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Facebook, Google Fail to Protect Users' Data; Tech Companies and Federal Government Pursue Federal Data Privacy Frameworks

Throughout 2018, social network platform Facebook was the target of investigations and widespread criticisms over allegations that it failed to adequately protect users' data. The scrutiny began in March 2018 after several news outlets reported that Facebook was aware that Cambridge Analytica, a political data firm connected to President Donald Trump's 2016 campaign, had gained unauthorized access to personal information of millions of Facebook users in 2015. In the wake of the reports, lawmakers and regulators in the United States and abroad opened investigations into why Facebook had waited until 2018 to inform its users that their data may have been improperly accessed. Facebook CEO Mark Zuckerberg was also asked to appear before Congressional committees to answer lawmakers' questions about his company's privacy missteps and tech companies' growing reach into people's daily lives.

Later in 2018, Facebook and Google faced criticism over separate privacy incidents. On September 28, Facebook announced that a security attack affected the data of over 50 million user accounts. On October 8, Google announced that the company had previously discovered and remedied a software bug that allowed third-party developers access to the personally identifiable information of as many as 500,000 Google+ users, including their names, email addresses, ages, occupations, and relationship status.

Meanwhile, tech companies, the Trump administration, and a U.S. Representative each took different actions related to adopting a new federal law or framework protecting internet users' privacy and security online, prompting support from some observers and concerns from others.

Political Data Firm Improperly Obtained Data From Millions of Facebook Users

On March 17, 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 harvested personal data from more than 50 million Facebook users without permission. Cambridge Analytica obtained the data from a Facebook app called "thisisyourdigitallife," 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 for academic purposes. Kogan's data collection began in 2014, and only about 270,000 Facebook users consented to sharing their Facebook profile data with the app. However, the app also harvested data from profiles of the users' friends, even though the friends had not consented to data collection. Ultimately, more than 87 million raw data profiles were shared with Cambridge Analytica. Both *The New York Times* and *The Observer* reported that Cambridge Analytica, which had received substantial funding from Republican donor Robert Mercer, planned to use the data to develop comprehensive psychographic profiles of individuals with the intent to influence voting behaviors.

In a March 16 blog post, Facebook announced that the company had suspended Cambridge Analytica and the SCL Group from the social media site, as well as Kogan and former Cambridge Analytica-employee-turned-whistleblower Christopher Wylie for violations of Facebook's terms of service. "Although Kogan gained access to this information in a legitimate way and through the proper channels that governed developers on Facebook at the time, he did not subsequently abide by our rules. By passing information on to a third party, including SCL/Cambridge Analytica and Christopher Wylie of Eunoia Technologies, he violated our platform policies," Facebook Vice President and Deputy General Counsel Paul Grewal wrote. "When we learned of this violation in 2015, we removed his app from Facebook and demanded certifications from Kogan and all parties he had given data to that the information had been destroyed. Cambridge Analytica, Kogan and Wylie all certified to us that they destroyed the data."

In a March 17 update to its initial blog post, Facebook pushed back against reports that Cambridge Analytica's access to social media users' information should be considered a data breach. Rather, Facebook maintained that Kogan obtained information from users who chose to use his app and provided consent. "People knowingly provided their information, no systems were infiltrated, and no passwords or sensitive pieces of information were stolen or hacked," Grewal wrote.

The reports that Cambridge Analytica had improperly accessed millions of Facebook users' data prompted condemnation of the social media platform in the United States

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and abroad. Given widespread concerns that foreign countries used Facebook to meddle in American elections, many critics expressed alarm that the data had been collected by a foreign political consulting company. In a March 18 statement to *The Washington Post*, U.S. Sen. Amy Klobuchar (D-Minn.) called on Facebook CEO Mark Zuckerberg to appear before Congress. "They say 'trust us,' but Mark Zuckerberg needs to testify before the Senate Judiciary Committee about what Facebook knew about misusing data from 50 million Americans in order to target political advertising and manipulate voters," Sen. Klobuchar said.

On April 10, in response to the Cambridge Analytica revelations, Sens. Richard Blumenthal (D-Conn.) and Ed Markey (D-Mass.) introduced the Customer Online Notification for Stopping Edge-Provider Network Transgressions (CONSENT) Act. The bill would require an online service, such as Facebook, to provide information to consumers about data collection, use, and sharing processes. The bill also would require that online services obtain opt-in consent from users before using, sharing, or selling consumer data and would compel companies to develop data storage protections so that individuals cannot be identified. The CONSENT Act identified the Federal Trade Commission (FTC) as the primary agency tasked with enforcing the new rules. The full text of the bill is available online at: https://www.congress.gov/bill/115th-congress/senate-bill/2639/text. As the *Bulletin* went to press, the bill remained in the U.S. Senate Committee on Commerce, Science, and Transportation.

COVER STORY

Additionally, on March 26, the FTC formally announced that it was investigating whether Facebook's failure to secure users' data from unauthorized collection violated a 2011 consent decree barring the company from making deceptive claims about its data privacy practices. The 2011 consent decree required Facebook to obtain affirmative consent from users before making changes to the site that would override users' privacy preferences. "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 . . . or that engage in unfair acts that cause substantial injury to consumers in violation of the FTC Act," FTC Bureau of Consumer Protection acting director Tom Pahl wrote in the March 26 press release. "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."

Besides the FTC, several state attorneys general announced that they would seek more information from Facebook about its failures to prevent Cambridge Analytica from collecting users' data. In a March 26 open letter signed by 37 state attorneys general, the National Association of Attorneys General wrote that it was calling on Facebook to provide several answers about its data protection and privacy policies. "These revelations raise many serious questions concerning Facebook's policies and practices, and the processes in place to ensure that they are followed," the officials wrote. "Even with the changes Facebook has made in recent years, many users still do not know that their profile — and personal data — is available to third-party vendors. Facebook has made promises about users' privacy in the past, and we need to know that users can trust Facebook. With the information we have now, our trust has been broken."

Facebook also faced challenges and criticisms over its handling of users' data in the individual litigation realm. On April 9, Bloomberg BNA reported that the Cambridge Analytica scandal had prompted at least 18 lawsuits against Facebook throughout the United States. The lawsuits, filed by users and investors, levied several accusations against the social media company, ranging from alleged privacy violations, user agreement breaches, consumer fraud, unfair competition, negligence, securities fraud, and racketeering. Attorney Marc Melzer told Bloomberg BNA on April 9 that the wide-ranging lawsuits would require Facebook to proceed carefully. "Facebook's having to fight on multiple fronts, with potentially conflicting strategies and obligations, is what will make this 'litigation swarm' problematic," Melzer said.

Beyond U.S. borders, lawmakers and data privacy regulators announced that they too would investigate Facebook's failure to prevent Cambridge Analytica from improperly obtaining users' data. The UK Information Commissioner's Office (ICO) announced on March 19 that it planned to investigate "the use of personal data for political campaigns," which included "the acquisition and use of Facebook data." On July 10, the ICO announced that it would issue a £500,000 (approximately $644,000) fine against Facebook for failing to adequately protect users from Cambridge Analytica's improper data collection and the lack of transparency regarding how others may have also harvested user data without consent. The fine was announced as part of an ICO report on possible misuse of personal social media data during the UK's referendum on whether to retain membership in the European Union (EU), also known as "Brexit." The £500,000 fine was the maximum amount that could be levied against Facebook under the UK's now defunct 1998 Data Protection Act, as the company's actions had taken place prior to the EU's General Data Protection Regulation (GDPR) going into effect in May 2018 and the GDPR was adopted by the EU in Spring 2016 to replace the previous framework, as well as provide greater protection for EU citizens' 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.)

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>
> **— National Association of Attorneys General**

On Oct. 25, 2018, the ICO officially levied the £500,000 fine. According to the ICO, the fine would have been far higher had Facebook's actions taken place after the GDPR took effect, including a maximum fine of £17 million or four percent of global turnover, whichever is higher, according to the Associated Press (AP). In an October 25 statement, ICO Commissioner

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Elizabeth Denham said, "We considered these contraventions to be so serious we imposed the maximum penalty under the previous legislation.. . . The fine would inevitably have been significantly higher under the GDPR." She added, "One of our main motivations for taking enforcement action is to drive meaningful change in how organisations handle people's personal data."

A Facebook spokesperson said in a separate statement, "We are currently reviewing the ICO's decision. While we respectfully disagree with some of their findings, we have said before that we should have done more to investigate claims about Cambridge Analytica and taken action in 2015." The spokesperson added, "We are grateful that the ICO has acknowledged our full cooperation throughout their investigation, and have also confirmed they have found no evidence to suggest UK Facebook users' data was in fact shared with Cambridge Analytica."

Data privacy advocacy groups and activists also joined the chorus of criticisms directed at Facebook. In a March 23 post on the American Civil Liberties Union's (ACLU) "Free Future" blog, ACLU of California Technology & Civil Liberties Director Nicole Ozer and ACLU of Northern California Technology and Civil Liberties Project Policy Attorney Chris Conley argued that Facebook has consistently failed to protect users' privacy. "There's been some debate over whether this is a 'data breach,' but for the most part that is a red herring," they wrote. "If anything, this is arguably worse than the result of an inadvertent technical failure. Instead, it was a predictable outcome of the choices that Facebook has made to prioritize the bottom line over user privacy and safety."

In a March 19 op-ed for *The New York Times*, University of North Carolina (UNC) School of Information and Library Science Professor Zeynep Tufekci maintained that Facebook regularly disregards privacy concerns. "Despite Facebook's claims to the contrary, everyone involved in the Cambridge Analytica data-siphoning incident did not give his or her 'consent' — at least not in any meaningful sense of the word. It is true that if you found and read all the fine print on the site, you might have noticed that in 2014, your Facebook friends had the right to turn over all your data through such apps. (Facebook has since turned off this feature.) If you had managed to make your way through a bewildering array of option, you might have even discovered how to turn the feature off," Tufekci wrote. "This wasn't *informed* consent. This was exploitation of user data and user trust" (emphasis in original).

In response to mounting criticism, CEO Mark Zuckerberg posted to his own public Facebook page that he planned to take steps, including auditing thousands of apps, to address the social media site's failure to prevent third-party applications from improperly harvesting users' data. "We have a responsibility to protect your data, and if we can't then we don't deserve to serve you. I've been working to understand exactly what happened and how to make sure this doesn't happen again," Zuckerberg wrote. "The good news is that the most important actions to prevent this from happening again today we have already taken years ago. But we also made mistakes, there's more to do, and we need to step up and do it."

On March 28 Facebook unveiled a new centralized system that would offer users greater control over their privacy and security settings. *The New York Times* reported that the new system would provide all of Facebook's privacy and security options on a single page. Previously, users would need to navigate to about 20 different sections and pages to make changes to their privacy and security settings. The *Times* noted that Facebook had begun development on the centralized privacy settings page in 2017, but sped up its deployment in the wake of the Cambridge Analytica scandal.

Less than a month after *The New York Times* and *The Observer* stories about Cambridge Analytica, Zuckerberg appeared before Congress to answer lawmakers' questions about Facebook. The CEO appeared before a joint session of the Senate Judiciary and Commerce, Science, and Transportation Committees on April 10 and a single session of the U.S. House of Representatives Energy and Commerce Committee on April 11. During two days of testimony, Zuckerberg faced a range of questions on topics including whether Facebook adequately informs users about how their data is used, whether users actually understand how their data is used, and the extent to which Facebook collects data about individuals who do not have a profile account, among other privacy related topics. Some lawmakers also took the opportunity to question Zuckerberg on issues unrelated to data privacy and the Cambridge Analytica scandal, such as whether Facebook censored conservative speech, how it policed "hate speech," and the racial diversity makeup of Facebook's leadership and staff, among other subjects.

Throughout his testimony, Zuckerberg apologized for Facebook's failures and said that his company would attempt to do better in the future. "We didn't take a broad enough view of our responsibility, and that was a big mistake. And it was my mistake, and I'm sorry," Zuckerberg said. "I started Facebook, I run it, and I'm responsible for what happens here." The Facebook CEO also acknowledged that the company had failed on several fronts. "It's clear now that we didn't do enough to prevent these tools from being used for harm," Zuckerberg told the senators. "That goes for fake news, foreign interference in elections, and hate speech, as well as developers and data privacy."

Zuckerberg also pushed back against claims that users have little control over how their data is collected and used on Facebook. In responding to questions about Facebook's data collection processes being akin to surveillance, the CEO said that there were significant distinctions. "The difference is extremely clear, which is that on Facebook you have control over your information," Zuckerberg said. "The content that you share, you put there.. . . The information that we collect, you can choose to have us not collect. You can delete any of it, and of course, you can leave Facebook if you want.. . . I know of no surveillance organization that gives people the option to delete the data that they have or even know what they're collecting."

As for the scandal that prompted the hearings, Zuckerberg placed much of the blame on Cambridge Analytica and Kogan for violating Facebook's terms of service. "When we heard back from Cambridge Analytica that they had told us that they weren't using the data and deleted it, we considered it a closed case," Zuckerberg said. "In retrospect, that was clearly a mistake. We shouldn't have taken their word for it. We've updated our policy to make sure we don't make that mistake again."

Zuckerberg added that Facebook would be investigating whether other companies deploying applications on the site had acted improperly. "[Facebook will be] investigating many apps, tens of thousands of apps, and if we find any suspicious activity, we're going to conduct a full audit of those apps to

understand how they're using their data and if they're doing anything improper," Zuckerberg said. "If we find that they're doing anything improper, we'll ban them from Facebook and we will tell everyone affected."

Although many agreed that the Facebook CEO deftly handled his first appearance before Congress, several observers suggested that the substance of Zuckerberg's responses to questions was often lacking and misleading. In an April 12 column, *Washington Post* tech columnist Geoffrey A. Fowler disputed Zuckerberg's arguments that users have control over their data. "Whenever he was questioned why Facebook collects so much data, he wheeled out: 'You have control over your information.' That's like saying anyone can control a 747 because it has buttons and dials. Many pilots even opt for autopilot," Fowler wrote. "Yes, when you publish a photo or post on Facebook, you can set an audience — just friends or public. (There's a drop-down menu that says 'Who should see this?') But Zuckerberg acts like keeping your cousin from seeing photos of your escapades in Cancun is the end of the data challenge. It's not."

In an April 11 post on "Deeplinks," Electronic Frontier Foundation (EFF) researcher Gennie Gebhart agreed that Zuckerberg oversold the idea that users could have widespread control over their data on Facebook. "Zuckerberg's insistence that users have complete control is a smokescreen. Many members of Congress wanted to know not just how users can control what their friends and friends-of-friends see. They wanted to know how to control what third-party apps, advertisers, and Facebook itself are able to collect, store, and analyze. This goes far beyond what users can see on their pages and newsfeeds," Gebhart wrote. "Facebook's ethos of connection and growth at all costs cannot coexist with users' privacy rights. Facebook operates by collecting, storing, and making it easy to find unprecedented amounts of user data. Until that changes in a meaningful way, the privacy concerns that spurred these hearings are here to stay."

Others warned Congress to tread carefully after many lawmakers called for greater regulation of the tech industry throughout Zuckerberg's testimony. In an April 11, 2018 op-ed for *The New York Times*, Alvaro M. Bedoya, a Georgetown Law professor and former chief counsel to the Senate Judiciary Subcommittee on Privacy, Technology and the Law, argued that any sweeping legal reforms regarding data privacy faced significant challenges. "Mark Zuckerberg promises that Facebook can do better to protect our privacy. Three times during his testimony before Congress[,] . . . he used the same example: Face recognition technology, he explained, should require 'special consent' from users. He left out a key fact: This week, lobbyists paid by Facebook are working with Illinois lawmakers backed by Facebook to gut the state's face recognition privacy law, the strongest in the nation," Bedoya wrote. "This should make us very skeptical about any calls for a broad, European-style privacy law that would apply across technologies and platforms. We cannot underestimate the tech sector's power in Congress and in state legislatures. If the United States tries to pass broad rules for personal data, that effort may well be co-opted by Silicon Valley, and we'll miss our best shot at meaningful privacy protections."

On July 2, *The Washington Post* reported that several federal agencies had partnered to investigate Facebook's actions and statements regarding Cambridge Analytica. Specifically, officials from the Federal Bureau of Investigation (FBI), the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), and the Department of Justice (DOJ) joined forces to investigate what Facebook knew about Cambridge Analytica's unauthorized data collection in 2015 as well as why the company did not reveal more information to its users and investors. As the *Bulletin* went to press, the agencies had not publicly announced any developments in their probe of Facebook.

After the announcements of coordinated investigations and fines, Facebook appeared to revise how it was handling data privacy concerns. On July 20, *The Wall Street Journal* reported that Facebook announced it was preemptively suspending data analytics firm Crimson Hexagon ahead of a privacy-related audit of the firm's data collection, storage and sharing practices. Crimson Hexagon, which has a long-standing data sharing partnership with Facebook, collects large amounts of data from Facebook users' who have made their information publicly available, according to *The Wall Street Journal*. Facebook said the suspension was necessary to protect its users. "We don't allow developers to build surveillance tools using information from Facebook or Instagram," Facebook said in a July 20 statement. "We take these allegations seriously, and have suspended the apps while we investigate."

Ultimately, Facebook's inability to put to bed its data privacy missteps and critics' subsequent concerns may be indicative of the problems facing the evolving digital media landscape as a whole. In an August 6 commentary for the "Hard Questions" series on the Facebook "Newsroom" blog, former FTC Commissioner Terrell McSweeny argued that a larger discussion about consumer privacy and data sharing on all social media sites is needed now more than ever. "Most of us are now familiar with the grand bargain of our digital economy. We enjoy the benefits of the innovative products and services available to us, often for free, in exchange for our data. We experience the pleasure and ease they bring to our lives when we download apps for work, entertainment, transportation, food — almost anything. For the most part, we don't dwell on who has our data and how it's being used. That is, until something unexpected occurs that frays our trust and calls into question whether consumers are bearing too much risk in the deal," McSweeny wrote. "For years privacy experts have rightly warned that consumers relinquish too much information with too little understanding of how it's used and limited recourse when it's mishandled. Under the current US data protection framework, so long as a person is properly notified and consents to how their data will be used, nothing more is required. Now this framework is being challenged — in the US and elsewhere — and one of the central issues in the global discussion about privacy is how much control consumers should have over how their data flows. This conversation is long overdue."

29 Million Facebook Users Have Information Hacked in September 2018 Security Breach

On Sept. 28, 2018, Facebook announced that a security attack compromised the data of almost 50 million user accounts, including exposing their names, phone numbers, hometowns, and genders, among other profile information. After further investigation, the company reduced the number of affected accounts to 29 million, which is still believed to be the largest data breach in Facebook's history, according to *The New York Times* on September 28.

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Facebook's engineering team discovered the attack on September 16 after they saw an unusual spike in user activity. On September 25, the team discovered that attackers exploited a series of flaws relating to Facebook's "View As" feature, which is designed to allow users to experience how their profile looks to another person. The flaws allowed the attackers to steal access tokens — digital keys that allow access to an account. Guy Rosen, Facebook's vice president of product, told *Wired* on September 28 that the attack was a "complex interaction of multiple bugs," adding that the attackers likely had some level of sophistication.

In a September 28 conference call with reporters, Facebook's founder and CEO Mark Zuckerberg said, "We were able to fix the vulnerability and secure the accounts, but it definitely is an issue that it happened in the first place." However, neither Facebook nor Zuckerberg identified the attackers or where they may have originated.

Sen. Mark R. Warner (D-Va.), called the breach "deeply concerning" and requested a full investigation in a September 28 statement. "Today's disclosure is a reminder about the dangers posed when a small number of companies like Facebook or the credit bureau Equifax are able to accumulate so much personal data about individual Americans without adequate security measures," Warner said. "This is another sobering indicator that Congress needs to step up and take action to protect the privacy and security of social media users."

Facebook will also likely face scrutiny in the European Union (EU) due to the General Data Protection Regulation (GDPR), which 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.)

After launching an investigation in September, the Irish Data Protection Commission, an agency charged with monitoring compliance with the GDPR, told CNBC on October 16 that approximately three million Europeans were affected by the breach. The agency also criticized Facebook's disclosure, stating that the September 28 notice lacked sufficient details regarding the attack. If Facebook is found to have violated GDPR, it could be liable for up to four percent of annual revenue, according to CNBC. As the *Bulletin* went to press, the EU had not levied any penalties against Facebook regarding the September data breach.

> "Today's disclosure [that millions of Facebook users' accounts were compromised] is a reminder about the dangers posed when a small number of companies like Facebook or the credit bureau Equifax are able to accumulate so much personal data about individual Americans without adequate security measures."
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> **— Sen. Mark R. Warner (D-Va.)**

Google Shuts Down Google+ Following Data Breach; Faces Criticism Over Non-Disclosure of Privacy Breach

In an Oct. 8, 2018 statement, Google announced that it had previously discovered and remedied a "software bug," which allowed third-party developers access to the personally identifiable information of as many as 500,000 Google+ users, including names, email addresses, ages, occupations, and relationship status between 2015 and March 2018. In the same statement, Google announced that the company would largely discontinue its social network service, Google+, and introduced new tools to give users more control over their data. However, observers criticized Google for disclosing the breach seven months after it was discovered in March.

The company's statement came shortly after an Oct. 8, 2018 report by *The Wall Street Journal* broke the news of the data exposure. The report discussed an internal memo by Google's legal and policy staff warning senior executives, including Google's CEO Sundar Pichai, that disclosing the incident would likely trigger "immediate regulatory interest." The internal memo, as well as Google's own statement, argued that although users' data was accessible, Google itself has no evidence that any data was misused and therefore did not legally need to disclose the bug, according to *The Wall Street Journal*.

However, several observers criticized the company for its decision to not immediately disclose the vulnerability. In an October 8 *Washington Post* article, Executive Director of the Center for Digital Democracy Jeff Chester called the delay in revealing the software bug "a digital cover-up." He added, "Google has demonstrated that it cannot be relied on to protect privacy."

Georgetown Law professor David C. Vladeck, the former director of the Federal Trade Commission's (FTC) Bureau of Consumer Protection, told *The Washington Post* on October 8 that the incident was "obviously a problem for Google." He added, "Even if the problem was an unanticipated bug, what is Google's defense for concealing that bug for six months, especially if users could have taken steps to mitigate the . . . sharing of their data."

During an October 10 Congressional hearing, Sen. Richard Blumenthal (D-Conn.) said that he would seek an investigation into the Google+ data exposure. "I will be calling later today, in a letter to the FTC, for an investigation of Google in connection with this incident," Blumenthal said, according to *Engadget* on the same day. He added that Ireland and Germany were also looking into the matter.

Conversely, Ben Smith, a Google vice president for engineering, defended Google's decision to not immediately disclose the breach. He wrote in the October 8 statement, "Whenever user data may have been affected, we go beyond our legal requirements and apply several criteria focused on our users in determining whether to provide notice." He added that in weighing whether to disclose the incident, the company considered "whether we could accurately identify the users to inform, whether there was any evidence of misuse, and whether there were any actions a developer or user could take in response. None of these thresholds were met in this instance."

Several privacy advocates noted that Google signed a consent decree with the FTC in 2011 to settle allegations that an earlier social media platform, Google Buzz, mishandled user data. "I think we're passed the point where Google should get to decide if Google has done enough to address a problem. A company deciding on its own whether or not it thinks it should notify is never the right answer, because there's no incentive to take the criticism and the stock hit," Marc Rotenberg, president of the Electronic Privacy Information Center, told *Wired* on October 8. As a party of that settlement, Google paid a fine of $22.5 million and agreed to 20 years of privacy audits.

Tech Companies, Trump Administration, and Congress Push for Federal Strategies or Frameworks Regarding Data Privacy and Cybersecurity

In fall 2018, technology companies, the Trump administration, and a U.S. Representative 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 U.S. Senate Committee on Commerce, Science and Transportation to discuss and advocate for a potential federal privacy law. President Donald Trump's administration also took steps regarding a potential national consumer cybersecurity and privacy framework, including a framework proposed by the White House, a proposed approach to online consumer privacy by the National Telecommunications and Information Administration (NTIA), an office within the U.S. Department of Commerce, and a meeting held by the U.S. Department of Justice (DOJ). 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.

According to *The Street* and *Mashable* on September 26, the main line of discussion in the Senate Committee hearing centered around what should be considered when creating or implementing a federal privacy law. Several news outlets reported that the tech company executives generally expressed a need for a federal privacy law in order to provide "clarity and consistency," rather than a "patchwork" of privacy laws across various states and industries. An additional area of discussion considered the appropriate enforcement agency, namely whether the Federal Trade Commission (FTC) should be tasked with enforcing a federal law and whether its power should be expanded.

The executives further argued a federal data privacy law should not resemble the European Union's (EU) new General Data Protection Regulation (GDPR), as many U.S. business owners found the GDPR guidelines too strict to follow, according to *The Street*. The GDPR, which took effect in May 2018, was 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.)

In a Sept. 14, 2018 "Deeplinks" blog post, the Electronic Frontier Foundation (EFF) expressed concern that the Committee had not invited any consumer privacy groups to testify. "Since we can't be there to say this ourselves, we'll say it here: EFF will oppose any federal legislation that weakens today's hard-fought privacy protections or destroys the states' ability to protect their citizens' personal information. EFF has had a long and continuous battle with some of the testifying companies, such as Google and AT&T, regarding your right to data privacy, and we're not going to give up now," the post read. The full blog post is available online at: https://www.eff.org/deeplinks/2018/09/game-rigged-congress-invites-no-consumer-privacy-advocates-its-consumer-privacy.

One day prior to the hearing, *ZDNet* reported that Google had published a proposed framework for a federal data protection regulation. The framework listed several requirements of tech companies and other organizations, including that they:

- Collect and use personal information responsibly
- Mandate transparency and help individuals be informed
- Place reasonable limitations on the manner and means of collecting, using, and disclosing personal information
- Maintain the quality of personal information
- Make it practical for individuals to control the use of personal information
- Give individuals the ability to access, correct, delete, and download personal information about them
- Secure personal information

The framework also included several areas providing scope and accountability, including "hold[ing] organizations accountable for compliance," "focus[ing] on risk of harm to individuals and communities," and more. The full proposed framework is available online at: https://services.google.com/fh/files/blogs/google_framework_responsible_data_protection_regulation.pdf.

In an October 3 opinion piece for *The Washington Post*, Neema Singh Guliani, legislative counsel at the American Civil Liberties Union (ACLU), argued that a federal law would likely preempt state laws. She therefore argued that the tech companies "suddenly [being] receptive to the idea of federal privacy legislation . . . [a]fter years of claiming they could self-regulate" was actually "an effort to enlist the Trump administration and Congress in companies' efforts to weaken state-level consumer privacy protections," including in California. Previously, *The Washington Post* reported on July 27, 2018 that several tech companies, including Facebook, IBM, Microsoft, and others, were working with the Trump administration to lobby Congress to pass a federal law.

Guliani continued, "[W]iping out — otherwise known as preempting — state protections would be a bad deal for consumers.. . . [It would] likely put existing consumer protections, many of which are state-led, on the chopping block and leave states bound by a federal law that could prevent additional consumer privacy protections from ever seeing the light of day. State regulators could lose the authority to sue or fine companies that violate their laws. And consumers may even be barred from taking companies to court."

Guliani further argued that "[p]articularly in the area of consumer privacy, we should be wary of preemption that could lock in place federal standards that are soon obsolete. Today, even refrigerators can collect sensitive data. New technology will likely require

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additional protections and experimenting with different solutions, and states have a vital role in fashioning those solutions." She concluded by stating, "This doesn't mean we should give up on strong federal privacy legislation; we need it now more than ever. But any such legislation must put consumers in control of their own data."

In an October 19 interview with *Legaltech News*, Laura Moy, executive director of Georgetown Law's Center on Privacy & Technology, agreed that a federal standard that eliminates state laws surrounding cybersecurity could do more harm than good. "There are a number of reasons consumers benefit from state cybersecurity and privacy laws — not only do they often contain strong substantive standards, but states are often much more able to update their laws in response to the changing digital environment than Congress can do," Moy said. "Consumers also benefit from the excellent work of state attorneys general who not only vigorously enforce state-specific laws, but also engage in ongoing dialogue with businesses and provide useful guidance materials that help well-meaning businesses to comply."

In fall 2018, the Trump administration also took additional steps towards a national data privacy and cybersecurity framework. On Sept. 20, 2018, the White House announced the introduction of the new "National Cyber Strategy of the United States." The document identified four "pillars" of cybersecurity strategy, including first that it would "Protect the American People, the Homeland, and the American Way of Life." This would be accomplished in three ways: "Secur[ing] Federal Networks and Information," "Secur[ing] Critical Infrastructure," and "Combat[ing] Cybercrime and Improv[ing] Incident Reporting."

Pillar II aimed to "Promote American Prosperity" by fostering "a Vibrant and Resilient Digital Economy," protecting "United States Ingenuity," and developing "a Superior Cybersecurity Workforce." Pillar III was titled "Preserve Peace through Strength" and included enhancing cyber stability through responsible government action, as well as "attribut[ing] and [deterring] Unacceptable Behavior in Cyberspace." Finally, Pillar IV aimed to "Advance American Influence" through the promotion of an open internet, such as through security, internet freedom, and more. The full document is available online at: https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf.

Meanwhile, on Sept. 25, 2018, the NTIA issued a Request for Comment on a "proposed approach to consumer data privacy designed to provide high levels of protection for individuals, while giving organizations legal clarity and the flexibility to innovate." According to a press release connected to the Request for Comment, the "Trump Administration's proposed approach focuses on the desired outcomes of organizational practices, rather than dictating what those practices should be," therefore providing more autonomy to companies.

The desired outcomes of the approach included that organizations "should be transparent about how they collect, use, share, and store users' personal information" and also "employ security safeguards to protect the data that they collect, store, use, or share," among other recommendations. Users should be able to "exercise control over the personal information they provide to organizations" and "reasonably access and correct personal data they have provided." The full press release is available online at: https://www.ntia.doc.gov/press-release/2018/ntia-seeks-comment-new-approach-consumer-data-privacy.

Also on September 25, Reuters reported that then-Attorney General Jeff Sessions led a DOJ "listening session" with 13 state attorneys general, as well as the attorney general of the District of Columbia, focusing on "protecting consumer privacy." According to Nebraska Attorney General Doug Peterson, much of the discussion focused on whether concerns over the collection of consumers' personal data could be addressed through antitrust law, an area of law preventing monopolies and promoting fair competition and business practices. Peterson also said that the session led to "no immediate conclusions."

Finally, in early October 2018, Rep. Khanna introduced an "Internet Bill of Rights," in order to protect internet users' data privacy and security. According to a press release by Khanna's office, the Bill of Rights included six key principles:

- Right to universal web access
- Right to Net Neutrality
- Right to be free from warrantless metadata collection
- Right to disclosure amount, nature, and dates of secret government data requests
- Right to be fully informed of scope of data use
- Right to be informed when there is change of control over data

The full press release is available online at: http://www.rokhanna.com/issues/internet-bill-rights.

An October 4 *New York Times* op-ed provided four additional principles articulated by Khanna, including that consumers should have to give their permission — an "opt in" rather than "opt out" system — before their data can be collected and shared with third parties.

In an October 15 interview with *Legaltech News*, Marc Rotenberg, executive director and president of the Electronic Privacy Information Center in Washington, D.C., called Khanna's principles for an Internet Bill of Rights "a very useful framework." Berin Szoka, president of the libertarian think tank TechFreedom, agreed, contending that "[s]ome of these things [the Internet Bill of Rights principles] are totally uncontroversial and everyone would agree on."

However, he also pointed out that Khanna's principles are "just principles" and not legislation that would provide specifics. Szoka also contended that they could pose some potential problems, such as whether the principle of a data collection entity having "reasonable business practices and accountability to protect your privacy" would be nebulous and make the FTC akin to the Consumer Financial Protection Bureau. "The implications for the commission could be a very broad authority," he said. "[It] could be problematic and the commission could have a blank slate, and it would be hard to comply. You may say, 'I don't feel sorry for Google and Facebook,' but the smaller companies trying to become Google [or] Facebook won't be able to navigate," which would ultimately risk less competition from startups."

As the *Bulletin* went to press, the federal government had not formally enacted or passed a federal data privacy law or framework.

