.

In an April 28 statement, *Times* spokesperson Eileen Murphy said, "We are deeply sorry for the publication of an anti-Semitic cartoon last Thursday in the print edition of The New York Times that circulates outside of the United States, and we are committed to making sure nothing like this happens again. Such imagery is always dangerous, and at a time when anti-Semitism is on the rise worldwide, it's all the more unacceptable." She continued, "We have investigated how this happened and learned that, because of a faulty process, a single editor working without adequate oversight downloaded the syndicated cartoon and made the decision to include it on the Opinion page." On June 11, *The Washington Post* did not identify the editor in question by name, but reported that the person was located in Hong Kong.

Antunes, a cartoonist for the Portuguese newspaper *Expresso*, explained his cartoon in an email to the *Jerusalem Post*, writing, "Trump's erratic, destructive, and often blind politics encouraged the expansionist radicalism of Netanyahu. To illustrate this situation, an analogy occurred to me with a blind man led by a guide dog, and, to help identify [Netanyahu], little known in Portugal, I added the Star of David, a symbol of the State of Israel and a central element of its flag." Antunes added, "I do not seek controversy. I try to make critical cartoons of situations that seem to me wrong, unfair, and undemocratic.. . . I have nothing against the Jews but I have many things against the politics of Israel."

On April 29, 2019, the *Jerusalem Post* noted that Antunes won the top prize at the 20th International Salon of Cartoons in Montreal in 1983. His winning cartoon depicted "Israeli soldiers tormenting Lebanese women and children" in a style reminiscent of an infamous photo of

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Cartoonists, *continued from page 47*

Nazis tormenting Jewish people during the Holocaust.

Previously, in 2015, the *Jerusalem Post* quoted an interview of Antunes by Portuguese publication *Observador* following the 2015 *Charlie Hebdo* attack in Paris, France in which brothers Said and Cherif Kouachi forced their way into the offices of the satirical French newspaper and opened fire with assault rifles, killing 12 people and injuring 11 more. Among the victims were *Charlie Hebdo* editor and cartoonist Stephane Charbonnier, as well as cartoonists Jean Cabut, Bernard Verlhac, Georges Wolinski, and Philippe Honore. Antunes said, "The profession of cartoonist is a profession of risk, we make risks and take risks.. . . There is always fear there, but there is no other option but to defend freedom of expression." (For more information on the attack, see "*Charlie Hebdo* Attack Leaves Several Dead, Sparks International Debate on Limits of Free Speech" in the Winter/Spring 2015 issue of the Silha *Bulletin* and "Journalists Abroad Face Uncertain Legal Challenges; U.S. Television News Reporters Slain During Live Report" in the Summer 2015 issue.)

On June 10, 2019, the *Times* announced that it would no longer run daily political cartoons in its international edition, thereby ending its relationship with contract cartoonists Patrick Chappatte and Heng Kim Song. James Bennet, the editorial page editor at the *Times*, said that the newspaper was "very grateful for and proud of" the work of two contract cartoonists. However, he added that the *Times* "intend[ed] to do more such work" in the style of freelance writer Jake Halpern's and freelance cartoonist Michael Sloan's nonfiction series entitled "Welcome to the New World," which told the story of a Syrian refugee family in a form similar to that of a graphic novel and garnered the *Times* a Pulitzer Prize in 2018 for editorial cartooning. The full series is available online at: https://www.nytimes.com/series/syrian-refugee-family-welcome-america.

In a June 10 blog post, Chappatte wrote, "I'm putting down my pen, with a sigh: that's a lot of years of work undone by a single cartoon — not even mine — that should never have run in the best newspaper of the world." He also criticized the *Times*' decision, "I'm afraid this is not just about cartoons, but about journalism and opinion in general. We are in a world where moralistic mobs gather on social media and rise like a storm, falling upon newsrooms in an overwhelming blow. This requires immediate counter-measures by publishers, leaving no room for ponderation or meaningful discussions." He added, "I have consistently warned about the dangers of those sudden (and often organized) backlashes that carry everything in their path. If cartoons are a prime target it's because of their nature and exposure: they are an encapsulated opinion, a visual shortcut with an unmatched capacity to touch the mind. That's their strength, and their vulnerability." Chappatte's full blog post is available online at: https://www.chappatte.com/en/the-end-of-political-cartoons-at-the-new-york-times/.

The *Times*' decisions also led to criticism from observers. In a June 11 interview with *The Washington Post*, Daryl Cagle, head of the syndicate Cagle Cartoons, said, "By choosing not to print editorial cartoons in the future, the Times can be sure that their editors will never again make a poor cartoon choice. Editors at the Times have also made poor choices of words in the past. I would suggest that the Times should also choose not to print words in the future – just to be on the safe side."

In a June 10 tweet citing Chappatte's blog post, CNN correspondent and anchor Jake Tapper wrote, "This is a horrible decision by the NYT." Jen Sorensen, a political cartoonist for the *Daily Kos*, tweeted on the same day, "By this standard of blaming an entire medium for an editing failure, the NYT should have no columnists left."

In a June 12 opinion piece for *The Guardian*, cartoonist and author Martin Rowson called the *Times*' "cartoon ban" a "sinister and dangerous over-reaction" and a "gross overcorrection." He continued, "[T]his [goes] deeper than an over-reaction to an ill-judged cartoon. Cartoons have been the rude, taunting part of political commentary in countries around the world for centuries, and enhance newspapers globally and across the political spectrum, in countries from the most tolerant liberal democracies to the most vicious totalitarian tyrannies. As we all know, they consequently have the power to shock and offend. That, largely, is what they're there for, as a kind of dark, sympathetic magic masquerading as a joke."

Canadian Cartoonist Fired after Posting Cartoon of President Trump on Social Media

On July 1, 2019, several media outlets in Canada and the United States reported that freelance cartoonist Michael de Adder had been let go by Canadian publisher Brunswick News Inc. (BNI). The move prompted criticism from observers, especially cartoonists, who argued that editorial cartoons play an important role not only in the United States and Canada, but around the world.

On June 26, de Adder tweeted a cartoon depicting President Donald Trump standing next to a golf cart parked near a body of water. Trump was depicted holding a golf club and looking down at two bodies lying at his feet at the edge of the water, asking them, "Do you mind if I play through?" The bodies were drawn to resemble Mexican photo journalist Julia Le Duc's photo of father Oscar Alberto Martinez Ramirez and his daughter Angie Valeria, who died crossing the Rio Grande while trying to emigrate from Mexico to the United States. Within a few days, de Adder's cartoon was shared on social media by several celebrities, including actors George Takei and Mark Hamill, according to *The Washington Post* on June 30.

Although de Adder never offered BNI the chance to publish the cartoon in any of its newspapers, he was informed later that week that his contract had been cancelled. In a July 14 piece for NBC News, de Adder noted that he had contributed to BNI for 17 years. In an interview with the *Post*, de Adder also noted that the publisher made him its primary cartoonist in 2018, including by putting his cartoons in newspapers in Toronto and Halifax. "I had a good relationship with my editors just four days previous," de Adder told the *Post*. "I had supplied my cartoons and there were no issues. I replaced [or rejected] cartoons whenever they wanted.. . . So what normal human being wouldn't think [the timing of his firing] was more than a coincidence?"

In his piece for NBC News, de Adder argued that he was let go for his repeated criticism of President Trump. He wrote, "In my opinion, and given past experiences, I think it's likely I wasn't let go for one Trump cartoon. It's more likely I was let go for *all* my Trump cartoons" (emphasis in original).

De Adder further contended that editorial cartoonists losing their jobs for reasons like criticizing President Trump "does matter." He continued, "Editorial cartoons have never been more important, and with social media, they have an increasingly broad reach. In a sense, they are a more powerful tool

than they have ever been. Newspapers are cutting one of their best assets when they are at their most vulnerable. And in turn, democracy is losing one of its most treasured safeguards." De Adder's full post is available online at: https://www.nbcnews.com/think/opinion/my-editorial-cartoon-satirizing-trump-border-crisis-went-viral-then-ncna1029431.