Sarah Wiley
Silha Research Assistant

Casey Carmody
Former Silha Research Assistant

President Trump Continues Anti-Press Rhetoric and Actions

In fall 2018, President Donald Trump and his administration continued to use and promote anti-press rhetoric and actions. On November 7, President Trump called CNN reporter Jim Acosta "a rude, terrible person" during a press conference after Acosta asked the president about his characterization of the Central American migrant caravan as "an invasion," among other topics. Later the same day, the Trump administration revoked Acosta's "hard" press credential, restricting his access to the White House. On November 13, CNN and Acosta filed a lawsuit in federal court against President Trump, as well as several members of his administration, contending that revoking Acosta's credentials violated the First and Fifth Amendments, among other claims. On November 16, a federal judge required that the White House reinstate Acosta's credentials, reasoning that Acosta suffered "irreparable harm" because he was denied due process under the Fifth Amendment. The judge also indicated that Acosta's First Amendment rights outweighed the White House's right to have orderly press conferences, and that the First Amendment applies when an administration opens the White House grounds to some reporters, but denies it to others. The White House reinstated the credentials three days later.

FIRST AMENDMENT

On October 19, President Trump praised Rep. Greg Gianforte (R-Mont.) during a rally in Missoula, Mont., prompting criticism from media members and observers. Previously, in June 2017, Gianforte had pleaded guilty to misdemeanor assault after "body slamming" *Guardian* political reporter Ben Jacobs during a May 2017 campaign event.

Finally, on September 5, President Trump called on the U.S. Department of Justice (DOJ) to investigate an anonymous op-ed published by *The New York Times* that purported to be written by a senior Trump administration official. The same week, President Trump reiterated his desire to "change libel laws" in the United States following the publication of a book providing behind-the-scenes details about the Trump White House.

Meanwhile, on August 16, more than 400 news outlets, including *The New York Times* and the Minneapolis *Star Tribune*, posted coordinated op-ed pieces supporting journalists and denouncing President Trump's political attacks on the media. The following day, the U.S. Senate unanimously passed a resolution "reaffirming freedom of the press as a priority in efforts of the Government of the United States to promote democracy and good governance."

As a presidential candidate and as president, Trump has frequently referred to journalists and news outlets as the "fake news media" and "enemies of the people." A Sept. 21, 2018 poll conducted by the Minneapolis *Star Tribune* and Minnesota Public Radio (MPR) News found that "[j]ust 29 percent of likely voters statewide approved of Trump's description of the news media as the enemy of the people, while 64 percent disapproved." However, 68 percent of Republicans approved of President Trump's rhetoric, compared to 20 percent of independents and four percent of Democrats.

In a September 21 interview with the Minneapolis *Star Tribune*, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley called it "dangerous" for President Trump to swipe broadly at the news media, which she said is "one of the most important checks on government excesses and one of the most important conduits of information for the public." She added, "If you're going to say, 'No, you don't need information,' or 'It's a subversive act to provide it to you,' that's right out of the autocrat's playbook." (For more information on President Trump's relationship with the media, see "Journalists in the United States and Abroad Face Threats of Violence and Incarceration" on page 17 of this issue of the Silha *Bulletin*, *Five Newspaper Staff Members Killed, Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Physical Violence, Other Dangers in the United States and Abroad," and *Federal Prosecutors Seize Phone and Email Records of New York Times Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents," in the Summer 2018 issue, "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

President Trump Calls CNN Reporter "Rude, Terrible Person," Revokes His Press Credentials; Federal Judge Requires Trump Administration Reinstate Credentials

On Nov. 7, 2018, President Donald Trump called CNN reporter Jim Acosta "a rude, terrible person" after he asked the president about his characterization of the Central American migrant caravan as "an invasion" during a press conference following the 2018 midterm elections. Hours later, several media outlets reported that the White House had revoked Acosta's "hard" press pass for the White House. 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. On November 16, a federal judge ruled that the White House must reinstate Acosta's credentials, finding that Acosta suffered "irreparable harm" because his due process rights had been violated. 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. CNN summarily dropped the lawsuit against the White House, writing in a statement that it was "no longer necessary."

During the November 7 press conference, President Trump told Acosta, "I think you should let me run the country, you run CNN and if you did it well, your ratings would be much better." 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

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enough. That's enough. That's enough. That's enough" and told Acosta to "put down the mic" as a White House intern reached to grab it. President Trump added, "CNN should be ashamed of itself having you working for them. You are a rude, terrible person. You shouldn't be working for CNN.. . . You're a very rude person. The way you treat [White House Press Secretary] Sarah Huckabee [Sanders] is horrible. And the way you treat other people are horrible. You shouldn't treat people that way."

According to *The Washington Post* on November 7, NBC News reporter Peter Alexander tried to stand up for Acosta, calling him a "diligent reporter." Trump responded, "Well, I'm not a big fan of yours, either." Later in the press conference, after PBS NewsHour's White House correspondent Yamiche Alcindor asked President Trump about calling himself a "nationalist" and whether he was supporting white nationalists, the president responded, "I don't know why you'd say that — that's such a racist question."

Later in the day on November 7, Acosta tweeted "I've just been denied entrance to the [White House]. Secret Service just informed me I cannot enter the WH grounds for my 8pm hit." Sanders summarily posted a series of tweets confirming that the White House had suspended Acosta's "hard pass" to enter the White House "until further notice." Sanders also tweeted the White House's reasoning for doing so. "President Trump believes in a free press and expects and welcomes tough questions of him and his Administration. We will, however, never tolerate a reporter placing his hands on a young woman just trying to do her job as a White House intern," Sanders tweeted, contending that Acosta had assaulted the intern who tried to take the microphone away from him during the press conference. Sanders continued, "This conduct is absolutely unacceptable. It is also completely disrespectful to the reporter's colleagues not to allow them an opportunity to ask a question.. . . As a result of today's incident, the White House is suspending the hard pass of the reporter involved until further notice."

Additionally, Sanders tweeted a video depicting Acosta refusing to let go of the microphone. However, CNN reported the following day that the video did not "come directly from one of the many cameras that had been at the press conference. Instead, it appeared to have come from Paul Joseph Watson, an editor-at-large for 'InfoWars,' a media organization known for peddling conspiracy theories and hateful content." CNN added that the video "did not accurately portray what happened — it appears to show Acosta's arm moving in a downward motion towards the intern's arm faster than it actually did."

The Washington Post added on November 11 that the video was missing Acosta saying "Pardon me, ma'am," as he maintains a firm grip on the microphone. The *Post* also noted that the video tweeted by Sanders also contained repeated frames that did not exist in the original footage. White House counselor Kellyanne Conway, in a November 11 interview on "Fox News Sunday," contended that the video was not altered, but merely "sped up."

Acosta responded to Sanders in a November 7 tweet, "This is a lie." In a statement, CNN criticized President Trump and the decision to suspend Acosta's access to the White House. "This president's ongoing attacks on the press have gone too far. They are not only dangerous, they are disturbingly un-American," the statement read. "While President Trump has made it clear he does not respect a free press, he has a sworn obligation to protect it. A free press is vital to democracy, and we stand behind Jim Acosta and his fellow journalists everywhere."

Other observers and reporters also decried the move, including Chuck Ross, a reporter at *The Daily Caller*, a website that often criticizes CNN, who stood up for Acosta. "Plenty to criticize Acosta about," Ross tweeted on November 7, "but he did not 'place his hands' on the intern. It's ridiculous for anyone to suggest he did."

In a November 7 press release, the Reporters Committee for Freedom of the Press (RCFP) wrote that it "vehemently object[ed] to the revocation of a CNN reporter's access credentials." The press release continued, "Journalists have a right to ask questions and seek answers on behalf of the American people. This is clearly inappropriate and unprecedented punishment by the Trump administration for what it perceives as unfair coverage by the reporter, and White House Press Secretary Sarah Sanders' false description of the events leading up to it is insulting not only to the nation's journalists, but to its people. The founders of our country knew there would be tension between our leaders and our journalists. In fact, they designed our system that way, knowing that a free and assertive press is the best defense against tyranny."

White House Correspondents' Association (WHCA) president Oliver Knox also called for the White House to reinstate Acosta's credentials. "Journalists may use a range of approaches to carry out their jobs and the WHCA does not police the tone or frequency of the questions its members ask of powerful senior government officials, including the President," he wrote in a statement. "Such interactions, however uncomfortable they may appear to be, help define the strength of our national institutions. We urge the White House to immediately reverse this weak and misguided action."

In a November 10 interview with WCCO News Talk 830 in Minneapolis, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley argued that the video circulated by Sanders was especially problematic. "Lifting his press pass is a big step. And I think, in my own view, unjustified. But let's take it one step further, if that's not bizarre enough, . . . the other thing is Sarah Sander's circulation of the doctored videotape of the press conference. This is, to me, without precedent. I cannot think of anything comparable that's happened in any White House and I think it's beyond the pale."

She continued, "I see absolutely no way, no matter how strongly you support the president, how you can possibly think that it's acceptable for the White House to basically be distributing this thing that [President Trump] keeps saying he hates so much, which is 'fake news.'" Kirtley added, "I'm not saying it was a great optical moment for anybody there. But the way it has been framed as he was chopping her arm, that is just not true."

Richard Tofel, the general manager of non-profit investigative journalism organization ProPublica, suggested in a November 13 interview with *The Washington Post* that journalists band together and walk out of the White House press room. "If favorable coverage is the price of operating with the [White House] gates, then we can cover it from outside the gates," he said. "I think that as a matter of press freedom, the press corps in the room should say, 'If you've redefined the rules to hand out passes only to those whose coverage you don't object to, we're all leaving.' This isn't principally a legal question. It's a question of editorial independence."

Some media experts contended that CNN could sue the White House over banning Acosta. In a series of tweets on November 7, University of Georgia media law professor Jonathan Peters explained the "legal implications of pulling Acosta's hard pass." He cited *Sherrill v. Knight* in which the U.S. Court of Appeals for the D.C. Circuit held that *The Nation* writer Robert Sherrill had a First Amendment right of access to White House news conferences because they were "generally inclusive" of the press. 569 F.2d 124 (1977). The court added, however, that "It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all."

Peters added that excluding a journalist "arbitrarily or absent good cause would implicate the First Amendment." He continued, "Lower courts have used that approach — protecting [journalists'] access where it's 'generally inclusive' of the press, while otherwise allowing officials selectively to grant interviews and give out [information] — in many contexts: access to tax records, press tables, prosecutorial records, etc." Peters concluded by writing, "A critical question, constitutionally, is whether Acosta's hard pass was pulled 'arbitrarily' or 'for less than compelling reasons.'"

In a November 11 interview on CNN's "Reliable Sources," prominent First Amendment attorney Floyd Abrams also contended that CNN could sue the White House, but argued that the network would likely exercise caution. "I think it's a really strong lawsuit," Abrams said. "I can understand CNN being reluctant to sue because the president keeps saying CNN is the enemy of me, and CNN might have reluctance to have a lawsuit titled 'CNN vs. Donald Trump.' That said, yes, I think they should sue."

Abrams further argued that it was likely the White House would ban another reporter in the future. He said, "So whether it's CNN suing or the next company suing, someone is going to have to bring a lawsuit.. . . And whoever does is going to win unless there's some sort of reason." (Abrams delivered the 20th Annual Silha Lecture, titled "Confidential Sources of Journalists: Protection or Prohibition?" on Oct. 24, 2005. For more on the lecture, see "2005 Silha Lecture Features First Amendment Attorney Floyd Abrams" in the Fall 2005 issue of the Silha *Bulletin*.)

On November 11, *The Hill* reported that former ABC News White House correspondent Sam Donaldson had claimed on CNN's "Reliable Sources" that CNN and Acosta were, in fact, suing the Trump administration, citing that he had been asked to submit an affidavit in the lawsuit in preparation for a court hearing.

On November 8, literary and human rights group PEN American Center, Inc. (PEN America) published a press release in response to the withdrawal of Acosta's credentials. The press release explained that the group had filed a lawsuit in October against President Trump "arguing that his threats and use of the machinery of government to exact reprisals against journalists and media organizations violate the First Amendment." The press release continued, "We specifically cited his threats to withdraw press credentials from reporters based on critical questions and stories as a prime example of this behavior.. . . The White House's withdrawal of the press credentials of CNN White House reporter Jim Acosta was in clear retaliation for Acosta's persistent questioning of the President on topics he did not wish to address during a press conference yesterday afternoon."

The press released added, "The rescission of Acosta's credentials, accompanied by a demonstrably false account by White House Press Secretary Sarah Huckabee Sanders of the actions that led to the withdrawal, are yet more evidence that the President and the administration feel no compunction about exacting punishment on journalists for hard-hitting coverage." Some observers suggested that Acosta was considering joining the PEN American lawsuit. (For more information on the PEN America lawsuit, see "President Trump Prevails in Two Federal Court First Amendment Rulings, Faces New Lawsuit in Southern District of New York" on page 23 of this issue of the Silha *Bulletin*.)

On November 13, several media outlets reported that CNN and Acosta had, in fact, filed a lawsuit in the U.S. District Court for the District of Columbia against President Trump, as well as several members of his administration, including Sanders. The complaint first detailed President Trump's anti-press criticism, which "has been directed at other news organizations [beyond CNN]." The complaint added that the "revocation of Acosta's credentials is only the beginning; as the President explained, there 'could be others also' who get their credentials revoked."

Second, the lawsuit cited *New York Times v. Sullivan* in which the U.S. Supreme Court held that the First Amendment demonstrates a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254, 270 (1964). The lawsuit also cited *Hustler Magazine, Inc. v. Falwell*, in which the Court held that government officials "lack the authority to quash '[t]he sort of robust political debate encouraged by the First Amendment' — debate that is 'bound to produce speech that is critical of those who hold public office.'" 485 U.S. 46, 51 (1988).

Additionally, the lawsuit cited *Sherrill v. Knight*, reiterating the same points made by Peters that the D.C. Circuit "has been clear that 'the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that . . . access [to White House press facilities] not be denied arbitrarily or for less than compelling reasons.'"

Third, CNN and Acosta argued that the revocation of his press credentials violates the First Amendment, contending that "[the plaintiffs'] access to the White House, their coverage of the November 7, 2018 press conference, and Acosta's questions to President Trump during that conference . . . were all protected activities under the First Amendment." The lawsuit further argued that the defendants initially claimed they revoked the credentials because Acosta "placed his hands" on an intern, but that this contention was inaccurate. The complaint also contended that President Trump's statement that Acosta's credentials were suspended because he failed to "treat the White House with respect" was "hollow and hardly sufficiently compelling to justify the indefinite revocation." As a result, according to the lawsuit, the "only reasonable inference from Defendants' conduct is that they revoked Acosta's credentials as a form of content- and viewpoint-based discrimination and in retaliation for Plaintiffs' exercise of protected First Amendment activity."

Fourth, the complaint asserted that revocation of Acosta's press credentials violated his Fifth Amendment right to due process because he received no direct notice or an "opportunity to be heard" before his credentials were revoked. The

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complaint also stated that Acosta received no written explanation for the revocation. Further, the complaint alleged that Acosta "cannot serve as a White House correspondent" because, without his credentials, he cannot access his office in the White House.

Finally, the complaint alleged that the defendants' actions violated the Administrative Procedure Act because they "acted arbitrarily, capriciously, and otherwise not in accordance with law." The complaint noted that "[g]enerally, the Secret Service may grant or deny a request for a security clearance made in connection with an application for a White House press pass" under 31 C.F.R. § 409.1. However, the complaint also stated that the Secret Service's discretion is "expressly limited" and that Secret Service officials making that determination must "be guided solely by the principle of whether the applicant presents a potential source of physical danger to the President and/or the family of the President so serious as to justify his or her exclusion from White House press privileges."

The complaint requested that the district court enter several forms of relief, including "[i]mmediate restoration of Acosta's press credentials and hard pass so that Plaintiffs may continue to report from White House briefings and perform their jobs on White House grounds and at other presidential events." The lawsuit also sought a "declaration that the revocation of Acosta's press credentials was unconstitutional."

Gibson, Dunn & Crutcher LLP attorney Theodore J. Boutrous, Jr. signed the complaint, which was accompanied by a motion for a temporary restraining order (TRO). Boutrous also represented CNN at a November 14 hearing regarding the motion for the TRO. (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" on page 62 of this issue of the Silha *Bulletin*.) Attorney Ted Olson, known best for representing George W. Bush in *Bush v. Gore*, 531 U.S. 98 (2000), and CNN chief counsel David Vigilante also represented CNN and Acosta. The full complaint is available online at: https://cnnpressroom.files.wordpress.com/2018/11/2-complaint.pdf.

After CNN and Acosta filed their complaint, the White House released a statement, which read, "We have been advised that CNN has filed a complaint challenging the suspension of Jim Acosta's hard pass. This is just more grandstanding from CNN, and we will vigorously defend against this lawsuit." The statement continued, "CNN, who has nearly 50 additional hard pass holders, and Mr. Acosta is no more or less special than any other media outlet or reporter with respect to the First Amendment. After Mr. Acosta asked the President two questions — each of which the President answered — he physically refused to surrender a White House microphone to an intern, so that other reporters might ask their questions. This was not the first time this reporter has inappropriately refused to yield to other reporters."

The statement added, "The White House cannot run an orderly and fair press conference when a reporter acts this way, which is neither appropriate nor professional. The First Amendment is not served when a single reporter, of more than 150 present, attempts to monopolize the floor. If there is no check on this type of behavior it impedes the ability of the President, the White House staff, and members of the media to conduct business."

In a November 13 interview with *The Washington Post*, executive director of the Knight First Amendment Institute at Columbia University (Knight Institute) Jameel Jaffer drew a parallel to a case that the organization brought against President Trump in 2017, alleging that he could not block his critics on Twitter. On May 23, 2018, U.S. District Court for the Southern District of New York Judge Naomi Reice Buchwald ruled in favor of the Knight Institute, finding that President Trump had violated the First Amendment by blocking Twitter users who were critical of him or his policies, finding that it constituted viewpoint discrimination. *Knight First Amendment Institute v. Trump*, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

Jaffer, citing Buchwald's ruling, told the *Post*, "The government cannot exclude reporters from [the White House] because of their views.. . . Once the government created a general right of access it cannot selectively withdraw it based on viewpoint. Viewpoint is not a criterion that establishes a media organization's right to be at a news briefing." (For more information on the Knight Institute's lawsuit and Buchwald's ruling, see "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*.)

On November 14, the U.S. Department of Justice (DOJ) filed a memorandum in support of the White House's opposition to the plaintiffs' motion for a TRO, contending that the White House's "discretionary decision [to revoke Acosta's] credential was "lawful" and "permissible." The memorandum reasoned that President Trump and the White House "possess the same broad discretion to regulate access to the White House for journalists[.]" The memorandum contended that because the president and his staff have "absolute discretion over which journalists they grant interviews to, as well as over which journalists they acknowledge at press events," they also have discretion over which journalists "receive on-demand access to the White House grounds and special access during White House travel for the purposes of asking questions to the President or his staff."

The memorandum further argued that "[n]o journalist has a First Amendment right to enter the White House." Additionally, the DOJ contended that *Sherrill v. Knight* did not apply because, in that case, the D.C. Circuit addressed "solely the Secret Service's decision to deny a pass on security grounds to a journalist to whom the White House had otherwise decided to grant access." The memorandum stated that in this case, "'all parties' do not 'recognize' that Mr. Acosta deserves access to the White House" and that "Acosta's access [was] denied at a different stage in the decisional process."

The DOJ added, "The public interest does not require that Mr. Acosta be given immediate access to the White House complex. The public can benefit from his reporting from outside the complex . . . and is additionally well-served by the numerous other journalists who retain their hard passes." The full memorandum is available online at: https://www.cnn.com/2018/11/14/media/white-house-response-cnn-lawsuit/index.html.

In a November 16 hearing, District of Columbia Judge Timothy J. Kelly, who was appointed to the court 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," according to CNN on November 16. Kelly reasoned that the decision to revoke Acosta's hard pass was "so shrouded in mystery that the government could not tell me . . . who made the decision."

According to *BuzzFeed News* Capitol Hill reporter Paul McLeod, Kelly also indicated that Acosta's First Amendment rights overrule the White House's right to have orderly press conferences. *Washington Post* media critic Erik Wemple tweeted that Kelly also stated that "the fact that [CNN] has other pass holders does NOT make the 'harm to [Acosta] any less irreparable." Kelly further contended that although there is no First Amendment right to access the White House grounds, once those areas are opened to reporters, but denied to others, the First Amendment "comes into play," according to *The Guardian*. However, *The Washington Post* reported that Kelly had clarified that this was a "very limited ruling" and that he was not making a judgment on the First Amendment claims.

CNN reported on November 16 that Kelly "left open the possibility, however, that the White House could seek to revoke it again if it provided that due process," though Kelly also indicated that he thought Acosta and CNN would likely prevail in the case overall.

Following the hearing, Acosta told reporters outside the courthouse, "I just want to say something very briefly and I want to thank all of my colleagues in the press who supported us this week and I want to thank the judge for the decision he made today and let's get back to work." Boutrous told reporters, "This is a great day for the First Amendment and journalism."

In a statement, CNN and Acosta wrote, "We are gratified with this result and we look forward to a full resolution in the coming days. Our sincere thanks to all who have supported not just CNN, but a free, strong and independent American press."

In a November 16 interview with WCCO, Kirtley explained that Kelly only granted "a temporary restraining order, which by its terms means that it will only last for a short period of time pending further review." Kirtley said that the ruling "played out the way I expected that it would. I figured that [Kelly] would be most likely to look at the procedure that was followed here, or rather, not followed, in taking way Acosta's press pass. The reason I say that is because that's really the simpler way for the judge to approach a question like that. When you get into the First Amendment, it gets quite complicated unless you are the former Justice Hugo Black who [thought] the First Amendment was absolute."

Kirtley continued, "[Kelly] certainly reserves the right to go back later on as the hearings progress and look at the First Amendment question in greater detail. I will say that the fact that he said that Acosta was suffering irreparable harm by having the press pass taking away sounds like the First Amendment is very much lurking in the background because that is classic First Amendment language to say that a journalist is 'irreparably harmed' every minute he's deprived of his right to gather the news.. . . That's an important indicator, coupled with the fact that [Kelly] said he believes that Acosta will ultimately prevail."

On November 19, *The Washington Post* reported that hours after Kelly's ruling, Sanders and deputy chief of staff for communications Bill Shine had sent a letter to CNN and Acosta saying they would immediately suspend his credentials again when the TRO expired after 14 days. The letter stated that Acosta's behavior "violated the basic standards governing [news conferences], and is, in our preliminary judgment, sufficient factual basis to revoke your hard pass." According to the *Post*, Boutrous summarily requested an emergency hearing and an expedited schedule, which would allow Kelly to enter a preliminary injunction, the next step after a TRO that provides more lasting relief.

However, also on November 19, the *Post* reported that the White House had reached a "final determination" and told CNN in a letter that they would restore Acosta's press credentials, so long as he abided by new rules at presidential press conferences. The four rules 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." According to the letter, failure to abide by these rules "may result in suspension or revocation of the journalist's hard pass." As the *Bulletin* went to press, the new rules had not been published in the Federal Register or otherwise made official.

The letter stated, "Having received a formal reply from your counsel to our letter of November 16, we have made a final determination in this process: your hard pass is restored.. . . Should you refuse to follow these rules in the future, we will take action in accordance with the rules set forth above. The President is aware of this decision and concurs." The *Post* asserted that the action was an "about-face" and "appeared to be a concession to CNN in its lawsuit against the [Trump] administration."

CNN summarily dropped its lawsuit against the White House, writing in a statement that it was "no longer necessary" after Acosta's press pass was restored. The statement added, "We look forward to continuing to cover the White House."

Observers pointed out that this 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, the *Los Angeles Times*, the *New York Daily News*, *Politico*, *BuzzFeed*, the BBC, the *Huffington Post*, and *The Guardian*, 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*.)

Additionally, 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

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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 at a photo op of the two leaders in the Oval Office. Among Collins' questions were "Did Michael Cohen betray you, Mr. President?" and "Mr. President, are you worried about what Michael Cohen is about to say to the prosecutors?"

The move prompting criticism from several observers, including Fox News president Jay Wallace, who came to the defense of Collins and CNN in a July 25 statement. "We stand in strong solidarity with CNN for the right to full access for our journalists as part of a free and unfettered press," he said. *The Hill* noted on July 26 that two weeks earlier, during a July 13 joint news conference with British Prime Minister Theresa May, President Trump had refused to answer questions from Acosta, calling CNN "fake news." (For more information on the White House banning Collins' and President Trump's comments during the July 13 joint news conference, 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*.)

President Trump Praises Montana Congressman Who Assaulted Reporter

On Oct. 19, 2018, President Donald Trump prompted additional criticism from media members and observers when he praised Rep. Greg Gianforte (R-Mont.) during a rally in Missoula, Mont. In June 2017, Gianforte pleaded guilty to misdemeanor assault after "body slamming" *Guardian* political reporter Ben Jacobs during a May 2018 campaign event. Gianforte later apologized for the incident and was sentenced to a 180-day deferred sentence, which included anger management and community service. (For more information on Gianforte's assault of Jacobs, see *Montana Politician "Body Slams" Journalist, Pleads Guilty to Misdemeanor Assault* in "Journalists Face Physical Restraints and Arrests; Trump Video Raises Further Concerns about Violence Against the Media" in the Summer 2017 issue of the Silha *Bulletin*.)

According to *The Guardian* and Reuters, President Trump called Gianforte "a great guy" and a "tough cookie." President Trump also said, "Greg is smart. And by the way, never wrestle him. You understand. Never." He continued, "We endorsed Greg very early. But I heard that he body-slammed a reporter. This was the day of the election or just before, and I thought, 'Oh, this is terrible! He's going to lose the election.' And then I said, 'Wait a minute, I know Montana pretty well, I think it might help him.' And it did." He concluded, "Any guy that can do a body-slam . . . is my guy."

In an October 19 statement, *The Guardian* U.S. editor John Mulholland said, "The president of the United States tonight applauded the assault on an American journalist who works for the Guardian. To celebrate an attack on a journalist who was simply doing his job is an attack on the first amendment by someone who has taken an oath to defend it." He continued, "[I]t runs the risk of inviting other assaults on journalists both here and across the world where they often face far greater threats. We hope decent people will denounce these comments and that the president will see fit to apologize for them."

In an October 19 article for CNN Politics, editor-at-large Chris Cillizza explained why President Trump's comments were so problematic. "Trump undoubtedly viewed this line as a success because people laughed — always his measure of whether a barb worked," Cillizza wrote. "But, ask yourself this: What was the humor proposition here? What were people actually laughing at? The answer is this: They were laughing at one person assaulting another." Cillizza continued, "What all of that spin and, frankly, garbage, misses is that what Trump is doing — along with those who laugh when he does it — is dehumanizing reporters. These aren't people like you and I, Trump is saying. They deserve to get beat up, to get assaulted, to get roughed up a little bit.. . . All of which . . . is troubling. Very troubling."

On Nov. 11, 2018, the *Huffington Post* reported that Gianforte won re-election in Montana. The *Post* noted that Gianforte's "biggest hurdle to re-election was likely his own reputation," citing his assault of Jacobs.

***The New York Times* Publishes Op-Ed by Senior Trump Administration Official, Drawing Criticism from President Trump and Some Observers**

On Sept. 5, 2018, *The New York Times* published an op-ed that purported to be written by a senior Trump administration official, prompting some observers, as well as President Donald Trump, to criticize the op-ed and the anonymous author, while others praised the decision by the *Times* to publish it. Three days later, President Trump called on the U.S. Department of Justice (DOJ) to investigate the anonymous op-ed. Meanwhile, some observers noted that the release of the op-ed occurred at the same time as the publication of a book by Bob Woodward, an associate editor at *The Washington Post*, in which he provided behind-the-scenes details about the Trump White House based on anonymous interviews with several Trump administration officials and other individuals. The publication of the book prompted President Trump to reiterate his desire to "change libel laws" in the United States.

The September 5 op-ed, titled "I Am Part of the Resistance Inside the Trump Administration," first asserted that "many of the senior officials in his own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations" because those officials, including the author of the op-ed, "believe [their] first duty is to this country, and the president continues to act in a manner that is detrimental to the health of our republic."

The op-ed goes on to criticize President Trump, such as that he "shows little affinity for ideals long espoused by conservatives" and that his leadership style is "impetuous, adversarial, petty and ineffective." The piece also criticized President Trump's "mass-marketing of the notion that the press is the "enemy of the people," which the author argued was "anti-democratic." The full op-ed is available online at: https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html?action=click&module=Opinion&pgtype=Homepage.

Below the headline of the op-ed, *The New York Times* included the message, "The Times is taking the rare step of publishing an anonymous Op-Ed essay. We have done so at the request of the author, a senior official in the Trump administration whose identity is known to us and whose job would be jeopardized by its disclosure. We believe publishing this essay anonymously is the only way to deliver an important perspective to our readers." The message also stated that readers could "submit a question about the essay or our vetting process" on a separate online form that would send the questions to *Times* op-ed editor,

James Dao, who would answer a selection of them. The form, which is no longer accepting submissions, is available online at: https://www.nytimes.com/2018/09/05/reader-center/oped-questions.html?module=inline.

On September 8, the *Times* published a story titled "How the Anonymous Op-Ed Came to Be," which answered several questions raised by readers, including "Why did you publish this piece?" Dao responded that the op-ed "offered a significant first-person perspective we haven't presented to our readers before: that of a conservative explaining why they felt that even if working for the Trump administration meant compromising some principles, it ultimately served the country if they could achieve some of the president's policy objectives while helping resist some of his worst impulses." Another question asked how the *Times* found the writer, to which Dao responded, "The writer was introduced to us by an intermediary whom we know and trust." The full article is available online at: https://www.nytimes.com/2018/09/08/reader-center/anonymous-op-ed-trump.html?module=inline.

Following the publication of the op-ed, on September 5, President Trump criticized the *Times* and the anonymous author. He wrote in a tweet, "Does the so-called 'Senior Administration Official' really exist, or is it just the Failing New York Times with another phony source? If the GUTLESS anonymous person does indeed exist, the Times must, for National Security purposes, turn him/her over to government at once!" President Trump also tweeted, "TREASON?"

Additionally, on September 7, multiple news outlets reported that President Trump told reporters aboard Air Force One that then-Attorney General Jeff Sessions "should be investigating who the author of this piece was because I really believe it's national security."

In a statement the same day, *The New York Times* responded by stating, "We're confident that the Department of Justice understands that the First Amendment protects all American citizens and that it would not participate in such a blatant abuse of government power. The President's threats both underscore why we must safeguard the identity of the writer of this op-ed and serve as a reminder of the importance of a free and independent press to American democracy." On September 13, *The Washington Post* reported that Federal Bureau of Investigation (FBI) Director Christopher A. Wray declined to say whether the agency would conduct an investigation. As the *Bulletin* went to press, neither the DOJ nor the FBI had announced whether an investigation was conducted.

President Trump was not alone in criticizing the *Times* op-ed. In a September 5 opinion piece for *The Washington Post*, media critic Erik Wemple criticized it as "not [having] a lot of news value." He cited "remarkable work" done by reporters "over the past couple of years in documenting how President Trump's Cabinet and staff have freaked out over his incompetence." However, Wemple added, "Like most anonymous quotes and tracts, this one is a PR stunt. Mr. Senior Administration Official gets to use the distributive power of [*The New York Times*] to recast an entire class of federal appointees. No longer are they enablers of a foolish and capricious president. They are now the country's most precious and valued patriots."

In an interview with MSNBC, David Jolly, a former Republican representative from Florida, said that if the author of the op-ed "wants to do something in service to the nation, you have to come forward and sign your name for this."

In a September 5 statement, *New York Times* spokesperson Eileen Murphy defended the op-ed. She wrote, "We are incredibly proud to have published this piece, which adds significant value to the public's understanding of what is going on in the Trump administration from someone who is in a position to know."

In a September 6 story, the BBC praised the publication of the op-ed, arguing that it "passe[d] key tests." The article stated that "the approach to anonymity is informed by those same two principles: protection of sources, and editorial justification." The BBC argued that although a reported could have "used the words in the op-ed to inform a news story[,] . . . sometimes there is so much the source wants to say that presenting it in op-ed form is better. Wrapping it in a news story doesn't necessarily add much."