However, on July 1, 2019, the Canadian Broadcasting Corporation (CBC) reported that BNI denied the claim that the cartoon of President Trump was the reason for terminating de Adder's freelance contract. "This is a false narrative which has emerged carelessly and recklessly on social media. In fact, BNI was not even offered this cartoon," the company said in a statement. "The decision [to replace de Adder with editorial cartoonist] Greg Perry was made long before this cartoon, and negotiations had been ongoing for weeks."

On June 30, 2019, *The Washington Post* reported that de Adder planned to continue working for newspapers in Halifax and Ottawa, and would also contribute to the American cartoon outlet Counterpoint, recently created by former *Houston Chronicle* cartoonist Nick Anderson, the *Economist* and *Baltimore Sun* cartoonist Kal Kallaugher, and Rob Rogers, who was fired in 2018 from the *Pittsburgh Post-Gazette* allegedly because a number of his cartoons were found to be critical of Trump or his administration. (For more information on the firing of Rogers, see "*Pittsburgh Post-Gazette* Fires Longtime Editorial Cartoonist Rob Rogers in the Summer 2018 issue of the Silha *Bulletin*.)

When asked if he would continue creating cartoons that are critical of President Trump, de Adder told the *Post*, "I'm working on one now."

In a July 6, 2019 article, *San Francisco Chronicle* opinion page editor John Diaz quoted the responses of several cartoonists whose work regularly appears in that newspaper after he asked them whether de Adder's cartoon had crossed a line. Syndicated cartoonist Signe Wilkinson replied, "What line, anyway? People dying not quite over the border line is over the line to me." Wilkinson was a panelist at "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30."

Tom Meyer, another syndicated cartoonist, told Diaz that the cartoon was "everything a political cartoon is supposed to be: pithy and hard-hitting, with a dash of nasty. The only thing that provoked the publisher to fire Michael de Adder was the target of the cartoon. One of the things people like most about political cartoons is how blunt and rude they can be — ironically, just the sort of attitude most MAGA-hat-wearing fans love in their president."

Meyer cited the work of political cartoonist Thomas Nast, known as the Father of the American Cartoon, who waged a campaign in the 1870s against William Magear Tweed, often referred to as "Boss" Tweed, who operated as the "boss" of Tammany Hall, the influential Democratic Party political machine, and was frequently accused of corruption until his arrest in 1873. "[Political cartooning is] not subtle," Meyer said, "It's not an eloquently crafted opinion hiding in long gray columns of Times New Roman. It's an oar in the face. Or as Boss Tweed famously put it, 'I don't care so much what the papers write — my constituents can't read.. . . It's them damn pictures.'"

Elaine Hargrove
Silha Center Staff

"The State of Our Satirical Union" has a website!

A website featuring

"The State of Our Satirical Union: Hustler Magazine Inc. v. Falwell at 30,"

a symposium held April 20-21, 2018, is available online at:

http://stateofoursatiricalunion.dl.umn.edu/

The website features videos of the event, slideshows with highlights of the event and cartoons drawn during the symposium, participants' biographies, and more!

Be sure to visit it today!

("The State of Our Satirical Union" symposium was co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Association of American Editorial Cartoonists, the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communication.),

Federal Judge Rules Controversial Undercover Video Maker Protected from Certain Damages by First Amendment

On July 16, 2019, Judge William Orrick III of the U.S. District Court for the District of Northern California issued a tentative ruling in favor of pro-life activist David Daleiden, finding that the First Amendment protected him and his anti-abortion group, the Center for Medical Progress (CMP), from certain damages sought by Planned Parenthood Federation of America, Inc. (Planned Parenthood). The request for damages arose after Daleiden and CMP employees had misrepresented themselves to gain access to, and record, Planned Parenthood clinics across the United States. *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, No. 3:16-cv-00236-WHO (N.D. Cal. 2019). Among other claims, Planned Parenthood, a nonprofit organization comprising 59 member-affiliates providing sexual health care in the United States and globally, argued that CMP should have to pay for the security measures implemented following the release of the surreptitious videos recorded by Daleiden and other anti-abortion activists, which had prompted threats and violence against Planned Parenthood clinics and employees.

FIRST AMENDMENT

In March 2013, Daleiden, who describes himself as a "guerilla journalist," founded CMP to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue," according to CMP's website. In 2014 and 2015, Daleiden and anti-abortion activists Troy Newman, Albin Rhomberg, Phillip S. Cronin, Gerardo Adrian Lopez, and Sandra Susan Merritt misrepresented themselves as representatives of BioMax Procurement Services LLC, a company purportedly engaging in fetal tissue research, to gain access to several Planned Parenthood facilities, meetings, and private conferences. The activists wore hidden video cameras and recorded hundreds of hours of conversations with Planned Parenthood staff. During this same time period, Daleiden and others also gained entrance to the 2014 and 2015 annual meetings of the National Abortion Federation (NAF), an association of abortion providers.

In July 2015, Daleiden made several of the surreptitious recordings public, each alleging that Planned Parenthood employees illegally sold fetal tissue for profit. Planned Parenthood summarily denied the claims and argued that the videos were deceptively edited and manipulated. Nevertheless, five separate Congressional Committees, as well as several states, investigated Planned Parenthood in the ensuing weeks and months.

On Jan. 14, 2016, Planned Parenthood filed a lawsuit in the Northern District of California against CMP, Daleiden, and the other five activists. The complaint first alleged that the defendants had "created pseudonyms, manufactured fake identification, stole one woman's identity, and used a credit card with a fake name." The complaint further alleged that the defendants had "leveraged the 'professional' relationships they made at the conferences to seek access to individual Planned Parenthood doctors and affiliates, lying their way into private meetings — and even inside secure Planned Parenthood office and clinical space[.]"

The complaint alleged that although the videos were "deceptively edited" and "heavily manipulated," they "did their intended damage," leading to a "dramatic increase in the threats, harassment, and criminal activities targeting abortion providers and their supporters and, in particular, Planned Parenthood health centers after the release of Defendants' videos." The complaint further contended that several Planned Parenthood employees were also targeted by threats, harassment, and violence.

The complaint included several claims for relief, including first under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1962(c) and 1962(d), which punishes those who organize to engage in a pattern of illegal activity or a "criminal enterprise."

Second, the complaint alleged that the defendants violated the Electronic Communications Privacy Act, 18 U.S.C. § 2511, the federal wiretap law prohibiting any individual or organization from "intentionally intercept[ing], endeavor[ing] to intercept, or procur[ing] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication," among other provisions. The complaint alleged that the defendants did so by "using concealed electronic devices that make video and audio recordings that transmit such recordings through a wire or by radio." Third, the complaint alleged that the defendants violated state law by "intentionally record[ing] confidential communications" during conferences and private meetings. Cal. Penal Code §§ 632, 634.

Fourth, the complaint alleged that the defendants committed trespass on Planned Parenthood's property. The complaint asserted that "exceeded the scope of Plaintiff's consent to enter by knowingly and intentionally, surreptitiously videotaping Plaintiff's staff . . . without their knowledge or consent." The complaint argued that such actions led Planned Parenthood to suffer "economic harm and irreparable harm," including "dealing with security threats, property damage, governmental investigations, harassment and intimidation, online hacking, and other harms that have been the direct result of Defendants' illegal conduct."

Fifth, the complaint included a claim of intrusion upon a private place. The complaint argued that those working at Planned Parenthood facilities, as well as at annual conferences, had "objectively reasonable expectation[s]" that their "private conversations" and "private business conversations" would not be recorded. The complaint further alleged that the defendants therefore also violated the California Constitution's protection for privacy under Art. I § I.