In a September 5 interview with WCCO News Talk 830 in Minneapolis, Minn., Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said that the *Times* op-ed was not the first instance of a news organization taking such an action, but argued that the timing made it more unusual. "It is very rare for them to do this sort of thing; it's not unheard of though," Kirtley said. "I've seen op-ed pieces in the *Times* and elsewhere that were written by people that had been physically abused either in this country or were political dissidents in other countries.. . . What of course makes this so unusual is the timing of this right on top of the release of Bob Woodward's book, which is just chockful of allegations that are from sources whose identity is not revealed."

Woodward, an associate editor at *The Washington Post*, authored a book titled *Fear* in which he "paints a harrowing portrait of the Trump presidency, based on in-depth interviews with administration officials and others," according to a September 5 story by the *Post*. Prior to the official release of the book, which occurred on September 11, President Trump suggested in a September 5 tweet that Congress should change libel laws. He wrote, "Isn't it a shame that someone can write an article or book, totally make up stories and form a picture of a person that is literally the exact opposite of the fact, and get away with it without retribution or cost. Don't know why Washington politicians don't change libel laws?"

In a September 5 interview with *PolitiFact*, University of Michigan law professor Leonard M. Niehoff argued that under President Trump's hypothetical of someone who "totally make[s] up stories and form[s] a picture of a person that is literally the exact opposite of the fact," would be subject to current defamation laws. Niehoff said, "The president's tweet clearly assumes a situation where two things are the case.. . . First, that the person has 'totally' and intentionally 'made the information up' — it's not an instance of a mistake but of deliberate fabrication. And second, that the statement made is one of 'fact' and so is capable of being proved true or false, rather than being an opinion or a belief."

Niehoff argued that in this situation, defamation would give the aggrieved party a claim. "Even under the highly protective standard of *New York Times v. Sullivan*, a public official or figure would have a claim under these circumstances because this meets the test for 'actual malice.' . . . So to the extent that the president is describing the state of the law, he is simply and objectively wrong." Actual malice is the standard created in *Sullivan* requiring proof that defendants knowingly made false statements or made statements with reckless disregard for

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their truth or falsity. 376 U.S. 254 (1964). (Niehoff was a panelist at "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30," a symposium held April 20-21, 2018, co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Association of American Editorial Cartoonists (AAEC), the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communications. 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*.)

David Ardia, co-director of the University of North Carolina (UNC) Center for Media Law and Policy added that "[c]asebooks are filled with examples of people who have successfully used libel law to challenge false statements and portrayals in articles, books and movies."

President Trump's September 5 tweet was not the first instance in which he suggested that libel laws should be changed in the United States. In January 2018, author Michael Wolff, who previously contributed to *USA Today*, *The Hollywood Reporter*, and other media outlets, authored and released a book titled *Fire and Fury: Inside the Trump White House*, which described behind-the-scenes details about President Trump's White House and administration. After the publication of the book, President Trump called libel laws a "sham and a disgrace and do not represent American values or American fairness" during a January 10 cabinet meeting. During a February rally in Fort Worth, Texas, President Trump added, "I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.. . . We're going to open up those libel laws." (For more information on Wolff's book and President Trump's comments, see *Book About the Trump Administration's White House Raises Ethical and Legal Questions* in "The Ethics of Covering President Donald Trump" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

In her September 5 interview with WCCO, Kirtley also argued that the publication of the *New York Times* op-ed played into the 'fake news' narrative" articulated by President Trump. She said, "It is always the reality [that] news organizations that rely on anonymous sources have to be prepared for that accusation, especially in our current environment."

Media Organizations and Congress Address President Trump's Anti-Press Rhetoric

In the summer and fall of 2018, several media organizations, as well as the U.S. Senate, took different actions in response to President Donald Trump's anti-press rhetoric and actions.

On Aug. 10, 2018, *The Boston Globe* called for media outlets across the country to participate in a coordinated editorial response to President Trump's escalating anti-media rhetoric. On August 16, more than 400 news outlets, including *The New York Times* and the Minneapolis *Star Tribune*, posted coordinated op-ed pieces supporting U.S. journalists and denouncing President Trump's political attacks on the media. Each outlet wrote about the common theme that journalists are not "the enemy of the people." (For more information about *The Boston Globe*'s editorial, as well as threats made against the news outlet, see *California Man Indicted by Federal Grand Gury after Sending Threats to* The Boston Globe in "Journalists in the United States and Abroad Face Threats of Violence and Incarceration" on page 17 of this issue of the Silha *Bulletin*.)

On Aug. 17, 2018, the Senate unanimously passed a resolution "[r]ecognizing threats to freedom of the press and expression around the world and reaffirming freedom of the press as a priority in efforts of the Government of the United States to promote democracy and good governance." S.Res.501, which was introduced by Sens. Brian Schatz (D-Hawaii), Richard Blumental (D-Conn.), and Chuck Schumer (D-N.Y.), stated that "freedom of the press is a cornerstone of American democracy and is enshrined in the first amendment to the Constitution." The resolution cited statistics by the Committee to Protect Journalists (CPJ) indicating that in 2017, forty-six journalists were killed in cases in which the motive for the killing was confirmed to be related to reporting by those journalists, as well as an additional 20 journalists who were killed in cases in which the motive for the killing was unconfirmed.

The resolution also provided several laws and legal frameworks recognizing freedom of the press, including Article 19 of the United Nations (UN) Universal Declaration of Human Rights, adopted in Paris, France in 1948, which states that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Finally, the resolution included several actions to be taken by the Senate, including "commend[ing] journalists and media workers around the world for their essential role in promoting government accountability, defending democratic activity, and strengthening civil society, despite threats to the safety of those journalists and media workers," as well as "pay[ing] tribute to journalists who have lost their lives carrying out their work." The resolution also stated that the Senate shall "call[] on the President and the Secretary of State to[,] . . . on the basis of the protections afforded under the First Amendment to the Constitution of the United States, preserve and build upon the leadership of the United States on issues relating to freedom of the press," among other actions. The full text of the resolution is available online at: https://www.congress.gov/bill/115th-congress/senate-resolution/501/text.

President Trump's anti-press rhetoric also prompted David Kaye, the UN Special Rapporteur on freedom of expression, to condemn President Trump's attacks on the press, warning that they "erode public trust in the media and could spark violence against journalists." In a joint statement with Edison Lanza of the Inter-American Commission on Human Rights, Kaye said, "These attacks run counter to the country's obligations to respect press freedom and international human rights law." The full statement is available online at: https://news.un.org/en/story/2018/08/1016222.

Scott Memmel
Silha *Bulletin* Editor

Journalists in the United States and Abroad Face Threats of Violence and Incarceration

Throughout 2018, several journalists in the United States and abroad faced murder, incarceration, and threats of violence. On October 2, Jamal Khashoggi, a prominent Saudi journalist and *Washington Post* columnist, was killed inside the Saudi consulate in Istanbul, Turkey. His death produced international outrage and brought attention to the largely underreported Saudi-led war in Yemen. On September 12, a federal grand jury indicted a man charged with making threatening calls to *The Boston Globe* in response to the news outlet's coordinated editorial effort denouncing President Donald Trump. In his calls to *The Boston Globe*, the man repeatedly referred to the press as "the enemy of the people," prompting several observers to question whether President Trump's anti-press rhetoric could lead to violence against journalists. Additionally, on September 3, a judge in Myanmar sentenced two Reuters journalists to seven years in prison. The journalists were arrested several months earlier while investigating mass killings of the Rohingya ethnic minority in Myanmar. Finally, a U.S. federal judge denied a Salvadorian journalist's *habeas corpus* petition on September 4, finding that the journalist's detention by Immigration and Customs Enforcement (ICE) was not retaliation for his critical reporting on U.S. immigration policies.

REPORTERS IN DANGER

Washington Post Columnist Jamal Khashoggi Killed in Saudi Consulate in Istanbul

On Oct. 2, 2018, Jamal Khashoggi, a prominent Saudi journalist and *Washington Post* contributing columnist, was last seen entering the Saudi Consulate in Istanbul, Turkey. Several days later, on October 6, Turkish investigators alleged that Khashoggi was strangled and dismembered in the consulate. On October 15, Saudi officials admitted that Khashoggi was killed inside the consulate, but offered differing depictions of his death.

On Dec. 4, 2018, CIA Director Gina Haspel delivered a classified briefing for a small group of Senators regarding the agency's conclusions about the murder of Khashoggi. Several media outlets reported on the same day that several Senate leaders promptly declared that they were convinced MBS was "complicit" and "ordered" the killing of Khashoggi. Sen. Lindsey Graham (R-S.C.) told reporters, "[MBS] is a wrecking ball.. . . I think he's complicit in the murder of Mr. Khashoggi to the highest level possible." Sen. Richard C. Shelby (R-Ala.) agreed, stating, "[A]ll evidence points to that [conclusion], that all this leads back to the crown prince." He added, "This is conduct that none of us in America would approve of in any way." As the *Bulletin* went to press, additional details about the classified briefing and the CIA's report had not been released.

Khashoggi was one of Saudi Arabia's best-known personalities, according to an October 14 *New York Times* profile. He first received international attention in the 1980s for his coverage of the Soviet invasion of Afghanistan during which he conducted a series of interviews with Osama Bin Laden. Later in his career, Khashoggi developed strong ties to the Saudi royal family, serving as an adviser and unofficial spokesman for the crown. He also worked as the editor of *Al-Watan*, a progressive Saudi paper, in 2003 and again in 2007, but was fired on both occasions over controversial articles. Khashoggi's relationship with the crown began to weaken in 2015, after King Salman ascended to the throne. In 2016, Khashoggi was banned from media appearances and tweeting about Saudi Arabia after making remarks critical of President Donald Trump's Middle East policies.

Fearing escalating retribution for his reporting, Khashoggi fled to the United States in 2017, and began contributing monthly columns to *The Washington Post*. The columns were often critical of Saudi Crown Prince Mohammed bin Salman, also known as MBS. According to the *Times*, MBS contacted Khashoggi multiple times, asking him to "tone down" his rhetoric and return home. The *Times* reported that Khashoggi's friends feared that his columns led him to be placed on MBS's "blacklist." Additionally, the *Times* noted that Khashoggi was reportedly planning on starting a website that would publish translated economic reports showcasing the scale of corruption in Arab countries.

According to BBC News on Oct. 31, 2018, Khashoggi visited the Saudi Consulate in Istanbul first on September 28, in order to obtain a document certifying a previous divorce so he could marry Turkish researcher Hatice Cengiz, to whom he was engaged. BBC News reported that he was told that he would have to pick up the document later and made an appointment to return on October 2. According to CCTV footage released after his disappearance, Khashoggi was seen arriving at the consulate at 1:14 p.m. local time on October 2. Cengiz reportedly waited for him outside the consulate for 10 hours, but he did not reappear.

Over the next two weeks, Saudi Arabia denied all involvement in Khashoggi's disappearance. On October 5, MBS told *Bloomberg* that the Saudi government was unaware of Khashoggi's whereabouts. "We hear the rumors about what happened," he said. "He's a Saudi citizen and we are very keen to know what happened to him. And we will continue our dialogue with the Turkish government to see what happened to Jamal there." MBS also noted that the consulate would allow Turkish officials to search the premises. On October 6, the Consul General of Saudi Arabia Mohammad al-Otaibi allowed Reuters journalists to tour the consulate in order to prove that Khashoggi was not there. "I would like to confirm that . . . Jamal is not at the consulate nor in the Kingdom of Saudi Arabia, and the consulate and the embassy are working to search for him," he told Reuters.

Also on October 6, *The New York Times* reported that Turkish investigators had determined that Khashoggi was murdered inside the consulate. According to Turkish officials who spoke to the *Times* anonymously, Khashoggi was killed and dismembered inside the consulate, probably by a team of approximately 15 Saudi citizens. Turkish President Recep Tayyip Erdogan confirmed the report on October 23, adding that Turkish investigators believed the murder was "premeditated." He added, "It is clear that this savage murder did not happened instantly but was planned."

Erdogan's report contradicted Saudi Arabia's story. According to *The New York Times* on October 15, Saudi Arabia

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admitted that Khashoggi had been killed in the consulate, but alleged that he was killed as a result of an interrogation gone wrong that resulted in a "brawl." This explanation was quickly endorsed by President Trump. "It sounded to me like maybe these could have been rogue killers — who knows," President Trump told a group of reporters on October 15.

On October 19, *The Washington Post* reported that Saudi Arabia had detained 18 Saudis and fired five top officials in connection with its investigation into Khashoggi's disappearance. However, Saudi Arabia refused Turkey's request to extradite the detained individuals. President Trump called the arrests a "great first step," but noted that he would like additional details about the investigation. On November 15, the *Post* announced that Saudi Arabia had indicted 11 of the 18 suspects and were seeking the death penalty for five of them. As the *Bulletin* went to press, the suspects have not been named.

Other observers were more skeptical of the Saudi explanation. Sen. Lindsey Graham (R- S.C.) wrote in an October 19 tweet that he did not find Saudi Arabia's new narrative believable. "To say that I am skeptical of the new Saudi narrative about Mr. Khashoggi is an understatement," he wrote. "First we were told Mr. Khashoggi supposedly left the consulate and there was blanket denial of any Saudi involvement. Now, a fight breaks out and he's killed in the consulate, all without knowledge of Crown Prince." Graham again addressed MBS's involvement in Khashoggi's killing while a guest on "Meet The Press" on November 18. "The fact that he didn't know about it is impossible for me to believe," he said. "If he is going to be the face of Saudi Arabia going forward, I think the kingdom will have a hard time on the world stage. They are an important ally, but when it comes to the crown prince, he is irrational, he is unhinged, and I think he has done a lot of damage to the relationship between the United States and Saudi Arabia and I have no intention of working with him ever again."

On Oct. 31, 2018, Turkey's top prosecutor confirmed more details about Khashoggi's murder, but still did not provide any information about the location of his body, according to *The Washington Post* on the same day. As the *Bulletin* went to press, no further information about the whereabouts of Khashoggi's body have been released.

The Post also reported that the Turkish government was in possession of an audio recording of Khashoggi's murder, although the recording was not released publicly. On November 12, *The New York Times* reported that, according to three people familiar with the recording, one of the members of the kill team can be heard instructing someone over the phone to "tell your boss." Turkish officials believe the "boss" refers to MBS, potentially linking him to the assassination. Bruce O. Riedel, a former CIA officer, told the *Times* that "[a] phone call like that is about as close to a smoking gun as you are going to get." In a statement also released on November 12, Saudi officials denied that MBS had "any knowledge whatsoever" of Khashoggi's killing. The statement also contended that Saudi intelligence services had been permitted to listen to the recording and "at no moment was there any reference to the mentioned phrase."

On November 16, however, the CIA concluded that MBS ordered Khashoggi's assassination, as reported by *The Washington Post* on the same day. The *Post* noted that CIA officials have "high confidence" in the assessment. To reach its conclusion, the CIA cited a phone call between Khashoggi and Khalid, MBS's brother and the Saudi ambassador to the United States. In the phone call, Khalid bin Salman told Khashoggi that he would be safe visiting the Saudi Consulate in Istanbul. The *Post* asserted that Khalid made the call at his brother's request, according to multiple people familiar with the call. The CIA also based its conclusion about MBS's involvement due to his role in overseeing Saudi Arabia's government, and his relatively stable status as de-facto ruler, according to the *Post*. On November 18, Reuters reported that President Trump said the CIA's assessment was "very premature" but still "possible."

However, on November 19, the Associated Press (AP) reported that President Trump had said that there was no reason for him to listen to the audio recording of the "very violent, very vicious" killing of Khashoggi. In a November 18 interview on "Fox News Sunday," President Trump said, "It's a suffering tape, it's a terrible tape. I've been fully briefed on it, there's no reason for me to hear it." He added, "I know everything that went on in the tape without having to hear it."

On November 20, President Trump said in a formal presidential statement that his administration would take no action against MBS over Khashoggi's killing, calling Saudi Arabia a "great ally." "Our intelligence agencies continue to assess all information, but it could very well be that the Crown Prince had knowledge of this tragic event — maybe he did and maybe he didn't!" President Trump said in the statement. "That being said, we may never know all of the facts surrounding the murder of Mr. Jamal Khashoggi. In any case, our relationship is with the Kingdom of Saudi Arabia."

Also on November 20, in response to President Trump's statement, Senate Minority Leader Chuck Schumer (D-N.Y.) criticized the President's response. "You can't just throw in some exclamations (!!!!), yell that the world is dangerous, and call it a press release," he wrote. "That's not how a U.S. President responds to the murder of a journalist and American resident." Senator Jeff Flake (R-Ariz.) echoed Schumer's sentiment. "'Great allies' don't plot the murder of journalists, Mr. President," he tweeted on November 20. "'Great allies' don't lure their own citizens into a trap, then kill them." Committee to Protect Journalists (CPJ) Executive Director Joel Simon also issued a statement criticizing President Trump's response. "If you boil the White House Statement down to its essence, President Trump has just asserted that if you do enough business with the U.S., you are free to murder journalists," he wrote. "That's an appalling message to send to Saudi Arabia and the world."

Khashoggi's murder also sparked criticism from observers around the world. On Oct. 9, 2018, United Nations (UN) Special Rapporteur on freedom of expression David Kaye, as well as several other UN experts, called for an immediate, independent investigation into Khashoggi's disappearance. "An independent international investigation must immediately be launched into the events," he wrote in a statement. "Those responsible — perpetrators and masterminds — should be identified and brought to justice. We call on the Saudi and Turkish authorities to cooperate to fully resolve this case."

On October 10, Reporters Without Borders (RSF) also advocated for an independent international investigation into Khashoggi's disappearance and suggested that it could be carried out by Kaye. The statement also stated that "more than 15 journalists and bloggers have been arrested in a completely opaque manner in Saudi Arabia since last September." RSF's full statement

is available online at: https://rsf.org/en/news/rsf-refers-jamal-khashoggis-disappearance-un-working-group.

Simon asked the UN to investigate Khashoggi's death in a letter written to UN Secretary General António Guterres. "We believe that Khashoggi's case requires firm and sustained action on your part to ensure that the entire truth about the circumstances of his death is discovered, including the identity of those responsible for both carrying it out and for ordering it, and that the perpetrators are tried and punished in accordance with the international standards," he wrote. "The absence of resolute action by the international community, proportionate to the extreme gravity of the Khashoggi case, would send the wrong message that governments may kill journalists with impunity." The full letter is available online at: https://cpj.org/2018/11/cpj-calls-on-un-to-investigate-murder-of-journalis.php.

On October 10, forty-five free press organizations, including the Reporters Committee for Freedom of the Press (RCFP), the Freedom of the Press Foundation, and the National Newspaper Association, signed onto a letter written by the Society of Professional Journalists (SPJ) asking the Saudi Arabia ambassador to the United States to launch an investigation into Khashoggi's disappearance. "The threat of violence, kidnapping or death to any journalist who is seeking the truth and reporting it is dangerous to freedom and democracy around the world," the letter read. "It is of the utmost importance that officials do everything in their power to find Khashoggi, return him to his fiancée and family and hold those responsible for his disappearance accountable." The full letter is available online at: https://www.spj.org/news.asp?REF=1611.

Khashoggi's killing also brought increased attention to the Saudi-led war in Yemen. On October 29, *The New York Times* ran a front-page story detailing the largely underreported war that has lasted over three years and caused what the UN deemed the "world's worst humanitarian crisis." The war, led by Saudi Arabia and the United Arab Emirates (UAE), initially started to quell Houthi rebels who seized control of western Yemen. The war continued, causing widespread hunger and a cholera epidemic that killed tens of thousands of Yemeni citizens.

Some observers complained that it took the killing of a Westerner to bring international attention to the war. In an interview with the *Times*, Dr. Mekkia Mahdi said, "We're surprised the Khashoggi case is getting so much attention while millions of Yemeni children are suffering." She added, "Nobody gives a damn about them." On November 1, Almasirah Media Network, a Yemeni TV channel, reported that Mohammed Ali al-Houthi, a Yemeni political figure and former President of the Revolutionary Committee, issued a statement expressing similar frustration with the lack of international media coverage of the war in Yemen. "Although every victim left behind by the illegal aggression raids in Yemen deserves the same attention as Khashoggi, unfortunately none of the clear war crimes in Yemen has provoked the same international outrage," he said.

> "The threat of violence, kidnapping or death to any journalist who is seeking the truth and reporting it is dangerous to freedom and democracy around the world."
>
> **— Society of Professional Journalists with 45 Press Organizations**

California Man Indicted by Federal Grand Gury after Sending Threats to *The Boston Globe*

On Sept. 12, 2018, several news outlets reported that a federal grand jury in Boston had indicted a California man after he threatened to harm *Boston Globe* journalists in response to the newspaper's coordinated editorial campaign denouncing President Donald Trump's anti-press rhetoric. Robert Chain was charged with seven counts of using interstate and foreign commerce to transmit a threat to injure another person. Chain's threats prompting observers to question whether President Trump's anti-press rhetoric could lead to violence against journalists.

On Aug. 10, 2018, *The Boston Globe* called for media outlets across the country to participate in a coordinated editorial response to President Trump's escalating anti-media rhetoric. On August 16, more than 400 news outlets, including *The New York Times* and the Minneapolis *Star Tribune*, posted coordinated op-ed pieces supporting U.S. journalists and denouncing President Trump's political attacks on the media. Each outlet wrote about the common theme that journalists are not "the enemy of the people." (For more information on the coordinated op-ed, see "President Trump Continues Anti-Press Rhetoric and Actions" on page 9 in this issue of the Silha *Bulletin*.)

According to a criminal complaint filed on Aug. 29, 2018 in the U.S. District Court for the District of Massachusetts by Federal Bureau of Investigation (FBI) Special Agent Thomas M. Dalton, Chain's threatening calls to *The Boston Globe* began on Aug. 10, 2018, immediately after the news outlet announced the coordinated editorial effort. The complaint alleged that the calls continued until Aug. 22, 2018. In one of the calls, Chain threatened to "shoot you motherfuckers in the head . . . shoot every fucking one of you." On Aug. 16, the date of the coordinated editorial response, he called journalists "the enemy of the people," and threatened to "kill every fucking one of you.. . . I'm going to shoot you in the fucking head later today, at 4 o'clock."

According to the complaint, the origin of the calls was blocked, but authorities later determined that they came from a landline registered to Chain's home. The complaint further alleged that, on Aug. 22, 2018, a *Boston Globe* employee asked the caller why he was calling. Chain replied, "[b]ecause you are the enemy of the people . . . as long as you keep attacking the President, the duly elected President of the United States, in the continuation of your treasonous and seditious acts, I will continue to threats, harass, and annoy the *Boston Globe*."

Dalton concluded that "probable cause exists to conclude that [Chain] transmitted in interstate commerce any communication containing any threat to injure the person of another, in violation of [18 U.S.C. § 875]," titled "Interstate Communications," which provides, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." The full criminal complaint is available online at: https://www.documentcloud.org/documents/4801584-Robert-Chain.html.

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Journalists, *continued from page 19*

On September 18, a federal grand jury indicted Chain on seven counts under 18 U.S.C. § 875. On September 24, Chain pleaded not guilty to all six counts. During his arraignment, a federal prosecutor stated that law enforcement was investigating whether Chain made similar calls to *The New York Times* and the National Football League (NFL), according to a Sept. 24, 2018 *Boston Globe* story. As the *Bulletin* went to press, no further announcements had been made in the case.

In an Aug. 30, 2018 U.S. Department of Justice (DOJ) press release, U.S. Attorney Andrew Lelling stated that the U.S. Attorney's Office would prosecute anyone making threats like these. "In the past few months, this office has charged people with threatening to bomb a minority commencement ceremony at Harvard, threatening to shoot people at a Second Amendment rally, offering money to anyone who kills a federal agent, and mailing white powder and threatening notes to certain public figures," he said. "Anyone — regardless of political affiliation — who puts others in fear for their lives will be prosecuted by this office. In a time of increasing political polarization, and amid the increasing incidence of mass shootings, members of the public must police their own political rhetoric. Or we will."

Special Agent in Charge of the FBI Boston Division Harold Shaw said in the same press release that Chain's arrest should "serve as a warning to others" that threats will be taken seriously. "Everyone has a right to express their opinion, but threatening to kill people, takes it over the line and will not be tolerated," he said. "All threats are taken seriously, as we never know if the subject behind the threat intends to follow through with their actions."

In an Aug. 30, 2018 memo sent to employees of *The Boston Globe*, Vice President of Strategic Partnerships and Marketing Jane Bowman commended the staff for not letting the threats impact their work. "While it was unsettling for many of our staffers to be threatened in such a way, nobody — really, nobody — let it get in the way of the important work of this institution," she said. "We are grateful to the FBI, the US Attorney's Office, the Boston Police, and local authorities in California for the work they did in protecting the Globe while threats were coming in, for investigating the source, and for making the arrest. We couldn't have asked for a stronger response."

The caller's repeated use of the phrase "the enemy of the people" sparked some to criticize President Trump's rhetoric for encouraging violence against journalists. Rep. Katherine Clark (D-Mass.) wrote in an Aug. 20, 2018 tweet that "[h]urling hateful and dangerous rhetoric has a real impact on people's lives. It's perilous to think otherwise. Thank you to the @BostonGlobe for your unwavering dedication to the truth, to the news, and our country."

The same day, Daniel Schulman, the deputy Washington, D.C. bureau chief at *Mother Jones*, cautioned that President Trump's consistent press condemnation was dangerous. "As recently as this morning, Trump called the media 'the enemy of the people,'" he wrote. "He's going to get people killed."

> "This man threatened to kill journalists, calling them the 'enemy of the people'. . . . Words matter. The hatred stirred by Trump against journalists is having an effect, and over time, it could get someone killed."
>
> **— Renato Mariotti, CNN legal analyst**

Also in an Aug. 20, 2018 tweet, CNN legal analyst Renato Mariotti echoed Shulman's comments. "This man threatened to kill journalists, calling them the 'enemy of the people,'" he tweeted. "Words matter. The hatred stirred by Trump against journalists is having an effect, and over time, it could get someone killed." (For more information on how President Trump's relationship with the press and criticism that his rhetoric may lead to violence against journalists, see "President Trump Continues Anti-Press Rhetoric and Actions" on page 9 in this issue of the Silha *Bulletin*, *Five Newspaper Staff Members Killed, Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Physical Violence, Other Dangers in the United States and Abroad," and *Federal Prosecutors Seize Phone and Email Records of New York Times Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents," in the Summer 2018 issue, "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

Two Reuters Journalists Sentenced to Seven Years in Prison While Covering Rohingya Killings in Myanmar

On Sept. 3, 2018, a judge in Myanmar sentenced two Reuters journalists to seven years in prison for illegal possession of official documents in violation of the country's Official Secrets Act, India Act XIX, 1923. The journalists, Wa Lone and Kyaw Soe Oo, were detained on Dec. 12, 2017 while investigating violence against the Rohingya ethnic minority in Myanmar's Rakhine state. Observers from the international community voiced support for the journalists, and condemned Myanmar's civilian leader, Aung San Suu Kyi, for allowing the military to silence reports of human rights abuses in the country.

In December 2017, Lone and Soe Oo were arrested by Myanmar police. At the time of the arrest, the journalists were on assignment for Reuters, investigating the deaths of 10 Rohingya men and boys in Inn Din, a coastal village in Myanmar's Rakhine state. On Sept. 16, 2018, *The New York Times* reported that Lone and Soe Oo were arrested after meeting two police officers for lunch in a restaurant in Myanmar's major city, Yangon. During the ensuing court proceedings, which lasted nearly nine months, the journalists asserted that the officers arranged the meeting in order to provide them with information about 10 Rohingya men and boys killed in Inn Din.

According to the *Times*, one of the officers, Naing Lin, handed Lone rolled up documents that allegedly contained secret government information. Lone told the court that the documents had "nothing to do with our conversation," and contended that neither he nor Soe Oo solicited them. The journalists were arrested soon after

leaving the restaurant, before they had time to look at the documents, according to the *Times*. In court, Lin denied giving the journalists the documents. However, a police captain, Moe Yan Naing, testified that Lin was ordered to plant the documents on Lone as part of a set up.

The prosecution alleged a different story, asserting that the journalists had been detained during a routine traffic shop, and then found to be in possession of papers containing secret information, according to *The Guardian* on Sept. 3, 2018.

After the arrests, Reuters released the results of Lone's and Soe Oo's investigation. The Feb. 2, 2018 article, titled "Massacre in Myanmar," reported that Myanmar military and paramilitary police had taken eight Rohingya Muslim men and two teenage boys captive. The article alleged that eight days before the incident, military and paramilitary police organized Inn Din's Buddhist residents, and residents of several other villages, to burn Rohingya homes. The Rohingya were then reportedly forced to flee Inn Din and take shelter on a nearby beach. A group of soldiers arrived on the beach and took the 10 men and boys away for questioning. The men and boys were allegedly bound together, and villagers were invited to beat them with sticks and machetes. Photographs show that one of the men, an Islamic teacher, was beheaded. The article claims that soldiers shot each of the captives two to three times, and then buried them in a mass grave. The full article is available online at: https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/.

According to an Aug. 27, 2018 United Nations (UN) report, the massacre was part of a larger campaign of violence against the minority Muslim Rohingya community in Myanmar. Andrew Gilmour, the UN Assistant Secretary General for Human Rights, called the Rohingya persecution "ethnic cleansing" and a "campaign of terror and forced starvation that seems to be designed to drive the remaining Rohingya from their homes." According to the UN Refugee Agency, over 723,000 Rohingya refugees have fled Myanmar since August 2017.

On Sept. 3, 2018, Reuters reported that Lone and Soe Oo had been sentenced by a Myanmar court to seven years in prison for the illegal possession of official documents. Lone and Soe Oo had pleaded not guilty to violating section 3.1.c of the colonial-era Official Secrets Act, which punishes anyone who "obtains, collects, records or publishes or communicates" state secrets that might be useful to an enemy and carries a maximum penalty of 14 years in prison, according to *Frontier Myanma*, an English-language weekly magazine.

The convictions prompted sweeping condemnation from Reuters, human rights activists, and the international community. In a Sept. 3, 2018 statement, Reuters editor-in-chief Stephen J Adler said the convictions were "a major step backward in Myanmar's transition to democracy," and hinted at possible legal intervention in an international forum. "Today is a sad day for Myanmar, Reuters journalists Wa Lone and Kyaw Soe Oo, and the press everywhere," he said. "Without any evidence of wrongdoing and in the face of compelling evidence of a police set-up, today's ruling condemns them to the continued loss of their freedom and condones the misconduct of security forces."

The U.S. Embassy in Myanmar also criticized the convictions in a September 3 statement posted on its blog and social media accounts. "Today's conviction of journalists Wa Lone and Kyaw Soe Oo under the Official Secrets Act is deeply troubling for all who support press freedom and the transition toward democracy in Myanmar," the post said. "The clear flaws in this case raise serious concerns about rule of law and judicial independence in Myanmar, and the reporters' conviction is a major setback to the Government of Myanmar's stated goal of expanding democratic freedoms." The statement also advocated for the immediate release of both journalists and encouraged the government to stop prosecuting journalists for uncovering human rights abuses and other matters of public concern.

U.S. Vice President Mike Pence also voiced support for the journalists in a September 4 tweet, writing, "Wa Lone & Kyaw Soe Oo shd [*sic*] be commended — not imprisoned — for their work exposing human rights violations & mass killings. Freedom of religion & freedom of the press are essential to a strong democracy."

British Ambassador to Myanmar Dan Chugg released a September 3 statement on Facebook, speaking on behalf of the British Government and EU member states. "This case has cast a long shadow over freedom of expression and the rule of law in Myanmar," he said. "In any democracy, journalists must be free to carry out their jobs without fear or intimidation; this verdict has undermined freedom of the media in Myanmar. The verdict has also struck a hammer blow for the rule of law."

On September 20, UN Secretary-General Antonio Guterres spoke with reporters at the UN, condemning the convictions of Lone and Soe Oo. "It is not acceptable to have the journalists of Reuters being in jail for what they were doing," he said. "It is my deep belief that that should not happen and I hope that the government will be able to provide a pardon to release them as quickly as possible."

Human rights and free press advocacy groups also voiced their support for the detained journalists. Tirana Hassan, Amnesty International's Director of Crisis Response, released a Sept. 3, 2018 statement calling the verdict "appalling" and "politically motivated." "Today's verdict cannot conceal the truth of what happened in Rakhine State," she said. "It's thanks to the bravery of journalists like Wa Lone and Kyaw Soe Oo that the military's atrocities have been exposed."

Shawn Crispin, the Committee to Protect Journalists' (CPJ) senior Southeast Asia Representative, also released a statement on Sept. 3, 2018, calling the convictions "a new press freedom low for Myanmar." He added, "[T]he process that resulted in their convictions was a travesty of justice and will cast Myanmar as an anti-democratic pariah as long as they are wrongfully held behind bars.. . . We call on Myanmar's civilian authorities to immediately release the journalists."

In a Sept. 13, 2018 press conference, Myanmar's civilian leader Aung San Suu Kyi defended the convictions, arguing that Lone and Soe Oo were "not jailed for being journalists." "They were jailed because sentence has been passed on them, because the court has decided they have broken the Official Secrets Act," she said. "They have every right to appeal the judgement and to point out why the judgement was wrong." Suu Kyi was awarded the Nobel Peace Prize in 1991 for her work leading the opposition to the military junta that ruled Myanmar (then known as Burma) from 1962 until 2011.

Suu Kyi's comments prompted Nikki Haley, then-U.S. Ambassador to the UN, to post a September 13 tweet, which read, "First in denial about the abuse the Burmese military placed on the Rohingya, now justifying the imprisonment of the

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two Reuters reporters who reported on the ethnic cleansing. Unbelievable."

Judge Allows ICE to Detain Salvadorian Journalist Who Spoke Out Against the Agency

On Sept. 4, 2018, U.S. District Court for the Western District of Louisiana Judge Dee D. Drell denied a Salvadoran journalist's *habeas corpus* petition, finding that the detention of Manuel Duran Ortega was not retaliation for the journalist's critical stories about the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and local police. *Duran Ortega v. U.S. Department of Homeland Security*, No. 1:18-cv-00508 (W.D. La. 2018). Several human rights and media advocacy organizations voiced support for Duran Ortega, contending that his arrest in April 2018 and ensuing detention by the DHS violated his First Amendment rights.

Ortega immigrated to the U.S. from El Salvador in 2006 after receiving death threats related to his reporting on corruption in the Salvadorian government. In 2007, he failed to attend an immigration hearing, and the Atlanta Immigration Court entered a removal order against him. As a result, his immigration case was closed. On April 8, 2018, Duran Ortega filed a motion to reopen his immigration case with the Atlanta Immigration Court. On April 24, 2018, a Louisiana Immigration judge denied the motion, holding that the DHS satisfied statutory notice requirements. Duran Ortega appealed the decision on May 31, 2018. As the *Bulletin* went to press, the case was currently pending in front of the Board of Immigration Appeals.

Duran Ortega was arrested by Memphis police on April 3, 2018 while reporting on a protest against the alleged practice of turning detained immigrants over to ICE, instead of releasing them. Duran Ortega was charged with obstruction of a highway and disorderly conduct, both misdemeanor charges. The charges were dropped two days later, but instead of being released, Ortega was transferred into DHS custody and remained in LaSalle Detention Center in Jena, La.

On April 13, 2018, Duran Ortega filed a petition for a writ of *habeas corpus*, which are used in order to allow detainees to challenge the legality of their detention. In the petition, Duran Ortega asserted that he was being detained "in order to punish and suppress his speech as a journalist, in violation of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution." The petition argued that Ortega was arrested while "engaged in activities as a member of the press" and that the Memphis Police Department arrested him without probable cause. The petition further alleged that the detention by DHS was a direct result of the unlawful arrest, and that Ortega asserted was attempting to comply with police orders and wearing press credentials. The full petition is available online at: https://www.splcenter.org/sites/default/files/manuel_duran_habeas_final.pdf.

On Sept. 4, 2018, Drell denied Duran Ortega's *habeas* petition, finding first that Duran Ortega's claims against the Memphis Police Department for "retaliation and press suppression" were "moot." He wrote, "Because Duran Ortega is no longer in custody for the Tennessee misdemeanor charges and those charges have been dismissed, this court does not have jurisdiction to relieve those charges under the *habeas* statute."

Second, Drell held that Duran Ortega did "not carr[y] his burden of proving he [was] detained in violation of the United States Constitution or law." Drell reasoned that Duran Ortega did not contest the removal order issued against him in 2006, and that the removal order gave ICE probable cause to detain him "at any appropriate time." Drell further argued that Duran Ortega's current detention was not invalidated by his allegedly unlawful arrest on April 3, 2018. Drell therefore denied Duran Ortega's petition and dismissed the case with prejudice. The order denying Duran Ortega's *habeas* petition is available online at: https://www.courtlistener.com/recap/gov.uscourts.lawd.162401/gov.uscourts.lawd.162401.30.0.pdf.

In a Sept. 5, 2018 interview with *Law360*, Michelle Lapointe, one of Duran Ortega's attorneys and acting deputy legal director of the Immigrant Justice Project at the Southern Poverty Law Center, criticized the detaining of Duran Ortega. "It is frustrating that the government persists in imprisoning, for months on end, a respected journalist and beloved community member who has committed no crime and whose deportation has been stayed by the immigration courts," she said. "While we're disappointed by the court's decision not to order Manuel's release from detention while he fights his immigration case, we will continue to advocate for him and the First Amendment principles he stands for."

After Duran Ortega's arrest, several organizations, including the American Civil Liberties Union (ACLU), the Society for Professional Journalists (SPJ), and Reporters Without Borders (RSF) North America, among others, signed a letter in support of Duran Ortega written by Joseph Torres, the Senior Director of Strategy and Engagement at Free Press, a media advocacy organization. "The First Amendment guarantees a free press," the letter read. "That means that reporters like Duran can't be subject to censorship by the government, nor can government use any measures to prevent the expression of ideas before they are published, or to punish reporters for doing their job. Prior restraint by any official means is clearly unconstitutional." The full letter is available online at: https://www.freepress.net/sites/default/files/2018-05/free_manuel_duran_letter_0.pdf.

In a May 3, 2018 statement, RSF North America Bureau Director Margaux Ewen urged the U.S. government to reconsider deporting Duran Ortega. "It is concerning that a journalist wearing his press credentials while reporting was arrested and has been held in an ICE facility for the past month," she said. "Manuel Duran Ortega came to the United States after fleeing life-threatening situations in his home country and has been well-known in Memphis for covering controversial issues related to local and federal law enforcement ever since. We urge the US government to consider the consequences of sending an investigative journalist back to a country where he has faced death threats."

Duran Ortega was not the first journalist detained by ICE. Emilio Gutierrez Soto, a Mexican journalist, was held in immigrant detention after his asylum request was denied in late 2007. He and his son were abruptly released on July 26, 2018 after a judge ordered the government to justify Gutierrez Soto's continued detention. Gutierrez Soto's lawyers argued that he was detained because he is an outspoken critic of U.S. immigration policies, citing a document that showed he was on a list used by ICE to target immigrants for arrest, usually reserved for people suspected of violent crimes.

Kirsten Nordstrom
Silha Research Assistant

President Trump Prevails in Two Federal Courts' First Amendment Rulings, Faces New First Amendment Lawsuit

In fall 2018, President Donald Trump prevailed in two First Amendment cases in federal court. On September 11, the U.S. Court of Appeals for the Sixth Circuit held that then-Republican presidential candidate Trump did not "incite a riot" when he called for security to remove protestors at a March 2016 rally. During his 35-minute speech, Trump repeatedly said "get 'em out of here" in reference to the protestors, leading to an altercation with several of Trump's supporters. On October 15, Judge S. James Otero of U.S. District Court for the Central District of California granted an anti-SLAPP special motion brought by President Trump, dismissing a defamation lawsuit filed by adult-film actress Stormy Daniels regarding an April 2018 tweet in which President Trump questioned her credibility. The lawsuit marked the latest legal battle stemming from a 2016 settlement agreement between the actress and President Trump's former attorney, Michael Cohen, that attempted to keep her silent about her alleged affair with Trump in 2006.

FIRST AMENDMENT

Meanwhile, on October 16, literary and human rights group PEN American Center, Inc. (PEN America) filed a First Amendment lawsuit in the U.S. District Court for the Southern District of New York against President Donald Trump in an effort to stop him and his administration from "retaliate[ing]" or "threaten[ing] retaliation" against journalists and media organizations when he disagrees with their coverage.

Sixth Circuit Holds that Presidential Candidate Trump Did Not Incite a Riot at 2016 Rally

On Sept. 11, 2018, the U.S. Court of Appeals for the Sixth Circuit held that then-Republican presidential candidate Donald Trump did not "incite a riot" when he called for security to remove protestors at a March 2016 rally, which led to an altercation between the protesters and some of Trump's supporters. *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018). The Sixth Circuit held that the United States has "chosen to protect unrefined, disagreeable, and even hurtful speech to ensure that we do not stifle public debate."

The case arose on March 1, 2016 during a campaign rally conducted at the Kentucky International Convention Center in Louisville, Ky. The rally was organized by Donald J. Trump for President, Inc. (Trump campaign), a Virginia corporation. Plaintiffs Kashiya Nwanguma, Molly Shah, and Henry Brousseau, all residents of Kentucky, attended the rally with the intention of peacefully protesting.

On five different occasions, Trump called on security to "get 'em out of here" in the midst of his 35-minute speech. Trump also said "don't hurt 'em" in at least one instance. In response, members of the audience assaulted, pushed, and shoved plaintiffs, and Brousseau was punched in the stomach, according to the Sixth Circuit. Defendants Matthew Heimbach and Alvin Bamberger, Ohio residents and supporters of Trump, were in the audience during the rally and participated in the assaults. Video of the rally is available online at: https://www.youtube.com/watch?v=ES6ZOQr6GeA.

In May 2016, the plaintiffs filed a complaint in the Jefferson County Circuit Court in Louisville alleging state law tort claims for battery, assault, incitement to riot, as well as negligence, gross negligence, and recklessness against Trump, the Trump campaign, Heimbach, Bamberger, and an unknown woman who punched Brousseau. Because of the diversity of citizenship, the case was moved to the U.S. District Court for the Western District of Kentucky where the court initially refused to dismiss the incitement-to-riot and negligence claims, but later concluded that the negligence claim was "incompatible with the First Amendment." *Nwanguma v. Trump*, 273 F. Supp. 3d 719 (W.D. Ky. 2017).

Judge David McKeague wrote the majority opinion of the Sixth Circuit, which first addressed the plaintiffs' claim that Trump incited a riot, a misdemeanor under the Kentucky Penal Code, Ky. Rev. Stat. § 525.040, and actionable in damages under Ky. Rev. Stat. § 446.070. The Kentucky statute provides that "[a] person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot." "Riot" is defined as "a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons[.]"

McKeague explained the definition includes five elements: "(1) incitement (2) of five or more persons (3) to engage in a public disturbance (4) involving tumultuous and violent conduct (5) creating grave danger of personal injury or property damage." McKeague held that the plaintiffs' allegations "fail[ed] to make out a valid incitement-to-riot claim under Kentucky law" because the statements uttered by Trump "[did] not make out a plausible claim for incitement to engage in tumultuous and violent conduct creating grave danger of personal injury or property damage." He added, "The notion that Trump's direction to remove a handful of disruptive protesters from among hundreds or thousands in attendance could be deemed to implicitly incite a riot is simply not plausible — especially where any implication of incitement to riotous violence is explicitly negated by the accompanying words, 'don't hurt 'em.'"

McKeague next turned to the U.S. Supreme Court's ruling in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the Court recognized "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The Supreme Court also established a test that precludes speech from being sanctioned as incitement to riot unless "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech," as interpreted by the Sixth Circuit in *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc).

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First Amendment, *continued from page 23*

McKeague concluded that the case law derived from the *Brandenburg* test "makes clear . . . that, even if plaintiffs' allegations could be deemed to make out a plausible claim for incitement to riot under Kentucky law, the First Amendment would not permit prosecution of the claim." He reasoned that the "speaker's intent to encourage violence . . . and the tendency of his statement to result in violence . . . are not enough to forfeit First Amendment protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly." In this case, although President Trump's words "[i]n the ears of some supporters . . . may have had a tendency to elicit a physical response, in the event a disruptive protester refused to leave, but they did not specifically advocate such a response."

McKeague also cited *Snyder v. Phelps*, 562 U.S. 443 (2011), in which the Supreme Court held that the First Amendment protects the picketing of military funerals by the Westboro (Kan.) Baptist Church, 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*.)

McKeague concluding by citing Chief Justice John Robert's line "Speech is power" from *Snyder v. Phelps*. He continued, "Yet, as a nation, we have chosen to protect unrefined, disagreeable, and even hurtful speech to ensure that we do not stifle public debate. The First Amendment demands governmental tolerance of speech, in the name of freedom, subject to "a limited number of categorical exclusions.. . . The speech that forms the premise for plaintiffs' incitement-to-riot claim does not come within any of these limited exclusions."

In a short concurrence, Judge Helene N. White wrote that the majority opinion "elide[d] salient details of Trump's speech" and "overemphasize[d] the legal significance of the 'don't hurt 'em' statement." However, she agreed with the majority's ruling because she "agree[d] that the allegations are insufficient to constitute incitement to riot under Kentucky Revised Statutes § 525.040." White added, "Given our agreement that plaintiffs have failed to state a claim under Kentucky law, there is no need to reach the constitutional issue, and we should not offer our advisory opinion on whether if the speech had violated the incitement statute, it would nevertheless be protected by the First Amendment, thus rendering the statute unconstitutional as applied." The full majority opinion and White's concurrence are available online at: http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0202p-06.pdf.

Greg Belzley, a lawyer for the protesters, told *Politico* in a September 11 email that he disagreed with the Sixth Circuit's ruling. "I'm having a very difficult time understanding the Court's ruling — that unless the actual words objectively advocate violence completely detached from their context, it doesn't matter that the speaker intended to incite violence or that the same words have incited violence in the past." He added, "It is a frightening ruling even under the best of circumstances, but a license for a reckless authoritarian to stretch the limits."

In a September 11 email to *BuzzFeed News*, Dan Canon, another lawyer for the protesters, criticized Trump's comments at the rally. "Mr. Trump, throughout his campaign, intentionally used crowd violence to suppress dissident speech — the kind of core speech that the First Amendment traditionally protects. The Court's opinion today gives him a free pass for that conduct, even though he had publicly been asking for violence to occur at these rallies for months, and even though his co-defendants have said they would not have attacked our clients if Trump had not directed them to do so," Canon said. "Allowing a candidate for public office to use the First Amendment as a shield under these circumstances is unprecedented and dangerous."

Canon and Belzley both said that the plaintiffs planned to "seek further review," though they did not clarify whether they would appeal the case to the Supreme Court or ask for an *en banc* review by the full Sixth Circuit. As the *Bulletin* went to press, no further actions had been taken in the case.

Federal Judge Dismisses Defamation Lawsuit Brought By Stormy Daniels Against President Trump

On Oct. 15, 2018, Judge S. James Otero of U.S. District Court for the Central District of California granted a special motion brought by President Donald Trump under the Texas anti-SLAPP statute to dismiss a defamation lawsuit filed by adult-film actress Stormy Daniels regarding an April 2018 tweet in which President Trump questioned her credibility. Otero found that President Trump's tweet constituted "'rhetorical hyperbole' normally associated with politics and public discourse in the United States," and was therefore protected by the First Amendment. Previously, on Sept. 24, 2018, several news outlets reported that during a hearing on the same day, Otero had said that the tweet by President Trump appeared to be free speech that "lies at the heart of the [First] Amendment" and was "political speech" on a "matter of public concern."

Daniels, whose real name is Stephanie Clifford, reached a settlement with President Trump's former attorney, Michael Cohen, in the weeks leading up to the 2016 election, according to CNN on Sept. 8, 2018. The agreement included a $130,000 payment to Clifford in exchange for her silence about an alleged affair with Trump in 2006. The agreement became the subject of a lawsuit between President Trump and Clifford. As the *Bulletin* went to press, the case remained ongoing.

On April 17, Clifford's attorney, Michael Avenatti, released a forensic artist's sketch of a man who Clifford claimed threatened her with harm in 2011 if she spoke about the 2006 affair, according to the *Los Angeles Times* on September 24. On March 25, Clifford told CBS's "60 Minutes" that the man approached her in a parking lot in Las Vegas and said, while looking at her young daughter, that it would be a shame if "something happened to her mom."

On April 18, President Trump tweeted, "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" The tweet was in response to another tweet by Twitter user "RealShennaFox" who posted the sketch next to an image of Clifford with her husband, who bears a resemblance to the man in the sketch.

On April 30, Clifford filed a defamation lawsuit against President Trump in the Southern District of New York. The lawsuit alleged that President Trump's tweet "falsely attacks the veracity of Ms. Clifford's account of the threatening incident that took place in 2011. It also operates to accuse Ms. Clifford of

committing a crime under New York law, as well as the law of numerous other states, in that it effectively states that [she] falsely accused an individual of committing a crime against her when no such crime occurred."

Thus, the lawsuit alleged that President Trumps' tweet was "false and defamatory." It further alleged that President Trump made the statement knowing it was "false or was made with reckless disregard for the truth or falsity of the statement," which would satisfy the actual malice standard created in *New York Times v. Sullivan* requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. 376 U.S. 254 (1964). Additionally, the complaint argued that the tweet was defamation *per se*. The full complaint is available online at: https://www.dropbox.com/s/cghg5fwc42lh7y7/Complaint.pdf?dl=0.

On Aug. 9, 2018, CNN, *The Hill*, and *Politico* reported that Southern District of New York Judge Jesse M. Furman ordered that the lawsuit be moved to California federal court. Clifford had previously been opposed to the move, but consented to transfer the case. Avenatti explained that her legal team had "determined that it would allow us to proceed with a deposition of Mr. Trump more expeditiously and also likely result in a much faster trial." President Trump's lawyers had previously argued that the case should be moved for several reasons, including that the defamation case was related to other lawsuits brought by Clifford against President Trump, according to CNN.

On Aug. 27, 2018, President Trump filed a motion to dismiss the defamation lawsuit, contending that Clifford's suit was barred by several defamation doctrines, including first that President Trump's tweet was "protected opinion" because politicians, "in the course of public debate, are entitled to enter the debate and express their beliefs, including their disbeliefs, of the claims of their adversaries."

Second, the motion argued that Clifford could not prove that she had suffered any damages as a result of her tweet and was instead "making money . . . as a result of her disputes with the President," citing her numerous appearances on national television. Third, the motion asserted that Clifford is a "clear public figure," meaning she would have to prove actual malice, which the motion contended her complaint failed to do.

Finally, the motion argued that the lawsuit was "nothing more than a public relations move by Plaintiff and her outspoken lawyer to obtain still more publicity and attention." The motion added, "This suit improperly injects the United States courts into what is effectively a public debate involving a major politician and one (or two) of his public antagonists. This suit is designed to chill the President's free speech rights on matters of public concern."

Additionally, because Clifford is a citizen of Texas, the motion cited the Texas anti-strategic litigation against public participation (SLAPP) statute, the Texas Citizens Participation Act (TCPA), which allows courts to dismiss defamation suits against defendants who "exercise . . . the right to free speech," meaning "a communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code § 27.001 *et seq*. The statute requires that the plaintiff present "clear and specific evidence" in opposition to a motion to dismiss in support of "each of the essential elements of Plaintiff's defamation claim." The motion asserted that Clifford had failed to do so.

The motion also cited California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, which requires that a plaintiff show, in response to an anti-SLAPP motion, that there is a probability that she will prevail on the claim. The motion argued that because President Trump's tweet was protected opinion, was not defamatory *per se*, and did not fall under the actual malice standard, Clifford could not show "any probability that she will prevail on her claim," meaning her case would be dismissed and that attorney's fees would be awarded to President Trump. The full motion is available online at: https://www.courthousenews.com/wp-content/uploads/2018/08/Stormy-Trump-Trump-ANTISLAPP.pdf. (For more information on anti-SLAPP statutes, see "Several State Courts and Legislatures Grapple with Anti-SLAPP Laws" in the Summer 2017 issue of the Silha *Bulletin*.)

On September 24, the *Los Angeles Times* reported that Otero said that President Trump's tweet looked like free speech that "lies at the heart of the [First] Amendment." He reasoned that it was "the type of political discourse and commentary that takes place in elections all the time," and added that he was "troubled that there's a claim here for defamation." According to CNN on the same day, Otero called the tweet "political hyperbole" and "opinion protected by free speech." *Business Insider* reported that Otero called the tweet "free speech by a public official on a matter of public concern."

According to the *Los Angeles Times*, when Avenatti told Otero "this was not political by any stretch of the imagination," Otero interrupted and contended that the tweet seemed to be protected speech by a public official about a public figure. President Trump's lawyer, Charles Harder, agreed, stating that the tweet was "all done in this hyperbolic context of the political realm." Harder, of Harder, Mirell, and Abrams LLP, is best known for his victorious lawsuit against media gossip website *Gawker* on behalf of former professional wrestler Hulk Hogan, as well as his more recent legal attacks on technology news website *TechDirt* and women's website *Jezebel*. (For more information on Harder and his lawsuits against media outlets, see "Attorney Charles Harder Continues Attacks on News Websites by Filing Defamation Suits" in the Fall 2017 issue of the Silha *Bulletin*, "*Gawker* Shuts Down After Losing Its Initial Appeal of $140 Million Judgment in Privacy Case" in the Summer 2016 issue, and "*Gawker* Faces $140 Million Judgment after Losing Privacy Case to Hulk Hogan" in the Winter/Spring 2016 issue.)

Otero concluded the hearing by asking Harder whether President Trump wanted Clifford to cover the president's legal fees if the case were dismissed, to which Harder responded, "Yes."

Outside the courthouse, Avenatti told reporters that there was a "palpable irony" in Harder's free-speech argument on behalf of a president who "wants to jail journalists," according to the *Los Angeles Times*.

On Oct. 15, 2018, Otero granted President Trump's special motion to dismiss Clifford's complaint pursuant to the TCPA. Otero first found that Clifford's lawsuit was related to President Trump's "right of free speech on an issue of public concern," meaning the TCPA "applies to the Special Motion to Dismiss/Strike."

Otero next determined whether Clifford established a *prima facie* case for defamation, which meant she had to allege that: "(1) Mr. Trump published a false statement; (2) that defamed Ms.

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Clifford; (3) with the requisite degree of fault regarding the truth of the statement[;] . . . and (4) damages."

Regarding whether President Trump published a false statement, Otero ruled that the tweet constituted "'rhetorical hyperbole' normally associated with politics and public discourse in the United States." He added, "The First Amendment protects this type of rhetorical statement." Otero therefore granted the special motion to dismiss.

Nevertheless, Otero wrote that "[i]n the interest of completeness, the Court briefly addresses the other arguments made by the parties in the briefing." Otero held that Clifford's "focus on the actual malice argument comes as no surprise because Plaintiff stands on thin ice in asserting that Mr. Trump's tweet is an actionable statement." He continued, "Instead, Plaintiff seeks to use her defamation action to engage in a 'fishing expedition' concerning the conclusory allegations in the Complaint. The Court will not permit Plaintiff to exploit the legal process in this way."

Otero further ruled that President Trump was entitled to "reasonable" attorney's fees under the TCPA. Otero's full ruling is available online at: https://www.documentcloud.org/documents/5002740-Clifford-v-Trump-Order-Granting-Anti-SLAPP-Motion.html.

On October 15, Avenatti tweeted photos of a notice of appeal be filed in the U.S. Court of Appeals for the Ninth Circuit. The tweet is available online at: https://twitter.com/MichaelAvenatti/status/1051995988276047872. As the *Bulletin* went to press, no further announcements had been made in the case.

Avenatti also tweeted, "Trump's contrary claims are as deceptive as his claims about the inauguration attendance." Harder countered in an October 15 statement, "No amount of spin or commentary by Stormy Daniels or her lawyer, Mr. Avenatti, can truthfully characterize today's ruling in any way other than total victory for President Trump and total defeat for Stormy Daniels."

In a tweet the following day, President Trump quoted a Fox News headline, which read, "Federal Judge throws out Stormy Danials lawsuit versus Trump. Trump is entitled to full legal fees" and wrote, "Great, now I can go after Horseface and her 3rd rate lawyer in the Great State of Texas. She will confirm the letter she signed! She knows nothing about me, a total con!"

On Dec. 3, 2018, *Bloomberg* reported that President Trump had requested that Clifford pay double his attorney's fees in order to deter future frivolous lawsuits. As the *Bulletin* went to press, Otero had not ruled whether Clifford would be required to pay the proposed $778,806.

PEN America Files First Amendment Lawsuit Against President Trump, Alleges He Retaliated Against Media Outlets and Journalists

On Oct. 16, 2018, literary and human rights group PEN American Center, Inc. (PEN America) announced in a press release that it had filed a lawsuit in the U.S. District Court for the Southern District of New York against President Donald Trump in an effort to "stop [him] from using the machinery of government to retaliate or threaten reprisals against journalists and media outlets for coverage he dislikes." The lawsuit acknowledged that President Trump's anti-press rhetoric was protected by the First Amendment, but that there was "lots of evidence" to demonstrate that he had taken several actions in violation of the First Amendment's protections of free speech and freedom of the press.

The lawsuit began by explaining its desire to prevent President Trump's "official acts . . . intended to stifle exercise of the constitutional protections of free speech and a free press." More specifically, the lawsuit alleged that President Trump's "retaliatory directives" and "credible public threats to use his government powers against news organizations and journalists who have reported on his statements, actions, and policies in ways he does not welcome" violated the First Amendment's protections of free speech and press freedom.

The lawsuit continued, "President Trump has thus intentionally hung a sword of Damocles over the heads of countless writers, journalists, and media entities, including members of [PEN America]. His actions seek to accomplish indirectly what the President cannot do directly: impede professional and investigative journalism, and silence criticism."

PEN America's complaint included several examples, including President Trump "repeatedly call[ing] for action to punish the online retailer Amazon because Jeff Bezos, its chief shareholder and CEO, owns [*The Washington Post*], whose accurate coverage of his Administration the President finds objectionable." One such action was an executive order directing the U.S. Postal Service to review its financial practices, such as the shipping rates it offers to companies like Amazon.

Another example was President Trump's "public threat[] . . . to use the [U.S. Department of Justice's (DOJ)] antitrust merger-review process to retaliate against CNN for its news coverage" in regards to the proposed merger between Time Warner, which is CNN's parent company, and AT&T. PEN America stated that although a subsequent lawsuit by the DOJ to block the merger did not succeed in federal court, the litigation still cost CNN's parent company "significant resources."

PEN America's complaint also alleged that President Trump had threatened to challenge broadcast licenses for television stations owned by or carrying NBC, as well as other networks. Additionally, the complaint cited the White House banning CNN reporter Kaitlan Collins from a Rose Garden press conference for asking questions the White House deemed "inappropriate" in July 2018. (For more information on the White House blocking Collins from the press conference, see "Journalists Face Physical Violence, Other Dangers in the United States and Abroad" in the Summer 2018 issue of the Silha *Bulletin*.)

PEN America's complaint cited several U.S. Supreme Court First Amendment cases, including *New York Times v. Sullivan*, in which the court found that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254, 270 (1964).

The complaint also cited the 1936 case *Grosjean v. American Press Co.*, in which the Supreme Court wrote that "[t]he newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U.S. 233, 250 (1936).

Although the lawsuit deplored President Trump's anti-press rhetoric, including his repeated references to several media outlets as "fake news" and journalists as "enemies of the American people," it conceded that such speech is protected by the First Amendment and was not the basis of the lawsuit. Nevertheless, the lawsuit reiterated that President Trump "has done more than to exercise his right to denounce his critics. He has threatened to engage, and has engaged, in conduct intended to retaliate against specific news organizations and journalists whose content and viewpoints displease him." (For more information on President Trump's anti-press rhetoric, see "Journalists in the United States and Abroad Face Threats of Violence and Incarceration" and "*The New York Times* Publishes Op-Ed by Senior Trump Administration Official, Drawing Criticism from President Trump and Some Observers" in this issue of the Silha *Bulletin*.)

Thus, PEN America sought two remedies for President Trump's "unconstitutional actions aimed at suppressing speech: "(a) declaring that Defendant Trump's retaliatory acts violate the First Amendment, and (b) enjoining [President Trump] from directing any officer, employee, agency, or other agent or instrumentality of the United States government to take any action against any person or entity in retaliation for speech that the President or his Administration do not like." The Associated Press (AP) noted on October 16 that PEN America did not seek monetary redress beyond "costs, including attorneys' fees," and other "relief as the Court deems just and proper."

The full lawsuit is available online at: https://pen.org/wp-content/uploads/2018/10/PEN-America-v-Trump-Complaint.pdf. As the *Bulletin* went to press, no announcements had been made in the case.

In an October 16 statement, David A. Schulz, co-director of the Media Freedom and Information Access Clinic, a Yale Law School program serving as co-counsel with the nonprofit, nonpartisan Protect Democracy in the lawsuit, said "We wouldn't be filing this lawsuit if we didn't think it would be meritorious.. . . There is so much evidence of the president's motives." (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 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*.)

In an October 16 interview with the AP, PEN America CEO Suzanne Nossel said, "Media organizations are focused on covering the news objectively and providing the essential transparency and accountability that is the work of a free press." She added, "Every organization has to make their own determination of how best to play their role in this environment. That media organizations might determine to focus on journalism should not mean that the President's violations go unchallenged by those affected by them."

In an interview with *The Guardian* on the same day, PEN America president Jennifer Egan argued that although President Trump's anti-press did not violate the First Amendment, "[t]his is not to say that routine public denigration by the president . . . has no impact. On the contrary, Trump's repeated cries of 'fake news' have eroded faith in the press and smudged the distinction between truth and propaganda." She continued, "But the president has done more than vent against the press: he has threatened to use his presidential powers to stymie reporters and news organisations, and has followed through on those threats."

Scott Memmel
Silha *Bulletin* Editor

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First Amendment Coalition Sues Department of Justice Over Secret Collection of Journalist's Telephone and Email Records

On Sept. 19, 2018, the First Amendment Coalition (FAC) filed a lawsuit against the U.S. Department of Justice (DOJ) in an effort to force the disclosure of records related to the seizure of *New York Times* reporter Ali Watkins' confidential telephone and email records by President Donald Trump's administration. The complaint alleged that the DOJ failed to respond to two Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests by FAC, each of which could provide information of "overwhelming public interest" regarding whether the DOJ followed its own guidelines in obtaining Watkins' records.

FOIA

Previously, on June 7, 2018, *The New York Times* reported that federal prosecutors had secretly seized Watkins' phone and email records as part of an investigation into alleged classified leaks by former U.S. Senate aid James A. Wolfe, who was arrested on the same day on three counts of lying to federal authorities. (For more information on the investigation into Wolfe, see *Former U.S. Senate Staffer Pleads Guilty to Lying to the FBI, Avoids Charges Under Espionage Act* in "Investigations, Prosecutions, and Sentencing Continue In Government Leak Cases" on page 38 of this issue of the Silha *Bulletin* and *Federal Prosecutors Seize Phone and Email Records of* New York Times *Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents" in the Summer 2018 issue.)

The national security division of the U.S. attorney's office in Washington, D.C. notified Watkins of the seizure in a February 2018 letter, which the *Times* learned of on June 7, 2018. According to the *Times*, prosecutors had "years of customer records and subscriber information from telecommunications companies, including Google and Verizon, for two email accounts and a phone number of hers," though they did not obtain the content of the messages. The records spanned several years, including a period in which Watkins and Wolfe were dating.

The *Times* stated that although this was "the first known instance of the Justice Department going after a reporter's data under President Trump," the practice had occurred under President Barack Obama's administration, which pursued at least nine leak-related prosecutions, the most of any administration. For example, in May 2013, the DOJ notified the Associated Press (AP) that telephone records listing incoming and outgoing numbers of individual AP reporters, the general AP office numbers in New York, Washington, D.C., and Hartford, Conn., as well as the main number for AP reporters in the U.S. House of Representatives press gallery, had been obtained from the AP's telephone providers. Also in 2013, 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. (For more information on the secret subpoenas of the AP, see "Justice Department Secretly Subpoenas Associated Press Phone Records" in the Winter/Spring 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.)