Finally, the complaint also alleged civil conspiracy and breach of contract, as well as "unlawful, unfair, and fraudulent acts." The full complaint is available online at: https://www.courtlistener.com/recap/gov.uscourts.cand.294859.1.0.pdf.

During court proceedings, attorneys for Planned Parenthood claimed over $20 million in damages, arguing Daleiden should be responsible for security measures taken by Planned Parenthood following the posting of CMP's videos, according to *The Washington Times* on July 22, 2019. The security measures included security cameras, bulletproof windows, and fencing at Planned Parenthood clinics.

(For more information on the background of the case, as well as the legal dispute between NAF and CMP,

see *Federal Judge Holds Daleiden and his Attorneys in Contempt; California Attorney General's Office Refiles Felony Charges Against the Video Maker* in "Controversial Undercover Video Makers Face Legal Action and Ethical Concerns" in the Summer 2017 issue of the Silha *Bulletin* and "Grand Jury Indicts Creators of Undercover Planned Parenthood Videos; Possible Implications for Undercover Newsgathering" in the Winter/Spring 2016 issue.)

On May 16, 2018, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's denial of a motion by CMP to dismiss Planned Parenthood's lawsuit under California's Strategic Lawsuit Against Public Participation (SLAPP) statute, Cal. Civ. Proc. Code § 425.16. *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 735 Fed.Appx. 241 (9th Cir. 2018). The anti-SLAPP statute provides that "[a] cause of action against a person arising from any act . . . in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." CMP had argued that Planned Parenthood's lawsuit was "an attempt to silence and punish CMP and other Defendants for gathering information and publishing their findings."

However, the Ninth Circuit found that although CMP demonstrated that "their acts arose from behavior aimed at furthering their First Amendment speech rights," they had failed to demonstrate that "Plaintiffs had shown no probability of success on their claims." The full ruling is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-16-16997/pdf/USCOURTS-ca9-16-16997-0.pdf.

On April 1, 2019, several media outlets reported that the U.S. Supreme Court declined to hear an appeal by CMP to the Ninth Circuit's ruling. The group had filed a petition for *certiorari* to the Court, requesting that it dismiss Planned Parenthood's lawsuit under the anti-SLAPP law. According to *Jurist* on April 1, CMP had also requested that the Court accept the anti-SLAPP case in order to clarify how state anti-SLAPP laws apply in the federal system.

On July 16, 2019, Judge Orrick filed a tentative ruling in which he held that "absent a defamation claim," Planned Parenthood could not argue during the upcoming trial in September 2019 that it was entitled to damages that were the "result of third-party behavior and reaction to the publication of the video recordings." Orrick wrote that he was "inclined to exclude from the case all damages that stem from third parties' reactions to the release of the video recordings as impermissible publication damages barred by the First Amendment[.]" According to Orrick, these measures included "personal security for plaintiffs' staff and security guards for facilities; costs for physical upgrades to plaintiffs' facilities (e.g., security cameras, fencing, bulletproof glass); costs to fix incidents of vandalism or arson; costs to address hacks of plaintiffs' computer systems (including lost business due to inability to make reservations), as well as costs to prevent future intrusion into computer systems."

However, Orrick left open the possibility that Planned Parenthood could argue damages "for investigating intrusions into plaintiffs' conferences and facilities and improvements to access-security measures for conferences and facilities." He also refused to dismiss Planned Parenthood's privacy and trespass claims. In a July 18 press release, CMP wrote that Orrick had "instructed the parties to treat [the tentative ruling] as if it were substantially final."

The full ruling is available online at: http://www.centerformedicalprogress.org/wp-content/uploads/2019/07/Dkt.-718_Tentative-Ruling.pdf. As the *Bulletin* went to press, the trial had not begun in the case.

In its July 18 press release, CMP claimed that the ruling "significantly downsizes Planned Parenthood's lawsuit, reducing potentially over $20 million at issue to less than $100,000. Most importantly, the ruling affirms that citizen journalists exercising their First Amendment rights to speak and publish cannot be held liable for any bad actions taken by others in the free marketplace of ideas, absent a clear showing of defamation or intent to incite imminent lawless action. Planned Parenthood could provide no evidence or testimony in the case to back up either accusation, and so a lawsuit that was once an avalanche of charges has been reduced to essentially a trespassing dispute."