Criticism of such practices conducted by the Obama administration prompted the DOJ to rewrite its guidelines "regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media." Under 28 CFR § 50.10, the DOJ, when "determining whether to seek information from, or records of, members of the news media" must "strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society." Investigators must clear three additional hurdles when seeking journalists' records, including that "the information sought is essential to the successful investigation or prosecution," that the "government should have made all reasonable attempts to obtain the information from alternative, non-media sources," and that "[t]he government should have pursued negotiations with the affected member of the news media."

However, exceptions allow the DOJ to secretly obtain records if prior notice "would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm." The full regulations are available online at: https://www.law.cornell.edu/cfr/text/28/50.10.

The *Times* reported that it was "not clear whether investigators exhausted all of their avenues of information before confiscating [Watkins'] information" and that she had not been notified until well after the records were seized. DOJ spokeswoman Sarah Isgur Flores said in a June 10 statement that the department had "fully complied" with its internal guidelines in deciding to seize Ms. Watkins's records." She added, "Leak investigations are absolutely intended to have a chilling effect on leaks.. . . That's a perfectly legitimate objective from the government's point of view. You don't want people to leak classified information."

Nevertheless, several media experts and advocates criticized the move, including Bruce Brown, executive director of the Reporters Committee for Freedom of the Press (RCFP), who wrote in a June 8 statement that "[s]eizing a journalist's records sends a terrible message to the public and should never be considered except as the last resort in a truly essential investigation." (For more information on the seizure of Watkins' records and criticism by media experts and advocates, 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*.)

According to a Sept. 19, 2018 FAC press release, the nonprofit organization submitted two FOIA requests in June 2018 seeking "records relating to whether and how DOJ provided any notice to Watkins or the *New York Times*, as well as whether the DOJ followed its own internal guidelines for using legal process to obtain confidential journalist information." The DOJ failed not only to release any documents, but also to provide an "initial determination" in response to the FOIA request, according to the press release.

On September 19, FAC filed a lawsuit against the DOJ in the U.S. District Court for the Northern District of California, challenging the department's "failure . . . to fulfill FAC's requests for records concerning the government's secret collection of the phone and email records of journalists, specifically the DOJ's acquisition of the records of *New York Times* reporter Ali Watkins."

The complaint alleged one count against the DOJ for "Failure to Provide Notice of Determination and Produce Records Under FOIA." The complaint explained that FOIA requires that agencies must present a "determination" within 20 business days of a request. The deadline can be extended by 10 days, but only in "unusual circumstances." The complaint asserted that because "the time in which the DOJ was required to give FAC the required determination has passed" and FAC "exhausted its administrative remedies in connection with its FOIA requests," the organization was entitled to relief, including an injunction compelling the production of the requested records.

> "It's absolutely critical that the DOJ provide this information to the public so all can understand when, how and why the DOJ is collecting records of journalist communications — and if they are overreaching in doing so."
>
> **— David Snyder, First Amendment Coalition executive director**

The complaint also provided several reasons why the disclosure of the documents sought by FAC was important and necessary. First, the complaint alleged that neither Watkins, nor her employers, including *The New York Times*, *Buzzfeed*, and *Politico*, appeared to have been made aware of the government's "use of legal process to collect these records until long after the collection had begun."

Second, the complaint claimed that "[b]ased on the information publicly reported to date, it does not appear that the DOJ followed the Guidelines in Ms. Watkins' case. And, if it did, it is not apparent why or if the DOJ believed exceptional circumstances existed such that it could forego notice to Ms. Watkins about the extensive collection of her phone and email records."

Finally, the complaint contended that the question of whether the DOJ followed its guidelines "is of overwhelming public interest" because the government's "use of legal process" to obtain confidential records of journalists "directly threatens the ability of reporters to carry out their mission, enshrined under the United States Constitution, to report on matters of public interest and to hold the government accountable."

FAC added that the "ability of journalists to communicate with sources and to report on matters of public concern is substantially jeopardized when the government can freely intrude upon the journalist-source relationship by collecting information about such communications." The complaint cited the DOJ's guidelines, which recognize that "freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news," and that the guidelines were put in place "to provide protection to members of the news media from certain law enforcement tools . . . that might unreasonably impair newsgathering activities."

The complaint sought the public disclosure of "agency records and communications that would reveal, among other things, whether and to what extent the DOJ considered and/or followed the Guidelines in the case of Ms. Watkins." One such document could be "any correspondence or memos addressing: whether the DOJ believed the Guidelines applied in Ms. Watkins' case" or whether an exception applied. FAC also sought declaratory relief that the DOJ was in violation of FOIA for failing to notify FAC of its determination as to whether it would comply with its FOIA requests. The full complaint is available online at: https://firstamendmentcoalition.org/wp-content/uploads/2018/09/FACvDOJComplaint-1.pdf.

In the September 19 press release, FAC Executive Director David Snyder said, "It's absolutely critical that the DOJ provide this information to the public so all can understand when, how and why the DOJ is collecting records of journalist communications — and if they are overreaching in doing so."

Scott Memmel
Silha *Bulletin* Editor

Brett Kavanaugh Sworn In as the 114th U.S. Supreme Court Justice

On July 9, 2018, President Donald Trump nominated U.S. Court of Appeals for the D.C. Circuit Judge Brett Kavanaugh to fill the vacant seat on the U.S. Supreme Court after Associate Justice Anthony Kennedy announced his retirement two weeks earlier. Following a contentious confirmation process, Kavanaugh was confirmed as the 114th Supreme Court justice by the U.S. Senate on October 6, and was ceremonially sworn-in during an event hosted by President Trump two days later. Several observers contended that Kavanaugh had an "expansive view" of the First Amendment and that he may be "protective" of First Amendment rights, including free speech and freedom of the press, though not in all circumstances. However, observers also raised concern about Kavanaugh's Fourth Amendment jurisprudence, arguing that he often supported government interests, such as national security, over individuals' Fourth Amendment rights.

SUPREME COURT NEWS

On June 27, 2018, Justice Kennedy sent a letter to President Trump announcing that he was retiring after 30 years on the Court. Justice Kennedy, who was nominated to the Court by President Ronald Reagan in 1987 and was sworn in on Feb. 18, 1988, authored or joined several important opinions in significant First and Fourth Amendment cases. Observers contended that Justice Kennedy left a strong legacy on First Amendment jurisprudence, but that he left more of a mixed legacy on Fourth Amendment and privacy matters. (For more information on Justice Kennedy's retirement and legacy, see "U.S. Supreme Court Justice Anthony Kennedy Retires, Leaves Strong Legacy on First Amendment Jurisprudence, Mixed Legacy on Fourth Amendment" in the Summer 2018 issue of the Silha *Bulletin*.)

On July 9, President Trump announced that he was replacing Justice Kennedy with Kavanaugh, a former clerk of Justice Kennedy who had served for 12 years on the D.C. Circuit. Kavanaugh graduated from Yale University in 1987 with a Bachelor of Arts *cum laude* in American history. Kavanaugh graduated from Yale Law School in 1990.

On September 4, the Senate Judiciary Committee, which is made up of 21 senators, including 11 Republicans and 10 Democrats, began Kavanaugh's confirmation hearings, with the Democratic senators calling for more time to review thousands of pages of documents related to Kavanaugh, including his time in President George W. Bush's administration as White House Staff Secretary and in the White House Counsel's office.

On September 12, *The Intercept* reported that Sen. Dianne Feinstein (D-Calif.), the ranking Democrat on the Judiciary Committee, had received a letter detailing an accusation against Kavanagh, but withheld the letter from her colleagues. The full story is available online at: https://theintercept.com/2018/09/12/brett-kavanaugh-confirmation-dianne-feinstein/.

Later that day, CNN reported that the Federal Bureau of Investigation (FBI) forwarded the letter to the White House Counsel's office in accordance with guidelines for conducting background checks. Four days later, *The Washington Post* ran a story in which Stanford University Professor Christine Blasey Ford accused Kavanaugh, along with his friend Mark Judge, of trapping her in a room and sexually assaulting her during a party in high school. The full story is available online at: https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html?noredirect=on&utm_term=.d00eb0f1ed9d. Additional accusations were raised against Kavanagh, including by Deborah Ramirez, one of Kavanaugh's former classmates at Yale, in a September 23 story in *The New Yorker*.

On September 27, both Ford and Kavanagh testified before the Judiciary Committee, for which the Republican senators hired a sex-crimes prosecutor to conduct the line of questioning for them. The full video of the hearing is available online at: https://www.youtube.com/watch?v=OZ7ovA37u-0.

After an additional investigation by the FBI into the allegations, on October 6, the full Senate voted 50-48 to confirm Kavanaugh. Chief Justice John Roberts administered the constitutional oath and Justice Kennedy administered the judicial oath, according to a Supreme Court spokesperson on the same day. On October 8, President Trump held a ceremonial swearing-in at the White House.

Following President Trump's nomination of Kavanaugh, observers highlighted several notable First Amendment cases in which he wrote a majority, concurring, or dissenting opinion, or joined the majority of the court while serving on the D.C. Circuit. One "classic free speech" case highlighted by attorney Ken White in a July 10, 2018 post on his blog "Popehat" was *Initiative & Referendum Institute v. U.S. Postal Service*, 794 F.3d 21, 24 (D.C. Cir. 2015). Kavanaugh wrote the unanimous ruling of the D.C. Circuit in which he held that a Postal Service regulation that "ban[ned] . . . collecting signatures on perimeter sidewalks" violated that First Amendment because it caused "an impermissible 'chill' on plaintiffs' First Amendment rights," despite the fact that the Postal Service, in 2002, had announced that it would not enforce the prohibition. White argued that the ruling demonstrated that Kavanaugh "has applied the First Amendment vigorously to protect speech." Kavanaugh's full ruling is available online at: https://caselaw.findlaw.com/us-dc-circuit/1708234.html.

In an Aug. 7, 2018 SCOTUSblog post, William & Mary Law School Professor Timothy Zick pointed to *Boardley v. U.S. Department of Interior*, 615 F.3d 508 (D.C. Cir. 2010), in which Kavanaugh joined the unanimous opinion written by Judge Janice Rogers Brown. The court held that a law making it "unlawful to engage in expressive activities within any of this [United States'] 391 national parks unless a park official first issues a permit" was unconstitutional on its face and was "antithetical to the core First Amendment principle that restrictions on free speech in a public forum may be valid only if narrowly tailored." The D.C. Circuit found that "[r]equiring individuals and small groups to obtain permits before engaging in expressive activities within designated 'free speech areas' (and other public forums within national parks) violated the First Amendment." The full ruling is available online at: https://caselaw.findlaw.com/us-dc-circuit/1534174.html.

However, White noted that Kavanaugh also applied traditional First Amendment exceptions in some cases. For example, in *Al Bahlul v. United States*, 767 F.3d 1, 75–76 (D.C. Cir. 2014), the D.C. Circuit addressed a challenge to the conviction of Ali Hamza Ahmad Suliman al Bahlul (Bahlul), who was accused of creating Al Qaeda recruitment videos aimed at inciting viewers to kill Americans. Kavanaugh wrote an opinion concurring in part and dissenting in part in which he argued that "even if the First Amendment did apply to Bahlul's speech in Afghanistan, the Supreme Court "has made clear that the First Amendment does not protect speech such as Bahlul's that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action,'" citing the "incitement" standard articulated by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Kavanaugh's full opinion is available online at: https://caselaw.findlaw.com/us-dc-circuit/1672966.html.

In *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011), the D.C. Circuit addressed the constitutionality of the Washington, D.C. Defacement Statute, D.C. Code § 22–3312.01, which makes it "unlawful for any person or persons willfully and wantonly to disfigure . . . [or] to write, mark, or print obscene or indecent figures representing obscene or objects upon . . . Any property, public or private, building, statue, monument, office, public passenger vehicle, mass transit equipment or facility, dwelling or structure of any kind." In this case, the Rev. Patrick Mahoney notified the Metropolitan Police Department (MPD) and the Department of the Interior that he planned to "carry out a sidewalk chalk demonstration in front of the White House" in order to "protest President [Barack] Obama's position on abortion, and to protest the anniversary of the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)." The MPD responded that it would likely be in violation of the Defacement Statute.

The D.C. Circuit held that the District of Columbia "may prohibit defacement of Pennsylvania Avenue in front of the White House" and that the restriction on Mahoney's chalking was a "content-neutral regulation." The court further held that the District of Columbia met the "intermediate scrutiny" standard because it had a "substantial" interest in controlling the esthetic appearance of the street in front of White House, the statute was sufficiently tailored to serve this interest, and Mahoney had alternative channels to communicate his messages.

Kavanaugh, in a concurring opinion, agreed with the majority's conclusion that the statute constituted "a reasonable time, place, and manner restriction for purposes of First Amendment doctrine." However, he wrote separately "because [he did] not want the fog of First Amendment doctrine to make this case seem harder than it is." Kavanaugh further wrote, "No one has a First Amendment right to deface government property.. . . When, as here, the Government applies a restriction on defacement in a content-neutral and viewpoint-neutral fashion, there can be no serious First Amendment objection." Kavanaugh's full opinion is available online at: https://www.courtlistener.com/opinion/219205/mahoney-v-doe/.

In a July 2018 report, the Reporters Committee for Freedom of the Press (RCFP) discussed several additional areas of First Amendment jurisprudence in which Kavanaugh has ruled. According to the RCFP report, Kavanaugh "has written favorably with respect to the 'actual malice' standard as articulated in *New York Times v. Sullivan*, which sets him apart from the late Justice [Antonin] Scalia, who famously disagreed with the unanimous decision in that 1964 civil rights era case." 376 U.S. 254 (1964). Actual malice is the standard created in *Sullivan* requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

For example, in *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106 (D.C. Cir. 2017), the D.C. Circuit grappled with a case involving Yorie Von Kahl, who was convicted in federal court for murdering two U.S. Marshals during a 1983 shootout, and was sentenced to life in prison. Kahl repeatedly spoke to the media and the public in an effort to publicize his desire that his conviction be overturned and sentence vacated. In June 2005, Kahl filed a mandamus petition in the Supreme Court, asking that his sentence be vacated. The Bureau of National Affairs, now known as Bloomberg BNA (BNA), which provides professionals with information regarding governmental affairs, among other areas, summarized the petition in one of its publications: *Criminal Law Reporter*. Kahl sued BNA for defamation, arguing that it "falsely reported that the sentencing judge . . . had said that Kahl lacked contrition and believed the murders were justified."

Kavanaugh wrote the unanimous opinion of the D.C. Circuit and held that Kahl was a "limited-purpose public figure" because there was "public controversy concerning the 1983 shootout" and that he had "thrust [himself] to the forefront" of the controversy by "[using] his access to the press to promote his cause." As a result, Kahl had to prove actual malice. Kavanaugh ruled that Kahl had not demonstrated that BNA acted in such a way, including because BNA "acted reasonably in reviewing its report," among other reasons.

RCFP noted that in his decisions, Kavanaugh recognized that "[c]ostly and time-consuming defamation litigation can threaten" the "essential freedoms" of speech and of the press. He wrote, "To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." Kavanaugh's full ruling is available online at: https://law.justia.com/cases/federal/appellate-courts/cadc/16-7033/16-7033-2017-05-09.html.

Kavanaugh's First Amendment jurisprudence also includes his views on net neutrality. In 2017, Kavanaugh dissented in the D.C. Circuit's denial of petitions for *en banc* review of *United States Telecom Ass'n v. Federal Communications Commission*, 855 F.3d 381 (D.C. Cir. 2017). In 2016, a three-judge panel of the D.C. Circuit had upheld the Federal Communication Commission's (FCC) 2015 "net neutrality" rules reclassifying broadband and applying prohibitions on ISP's that prevented them from blocking, throttling, or prioritizing content. The court also held that "[c]ommon carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question." (For more information on net neutrality and the *U.S. Telecom Ass'n* decision, see "FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition" in the Summer 2018 issue of the Silha *Bulletin*, "FCC Repeals Net Neutrality, Prompts Legal Action and Legislation" in the Winter/Spring 2018 issue, "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation"

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Kavanaugh, *continued from page 31*

in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.)

On May 1, 2017, the D.C. Circuit refused to rehear the case *en banc*, finding that such a review "would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order." In his dissent, Kavanaugh wrote that although the 2015 order "is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States[,] . . . [it] is unlawful and must be vacated, however, for two alternative and independent reasons."

First, Kavanaugh argued that Congress "did not clearly authorize the FCC to issue the net neutrality rule" because it "has never enacted net neutrality legislation or clearly authorized the FCC to impose common- carrier obligations on Internet service providers [(ISPs)]."

Second, he contended that the 2015 net neutrality rules violated the First Amendment. Kavanaugh cited *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as evidence that the First Amendment "bars the [g]overnment from restricting the editorial discretion of [ISPs], absent a showing that an [ISP] possesses market power in a relevant geographic market." He found that the FCC had "not even tried to make a market power showing" and that the 2015 rules "transform[ed] the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers." Kavanaugh's dissenting opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/06F8BFD079A89E13852581130053C3F8/$file/15-1063-1673357.pdf.

In a July 12, 2018 interview with CNBC, Christopher Sprigman, a law professor at New York University who authored an *amicus* brief submitted to the D.C. Circuit in favor of net neutrality, asserted that Kavanaugh's argument in his dissent that ISPs have a First Amendment right to determine what data they transmit implies that "the data itself is speech." Sprigman contended that the ISPs could argue that "selling user data to advertisers counts as 'speech' also protected by the First Amendment" and, if that were the case, the government "would have to show an important interest that they are pursuing narrowly . . . and that just makes it much more difficult for the government to regulate it." CNBC concluded that this would "spell trouble for state efforts to legislate data privacy protections if they were challenged in the Supreme Court."

On Nov. 5, 2018, Kavanaugh recused himself from the vote in which the Supreme Court declined to grant *certiorari* in *U.S. Telecom*. Observers noted that he probably did so because he had already ruled in the case. (For more information on the Court declining to hear the case, see "Repeal of Net Neutrality Continues to Face Legal Uncertainty" on page 34 of this issue of the Silha *Bulletin*.)

RCFP also discussed several opinions written by Kavanaugh regarding the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and government transparency. For example, in *National Security Archive v. Central Intelligence Agency*, 752 F.3d 460 (D.C. Cir. 2014), the D.C. Circuit determined whether the Central Intelligence Agency (CIA) could withhold one of the draft volumes of CIA staff historian Dr. Jack B. Pfeiffer's 1973 five-volume opus about the now-infamous "Bay of Pigs invasion" in 1961. Volumes I and III had previously been revised and released to the public, and the drafts of Volumes II and IV were also released. However, the draft of Volume V was not released, prompting the National Security Archive, a non-profit research institute, to submit a FOIA request for the final volume in 2005.

Kavanaugh wrote the majority opinion, in which he held that the CIA could withhold the draft under Exemption 5 to FOIA, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." More specifically, the CIA invoked the "deliberative process privilege," a form of executive privilege that covers deliberative, pre-decisional communications within the Executive Branch. Kavanaugh reasoned that the draft volume would "expose the agency's decision-making process." He added, "[T]o require release of drafts that never result in final agency action would discourage innovative and candid internal proposals by agency officials and thereby contravene the purposes of the privilege." Kavanaugh's full opinion is available online at: https://caselaw.findlaw.com/us-dc-circuit/1667197.html. A full list of opinions written by Kavanaugh regarding FOIA is available on the bottom of RCFP's report, which is available online at: https://www.rcfp.org/kavanaugh.

One final area of First Amendment law in which Kavanaugh has ruled is campaign finance. Perhaps most notably, in *Republican National Committee v. Federal Election Commission*, Kavanaugh upheld a campaign finance law that limited contributions to national, state, and local political parties against a First Amendment challenge. 816 F.3d 113 (D.C. Cir. 2016). RCFP explained that these limitations, which are often referred to as "soft money bans" had previous been upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003).

In his opinion, Kavanaugh "rejected the RNC's arguments that their intended uses of soft money fell outside the *McConnell* precedent." He wrote, "This particular argument is another way of asking us to overrule *McConnell*'s holding with respect to the ban on soft money contribution to national political parties. As a lower court, we of course have no authority to do so." Kavanaugh's full opinion is available online at: https://scholar.google.com/scholar_case?case=16404957824007203 70&q=Republican+National+Committee+v.+FEC&hl=en&as_sdt=4,140.

RCFP argued that now that Kavanaugh is on the Supreme Court, he will have "freer rein to depart from precedent" related to campaign finance law. RCFP's discussion of Kavanaugh's rulings related to campaign finance is available online at: https://www.rcfp.org/kavanaugh.

Taken as a whole, some experts have argued that Kavanaugh has a strong record on First Amendment and free speech jurisprudence. On Aug. 27, 2018, "The Vetting Room," a blog run by several attorneys from across the United States, argued that Kavanaugh has "generally taken an expansive view of First Amendment rights, showing a willingness to strike down regulations that impinge, even slightly, on First Amendment territory," including in free press cases, such as *Kahl v. Bureau of National Affairs, Inc.*

White asserted in his July 10 blog post that Kavanaugh's "many opinions on free speech issues . . . trend very protective of free speech, both in substance and in rhetoric. His opinions are consistent with the Supreme Court's strong protection

of free speech rights this century." White continued, "People who buy into the "conservatives are weaponizing the First Amendment" narrative will see him as a strong advocate of that movement, in that he has applied the First Amendment to campaign finance laws, telecommunications regulation, and other aspects of the regulatory state. But he's also demonstrated fidelity to free speech principles in classic speech scenarios."

Observers also discussed Kavanaugh's Fourth Amendment jurisprudence, highlighting two cases in particular. First, Kavanaugh dissented in the denial of rehearing *en banc* for *United States v. Jones*, 1:05-cr-00386-ESH-1 (D.C. Cir. 2010). The case arose from the arrest of Washington, D.C. resident Antoine Jones, who was the owner of D.C.'s "Levels" nightclub, and was suspected of drug trafficking. During an investigation by a joint FBI and Metropolitan Police Department (MPD) task force, law enforcement obtained a warrant to install the GPS device on his car from a federal judge in Washington, D.C., but by the time it was installed on his car in Maryland, the warrant had expired. The government tracked the car's movements for 28 days, creating more than 2,000 pages of data.

A federal court sentenced Jones to life imprisonment after he was convicted of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. The D.C. Circuit reversed his conviction, finding that the police violated Jones' Fourth Amendment rights when it used the tracker to gather extensive information about his whereabouts. The Supreme Court later ruled in the case, with five justices, though not all in Justice Antonin Scalia's majority opinion, concluding that "longer term GPS monitoring in government investigations of most offenses impinges on expectations of privacy." 565 U.S. 400, 412 (2012). (For more information on *United States v. Jones*, see "Warrantless GPS Tracking Violates Fourth Amendment; White House Defends Warrantless Surveillance," in the Spring 2012 issue of the Silha *Bulletin*.)

In his dissent to the denial of rehearing, Kavanaugh "viewed with skepticism the D.C. Circuit's 'aggregation approach,' where one's reasonable expectation of privacy in otherwise public movements increases along with the volume of data collected," according to RCFP. However, University of Southern California (USC) Professor of Law Orin Kerr pointed out in a July 20, 2018 SCOTUSblog post that Kavanaugh also argued that the installment of the device, rather than its use, may have violated the Fourth Amendment because it was "an unauthorized physical encroachment on the property of the suspect's car," necessitating the full D.C. Circuit to rehear the case. Kavanaugh's full opinion is available online at: http://volokh.com/wp/wp-content/uploads/2010/11/MaynardDenial.pdf.

According to Kerr, Justice Scalia largely adopted this approach in his majority opinion, which Kerr referred to as the pre-*Katz* trespass test, meaning an alternative to the "reasonable expectation of privacy" standard set in *Katz v. United States*, 389 U.S. 347 (1967).

The second case highlighted by observers regarding Kavanaugh's Fourth Amendment jurisprudence was *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015), which focused on the constitutionality of the National Security Agency's (NSA) interpretation of Section 215 of the Patriot Act to allow the bulk collection of data, including the phone numbers dialed by millions of Americans. U.S. District Court for the District of Columbia Judge Richard Leon ruled that the plaintiffs "[had] standing to challenge the constitutionality of the Government's bulk collection and querying of phone record metadata, that they have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim, and that they will suffer irreparable harm absent preliminary injunctive relief." He stayed any remedy, however, while the appeal was pending.

According to Kerr in his July 10 SCOTUSblog post, the D.C. Circuit sent the case back to the district court on procedural grounds and, because the Section 215 program was about to expire, Leon ruled that the program was unlawful and refused to grant a stay. The D.C. Circuit issued an administrative stay the following day, leading the plaintiffs to request an emergency petition for rehearing *en banc*, which the D.C. Circuit denied.

In a concurrence for denying rehearing, Kavanaugh ruled in favor of the NSA, finding that "the Government's metadata collection program is entirely consistent with the Fourth Amendment." He cited *Smith v. Maryland*, 442 U.S. 735 (1979), in which the Supreme Court held that government "collection of [telephone] metadata from a third party such as a telecommunications service provider is not considered a search under the Fourth Amendment." Kavanaugh further reasoned that "[e]ven if the bulk collection of telephony metadata constitutes a search, the Fourth Amendment does not bar all searches and seizures. It bars only *unreasonable* searches and seizures. And the Government's metadata collection program readily qualifies as reasonable under the Supreme Court's case law" (emphasis in original). Kavanaugh's full opinion is available online at: https://scholar.google.com/scholar_case?case=18099556907815522361&hl=en&as_sdt=6&as_vis=1&oi=scholarr#[1].

RCFP noted in its report that "[a]s far as we can tell, Judge Kavanaugh has not issued a significant opinion in a case involving the traditional privacy torts: invasion of privacy, false light, public disclosure of private facts, or rights to publicity. Such cases are comparatively rare in the D.C. Circuit given its limited geographic jurisdiction."

In a Sept. 3, 2018 opinion piece for *The Hill*, Michael Macleod Ball, the president of 627 Consulting, LLC, an advocacy and management advisor to non-profit organizations, argued that Kavanaugh's "lifetime seat on the Supreme Court raises troubling concerns about our right to be free of unwarranted government oversight in an age of expanding capacity to engage in surveillance without our knowledge," citing *Jones* and *Klayman*.

Ball also cited Kavanaugh's dissent in *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) in which the full D.C. Circuit held that "the police violated the Fourth Amendment rights of a suspect by unzipping his jacket to search him without a warrant after a stop and frisk produced no results." Kavanaugh argued that the search was "justified as a reasonable continuation of the stop and frisk." Similarly, in *National Federation of Federal Employees v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012), Kavanaugh dissented from the court's invalidation of a random drug testing program for U.S. Forest Service employees at Job Corps Civilian Conservation centers.

Ball added, "Kavanaugh's record of repeatedly deferring to executive power and narrowing Fourth Amendment rights is out of step with advocates of all ideological stripes who value the fundamental importance of individual privacy."

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Repeal of Net Neutrality Rules Continues to Face Legal Uncertainty

The repeal of the Federal Communication Commission's (FCC) net neutrality rules on Dec. 14, 2017 continues to be fraught with legal challenges. On Nov. 5, 2018, the U.S. Supreme Court denied *certiorari* to review an earlier challenge to the FCC's authority to implement net neutrality rules in *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F. 3d 674 (D.C. Cir. 2016). Although plaintiffs and legal experts were unsurprised with the denial because the FCC had already rolled back the rules, other observers raised legal questions regarding the repeal process.

NET NEUTRALITY

On Sept. 30, 2018, California Gov. Jerry Brown signed into law SB 822, the "California Internet Consumer Protection and Net Neutrality Act of 2018." The law enacts net neutrality rules similar to those in the 2015 Open Internet Order, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1), previously enforced by the FCC and later repealed in December 2017, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1). On the same day, the U.S. Department of Justice (DOJ) filed a lawsuit in the U.S. District Court for the Eastern District of California to block the California law from going into effect on Jan. 1, 2019, arguing California lacks sufficient authority to regulate ISPs. However, on October 26, California Attorney General Xavier Becerra and the DOJ agreed to postpone litigation pending a separate case before the U.S. Court of Appeals for the D.C. Circuit involving challenges to the FCC's repeal.

Finally, on Sept. 20, 2018, *The New York Times* filed a complaint in the U.S. District Court for the Southern District of New York requesting a judicial order to compel the FCC to release records regarding the public comment period associated with the 2017 repeal of net neutrality rules. *New York Times Co. v. FCC*, No. 1:18-cv-08607 (S.D.N.Y. 2018). The *Times* made its first Freedom of Information Act (FOIA), 5 U.S.C. § 552, request in June 2017, as well as several subsequent attempts to narrow its request, each of which were denied by the FCC.

Net neutrality is the principle that Internet Service Providers (ISPs) should treat all data on the internet the same, regardless of the source. In February 2015, the FCC adopted the 2015 Open Internet Order, Protecting and Promoting the Open Internet, which implemented rules that reclassified broadband internet access as a "telecommunications service" under Title II of the Communications Act. This action provided the FCC the authority to regulate ISPs. The Open Internet Order also included three "bright-line" rules prohibiting ISPs from (1) blocking lawful internet content, (2) slowing down the speed of content delivery for specific applications or services, a practice known as throttling, and (3) paid prioritization, which would allow ISPs to favor some internet traffic over others.

On June 14, 2016, the D.C. Circuit upheld the Open Internet Order in a 2-1 decision, ruling that the FCC had the authority to implement the Order and that ISPs should provide equal access to all users. *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F.3d 674 (D.C. Cir. 2016). However, on Dec. 14, 2017, the FCC voted 3-2 to repeal its net neutrality rules in a Declaratory Ruling, a Report and Order, and an Order tilted "Restoring Internet Freedom" (collectively "Order"). The Order first "[r]estor[ed] the classification of broadband Internet access service as an 'information service'" as it had been classified prior to the 2015 Open Internet Order. Second, the Order "[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission." Finally, the FCC eliminated the rules preventing blocking, throttling, and paid prioritization. On Feb. 22, 2018, the FCC published the new rules in the Federal Register, though the rules did not immediately take effect.

The repeal faced immediate backlash through legal and legislative efforts. On Feb. 22, 2018, twenty-two state attorneys general and the attorney general of Washington, D.C., in an effort to preserve the net neutrality rules passed in the 2015 Open Internet Order, formally re-filed their petition for review in the D.C. Circuit against the FCC. *New York v. FCC*, No. 18-1055 (D.C. Cir. 2018). Multiple technology and internet companies, including Mozilla Corporation and Vimeo, Inc., and public interest organizations, including Free Press and Public Knowledge, as well as INCOMPAS, a trade association whose members include streaming services, edge providers, and competitive carriers, such as Facebook, Google, and Netflix, filed similar lawsuits against the FCC. As the *Bulletin* went to press, the D.C. Circuit had not announced a ruling regarding the lawsuits, which were merged into one case on March 12, 2018. *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. 2018).

Additionally, several state legislatures and governors took actions to protect net neutrality. On March 6, 2018, Washington Gov. Jay Inslee signed House Bill 2282, making Washington the first state to pass a law protecting net neutrality. The law requires "[a]ny person providing broadband internet access service in Washington state [to] publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services." The law also prohibits blocking and throttling "lawful content, applications, services, or nonharmful devices," as well as "[engaging] in paid prioritization." On April 10, Oregon Gov. Kate Brown signed a similar law, HB 4155, which prohibits a public body from contracting "with a broadband Internet access service provider" that (a) Engages in paid prioritization [or] (b) Blocks lawful content, applications or services or nonharmful devices," among other actions.

(For more information on net neutrality, see "FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition" in the Summer 2018 issue of the Silha *Bulletin*, "FCC Repeals Net Neutrality, Prompts Legal Action and Legislation" in the Winter/Spring 2018 issue, "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation" in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates

Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.)

Supreme Court Denies *Certiorari* in Net Neutrality Appeal

On Nov. 5, 2018, the U.S. Supreme Court voted 4-3 to deny *certiorari* to review and vacate the U.S. Court of Appeals for the D.C. Circuit's decision in *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F. 3d 674 (D.C. Cir. 2016). Both Chief Justice John Roberts and Justice Brett Kavanaugh recused themselves from the vote. Supporters of net neutrality praised the decision, arguing that courts would now likely follow the D.C. Circuit's decision in *U.S. Telecom* upholding of the Federal Communication Commission's (FCC) previous 2015 Open Internet Order establishing net neutrality rules, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1).

In *U.S. Telecom*, the D.C. Circuit upheld the 2015 Open Internet Order, finding that the FCC's authority to regulate Internet Service Providers (ISPs) and establish net neutrality rules is well within the agency's purview. On May 1, 2017, the D.C. Circuit denied petitions for *en banc* review, finding that such a review "would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order." *United States Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

However, then-D.C. Circuit Judge Kavanaugh, who filled the vacant seat on the U.S. Supreme Court left by Justice Anthony Kennedy, wrote a dissenting opinion. He found that although the 2015 order "is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States[,] . . . [it] is unlawful and must be vacated, however, for two alternative and independent reasons." First, Kavanaugh asserted that Congress "did not clearly authorize the FCC to issue the net neutrality rule" because it "has never enacted net neutrality legislation or clearly authorized the FCC to impose common- carrier obligations on Internet service providers." Second, Kavanaugh argued that the 2015 order violated the First Amendment. He found that the First Amendment "bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market," which the FCC failed to do. (For more information on Justice Kavanaugh, see "Brett Kavanaugh Sworn in as the 114th U.S. Supreme Court Justice" on page 30 of this issue of the Silha *Bulletin*.)

In their petition for *certiorari*, trade groups representing AT&T Inc., Verizon Communications Inc., and other broadband providers argued that the FCC lacked authority to create the former net neutrality rules that reclassified ISPs as a "telecommunication service" under Title II of the Communications Act. Petitioners also argued for the D.C. Circuit decision to be vacated — a step that would have stripped the previous ruling of any force as a precedent in current or future litigation.

> "[T]he Court's denial eliminated one opportunity for opponents to chip away at the validity of the (former) [net neutrality] rules or the [FCC's] authority to create and enforce them."
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> **— Stan Adams, Democracy and Technology legal counsel**

Lawyers for the U.S. Department of Justice (DOJ) and the FCC filed *amicus* briefs urging the Supreme Court to vacate the *U.S. Telecom* ruling. The DOJ and FCC argued that the 2016 D.C. Circuit decision should not act as precedent for current or future litigation over the FCC's repeal of the net neutrality rules, including lawsuits by 23 state attorneys general, multiple technology Internet companies, and public interest organizations to preserve net neutrality rules. *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. 2018).

On Nov. 5, 2018, a divided Supreme Court denied *cert* and refused to vacate the D.C. Circuit decision, leaving the 2016 ruling in place. However, according to the Supreme Court's Order, Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch were inclined to "grant the petitions, vacate the judgment of the United States Court of Appeals for the District of Columbia Circuit, and remand to that court with instructions to dismiss the cases as moot." The full Order List is available online at: https://www.supremecourt.gov/orders/courtorders/110518zor_o759.pdf.

Chief Justice Roberts and Justice Kavanaugh recused themselves from participating in the Supreme Court's deliberations. Although neither cited a reason, Amy Howe of SCOTUSBlog reported that Justice Kavanaugh recused himself because he had participated in the cases during his time on the D.C. Circuit. Additionally, *Bloomberg News* reported that Chief Justice Roberts recused himself because, according to financial disclosure reports, he owned Time Warner stock at the end of 2017. Time Warner was acquired by AT&T in June 2018.

Several plaintiffs in the case said the denial of *cert* was expected, given that the FCC repealed the Open Internet Order in 2017. "It is not surprising that the Supreme Court declined to hear this case dealing with the Wheeler FCC's 2015 Order. Once the current FCC repealed the 2015 Order, almost all parties . . . agreed that the case was moot. Today's decision is not an indication of the Court's views on the merits but simply reflects the fact that there was nothing left for the Court to rule on," the Internet and Television Association stated in a November 5 press release.

USTelecom President and CEO Jonathan Spalter similarly wrote in a separate statement, "This decision is not surprising because the D.C. Circuit's original decision was superseded by the FCC's Restoring Internet Freedom Order that correctly restored broadband as an information service. RIF remains the law of the land and is essential to an open Internet that protects consumers and advances innovation."

Advocates of net neutrality took solace in the Court's decision not to vacate. In a November 8 blog post, legal counsel for the Center of Democracy and Technology Stan Adams explained why the decision was a good outcome for advocates. "First, the Court's denial eliminated one opportunity for opponents to chip away at the validity of the (former) rules or the Commission's authority to create and enforce them," Adams wrote. "Second, the Court's decision not to vacate

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the *US Telecom* decision means that opinion remains the most on-point legal precedent in the *other* net neutrality case, *Mozilla v. FCC*" (emphasis in original).

Jessica Rosenworcel, a Democratic commissioner at the FCC, tweeted, "It wasn't enough for this FCC to roll back #NetNeutrality.. . . It actually petitioned the Supreme Court to erase history and wipe out an earlier court decision upholding open Internet policies. But today the Supreme Court refused to do so."

California Passes Comprehensive State Net Neutrality Law, Faces Litigation from Department of Justice, Internet Service Providers

On Sept. 30, 2018, California Gov. Jerry Brown signed into law SB 822, the "California Internet Consumer Protection and Net Neutrality Act of 2018." The law, previously approved by the state Assembly and Senate, enacts net neutrality rules similar to those in the 2015 Open Internet Order, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1), previously enforced by the FCC and later repealed in 2017, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1).

Specifically, the California law prohibits internet service providers (ISPs) from "[b]locking lawful content, applications, services, or nonharmful devices, subject to reasonable network management." The law also prohibits the "[i]mpairing or degrading [of] Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device," meaning ISPs cannot impair or degrade "(1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices." Additionally, the law prohibits "paid prioritization," which the law defines as the "management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic." The full law is available online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822.

Several observers praised the passage of the law. "I'm very grateful to the governor for really taking a hard look at this and understanding that if the federal government refuses to protect net neutrality, that California has a responsibility to step in," California Sen. Scott Wiener (D-San Francisco), S.B. 822's principal author, told *Gizmodo* on September 30.

Barbara van Schewick, director of Stanford Law School's Center for Internet and Society, told *Gizmodo*, "SB 822 sets a standard that other states can and should follow.. . . SB822 includes the important protections and clarifications in the full Order which explained the rules and closed known loopholes."

In a statement, Evan Greer, deputy director of Fight for the Future, a nonprofit advocacy group, stated, "This victory in California is a testament to the power of the free and open Internet to defend itself.. . . And it's a beacon of hope for Internet users everywhere who are fighting for the basic right to express themselves and access information without cable and phone companies controlling what they can see and do online."

However, on the same day the law was passed, the U.S. Department of Justice (DOJ) filed a lawsuit in the U.S. District Court for the Eastern District of California to block the California law from going into effect on January 1, 2019, arguing California lacked sufficient authority to regulate ISPs. The complaint contended that SB 822 is "preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution," citing California's own admission that it codified portions of the rescinded 2015 order. The DOJ therefore sought "a declaration invalidating and preliminarily and permanently enjoining" the California law. The full complaint is available online at: https://www.justice.gov/opa/press-release/file/1097306/download.

In a September 30 press release, then-Attorney General Jeff Sessions provided additional reasoning for the lawsuit, "Under the Constitution, states do not regulate interstate commerce — the federal government does," he said. "Once again the California legislature has enacted an extreme and illegal state law attempting to frustrate federal policy. The Justice Department should not have to spend valuable time and resources to file this suit today, but we have a duty to defend the prerogatives of the federal government and protect our Constitutional order. We will do so with vigor. We are confident that we will prevail in this case — because the facts are on our side."

FCC Chairman Ajit Pai showed support for the DOJ's lawsuit. "The Internet is free and open today, and it will continue to be under the light-touch protections of the FCC's Restoring Internet Freedom Order," Pai said in a Sept. 30 statement. "I look forward to working with my colleagues and the Department of Justice to ensure the Internet remains 'unfettered by Federal or State regulation,' as federal law requires, and the domain of engineers, entrepreneurs, and technologists, not lawyers and bureaucrats."

In a separate statement, Sen. Wiener said, "While the Trump administration does everything in its power to undermine our democracy, we in California will continue to do what's right for our residents."

On Oct. 3, 2018, several media outlets reported that four lobby groups, including USTelecom, The Wireless Association (CTIA), The Internet & Television Association (NCTA), and the American Cable Association (ACA), representing the broadband industry also filed a lawsuit in the Eastern District of California challenging California's new law. The complaint argued that it "presents a classic example of unconstitutional state regulation" because the statute "was purposefully intended to countermand and undermine federal law by imposing . . . the very same regulations that the [FCC] expressly repealed" and also violates the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. The complaint further reasoned that the law "regulates far outside the borders of the State of California and unduly burdens interstate commerce in violation of the dormant Commerce Clause of the United States Constitution. The full complaint is available online at: https://www.ustelecom.org/sites/default/files/documents/2018_10-03%20Complaint.pdf.

On October 26, California Attorney General Xavier Becerra agreed to a deal with the DOJ postponing litigation over the California Internet Consumer Protection and Net Neutrality Act pending a separate case before the U.S. Court of Appeals for the D.C. Circuit involving challenges to the FCC's repeal. *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. 2018). As the *Bulletin* went to press, the D.C. Circuit had not ruled in the case.

As part of the deal to postpone litigation, California officials agreed not to enforce the new net neutrality rules

that were to take effect on Jan. 1, 2019. Chairman Pai praised the deal in an October 26 statement. "I am pleased that California has agreed not to enforce its onerous Internet regulations," Pai said. "This substantial concession reflects the strength of the case made by the United States earlier this month."

However, net neutrality advocates said they were confident that the court battles would ultimately conclude in their favor. "Net neutrality ensures open access to the Internet and guarantees that each of us can decide for ourselves where to go on the Internet, as opposed to Internet service providers making that decision for us," Sen. Wiener told *The Washington Post.* "I look forward to successful litigation on this issue and to the restoration of strong net neutrality protections in our state."

New York Times sues FCC for Records Regarding Net Neutrality Repeal

On Sept. 20, 2018, *The New York Times* filed a complaint in the U.S. District Court for the Southern District of New York requesting a judicial order to compel the Federal Communication Commission (FCC) to release records regarding the public comment period associated with the 2017 repeal of net neutrality rules. *New York Times Co. v. FCC*, No. 1:18-cv-08607 (S.D.N.Y. 2018). The *Times* alleged that the FOIA request was aimed to determine the extent to which Russian hackers had influenced the public comment period.

The FCC's public comment system was flooded with over 22 million comments in May 2017 regarding the agency's plans to roll back net neutrality rules, eventually leading the public comment system to crash on May 7 and 8. FCC Chairman Ajit Pai initially blamed the incident on several distributed denial-of-service (DDoS) cyberattacks. However, according to an internal report by FCC Inspector General David Hunt, which was released on Aug. 6, 2018, the crash was due to "apparent shortcomings in the system." The report concluded the reason for the crash stemmed from poor site design, lack of readiness to handle massive traffic, and a surge in visits that took the site down.

Additionally, a Nov. 29, 2017 study by the Pew Research Foundation determined that 57% of the comments were submitted using either duplicate or temporary email accounts, and that 94% of the comments were submitted multiple times, suggesting that many of the comments received by the FCC were submitted by "bots." The study also found that some of the automated messages originated from Russia.

In an August 14 letter to Pai, several members of the U.S. House of Representatives Committee on Energy and Commerce expressed concern that the FCC "allowed the public myth created by the FCC to persist and your misrepresentations to remain uncorrected for over a year," and asked the FCC to respond to a written set of questions about the incident." The full letter is available online at: https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20ltr%208.14.18.pdf.

Meanwhile, on Nov. 21, 2017, then-New York Attorney General Eric Schneiderman announced an ongoing investigation into millions of fraudulent comments submitted during the public comment period. According to the statement, the New York Attorney General's office found that "tens of thousands of New Yorkers" had their identities attached to comments the individuals did not, in fact, submit. On Oct. 16, 2018, current New York Attorney General Barbara D. Underwood expanded the investigation. According to *The New York Times*, on Oct. 16, 2018, Underwood subpoenaed more than a dozen telecommunications trade groups, lobbying contractors, and Washington advocacy organizations, seeking to determine whether the groups submitted millions of fraudulent public comments.

In June 2017, the *Times* made its first Freedom of Information Act (FOIA), 5 U.S.C. § 552, request for the FCC's server logs to investigate possible Russian involvement with the public comment process. According to court records, on July 21, 2017, the FCC denied the request, asserting that releasing such information would compromise its IT systems and security. The FCC also cited Exemption 6 of FOIA, which restricts the disclosure of "personably identifiable information." The *Times* later narrowed the scope of its requests, but still sought IP addresses, time stamps, and the FCC's internal web server logs linked to public comments submitted to the agency.

However, the requests were still opposed by the FCC. "We are disappointed that *The New York Times* has filed suit to collect the Commission's internal Web server logs, logs whose disclosure would put at jeopardy the Commission's IT security practices for its Electronic Comment Filing System," an FCC spokesperson told *Ars Technica* on Sept. 21, 2018.

On September 20, several media outlets reported that the *Times* had formally filed a lawsuit and accused the FCC of withholding evidence of potential Russian meddling in the public comments. In its complaint, the *Times* explained that the "request at issue in this litigation involves records that will shed light on the extent to which Russian nationals and agents of the Russian government have interfered with the agency notice-and-comment process about a topic of extensive public interest: the government's decision to abandon 'net neutrality.'" The complaint alleged that "[d]espite the clear public importance of the requested records," and despite the *Times*' multiple attempts to narrow their requests, "the FCC has thrown up a series of roadblocks, preventing The Times from obtaining the documents."

The lawsuit asked the court to "[d]eclare that the documents sought by [the] FOIA request . . . are public under 5 U.S.C. § 552 and must be disclosed" and require that the FCC provide them to the *Times* within 20 days of the court order. The complaint was signed by David E. McCraw, deputy general counsel of *The New York Times*. (McCraw was the 32nd Silha Lecturer. For more information on his lecture titled "Making Media Law Great Again: The First Amendment in the Time of Trump," see "32nd Annual Silha Lecture Addresses Freedom of the Press During Trump Presidency" in the Fall 2017 issue of the Silha *Bulletin*.)

As the *Bulletin* went to press, the Southern District of New York had not ruled in the case.

Sarah Wiley
Silha Research Assistant

Investigations, Prosecutions, and Sentencing Continue In Government Leak Cases

In fall 2018, investigations and prosecutions related to leaks of secret government information and documents continued in different stages around the United States. On October 18, Terry James Albury, a former Minneapolis Federal Bureau of Investigation (FBI) agent charged with two counts of violating the Espionage Act, 18 U.S.C. § 793 *et seq*., was sentenced to four years in prison by a federal judge in Minnesota. The sentencing marked the conclusion of the second prosecution by President Donald Trump's administration of an individual who leaked classified government documents to the press. On October 17, another such case arose when senior U.S. Treasury Department employee Natalie Mayflower Sours Edwards was charged by federal prosecutors with two counts of violating federal law prohibiting the disclosure of highly confidential documents known as "suspicious activity reports" (SARs). 31 U.S.C. § 5322; 18 U.S.C. §§ 371-372. Edwards allegedly leaked the information to *BuzzFeed News*, which published at least 12 articles based on the documents.

LEAK INVESTIGATIONS

On October 15, James A. Wolfe, the former U.S. Senate Select Committee on Intelligence (SSCI) director of security, agreed to plead guilty to one count of making a false statement to the FBI. As part of the plea agreement, prosecutors dropped two additional charges for lying to the FBI, as well as requesting a lesser prison sentence.

Meanwhile, on August 1, the city of Minneapolis announced that it had hired an outside firm to investigate the leak of a private draft report to the Minneapolis *Star Tribune*, prompting criticism from media and transparency advocates. The report was the subject of a June 15, 2018 *Star Tribune* story regarding police urging paramedics to sedate people with ketamine, a strong tranquilizer. On November 8, the firm reported in a summary of its findings that it had not identified the source of the leak.

Former Minneapolis FBI Agent Sentenced to Four Years in Prison for Violating the Espionage Act

On Oct. 18, 2018, multiple media outlets reported that Terry James Albury, a former Minneapolis Federal Bureau of Investigation (FBI) agent who pleaded guilty to two counts of violating the Espionage Act, 18 U.S.C. § 793 *et seq*., was sentenced to four years in prison by U.S. District Court for the District of Minnesota Judge Wilhelmina M. Wright. The sentencing marked the conclusion of the Trump administration's second prosecution of an alleged leaker of government documents under the Espionage Act.

In March 2018, Albury, who began working for the FBI in 2000, was charged with one count of "knowingly and willfully" disclosing information related to national security and one additional count of retaining national defense information. In an August 2017 affidavit in support of an application for a search warrant, FBI Special Agent Matthew Pietropola identified "approximately 27 FBI and U.S. Government documents published online" by *The Intercept*, 16 of which were marked "classified." The FBI concluded that the documents had been leaked by "someone with direct access to them," which included Albury, who had electronically accessed over two-thirds of the documents through FBI information systems. On April 17, 2018, Albury pleaded guilty to the two counts under the Espionage Act. (For more information on the charges against Albury and his background at the FBI, see *DOJ Charges Former Minneapolis FBI Agent under Espionage Act; Second Such Action by the Trump Administration* in "Federal Government Targets a Leaker and Backpage.com" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

On Oct. 4, 2018, seventeen constitutional, First Amendment, and media law professors, including Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, filed an *amici curiae* brief in support of Albury and "the continued operation of a free, fair, and robust press in the United States."

The brief stated that the sentencing of Albury "require[d the District Court of Minnesota] to determine what criminal punishment should appropriately be imposed on a government employee who disclosed to a journalist information of significant public interest to his fellow citizens." The professors contended that the court "can and should consider the important First Amendment interests at stake," as well as "craft a punishment that properly weighs the constitutional protection of free speech and the public interest in the newsworthy disclosure at issue in this case against any actual harm to national security caused by Mr. Albury's act of conscience."

The brief cited several factors that underscored the important interests necessary for the court to make this determination. First, the professors argued that "the status of information as 'classified' does not, standing alone, establish the existence of harm from its publication or the gravity of the offense in its unauthorized disclosure." Instead, classified information may be "essential to reporting about law enforcement and other everyday matters the public legitimately needs to know," meaning journalists have often been required to rely on leaks in order to gain access to this information, especially given "overclassification" of materials as "classified" by the federal government.

Second, the brief suggested that the court consider "the nature and intent" of the Espionage Act, which was "never used to prosecute a leak to the media until more than 50 years later." According to the brief, the Act "has been transformed over the last decade" into an "Official Secrets Act," namely by President Barack Obama's administration, which prosecuted eight people in eight years for allegedly leaking classified information to journalists or for retaining such information. (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.)

Third, the brief stated that the court should "consider the fundamental First Amendment interests that are at stake in penalizing a leak of newsworthy information." The professors argued that new communication technologies "leave digital breadcrumbs that investigators can easily spot and follow to their source without ever consulting the reporter who receives the leak," which therefore makes "the First Amendment protection for confidential sources largely irrelevant."

Finally, the brief argued that the court should consider the "public value" of Albury's leak in determining the proper penalty. The brief cited *New York Times v. Sullivan* in which the U.S. Supreme Court found that the central purpose of the First Amendment is to protect the "the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. 254, 270 (1964). The brief explained that Albury was a government employee who "sought to inform citizens about secret and troubling law enforcement practices that many agree are unlawful or unwise." The resulting leak led to an "important public debate about specific FBI practices as well as the broader question of whether the FBI should be able to keep the rules governing its domestic investigations secret and therefore largely immune from democratic scrutiny." The full *amici* brief is available online at: https://fas.org/sgp/jud/albury-amicus.pdf.

On October 18, prior to Judge Wright announcing the sentence, Albury apologized to his former FBI colleagues, according to *The New York Times* on the same day. He also said that he regretted voicing his concerns through the news media and should have instead gone through official channels. He added, "I truly wanted to make a difference and never intended to put anyone in danger." Albury had previously argued that he was troubled by how racism within the FBI affected its interactions with minority communities, as reported by the Associated Press (AP) on April 17, 2018.

Wright then announced Albury's sentence, which included four years in prison, as well as three years of supervised release. She said, "You perceived your actions to be honorable.. . . But it is a misguided understanding of honor. It put our country at risk." Wright acknowledged Albury's concerns about racism, but called his actions "a fool's errand."

According to Reuters on October 18, Albury's attorneys had sought a much shorter sentence or just probation, citing that Albury has two children, among other arguments. Conversely, prosecutors sought a 52-month prison term.

In a statement on the same day, then-Attorney General Jeff Sessions, who previously vowed in 2017 to crack down on unauthorized disclosures of classified government information, said, "Today's sentence should be a warning to every would-be leaker in the federal government that if they disclose classified information, they will pay a high price." He added that the U.S. Department of Justice (DOJ) would continue "conducting perhaps the most aggressive campaign against leaks" in its history. (For more information on Sessions' comments in 2017, 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* and "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue.)

> "When you punish someone like [Albury], what that's going to do is deter people not only from leaking classified information, but from giving any kind of information to the press if there is any kind of doubt about whether it would damage national security."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

In an October 18 interview with KSTP-TV, the Twin Cities' ABC affiliate, Kirtley explained the danger of such prosecutions. "When you punish someone like this, what that's going to do is deter people not only from leaking classified information, but from giving any kind of information to the press if there is any kind of doubt about whether it would damage national security," Kirtley said. "It's because it creates frankly a fear, a chilling effect, as we would say." She added, "Any kind of espionage prosecution has an impact on transparency."

The sentencing of Albury marked the end of the Trump administration's second prosecution of an individual who leaked government documents to the news media. On Aug. 23, 2018, former National Security Agency (NSA) contractor Reality Winner was sentenced to 63 months in prison and three years of probation, as well as 100 hours of community service upon her release. Winner had been charged with one count of "willful retention and transmission of national defense information" under the Espionage Act after she was arrested on accusations of "removing classified material from a government facility and mailing it to a news outlet," which turned out to be *The Intercept*. The document was a classified report detailing two cyberattacks by Russia's Main Intelligence Agency (GRU) on a U.S. voting software supplier during the 2016 presidential election. (For more information on the Winner case, see *Former NSA Contractor Pleads Guilty to Violating the Espionage Act* 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* and *Department of Justice Arrest of NSA Leaker Marks First Such Prosecution under Trump Administration* in "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue.)

Senior Treasury Department Employee Charged with Leaking Confidential Documents to *BuzzFeed News*

On Oct. 17, 2018, the U.S. Attorney's Office for the Southern District of New York announced in a press release that the U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation

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(FBI) had filed a criminal complaint against Natalie Mayflower Sours Edwards, a senior advisor at the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN). The charges marked the latest effort by the Trump administration to crack down on leaks of secret government information.

The purpose of FinCEN is to "safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities." According to the October 17 press release, "suspicious activity reports" (SARs) are "filed confidentially by banks and other financial institutions to alert law enforcement to potentially illegal transactions" and are "not public documents."

The complaint, which was filed in the U.S. District Court for the Southern District of New York on October 17, alleged that on Aug. 2, 2018, Edwards had exchanged approximately 541 messages with a reporter via an encrypted application, as well as several files containing SARs. The reporter and news outlet were not named in the complaint, but were later identified by several news outlets, including *The New York Times*, as Jason Leopold of *BuzzFeed News*.

The substance of the SARs included information pertaining to President Donald Trump's former campaign chairman Paul Manafort; Trump campaign official Richard Gates; the Russian Embassy; accused Russian agent Maria Butina; and suspected Russian money launderer Prevezon Alexander, among other individuals and topics. The information was published in approximately 12 articles by *BuzzFeed News* between October 2017 and March 2018. The complaint provided details of each article, including one in October 2017 claiming that *BuzzFeed News* "'learned specific details about 13 [] wire transfers' related to Paul Manafort." The latest article, titled "Here's How A Major Western Bank Enabled A Suspected Russian Money Launderer" which was published on Oct. 15, 2018, is available online at: https://www.buzzfeednews.com/article/azeenghorayshi/prevezon-mueller-investigation-td-bank.

The complaint argued that there was probable cause to believe that Edwards had disclosed the SARs without authorization, including because she "had access to all of the SARs implicated in the [disclosures]" through "certain electronic folders" and that she had begun communicating with Leopold in July 2017, with ensuing conversations falling near the dates the 12 articles were published.

The complaint further alleged that on October 16, in an interview with federal law enforcement in Virginia, Edwards "initially concealed her relationship with [the reporter] and denied having any contacts with the news media." However, during questioning the following day, Edwards "confessed that she had provided SARs to a *BuzzFeed News* reporter" and had met with Leopold at least two times, though she still "falsely denied knowing that [the reporter] intended to or did publish that information," according to the complaint, which cited her internet usage as evidence that she was actually aware that the information had been published.

Additionally, the complaint noted that at the time she was questioned, Edwards was also in possession of a flash drive that "appeared to be the same drive on which she saved the SARs related to the [disclosures], among other files."

The Washington Post noted on October 17 that the complaint also indicated that the FBI had investigated one of Edwards' bosses, an associate director of FinCEN, who was not named in the document. However, people familiar with the case identified the person as Kip Brailey, according to the *Post*.

Count One of the complaint alleged "unauthorized disclosures of [SARs]" in violation of 31 U.S.C. § 5322 and 18 U.S.C. §§ 371-372. Count Two alleged "Conspiracy to Make Unauthorized Disclosures of [SARs]." Both counts carry a maximum sentence of five years in prison. The full complaint is available online at: https://www.justice.gov/usao-sdny/press-release/file/1101511/download.

On October 17, CNBC and *The Washington Post* reported that Edwards, a Quinton, Va. resident, was released on a $100,000 personal recognizance bond after her presentment in the U.S. District Court for the Eastern District of Virginia. The DOJ and FBI complaint was filed in New York because *BuzzFeed News* is based in New York City. As the *Bulletin* went to press, Edwards had not announced how she would plead in the case.

In the October 17 press release, U.S. Attorney Geoffrey S. Berman was quoted as saying, "We hope today's charges remind those in positions of trust within government agencies that the unlawful sharing of sensitive documents will not be tolerated and will be met with swift justice by this Office."

FBI Assistant Director-in-Charge William F. Sweeney Jr. said, "In her position, Edwards was entrusted with sensitive government information. As we allege here today, Edwards violated that trust when she made several unauthorized disclosures to the media. Today's action demonstrates that those who fail to protect the integrity of government information will be rightfully held accountable for their behavior." The full press release is available online at: https://www.justice.gov/usao-sdny/pr/senior-fincen-employee-arrested-and-charged-unlawfully-disclosing-sars.

Former U.S. Senate Staffer Pleads Guilty to Lying to the FBI, Avoids Charges Under Espionage Act

On Oct. 15, 2018, *The New York Times* reported that former U.S. Senate Select Committee on Intelligence (SSCI) director of security James A. Wolfe agreed to plead guilty to one count of making a false statement to the Federal Bureau of Investigation (FBI). In return, federal prosecutors agreed to drop two additional charges for making false statements, as well as request a lesser prison sentence. Wolfe's lawyers pointed out that their client had not been charged for leaking classified government secrets under the Espionage Act, 18 U.S.C. § 793 *et seq*., though he was questioned as part of a leak investigation.

In June 2018, Wolfe was arrested on three counts of lying to federal authorities as part of an FBI investigation into "multiple unauthorized disclosures of information to one or more members of the news media." The investigation began after multiple news outlets reported Carter Page, President Trump's former campaign aide, had had contacts with Russian intelligence operatives, information that was previously only available in classified documents provided by law enforcement officials to the SSCI.

In December 2017, FBI agents conducted a "voluntary, noncustodial interview" with Wolfe regarding his communication with four reporters, including *New York Times* reporter Ali Watkins, with whom he had been

in a relationship. Wolfe initially denied knowing the Watkins' sources until the FBI agents showed him a picture of himself and Watkins together. Wolfe then admitted that he had lied to the agents and that he had been in a relationship with her since 2014, though he maintained that he had never disclosed classified documents or information.

According to an indictment unsealed on June 7, 2018, Watkins, who worked for *BuzzFeed* at the time, had published information in April 2017 related to Page after communicating with Wolfe, including through "82 text messages" and a March 17, 2017 "28-minute phone call." Watkin's article is available online at: https://www.buzzfeed.com/alimwatkins/a-former-trump-adviser-met-with-a-russian-spy?utm_term=.ba1vyP6Vn#.widBzGmPq.

The New York Times reported on June 7 that federal prosecutors learned this information after the U.S. Department of Justice (DOJ) seized Watkins' phone and email records during the investigation, prompting criticism from media experts and advocates. (For more information on the case against Wolfe and the seizure of Watkins' records, see "First Amendment Coalition Sues Department of Justice Over Secret Collection of Journalist's Telephone and Email Records" on page 28 of this issue of the Silha *Bulletin* and *Federal Prosecutors Seize Phone and Email Records of* New York Times *Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents" in the Summer 2018 issue.)

On Oct. 15, 2018, Wolfe agreed to plead guilty to one count of making a false statement to the FBI. Prosecutors agreed to drop the remaining two counts as part of the plea agreement, as well as to recommend a "low offense level" under which federal sentencing guidelines would call for zero to six months in prison, according to *The New York Times* on the same day.

A sentencing hearing before U.S. District Court for the District of Columbia Judge Ketanji Brown Jackson was set for Dec. 20, 2018. As the *Bulletin* went to press, the hearing had not been held.

In a joint statement, Wolfe's lawyers, Preston Burton, Benjamin B. Klubes, and Lauren R. Randell, reiterated that their client had not been charged under the Espionage Act for leaking classified government information. "We have seen numerous distortions on social and other media of the facts of this matter," they said. "So we emphasize again today that Jim was never charged with having compromised classified information, nor is such a charge part of today's plea. Jim has accepted responsibility for his actions and has chosen to resolve this matter now so that he and his family can move forward with their lives."

> "Leak investigations like this are usually prompted by embarrassment over the underlying matter that was leaked.. . . [The investigation] chills whistleblowers from making disclosures that are matters of public interest."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Minneapolis Launches Investigation into Leak of Draft Report to the *Star Tribune*; Investigation Fails to Uncover Source of Leak

On Aug. 1, 2018, the Minneapolis *Star Tribune* reported that the city of Minneapolis had hired an outside firm to investigate the leak of a private draft report to the newspaper. The report was the subject of a June 15, 2018 *Star Tribune* story regarding instances of police urging paramedics to sedate people with a strong tranquilizer. Media and transparency advocates criticized the investigation, arguing that the draft report was a "matter of public concern." City officials defended the investigation, with some arguing that it was required under Minnesota law. On November 8, the *Star Tribune* reported that the investigation had not found the "exact source of [the] breach."

The *Star Tribune*'s June 15 story, written by reporter Andy Mannix, detailed how Minneapolis police officers had "repeatedly requested over the past three years that Hennepin County medical responders sedate people using the powerful tranquilizer ketamine, at times over the protests of those being drugged, and in some cases when no apparent crime was committed." The story further alleged that "[o]n multiple occasions, in the presence of police, Hennepin Healthcare EMS workers injected suspects of crimes and others who already appeared to be restrained . . . and the ketamine caused heart or breathing failure, requiring them to be medically revived."

Mannix cited a draft "city report," which was the result of an investigation conducted by the Office of Police Conduct Review, a division of the Minneapolis' Department of Civil Rights. Mannix stated that the *Star Tribune* "ha[d] obtained a copy [of the report]," which had been "circulated narrowly within City Hall but not disseminated to the public." The final version of the 115-page report was released on July 26, according to KSTP-TV, the ABC affiliate in St. Paul, on the same day.

On August 1, the *Star Tribune* reported that Minneapolis had hired St. Paul-based firm NeuVest to determine who leaked the report to the newspaper. Reporter Mukhtar M. Ibrahim wrote that the firm would "interview city employees to determine the extent of the breach, which will touch on all the staff members who had access to the draft report." KSTP reported that the contract between Minneapolis and NeuVest showed that the firm agreed to "gather information to allow the city of Minneapolis to determine whether or not a complaint that was made under the City's Ethics Policy is supported by the facts," as well as conduct other workplace investigations as agreed upon by the city, and also to provide written findings.

According to KSTP, Minneapolis agreed to pay NeuVest $275 an hour to conduct the "neutral workplace investigation," with a maximum compensation of $100,000. City Clerk Casey Carl told the *Star Tribune* that the leak investigation was the largest the city had launched since he was hired in 2010.

According to the *Star Tribune*, Minneapolis Mayor Jacob Frey launched a separate review into "the interaction between Minneapolis cops and medical personnel," selecting acting U.S. Attorney General Sally Yates to investigate whether Minneapolis police officers improperly influenced paramedics' decisions to use ketamine. Frey stated

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Leaks, *continued from page 41*

that the city's review was separate from the leak investigation, to which he claimed he was not involved.