On July 17, *Courthouse News* reported that during a July 17 hearing before Orrick, one day after he filed his tentative motion, Planned Parenthood attorney Amy Bombse, a lawyer at Rogers, Joseph O'Donnell PC, had said, "Their argument is 'We didn't break anything.' We say, 'Oh yes, you broke the sense of security that all our staff have in going to work every day and attending conferences.'"

Scott Memmel
Silha *Bulletin* Editor

Attorney Kelli L. Sager to Deliver 34th Annual Silha Lecture: "In Defense of Public Trials: Access to Court Proceedings in the Internet Age"

SILHA CENTER EVENTS

Almost a quarter of a century after the O. J. Simpson criminal trial riveted the country, the public's ability to observe or even read about court proceedings has barely progressed. The principle of open judicial proceedings is a hallmark of the U.S. judicial system, predating the American Revolution. Recent controversial civil and criminal cases, such as *Minnesota v. Mohamed Noor*, make it increasingly important for the public to scrutinize what is happening in their courts. Yet despite modern technological advances that make meaningful oversight of court proceedings and records easier than before, access to judicial proceedings remains inconsistent.

Although many judges embrace these new tools that help to open the courts to the public and press, the advent of social media has prompted others to limit the use of electronic devices, citing concerns about privacy and defendants' fair trial rights under the Sixth Amendment. Political attacks on the judiciary have further complicated the issue. And to compound the problem, newspapers and other traditional media outlets face dwindling resources to cover trials and to challenge restrictions on access. (For more information on the Noor Trial, see "Judge Allows Media and Public to Make Copies of Evidence from Trial of Former Minneapolis Police Officer, Restricts Live Streaming of Noor Sentencing Hearing" on page 40 of this issue of the Silha *Bulletin* and "Media Coalition Wins Legal Victory to Access Body Camera Video in Trial of Former Minneapolis Police Officer" in the Winter/Spring 2019 issue.)

Attorney Kelli L. Sager, best known for her representation of the media in the access issues that arose during the Simpson trial, will address these concerns and the importance of expanding — rather than retracting — access rights in the digital age when she delivers the 34th annual Silha Lecture on Monday, Oct. 28, 2019. Her lecture is titled, "In Defense of Public Trials: Access to Court Proceedings in the Internet Age."

Sager represents media and entertainment companies, as well as journalists, broadcasters, filmmakers, newspapers, web publishers, and authors. Among other accolades, Chambers USA has ranked Sager for 10 consecutive years in its top tier of media attorneys in the country, and she has been one of Lawdragon's 500 Leading Lawyers in America since 2005. Sager is regularly included in the *Los Angeles Daily Journal*'s list of Top 100 Lawyers, Top Intellectual Property Litigators, and Top Women Litigators.

In 2019, Sager received the "Excellence in Advocacy" award from the Beverly Hills Bar Association, and was named Best Lawyers' Los Angeles First Amendment and Media/Entertainment "Lawyer of the Year." Sager has served in leadership roles in many bar associations and non-profits, including chairing the American Bar Association (ABA) Forum on Communications Law and the International Bar Association's (IBA) Media Committee. She has volunteered for the U.S. Court of Appeals for the Ninth Circuit for more than a decade, and is currently a member of the Courts and Community Committee.

The 34th Annual Silha Lecture is sponsored by the Silha Center for the Study of Media Ethics and Law. It will take place on Monday, Oct. 28, 2019, starting at 7:30 pm, at Cowles Auditorium at the Hubert H. Humphrey School of Public Affairs on the West Bank of the University of Minnesota Twin Cities campus in Minneapolis. No reservations or tickets are required. Parking is available in the 19th and 21st Avenue ramps. Additional information about directions and parking can be found at www.umn.edu/pts.

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

Elaine Hargrove
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