Several observers raised concerns about the investigation. Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley argued in an August 1 interview with the *Star Tribune* that the draft report was a "matter of legitimate public concern [that] . . . outweighs whatever harm it is that the city is trying to claim." She added, "Leak investigations like this are usually prompted by embarrassment over the underlying matter that was leaked.. . . [The investigation] chills whistleblowers from making disclosures that are matters of public interest."

On Aug. 9, 2018, the Committee to Defend the First Amendment, a new, broad coalition of journalists, media and transparency advocates, attorneys, and others, held a news conference urging "Minneapolis Mayor Jacob Frey, the Minneapolis City Council and the Minneapolis City Clerk to end immediately the investigation into the leak of the draft report on Ketamine to the Star Tribune," according to an August 8 press release. Speakers at the news conference included Kirtley, as well as the legal director of the American Civil Liberties Union (ACLU) of Minnesota, Teresa Nelson, and Joseph Spear, president of the Minnesota Society of Professional Journalists (SPJ).

Kirtley reiterated her comments to the *Star Tribune*, contending that the investigation would have negative effects on public oversight of government and law enforcement. "It's really all about the eternal question of whether the government can keep its secrets," she said. "And I think the answer is it can if it can, but once the information is out, conducting an investigation like this serves only to chill public oversight and information."

Nelson agreed with Kirtley that the investigation would likely chill freedom of speech. "The city of Minneapolis' intensive investigation into the leak of information to a journalist is completely unnecessary and chills freedom of speech," she said. "Individuals who come across evidence of government malfeasance should not fear retaliation for exposing that wrongdoing." Nelson added, "And when it was publicized it resulted in almost immediate permanent change in policy by MPD, to address the issue."

Spear argued that the investigation could hurt relationships between reporters and their confidential sources. "Whistleblowers may be the only way that public finds out about reports and activities the government would rather keep secret," he said. "This issue is about three things: the public's right to know, the right of journalists to seek truth and report it, and government transparency."

In an August 8 tweet, the Minnesota SPJ reported that several Twin Cities journalists, transparency advocates, media experts, and others had signed two petitions asking Minneapolis to "stop the source hunt." The tweet added, "This isn't Salem — let the free press do its job!" According to the *Star Tribune* on August 9, nearly 300 journalists and individuals had signed the petitions, which were delivered to the city of Minneapolis during the press conference.

However, some city officials defended the investigation. In an August 1 interview with the *Star Tribune*, assistant city clerk and director of records and information management Christian Rummelhoff, who oversaw the investigation, said, "It's important for us to do this investigation, which is required by the law, and for us to educate people on how to effectively conduct oversight of the government."

In an August 6 opinion piece for the *Star Tribune*, Minneapolis city clerk Casey J. Carl argued that the city is required by the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.055, to investigate any leaks, like that of the draft report, to determine whether private or confidential data had been breached. Section 13.055 of the MGDPA states that a "government entity that collects, creates, receives, maintains, or disseminates private or confidential data on individuals must disclose any breach of the security of the data following discovery or notification of the breach." The entity may take "any measures necessary to determine the scope of the breach and restore the reasonable security of the data," including "an investigation into any breach in the security of data." The report from the investigation must include "(1) a description of the type of data that were accessed or acquired; (2) the number of individuals whose data was improperly accessed or acquired; (3) if there has been final disposition of disciplinary action[; and] (4) the final disposition of any disciplinary action taken against each employee in response."

On August 9, KARE-TV, Minneapolis' NBC affiliate, noted that the final report "was devoid of such private information," though it was unknown whether any additional information leaked to the *Star Tribune* was private data. Kirtley added in her remarks at the August 9 press conference that Minneapolis should have already known if there had been a breach of private data because they created the report.

Carl added that there would be no "effort to obtain any information related to the breach from the Star Tribune," citing Minnesota's Shield Law, the Free Flow of Information Act, which provides a "privilege not to reveal sources of information or to disclose unpublished information." Minn. Stat. § 595.021 *et seq.*

On Nov. 8, 2018, the *Star Tribune* reported that NeuVest had published a summary of its findings, which indicated that the investigation had not determined the "exact source of the breach." However, the investigation, which cost Minneapolis $22,000, did lead the city to notify two individuals that their private data may have been breached, according to the *Star Tribune*.

In a November 8 interview with the newspaper, Rummelhoff said, "We did not determine who provided the data to the [*Star Tribune*]." At a City Council Enterprise Committee meeting on November 8, Carl said, "This investigation was never about who may have created a breach. Rather, our focus has been on systems and processes.. . . How data was created or collected? Who had access and for what business purpose? How the data was shared during the drafting stage?"

Scott Memmel
Silha *Bulletin* Editor

Trump Administration Threatens Regulation of Social Media Companies and Google for Alleged Political Bias

On Aug. 28, 2018, President Donald Trump posted a pair of tweets alleging that Google search results were biased against right-wing media outlets and individuals, prompting criticism from some observers. On September 5, Google faced renewed criticism after Google executives did not attend a U.S. Senate Intelligence Committee hearing, prompting Google CEO Sundar Pichai to agree to testify before the U.S. House of Representatives. The September 5 hearing also prompted the U.S. Department of Justice (DOJ) to release a statement indicating that it would consider regulating tech companies and social media to prevent political bias. Observers argued that government attempts to regulate tech companies and social media sites would likely violate the First Amendment.

TECH CENSORSHIP

In a pair of tweets on Aug. 28, 2018, President Trump alleged anticonservative bias in Google search results, declaring the company's results were "RIGGED" and asserting that Google suppresses "voices of conservatives." The President also questioned whether such results were "illegal" and claimed that "the serious situation will be addressed!" Later in the day, President Trump's top economic adviser, Larry Kudlow, told reporters that the White House would be "taking a look" at whether, and how, Google should be regulated.

In response, Google rejected the allegation and argued that its searches are not politically biased. Google wrote in a September 28 statement, "When users type queries into the Google Search bar, our goal is to make sure they receive the most relevant answers in a matter of seconds. Search is not used to set a political agenda and we don't bias our results toward any political ideology. Every year, we issue hundreds of improvements to our algorithms to ensure they surface high-quality content in response to users' queries." Google added, "We continually work to improve Google Search and we never rank search results to manipulate political sentiment."

The accusation of tech companies suppressing conservative voices is frequently raised by Republicans and conservative-leaning media outlets. In April 2018, pro-Trump vloggers Lynette Hardaway and Rochelle Richardson, who use the names Diamond and Silk respectively, charged Facebook with censorship when the company deemed Facebook's content as "unsafe" and temporarily suspended their Facebook page in April. Facebook founder and CEO Mark Zuckerberg later admitted that the suspension was due to a mistake in their content moderation system. Similarly, in fall 2018, several websites, including Facebook and Twitter, removed the content of right-wing radio host Alex Jones and his conspiracy theory website, "InfoWars," leading to additional claims that tech companies stifle conservative voices. However, the companies countered that Jones was removed for violating rules against "hate speech" and "bullying," among other reasons.

Several scholars noted that the removal of Jones' content was not a violation of his First Amendment rights. In an August 9 interview with *USA Today*, executive director of the First Amendment Center at the Freedom Forum Institute Lata Nott said, "As private companies, Apple, Facebook and Spotify can decide what content appears on their platforms, so I wouldn't call (the tech sites' actions) a violation of speech." In an August 11 story for the *Huffington Post*, reporter Paul Blumenthal contended that "First Amendment judicial doctrine hardly has anything to say about the policing of speech on private digital platforms by the companies that own them." He continued, "In the 20th century, courts defined the right to freedom of speech as a protection against censorship by the government. Private actors like Google and Facebook are not governments (even if they act like them). They are private companies that are allowed to moderate content on their platforms as they please and remove users that are disruptive or screwing up the experience for everyone else." He added, "That's why others have tried to argue that online social media platforms are more like the modern-day public square, rather than the government." (For more information on the removal of Jones' content, see "Defamation Cases Continue for Right-Wing Radio Host and *BuzzFeed*; Former Political Candidates Bring Defamation Lawsuits" on page 52 of this issue of the Silha *Bulletin* and *Massachusetts Man, Sandy Hook Parents Sue Alex Jones for Defamation* in "Minnesota and Federal Courts Grapple with Defamation Questions; Right-Wing Radio Host Faces Several Defamation Lawsuits" in the Summer 2018 issue.)

Observers pointed out that President Trump's August 28 tweets seemed to mirror an August 25 claim by conservative news site, "PJ Media," which found that "96 Percent of Google Search Results for 'Trump' News Are from Liberal Media Outlets." The article was based on editor Paula Bolyard's personal experiences with using Google to search for "Trump." Bolyard's results included articles from CNN, CBS, CNBC, *The Atlantic*, *Politico*, Reuters, *USA Today*, *The New Yorker*, and *The Washington Post*, prompting Bolyard to argue that it was unfair most articles came from what she considered liberal media outlets.

However, in a study published in a July issue of the journal *Computers in Human Behavior*, researchers Seth Lewis and Efrat Nechushtai found that Google News recommendations were in fact largely homogeneous, with liberals and conservatives being shown the same links regardless of ideology. "Yes, Google News is dominated by mainstream news," Lewis, a University of Oregon media professor, told *Wired* on August 28. "If you consider mainstream news to be left-leaning, you will have concerns about the results you get from Google News. There's no question about that."

Google also faced criticism after the company refused lawmakers' requests to send Pichai or Google co-founder and Alphabet, Inc. CEO Larry Page to testify before the U.S. Senate Intelligence Committee regarding Russian use of social media to spread misinformation. Although Twitter CEO Jack Dorsey and Facebook Chief Operating Officer Sheryl Sandberg both attended the Senate Intelligence Committee hearing on Sept. 5, 2018, Google's executives were

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not present, prompting backlash from lawmakers, including Sen. Mark Warner (D-Va.), who said in a September 10 statement to reporters, "Google is sadly mistaken if they think they're off the hook after being a no-show."

However, after lawmakers' continued to condemn Google, multiple media outlets reported Pichai met privately with several Republican lawmakers on September 28, where he agreed to testify before the House Judiciary Committee in November 2018 to address concerns over the company's business practices, including claims of bias. "We remain committed to continuing an active dialogue with members from both sides of the aisle, working proactively with Congress on a variety of issues, explaining how our products help millions of American consumers and businesses, and answering questions as they arise," Pichai said in a September 28 emailed statement to *The Wall Street Journal*. As the *Bulletin* went to press, the date for the hearing had not been set.

Following the September 5 hearing, the DOJ released a statement by spokesman Devin O'Mally, who warned tech companies to refrain from political bias. "The Attorney General has convened a meeting with a number of state attorneys general this month to discuss a growing concern that these companies may be hurting competition and intentionally stifling the free exchange of ideas on their platforms," O'Malley said. As the *Bulletin* went to press, the DOJ had made no further announcements regarding a potential investigation into tech companies' alleged political bias.

First Amendment advocates, legal scholars, and lawmakers from both parties argued that government regulation of search results and other online content could violate the First Amendment. Sen. John Neely Kennedy (R-La.) underlined his hesitancy regarding such regulation to *The Washington Post* on August 28. "We can all agree on one thing: Poison is being spread on the Internet, but what is poison? Somebody is going to have to step in and be a neutral arbiter of what can go on, and what can't. I don't want to see the government do that," he said.

State courts in New York and California have previously found Google's search engine results are protected by the First Amendment, reasoning that Google's programming decisions resemble the protected editorial judgment of newspaper editors to decide what to cover. *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014); *S. Louis Martin v. Google, Inc.* No. CGC14539972 (Cal. Superior Court 2014). Eric Goldman, co-director of the High Tech Law Institute at Santa Clara University, told the *Post*, "The courts have uniformly ruled that search results are protected speech" and warned that the DOJ's investigation "could be a very serious broadside against the entire Internet industry coordinated by multiple layers of government."

> "It's not clear what the [DOJ is] investigating. If they're investigating companies without a clear reason, it's possible that the investigations themselves will stifle free speech."
>
> **— Alex Abdo, Knight First Amendment Institute senior staff attorney**

Alex Abdo, a senior staff attorney at the Knight First Amendment Institute at Columbia University, told *The Washington Post*, "It's not clear what the [DOJ is] investigating. If they're investigating companies without a clear reason, it's possible that the investigations themselves will stifle free speech."

Google also faces scrutiny internationally regarding censorship of search results. On Aug. 1, 2018, *The Intercept* reported that Google was considering launching a project named "Dragonfly," which would offer censored versions of its search engine and news application for the Chinese market. Google had previously refused to continue to block search results at the request of the Chinese state in 2010. The project has drawn criticism from free press advocates, Google employees, and political figures.

In an Oct. 4, 2018 speech to the Hudson Institute, Vice President Mike Pence called on Google to "immediately end development of the Dragonfly app that will strengthen the communist party's censorship and compromise the privacy of Chinese customers."

In an Aug. 28, 2018 open letter to Google, several human rights and press advocacy groups, including Reporters Without Borders (RSF), the Electronic Frontier Foundation (EFF), and the Committee to Protect Journalists (CPJ), also called on the company to cancel the project, highlighting concerns over Chinese state data collection practices used to crack down on journalists. "The project, codenamed 'Dragonfly', would represent an alarming capitulation by Google on human rights. The Chinese government extensively violates the rights to freedom of expression and privacy; by accommodating the Chinese authorities' repression of dissent, Google would be actively participating in those violations for millions of internet users in China," the letter read. "The Chinese government runs one of the world's most repressive Internet censorship and surveillance regimes. Human rights defenders and journalists are routinely arrested and imprisoned solely for expressing their views online."

Lokman Tsui, Google's head of free expression for Asia told *The Intercept* on August 10 that the Dragonfly project is "a really bad idea." Tsui added, "If Google wants to go back, it would be under the terms and conditions that Beijing would lay out for them. I can't see how Google would be able to negotiate any kind of a deal that would be positive. I can't see a way to operate Google search in China without violating widely held international human rights standards."

However, on October 15, Pichai doubled down on the company's push into China. "It turns out we'll be able to serve well over 99 percent of the queries," he said at *Wired* magazine's 25th anniversary celebration. In addressing concerns over access to information, freedom of expression and user privacy, Pichai stated "People don't understand fully, but you're always balancing a set of values, but we also follow the rule of law in every country."

Sarah Wiley
Silha Research Assistant

Stearns County Releases State Documents from the Wetterling Investigation

On Sept. 20, 2018, multiple news outlets reported that following a press conference by Sheriff Don Gudmundson, the Stearns County Sheriff's Office (Stearns County) released a 41,787-page investigative file related to the 27-year investigation into the 1989 abduction and murder of Jacob Wetterling. Following the release of the investigative file, several observers explained the importance of releasing the documents, as well as the ethical considerations journalists should consider before reporting on the contents of the file.

PRIVACY

In June 2017, Stearns County announced it would release more than 56,000 pages of information and 10,000 total documents related to the abduction and murder of 11-year-old Jacob Wetterling in St. Joseph, Minn. The case file included documents compiled by local, state, and federal authorities. Previously, on Sept. 1, 2016, Danny Heinrich, who was already jailed on federal child pornography charges, confessed to kidnapping and killing Jacob in October 1989.

On June 2, 2017, Patty and Jerry Wetterling, Jacob's parents, filed a lawsuit in the Minnesota District Court for the Seventh Judicial District, requesting that the court halt the release of some documents in the investigative file, claiming that several documents include "highly personal details." *Patty Wetterling and Jerry Wetterling v. Stearns County*, No. 73-CV-17-4904 (2017). On the same day, Stearns County (Minnesota) District Court Judge Ann Carrott issued a temporary restraining order (TRO) enjoining Stearns County from "disseminating or disclosing the personal information contained in the Jacob Wetterling criminal investigative file to any person."

On June 27, 2017, ten media organizations and transparency advocates, including the Silha Center for the Study of Media Ethics & Law (media-intervenors), filed a "complaint in intervention," arguing against the Wetterlings' claim that the information in the investigative file was "protected from disclosure by the state and federal constitutions," instead of the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.* The statute classifies information and documents from closed or inactive investigations as "public data," except in circumstances in which "the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data by this chapter or other law."

In December 2017, the federal government also filed a motion to intervene, asserting that the documents created by the Federal Bureau of Investigation (FBI) during the investigation needed to be returned to the agency, therefore making the records subject to the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, rather than the MGDPA. On March 29, 2018, Carrott granted a motion by the federal government for summary judgment, ordering Stearns County to return the portion of the investigative files originating with the FBI to the agency.

However, in an April 19 ruling, Carrott granted a motion for summary judgement by the media-intervenors regarding the state documents in the Wetterling file not created by the FBI. *Wetterling v. Stearns County*, No. 73-CV-17-4904 (April 19, 2018). Carrott found that the MGDPA allowed for the release of "inactive law enforcement investigative file documents" and that "a constitutional right of informational privacy does not apply to prohibit the disclosure of government data classified as public by state statute."

In a July 21, 2018 interview with the Minneapolis *Star Tribune*, Patty Wetterling said that her family had decided not to appeal Carrott's order, calling it a "tough journey." In an interview with WCCO-TV, Minneapolis' CBS affiliate, Doug Kelley, the Wetterlings' attorney, said that the family "just got tired" of fighting. (For more information on the background of the Wetterling investigation, Carrott's rulings, and the Wetterlings' decision, see "Wetterling Family Decides Not to Appeal Judge's Order Requiring the Release of State Documents from Wetterling Investigation" in the Summer 2018 issue of the Silha *Bulletin*, "Judge Orders Certain Files from Wetterling Investigation Be Returned to FBI, Allows Release of Remaining State Documents" in the Winter/Spring 2018 issue, "Media Groups Allowed to Join Lawsuit over Access to Documents in Wetterling Investigation; Dispute Expands to over Half the Case File" in the Fall 2017 issue, and "Media Groups and Transparency Advocates Challenge Family's Lawsuit, Judge's Ruling Halting the Release of 'Personal' Information" in the Summer 2017 issue.)

On Sept. 19, 2018, the day before the investigative file was released, the Wetterling family issued a statement, which read in part, "It is difficult for us to relive those dark days. With time, our family is healing and getting stronger and we appreciate all of the efforts to make things better for future victims of crime, their families and for all of us. Our hearts hurt for anyone who is pained or hurt from the release of this file. Clearly, changes are still needed." The full statement is available online at: https://www.mprnews.org/story/2018/09/19/jacob-wetterling-family-statement-before-investigative-file-release.

On September 20, Stearns County held a press conference for the release of the investigative files. According to Minnesota Public Radio (MPR) on the same day, Gudmundson delivered "a brutal assessment . . . of the cascading errors and internal friction among law enforcement that let Jacob Wetterling's killer stay free for decades even as the clues pointed overwhelmingly to [Heinrich]." One particular revelation was that Heinrich was arrested at a bar in Roscoe, Minn. in February 1990, a few months after Jacob went missing in October 1989. However, the "inexperienced FBI profilers" handling the case concluded after an interrogation that Heinrich did not abduct Jacob. Gudmundson called the interrogation and subsequent release of Heinrich a "fatal flaw."

Gudmundson added that the investigation went "off the rails" and that it "wasn't just on the wrong path, but on the wrong freeway." He also noted that anyone who reads the state investigative file "will not know about . . . some consequential events in the Wetterling case" because the release did not include the FBI's files.

Additionally, Gudmundson indicated that the MGDPA may be amended in the following legislative term to address situations like the release of the Wetterling investigative file. "Our release of these files is done, according to Minnesota state law and according to what the legislature has set down as what are data privacy issues," he said. "And some of those [issues], in my view, and certainly on the part of the Wetterling family, . . . certainly need some adjustment in the upcoming legislative session." However, Gudmundson did

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Wetterlings, *continued from page 45*

quote former U.S. Supreme Court Justice Louis Brandeis, who said, "sunlight is the best disinfectant" regarding the release of investigative and other law enforcement records. The full press conference is available online at: https://www.mprnews.org/story/2018/09/20/jacob-wetterling-probe-failures-documents-released. As the *Bulletin* went to press, the Minnesota legislature had not formally introduced an amendment to the MGDPA related to the Wetterling case file.

Former FBI investigator Al Garber attempted to refute some of Gudmundson's comments during the news conference, but was asked to leave the room, according to the *St. Cloud Times* on September 20. Garber instead spoke to reporters following the press conference, questioning how Gudmundson approached his review of the case. "I don't know what [Gudmundson's] motive is in this presentation, frankly, but I think that there are some important things you need to know to make this a positive experience," Garber said. "When he began the presentation saying it went 'off the rails,' that was a clue to me.. . . He has his beliefs . . . and he was gonna make it fit the facts in this case and I think that was wrong." He added, "Why was [the investigation] a failure? We had no evidence."

Garber also took issue with Gudmundson's comments about the FBI's interrogation of Heinrich, stating, "To say that this was an uninformed interview done by incompetent people just hurts, it really hurts and it's not true." He added, "Don wasn't there. He didn't see the day-to-day operation."

On September 21, the Twin Cities *Pioneer Press* reported that the released case files contained a variety of different materials on various subjects. First, the files included transcripts of jailhouse phone conversations between Heinrich and his brothers. One such transcript, according to the *Pioneer Press*, quoted Heinrich describing his mindset after the murder of Jacob: "I got home that night, . . . I'm gonna tell you the truth, and I cried. I could, my god, what have I done.. . . The wonderful, I don't know, I'm trying to think of what was wrong. I don't know what went, went wrong, everything went wrong. S—, I don't know what to think."

Second, the files contained documents indicating that investigators looked into hundreds of leads, as well as every known sex offender in Minnesota about a decade after the crimes. Third, the files included letters from psychics, who claimed they had leads from the "great beyond."

Fourth, there were a variety of documents and information about Daniel Rassier, a music teacher who lived with his parents near the Wetterlings, who was falsely targeted as a possible suspect beginning as early as 2002. For example, several documents included a list of every marathon Rassier ran in 2006, as well as a log of his movements in 2007, including one instance where he stopped to get gas.

Fifth, a file labeled "Transcripts 1989, Part 1" includes a transcript of a recording of Jacob in which he describes his "favorite things," including that his favorite hobby was collecting football cards." Sixth, the investigative file contained a transcript of a 911 call from Merlyn Jerzak, a neighbor of the Wetterlings, after he learned from his daughter, Jacob's brother, Trevor, and their friend Aaron Larson that Jacob had been abducted.

Finally, numerous photographs are contained in the investigative file, including of footprints matched to Heinrich early on in the investigation, as well as tire tracks and other footprints at the scene. Links to these materials are available online at: https://www.twincities.com/2018/09/21/jacob-wetterling-kidnapping-investigation-documents-stearns-county-minnesota-danny-heinrich/.

On Sept. 20, 2018, WCCO provided several additional documents in the investigative file. One such document detailed how the testimony by Trevor Wetterling and Aaron Larson, as well as the victims of a string of assaults in the 1980s of boys in Paynesville, Minn., all gave similar descriptions of the suspect, which were similar to descriptions of Heinrich. Another document details how a victim of the Paynesville incidents alleged that the assaults were related to Jacob's disappearance. Links to these documents and others are available online at: https://minnesota.cbslocal.com/2018/09/20/jacob-wetterling-key-investigation-files-released/.

Following the release of the documents, several observers explained why it was important that the investigative file be made public. In a September 20 interview with KSTP-TV, the Twin Cities' ABC affiliate, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley argued, "It's not just a question of saying, 'We as journalists want this.. . . It's that you, the public, have a right to see this."

Kirtley further contented that the files were of public concern. "We know with broad strokes what the outcome of this investigation was. We also know that it took many years," she said. "I think it's worth asking why. What happened? What did they do right? What did they do wrong? What was the role of the FBI? All important questions.. . . It's always painful to examine those kinds of things, but those are questions that have to be asked." Kirtley added, "This is essential to accountability.. . . Holding law enforcement accountable for what they do."

In a September 20 editorial, the Mankato *Free Press* argued that "[w]ithout the release of the documents, the mistakes of the investigation would not have been revealed and the government would have escaped accountability in this tragic case that was, according to Gundmundson [*sic*], poorly handled by investigators."

In an interview with KARE-TV, the Twin Cities' NBC affiliate, Hubbard School of Journalism and Mass Communication professor Chris Ison addressed the ethical considerations journalists face when reporting on sensitive topics, including the Wetterling investigative file. He said journalists must consider two values when writing about the files: to seek and report the truth and to minimize harm to innocent people.

Ison continued, "The first thing I would do is make sure there are a lot of voices in the room when we are making these decisions. I would tell my reporters [to] look for what has important news value for the general public, and to be aware of anything that is harmful to individuals that is not newsworthy, and to be sensitive about that." He added, "There is always somebody that doesn't want a story out there, and that doesn't mean we don't run it. We have to weigh that against doing the public good of doing that story."

KARE reported that its social media pages were filled with requests by viewers that the news outlet maintain the Wetterlings' privacy and not discuss the contents of the investigative file. KARE issued a statement in response, which read in part, "To our KARE community, we hear you. We've reviewed your concerns and appreciate your feedback. We've had many discussions in the newsroom about how to handle the Wetterling case file release press conference. As journalists, we feel it's important for citizens to have access to investigative records and please trust that we are not interested in re-victimizing the Wetterling family; we have no intention of revealing sensitive family information. We will focus on the investigation and hold the agencies involved accountable."

Scott Memmel
Silha *Bulletin* Editor

Ninth Circuit Ruling and Federal Lawsuit Target U.S. Customs and Border Protection for First and Fourth Amendment Violations

In the second half of 2018, a circuit court ruling and a federal lawsuit addressed First and Fourth Amendment concerns prompted by actions by U.S. Customs and Border Protection (CBP) agents. On Aug. 14, 2018, the U.S. Court of Appeals for the Ninth Circuit held that the First Amendment right to record law enforcement officers in the exercise of their official duties in public spaces extends to border patrol agents, reviving a lawsuit brought against CBP by two border policy advocates whose photographs at U.S. ports of entry in Southern California were confiscated and destroyed by border agents. On Aug. 23, 2018, an American Muslim woman filed a Rule 41(g) Motion, otherwise known as a "Motion to Return Property," against CBP, requesting that the agency return and delete data copied from her iPhone after it was seized in February 2018 and retained until July. The motion also requested that CBP identify whether it disclosed the data to a third party, and argued that the seizure, retention, and potential copying and sharing of her data, without reasonable suspicion, probable cause, or a warrant, violated the Fourth Amendment. On October 31, the plaintiff reached a settlement with CBP, which agreed to delete the seized data.

LAW ENFORCEMENT

Ninth Circuit Ruling on Photographing Border Agents

On Aug. 14, 2018, the *San Francisco Chronicle* reported that the U.S. Court of Appeals for the Ninth Circuit had reinstated a lawsuit by two border policy advocates whose photographs at U.S. ports of entry in Southern California were confiscated and destroyed by U.S. Customs and Border Protection (CBP). *Askins v. U.S. Department of Homeland Security*, 899 F.3d 1035 (9th Cir. 2018). The Ninth Circuit held that the First Amendment protects the right to photograph and record "matters of public interest," such as the official duties of law enforcement officials, which include border agents.

The case arose in April 2012 when Ray Askins, a U.S. citizen concerned with environmental health hazards near the U.S.-Mexico border, requested permission to photograph a vehicle inspection area in order to conduct his research into the effects of emissions at such locations. Askins called CBP to request permission to take the photographs and although he was told that it would be "inconvenient," his request was neither approved nor denied.

On April 19, 2012, Askins stood on a public street on the U.S. side of the border and took three or four photographs of a "secondary" inspection area. At no point did he cross the border or pass through border security. Multiple CBP officers summarily approached Askins and demanded that he delete the photographs. When Askins refused, the officers searched and handcuffed him, and also confiscated his camera. Askins was also detained inside an inspection area building for approximately 30 minutes, during which CBP had deleted all but one of his photographs of the inspection area.

Askins alleged that he had wanted to photograph "matters and events exposed to public view from outdoor and exterior areas of the Calexico port of entry" and "in the area immediately surrounding the Calexico port of entry building." He claimed that he refrained from doing so in light of the CBP policies and the enforcement of those policies against him.

The case arose for the second plaintiff, Christian Ramirez, a policy advocate who works on human rights issues in border communities, in June 2010 when he and his wife crossed the U.S. border into Mexico at a port of entry pedestrian entrance. Upon returning the same day, Ramirez, while standing on a public pedestrian bridge, noticed several male CBP officers at a security checkpoint inspecting and patting down only female travelers. Ramirez took 10 photographs with his cellphone camera, citing concerns that the officers may have been acting inappropriately.

Ramirez and his wife were summarily approached by private security officers, who ordered that they stop taking photos and produce their identification documents. When Ramirez refused to provide the documents, stating that they had already passed through border inspection, the officers radioed for backup. Five to seven CBP agents questioned Ramirez and, without his consent, confiscated his cellphone and deleted the photos he had taken from the bridge. Ramirez alleged that following these events, he refrained from documenting matters and events visible from public locations near the U.S. border, citing CBP policies and past enforcement against him.

In October 2012, Askins and Ramirez filed a lawsuit in the U.S. District Court for the Southern District of California, alleging that CBP's policies and practices violated their First and Fourth Amendment rights. They also sought declaratory and injunctive relief, damages, and costs and attorneys' fees. The government moved to dismiss, citing two CBP policies.

One of the policies was CBP Directive No. 5410-001B (Directive), which was released in 2009. The Directive "defines guidelines relating to the disclosure of official [CBP] information to accredited news organizations, mass media, published professional journals, and stakeholder groups." Section 6.2 provides procedures for media requests to photograph suspects. It states that "[d]ecisions to allow any photographing, videotaping or filming by the media at CBP facilities shall be made in consultation with the appropriate Public Affairs Specialist and with the concurrence and control of the appropriate CBP supervisor." The section further provides that "[p]hotographing of suspects/detainees by news organizations in public places . . . is neither encouraged nor discouraged," and states that "CBP personnel shall not interfere with photographing suspects in public places." Finally, the Directive prohibits the "[d]etention of persons or media and/or . . . of recording equipment, film or notes . . . unless the owner or operator of such materials has violated federal law, unlawfully breached the security of a CBP facility, or has endangered the safety of CBP personnel."

The second policy was CBP's "Ground Rules for News Media Representatives when Visiting Southern California Ports

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of Entry" (Ground Rules), which requires "members of the press who desire to film, conduct interviews or engage in any other media activity" to "clear their visit in advance with appropriate CBP officials." The Ground Rules further state that "[r]eporters who do not have such clearance may be denied access to port property," and "photographers and camera crews" must "be escorted by a designated officer at ALL times while on port property," without exception.

On Sept. 13, 2013, the Southern District of California held that Askins and Ramirez had sufficiently alleged the policies were content-based restrictions on speech in a public forum, triggering strict scrutiny, meaning the restriction of speech must be necessary to serve a compelling government interest and be "narrowly tailored" to achieve that interest. However, the court ruled that both policies survived strict scrutiny because they serve "perhaps the most compelling government interest: protecting the territorial integrity of the United States" and there were no less restrictive alternatives.

In 2015, the plaintiffs filed an amended complaint in which they formally challenged the CBP policies under the First Amendment, but dropped the Fourth Amendment claims and some defendants. The amended complaint argued that the policies constituted prior restraints and were unreasonably applied to Askins and Ramirez. The complaint further alleged that the CBP interpreted and enforced the Directive and Ground Rules as a "total ban on all photography by any person from any area within a port of entry without prior authorization from CBP." Askins and Ramirez alleged that such bans apply to public streets and sidewalks, which they contended constitute traditional public fora.

On March 23, 2016, Southern District of California Judge Thomas J. Whelan held that the court was "precluded" by the "law of the case doctrine" from revisiting its prior order. *Askins v. U.S. Department of Homeland Security*, 2016 WL 4597529 (S.D. Cal. 2016). Whelan reasoned that the plaintiffs had brought an "identical issue," but failed to "identify any clear error, intervening change in law, new evidence, changed circumstances, or manifest injustice resulting from the previous decision."

On Oct. 3, 2016, the Reporters Committee for Freedom of the Press (RCFP) and seven media organizations filed an *amici curiae* brief in support of Askins and Ramirez. The brief "emphasize[d] the importance of this case to the press's ability to report on issues that take place at the United States' border." The brief argued that the CBP policies "severely hinder the ability of the press to gather the news and inform the public — particularly in cases of breaking news where permission cannot be sought in advance — and essentially grant CBP veto power over the First Amendment right to photograph and record government activity."

The brief further argued that the CBP policies "infringe upon the public and press's well-established First Amendment right to photograph and record official conduct generally." The brief continued, "Courts have recognized several significant public policy rationales behind the First Amendment right to record police activity, including the ability to hold public officials accountable for misconduct and the promotion of trust in the community that comes with such transparency. These rationales are equally applicable to the recording of CBP officials in the performance of their official duties."

On Aug. 14, 2018, Judge Jay S. Bybee wrote for the unanimous Ninth Circuit, and initially addressed the "law of the case doctrine." Bybee held that the doctrine "does not preclude a court from reassessing its own legal rulings in the same case" and "does not apply here." He reasoned that the district court dismissed the plaintiffs' First Amendment claim, but without prejudice, meaning "it did not enter a final judgment in the case." The district court also granted the plaintiffs leave to amend their complaint "with respect to the constitutionality of the CBP photography policy." Thus, Bybee held that the district court "should simply have considered the amended complaint on its merits."

Bybee next turned to the plaintiffs' First Amendment claims. He first wrote that the First Amendment "protects the right to photograph and record matters of public interest," including "the right to record law enforcement officers engaged in the exercise of their official duties in public places," which, in this case, were border agents. (For more information on the First Amendment right to record on-duty law enforcement officers, see "Third Circuit Declares a First Amendment Right to Record On-Duty Police Officers" in the Summer 2017 issue of the Silha *Bulletin.*)

Second, Bybee wrote that the "government's ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is 'sharply circumscribed,'" citing the 1983 U.S. Supreme Court case *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 (1983). He also explained that "content-based restrictions of speech" are subject to strict scrutiny.

Bybee disagreed with the district court's reasoning that the CBP policies survived strict scrutiny because of "the extremely compelling interest of border security" and the government's general interest in "protecting United States territorial sovereignty." He cited the Ninth Circuit's 2013 ruling in *U.S. v. Cotterman* in which the court held that "[e]ven at the border, we have rejected an 'anything goes' approach." 709 F.3d 952, 957 (9th Cir. 2013). (For more information on *Cotterman*, see "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 of the Silha *Bulletin.*) Bybee further wrote that it is "the government's burden to prove that these specific restrictions are the least restrictive means available to further its compelling interest," and that they "cannot do so through general assertions of national security, particularly where plaintiffs have alleged that CBP is restricting First Amendment activities in traditional public fora such as streets and sidewalks."

Finally, Bybee held that Askins and Ramirez "adequately pleaded their claims." However, he cautioned that his opinion does not "mean to suggest that all or even any areas within a port of entry are necessarily public fora, or that allowing the public to transit through a port of entry for the purpose of crossing the border creates a public forum." Bybee concluded that "further factual development is required before the district court can determine what restrictions, if any, the government may impose in these public, outdoors areas." He therefore vacated the district court order and remanded the case for further proceedings. The full ruling is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/08/14/16-55719.pdf.

As the *Bulletin* went to press, no further action had been taken in the case.

In an Aug. 14, 2018 interview with the *San Francisco Chronicle*, American Civil Liberties Union (ACLU) attorney

Mitra Ebadolahi, who represented Askins and Ramirez, said that the ruling reaffirms that "the First Amendment applies to all law enforcement," including the Border Patrol, "and that calling something, quote-unquote, 'the border' doesn't remove it from constitutional protection."

RCFP attorney Caitlin Vogus told the *San Francisco Chronicle* that the ruling was "timely" because "immigration is a huge story" and should not be shielded from public view.

Traveler Files Lawsuit Against U.S. Border Agents Over Seized iPhone, Reaches Settlement with U.S. Customs and Border Protection

On Aug. 23, 2018, several news outlets reported that Rejhane Lazoja, whose iPhone was seized by U.S. Customs and Border Protection (CBP) agents upon returning from a trip to Switzerland in February 2018, had filed a lawsuit against CBP in the U.S. District Court for the District of New Jersey, alleging that the agency violated her Fourth Amendment rights. *Lazoja v. Nielsen*, No. 2:18-cv-13113 (D.N.J. 2018). The lawsuit, which was filed as a Rule 41(g) Motion, requested that CBP return and delete any data they copied from Lazoja's phone, as well as disclose any third parties that received the information. On Oct. 31, 2018, *Ars Technica* reported that Lazoja and CBP reached a settlement in which federal authorities agreed to delete the seized data.

Rule 41(g) of the Federal Rules of Criminal Procedure, titled "Motion to Return Property," provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." The rule continues, "The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings." According to *Ars Technica* on August 23, this rule is "[n]ormally . . . invoked for tangible items seized as part of a criminal investigation, not for digital data that can easily be copied, bit for bit."

According to the complaint, the case arose on Feb. 26, 2018 when Lazoja arrived at the Newark Liberty International Airport with her six-year-old daughter after a trip to Zurich, Switzerland. While passing through the CBP primary inspection, a CBP officer directed Lazoja to move to a separate line where two additional officers asked her several questions, including where she had traveled. Lazoja, a Muslim woman who wears a hijab in accordance with her religious beliefs, was then called into a small room where two officers further questioned her about her travels and whether she was ever a refugee.

When asked whether she carried any electronic devices, Lazoja produced her iPhone with the accompanying subscriber identity module (SIM Card), which contained photos of her "in a state of undress without her hijab," as well as privileged legal communications with the Council on American-Islamic Relations (CAIR) in New York, according to the complaint. Lazoja was repeatedly asked to unlock her iPhone using the necessary alphanumeric password. After Lazoja continued to refuse, two CBP officers, identified as "John Doe" and "Jane Doe" in the complaint, accompanied her to the baggage claim area and searched her luggage.

The two officers, as well as an additional officer identified as "John Doe 2" "did not return the iPhone" and instead provided Lazoja a receipt documenting the seizure of the device and SIM card, and indicated that they were sent to a U.S. Department of Homeland Security (DHS) lab. The phone and SIM Card were not returned until July 6, 2018.

On July 9, Lazoja requested that CBP "confirm whether [it] had made any copies of the [iPhone data]" and to "provide a legal basis for doing so; expunge any copies of the [d]ata; and confirm whether [CBP] shared copies of the [d]ata with any third parties." According to the complaint, Lazoja had not heard a response to her requests, prompting her to file the Rule 41(g) Motion.

On Aug. 23, 2018, Albert Fox Cahn, the legal director for CAIR, which was representing Lazoja, told *Ars Technica* that authorities "forensically cracked" her phone and copied its contents before returning it to her. However, he also confirmed that CBP provided "no justification for why they took the phone" and "never accused [Lazoja] of a crime." Lazoja's lawyer, Jay Rehman, who also works for CAIR, similarly wrote in court papers that Lazoja never received any assurance that CBP does not possess information from her phone, according to the *New York Post* on August 24.

Lazoja's brief in support of the Rule 41(g) Motion (brief) first alleged that CBP did not follow its own policies, including its new directive released on Jan. 4, 2018 titled "Border Searches of Electronic Devices." According to the brief, Directive No. 3340-049A requires that any device detained by CBP agents must be returned after a maximum of five days, unless "extenuating circumstances exist." The Directive also states that "if after reviewing the information . . . there is no probable cause to seize the device or the information contained therein, any copies of the information held by CBP must be destroyed, and any electronic device must be returned." The brief alleged that it was likely that CBP made copies of the information contained in Lazoja's iPhone because CBP agents have "a stated policy, custom, and practice of copying digital information from devices detained at the border." (For more information on the new directive, see "U.S. Customs and Border Protection Actions Continue to Raise First and Fourth Amendment Questions" in the Summer 2018 issue of the Silha *Bulletin*.)

Second, the brief argued that the search and seizure of Lazoja's phone violated the Fourth Amendment, which generally requires a warrant supported by probable cause to search, seize, or copy digital storage devices, or to share copies with third parties.

The brief cited several cases, including *Riley v. California* in which the U.S. Supreme Court concluded that "the ultimate touchstone of the Fourth Amendment is reasonableness" and that "reasonableness generally requires the obtaining of a judicial warrant." 134 S.Ct. 2477 (2014). The Supreme Court further held that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." The court ultimately held that individuals' privacy interests outweighed government interests in warrantless cell phone searches incident-to-arrest. (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

The brief next cited *Alasaad v. Nielsen* in which U.S. District Court for the District of Massachusetts Judge

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Denise J. Casper applied *Riley* to the border search context, holding that although border searches have been recognized as an exception to the Fourth Amendment warrant requirement, "the exception is not limitless." She further held that "[b]order searches must still be 'reasonable,' and the Court must still — as with searches conducted in the interior — balance 'the sovereign's interests' with the privacy interests of the individual." No. 17-cv-11730-DJC, 2018 WL 2170323 (D. Mass. 2018). (For more information on *Alasaad v. Nielsen*, see *Federal Judge Allows Lawsuit to Continue Over First and Fourth Amendment Concerns of Warrantless Border Searches and Seizures of Electronic Devices* in "U.S. Customs and Border Protection Actions Continue to Raise First and Fourth Amendment Questions" in the Summer 2018 issue of the Silha *Bulletin*.)

The brief also cited *United States v. Kim*, which revolved around a DHS agent seizing the laptop of Korean businessman Jae Shik Kim and shipping it to a forensic specialist in San Diego. 103 F.Supp. 3d 32, 59 (D.D.C. 2015). District of Columbia Judge Amy Berman Jackson ruled that the search of Kim's laptop was not "reasonable" given the totality of the circumstances surrounding the search. She wrote that the forensic analysis "did not possess the characteristics of a boarder search" and that it "more resembled the common nonborder search based on individualized suspicion, which must be prefaced by the usual warrant and probable cause standards." Jackson added that the court found the search of Kim's laptop using specialized forensic software "was supported by so little suspicion of ongoing or imminent criminal activity, and was so invasive of Kim's privacy and so disconnected from not only the considerations underlying the breadth of the government's authority to search at the border, but also the border itself, that it was unreasonable." (For more information on *United States v. Kim*, see *2009 Policy Continues to Raise Legal Questions Amid Increase in Warrantless Searches at U.S. Borders* in "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 of the Silha *Bulletin*.)

One additional case cited by the brief was *Carpenter v. United States* in which the Supreme Court, in a 5-4 decision, held that government actors need a warrant to obtain historical data from cell phone carriers detailing the movements of a cellphone user, known as cell site location information (CSLI). *Carpenter v. United States*, 585 U.S. ___, 2018 WL 3073916 (2018). The brief argued that the case demonstrated even further heightened privacy interests related to cell phones and location data. (For more information on *Carpenter*, see "U.S. Supreme Court Rules Law Enforcement Must Obtain Warrant To Access Individuals' Historical Cell Site Records" in the Summer 2018 issue of the Silha *Bulletin*.)

Third, the brief alleged that even if CBP could constitutionally seize Lazoja's iPhone, the "impermissibly-delayed return of said property, and failure to return her [d]ata, constitutes an independent violation of the Fourth Amendment" because "[p]rolonged detentions of property must be reasonable for their duration."

Finally, the brief asserted that any retention of data, or sharing of data with third parties, without a warrant supported by probable cause, violates the Fourth Amendment. It argued that there is "no possible justification" for CBP retaining the iPhone for more than 120 days without a warrant, as well as not returning any copies of Lazoja's data and failing to affirm whether it destroyed copies of the data or sent it to any third parties.

The motion requested that the district court order CBP to return Lazoja's data, expunge any copies, disclose all third parties who received and/or obtained copies of the data, and provide "information about the basis for the seizure and retention of the property." The motion also sought a declaratory ruling that CBP and its agents violated the Fourth Amendment. Lastly, the motion asked the court to enjoin the defendants from similar practices without a warrant supported by probable cause. The full brief in support of the Rule 41(g) Motion is available online at: https://www.documentcloud.org/documents/4781285-Document.html.

In an August 24 interview with *Gizmodo*, Cahn explained why searches of electronic devices are "far more intrusive" than luggage or physical files. "We're talking about an entire lifetime's worth of records," he said. "We're talking about real time location data. We're talking about all the incredibly intimate information that we all have on our cell phones and any sort of attempt by the government to copy that information, to seize that information, should require a warrant because of how incredibly intrusive it is."

Cahn added, "To be seen by strangers, strange men, without that head covering, even if it's in photographic form, that's an incredibly invasive and traumatic experience, and something that compounds the sense of invasion from this entire experience."

A CBP spokesperson said in an August 24 email to *Gizmodo* that "as a matter of policy, we do not comment on pending litigation." However, the email noted that in fiscal year 2016, the agency processed more than 390 million arrivals and performed 23,877 electronic media searches, which represents .0061 percent of arrivals. *Gizmodo* noted that that was an increase from 2015 when CBP searched the electronic media of .0012 percent of arrivals. *Ars Technica* reported on August 23 that in 2017, out of 397 million international travelers, there were only 30,200 digital border searches conducted, approximately 0.007 percent, though this was 0.005 percent more than 2016.

On Oct. 31, 2018, *Ars Technica* reported that Lazoja had reached a settlement with CBP in which federal authorities agreed to delete the seized data. In an interview with *Ars* on the same day, Cahn said that Lazoja was pleased with the result. "For us, it's a really exciting outcome, because this novel litigation approach worked and would get us a resolution really quickly, and it gave us a way to get our client's data deleted," he said. "We were prepared for much more pushback. It's incredibly useful to have this tool in our toolkit for when phones are taken in the future. I can't see any reason why this couldn't be done whenever another traveler is facing this sort of phone seizure."

Scott Memmel
Silha *Bulletin* Editor

Federal Judge Indicates the Public and the Press Have First Amendment Right to Witness All Portions of California Executions

On Aug. 17, 2018, multiple news outlets reported that Judge Richard Seeborg of the U.S. District Court for the Northern District of California denied a motion by California officials seeking to dismiss a lawsuit challenging state protocols barring the public and the press from viewing portions of an inmate execution, including the preparation and injection of lethal drugs, as well as medical assistance provided to an inmate if an execution fails. *Los Angeles Times Communications LLC v. Kernan*, No. 18-cv-02146-RS (N.D. Cal. 2018). Observers argued that although Seeborg had not provided a final ruling in the case, his ruling to dismiss the government's motion seemed very favorable to the media plaintiffs.

ACCESS

According to the *San Francisco Chronicle* on August 17, California's last execution was in January 2006, after which a federal judge ruled that flaws in staff training and lethal injection procedures had created "an undue risk of a botched and agonizing execution." This led to several attempts by California to revise its protocols related to executions, which included a 2016 ballot measure intended to speed up executions, according to the *Los Angeles Times* on August 17. The latest version of lethal injection regulations went into effect on March 1, 2018.

On April 11, 2018, Los Angeles Times Communications LLC; KQED, Inc., a non-profit media organization; and the San Francisco Media Center, a non-profit publishing online media (collectively "media outlets"), brought a lawsuit against Secretary of the California Department of Corrections and Rehabilitation (CDCR) Scott Kernan, as well as Ronald Davis, the Warden of San Quentin State Prison (collectively "the State"). The lawsuit targeted California's latest lethal injection protocols, which "bar[red] access to [several] key portions of executions." The lawsuit alleged that the public and the press have a First Amendment right to observe: "(1) the preparation of the lethal injection chemical; (2) the administration of the chemicals; and (3) the provision of medical assistance if an execution fails."

On May 3, the State filed a partial motion to dismiss, contending that the media outlets failed to "state a claim of a First Amendment right to observe the chemical preparation and medical assistance portions of California's execution process." The motion further alleged that the media outlets did not plead "facts, nor law, showing these portions of the execution should be open to public observation."

During an August 16 hearing, Deputy Attorney General Jay Goldman, who represented the CDCR, argued that "[r]endering medical aid isn't part of the execution." He further asserted that inmates have a right to privacy. "Does the press get to ride in the ambulance to the ER?" he asked. "If you get to that point you know the execution process didn't succeed, and the execution process is what they're able to watch."

Attorney Christopher Sun, who represented the plaintiffs, countered that California's protocols prevented the public from observing the consequences of a failed lethal injection. "The public has a right to witness what happens when something goes wrong and not rely on the state's representation," he said during the August 16 hearing.

In his August 17 opinion, Seeborg first noted that "[e]xecutions in the United States have historically been open to the public." He also explained that executions in California occur in a facility at San Quentin State Prison, which includes a centralized "Lethal Injection Room" surrounded by three viewing rooms for witnesses to see the execution via viewing windows with curtains. The "Infusion Control Room," which the public cannot see under California's protocols, is where staff members prepare the lethal drugs and inject them into tubes connected to the inmate's body. Additionally, Seeborg noted that if the inmate is still alive after the three required doses are administered, prison officials halt the execution, as well as "cut the public address system, close the curtains on the viewing windows, and lead witnesses out of the viewing room" before administering or calling for medical assistance.

Second, Seeborg cited *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002), in which the U.S. Court of Appeals for the Ninth Circuit held that the First Amendment provides the public and the press a qualified right to access governmental proceedings like executions. The Ninth Circuit wrote that "the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death."

Third, Seeborg addressed the State's argument that "preparing the lethal injection chemical and providing medical assistance are not part of the execution" and are not "inextricably intertwined," therefore making these portions of the process outside the holding of *California First Amendment Coalition*. Seeborg disagreed, holding that the Ninth Circuit's ruling "supports a more open interpretation of the right of access to observe executions, which can be applied as public debate reflects changes in society's view of capital punishment." He added, "Treating the inmate's entry into the execution chamber as the definitive trigger of a First Amendment right of access is not consistent with the reasoning of [the Ninth Circuit], and ignores its concern for an informed public debate."

Fourth, Seeborg noted that two district court rulings interpreted *California First Amendment Coalition* in a similar way. In *First Amendment Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940, 956 (D. Ariz. 2016), the District of Arizona found that Arizona's execution protocol "satisfied [*California First Amendment Coalition*] by allowing witnesses to view, at times only via closed-circuit television, when the condemned enters the execution chamber, is strapped to the gurney, and when intravenous lines are inserted." Seeborg noted that the court "did not extend the First Amendment right of access to portions of an execution before the inmate is brought into the execution chamber."

In *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 867 (D. Ariz. 2016), the District of Arizona similarly found that "a right of access could include

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Defamation Cases Continue for Right-Wing Radio Host and *BuzzFeed*; Former Political Candidates Bring Defamation Lawsuits

DEFAMATION

In summer and fall 2018, several prominent individuals faced or filed defamation lawsuits. Throughout 2018, right-wing radio host Alex Jones continued fighting defamation lawsuits that arose out of his repeated claims that the Sandy Hook shooting was faked. He filed motions to dismiss in three of the cases, citing Texas law. Meanwhile, several social media and streaming websites banned Jones and his conspiracy website, "InfoWars," contending that his content violated their terms and conditions.

In October 2018, litigation also continued in the defamation lawsuits related to the "Steele Dossier," a 35-page document detailing ties between then-Republican presidential candidate Donald Trump and the Russian government. On October 1, *BuzzFeed* requested that the U.S. District Court for the Southern District of Florida classify Russian businessman Aleksej Gubarev as a public figure in a defamation case he brought regarding *BuzzFeed*'s publication of the dossier. On October 17, *The New York Times* asked to intervene in the case and that the court unseal relevant records, alleging that it was impossible to report on the case with widespread redactions. Meanwhile, on August 20, a D.C. judge had dismissed a defamation lawsuit against Christopher Steele, a former MI6 intelligence officer who compiled the dossier, holding that Steele was protected by the First Amendment and Washington, D.C.'s anti-SLAPP statute.

On October 16, former U.S. Senate candidate and Arizona sheriff Joe Arpaio sued *The New York Times* for defamation, alleging they published an op-ed that harmed his ability to run for the Senate in 2020. Finally, on September 5, another former Senate candidate, Roy Moore, sued Sacha Baron Cohen, Showtime, and CBS over a skit that implied Moore was a pedophile on Cohen's Showtime show, "Who Is America."

Defamation Suits Against Alex Jones Progress as Online Platforms Ban Jones' Content

In fall 2018, Alex Jones, creator of the far-right website "InfoWars," which is known for promoting conspiracy theories, filed several motions to dismiss in three separate defamation lawsuits related to his claims that the 2012 Sandy Hook shooting was a "giant hoax." The motions came as more online platforms banned Jones' content because it violated user agreements, as well as terms and conditions related to hate speech.

On April 2, 2018, Marcel Fontaine sued Jones, "InfoWars," its parent company Free Speech Systems LLC, and Kit Daniels, an "InfoWars" reporter, for publishing a photograph of Fontaine that suggested he was the Sandy Hook Shooter. Fontaine argued that he was "targeted" by "InfoWars" because he

Executions, *continued from page 51*

viewing where the lethal chemical mixing and administration occurs if the State lacked a legitimate penological objective to conceal this from view." Seeborg wrote that the ruling "supports a more open rather than static treatment of its holding to cases involving a right of access to observe portions of an execution, distinct from a right of access to documents or information about the execution." Thus, Seeborg concluded that "[a]t the motion to dismiss stage, plaintiffs can satisfy their pleading burden . . . for a First Amendment right of access to observe portions of an execution" before and after the inmate is brought into the execution chamber.

Finally, Seeborg turned to whether the plaintiffs had "raised facts sufficient to achieve the requisite standard of plausibility regarding rights of access" before the inmate enters the Lethal Injection Room, or when medical care is provided after the injections have been administered. Seeborg found that the plaintiffs had sufficiently argued "a plausible claim [that] preparing the chemicals is inextricably intertwined with the execution process." He reasoned that the "lethal chemical injections are the actual cause of death and are prepared in the same Infusion Control Room where the chemicals are administered, by the same team of prison officials who administers them."

Seeborg further found that the media outlets sufficiently alleged a right to observe medical assistance "because it occurs after the inmate is brought into the execution chamber." He noted that witnesses can only be removed if the state had "a valid penological purpose," but that this was not the case in the present dispute because the defendants appeared to concede no such purpose regarding the preparations of the chemicals and had "only offer[ed] a potential medical privacy interest in preventing public access to an inmate's medical information during execution," which was not sufficient to qualify as a "valid penological purpose."

Thus, Seeborg denied the State's motion to dismiss. The full ruling is available online at: https://www.aclunc.org/docs/2018.09.06_Order_Denying_Defendants_Motion_to_Dismiss_Complaint_in_Part.pdf. As the *Bulletin* went to press, no further announcements had been made in the case.

On August 17, independent California news and culture outlet *48hills* contended that although Seeborg had not made a final ruling in the case, his decision to dismiss the State's motion "seem[ed] very favorable to the news media groups' overall arguments."

48hills also noted that as of August 2018, 744 inmates awaited execution in California, including 721 men and 23 women. The *San Francisco Chronicle* reported on the same day that more than 20 condemned prisoners in California have exhausted all appeals of their death sentences. The *Chronicle* further reported that unless Gov. Jerry Brown or his successor intervenes in these cases, executions could resume by August 2019. The *Los Angeles Times* observed that the California governor can only commute death sentences of inmates convicted of multiple felonies with the approval of four of the seven justices of the state Supreme Court.

Scott Memmel
Silha *Bulletin* Editor

was wearing a t-shirt emblazoned with a hammer and sickle and images of Joseph Stalin, Vladimir Lenin, and Karl Marx. On June 6, Jones filed a motion to dismiss, citing the Texas Citizens Participation Act (TCPA). Tex. Civ. Prac. & Rem. Code § 27.003. (For more information on Fontaine's lawsuit, see *Massachusetts Man, Sandy Hook Parents Sue Alex Jones for Defamation* 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*.)

In the motion to dismiss, Jones argued that Fontaine's cause of action should be dismissed under the TCPA, Texas' anti-SLAPP statute, which allows parties to file a motion to dismiss in a defamation case if the legal action revolves around their right to free speech, expression, association, or right to petition. Jones contended that Fontaine's lawsuit sought to restrict Daniels' right to speak freely on a matter of public concern, and therefore should be dismissed pursuant to the TCPA. The motion further argued that Fontaine would be unable to make a *prima facie* defamation case and alleged that the defendants were entitled to a truth defense under Texas defamation laws. The motion also asked the judge to award the defendants court costs, attorney's fees, and other expenses, and to sanction Fontaine. The full motion is available online at: http://infowarslawsuit.com/wp-content/uploads/2018/06/june-5-2018-defendants-motion-to-dismiss.pdf.

Fontaine's response to the motion to dismiss alleged that "InfoWars" decided to publish the photograph despite knowing that "[i]t was an obvious bad joke by an anonymous internet troll." Fontaine further argued that "InfoWars" published the photograph recklessly with no journalistic verification, and that the source of the photograph, an anonymous message on 4chan, a far-right discussion board, was so "patently unreliable" that the court should infer that "InfoWars simply did not care about the truth." It also argued that the motion to dismiss was filed solely to harm Fontaine and was "intended to delay these proceedings and drive up the costs of litigation for Plaintiff." The response continued, "InfoWars maliciously published an innocent man's photograph as a mass murder suspect based on an unattributed anonymous source from the gutter of the internet.. . . Publishing the article was a reckless act that unquestionably subjects InfoWars to a plausible cause of action for defamation." Fontaine also requested that the court award him reasonable attorney's fees and court costs. The response brief is available online at: http://infowarslawsuit.com/wp-content/uploads/2018/10/2018-07-26-Plaintiffs-Response-to-Defendants-Mtn-to-Dismiss-Under-the-Texas-Citizens-Participation-Act.pdf.

The court issued an order, but not a written opinion, when deciding the motion to dismiss. *Fontaine v. Jones*, No. D-1-GN-18-001605 (2018). According to *The New York Times* on Aug. 30, 2018, the court denied Jones' motion to dismiss regarding Fontaine's defamation claim, but granted it in regard to Fontaine's emotional distress claim. The judge also held that Fontaine could sue the other plaintiffs, but not Jones personally.

On September 14, the defendants filed a notice of accelerated appeal in the Third Court of Appeals in Austin, Texas. As the *Bulletin* went to press, the appeal remained pending.

On April 16, 2018, parents of two children killed in the 2012 Sandy Hook shootings filed two separate lawsuits against Jones, "InfoWars," and Free Speech Systems alleging that Jones' allegations that the shooting was faked were defamatory. In one lawsuit, Leonard Pozner and Veronique De La Rosa claimed that Jones used a technical glitch in a CNN interview with De La Rosa to allege that the shooting did not happen and that the plaintiffs were "liars and frauds." In a second lawsuit, Neil Heslin argued that Jones defamed him when citing a report prepared by one of Jones' employees that claimed it was impossible for Heslin to have held his dead son, despite Heslin's claims otherwise. (For more information on these lawsuits, see *Massachusetts Man, Sandy Hook Parents Sue Alex Jones for Defamation* in "Minnesota and Federal Courts Grapple with Defamation Questions; Right-Wing Radio Host Faces Several Defamation Lawsuits," in the Summer 2018 issue of the Silha *Bulletin*.)

On June 26, Jones and the other defendants filed a motion to dismiss under the TCPA in the Pozner and De La Rosa case. In the motion, they argued that the "lawsuit [was] a strategic device used by Plaintiffs to silence Defendants' free speech and an attempt to hold Defendants liable for simply expressing their opinions regarding questioning the government." It added that "[t]he goal of this lawsuit is to silence Defendants, as well as anyone else who refuses to accept what the mainstream media and government tell them, and prevent them from expressing any doubt or raising questions."

The plaintiffs, in a response filed on July 25, argued that they brought the lawsuit because Jones' rhetoric led to a woman stalking and threatening their family. The woman, Lucy Richards, later pleaded guilty to threatening the family and was sentenced to prison. "For years, Mr. Jones smeared this shattered family with his malicious statements and they nearly suffered another fatal tragedy as a result," the response says. "Yet Mr. Jones refused to stop, and he now seeks a license from this Court to continue pedaling his dangerous lies."

On August 30, *The New York Times* reported that the 261st Judicial District Court of Travis County, Texas had denied Jones' motion on August 30 as to all counts. *De La Rosa v. Jones*, No. D-1-GN-18-001842 (2018). On September 12, Jones gave notice of his intention to file an expedited interlocutory appeal. As the *Bulletin* went to press, the appeal remained pending.

The defendants filed a similar motion to dismiss the Heslin case in Travis County under the TCPA on July 13. The court held a hearing on the motion on August 30, but did not issue a ruling within 30 days of the hearing, as required by the TCPA. On October 2, Jones, contending that the court's failure to act meant the court denied the motion as a matter of law, filed notice of appeal. As the *Bulletin* went to press, all trial court proceedings, including a motion filed by Heslin to hold the defendants in contempt for failing to respond to discovery requests and produce parties for depositions, were stayed pending the appeal. *Heslin v. Jones*, No. D-1-GN-18-001835 (2018).

Pressure on Jones increased in the midst of the lawsuits. On August 6, *The New York Times* reported that Apple, Google, Facebook, and Spotify banned or severely restricted Jones' content. According to the *Times*, Apple removed five of six "InfoWars" podcasts on the Apple Podcasts app, citing hate speech as the reason for removal. Facebook

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removed four of Jones' pages, including one with almost 1.7 million followers for "glorifying violence" and "using dehumanizing language to describe people who are transgender, Muslims and immigrants." Google-owned YouTube removed Jones' channel, which had more than 2.4 million subscribers, for violating its prohibition on hate speech. Spotify also cited a prohibition on hate speech when banning one of Jones' podcasts. On September 6, Twitter also permanently banned Jones and "InfoWars," citing tweets and videos that violated the company's abusive behavior policy, according to a September 6 statement.

Others have protested against Jones, including his former wife, Kelly Jones. During a hearing in one of the defamation cases against Jones, Kelly Jones joined a protest outside the Travis County courthouse, according to an August 30 *Huffington Post* article. "Texans do care about justice, we care about bullies," she said during the protest. "We're a strong state and we don't put up with people bullying kids or parents of murdered schoolkids. We're not gonna tolerate that, we're gonna stand out here and protest peacefully."

Some legal experts believe that the outcome of these cases will help shape how courts handle the First Amendment in the Internet age, regardless of how they are resolved. Neil Richards, a First Amendment expert at the University of Washington Law School, told *Wired* on August 6 that courts should revisit some important precedents in order to adapt to new technologies. "It's clear that First Amendment doctrine needs to evolve, not to undo freedom of speech, but to ensure the values of public debate and of democratic self-government continue in a digital environment," he said.

Disputes Mount in "Steele Dossier" Defamation Case, D.C. Judge Dismisses Trump Dossier Defamation Case Against Christopher Steele

On October 9, *BuzzFeed* requested that the U.S. District Court for the Southern District of Florida classify Russian businessman Aleksej Gubarev as a public figure in a defamation case he brought regarding *BuzzFeed*'s publication of the "Steele Dossier" (dossier), a 35-page document compiled by former MI6 intelligence officer Christopher Steele detailing ties between the Russian government and then-Republican presidential candidate Donald Trump. On Oct. 17, 2018, *The New York Times* moved to intervene in the defamation case against *BuzzFeed* and also requested access to the judicial records in the case. Meanwhile, on Aug. 20, 2018, a Washington, D.C. judge dismissed a separate defamation lawsuit arising out of the dossier. In this case, three Russian billionaires, Mikhail Fridman, Petr Aven, and German Kahn, sued Steele for defamation related to claims in the dossier alleging their ties to the Russian government.

> "It's clear that First Amendment doctrine needs to evolve, not to undo freedom of speech, but to ensure the values of public debate and of democratic self-government continue in a digital environment."
>
> **— Neil Richards, University of Washington Law School professor**

During the 2016 U.S. presidential campaign, Steele compiled the dossier as part of opposition research against Trump. The dossier contained allegations of cooperation between Russia and the Trump campaign during the course of the general presidential election, among other claims. On Jan. 10, 2017, *BuzzFeed* published the 35-page dossier in its entirety. Although it flagged the allegations contained within the documents as "unverified, and potentially unverifiable," *BuzzFeed* explained that it published the document in full "so that Americans can make up their own minds about allegations involving the president-elect that have circulated at the highest levels of the US government." The dossier and *BuzzFeed* article are available online at: https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.darpRrV7#.vdxDJdZv.

Part of the dossier alleged that Gubarev was a "significant player" in an operation in which his companies, XBT Holdings S.A. and Webzilla, as well as their affiliates, "had been using botnets and porn traffic to transmit viruses, plant bugs, steal data and conduct 'altering operations' against the Democratic Party leadership." In February 2017, Gubarev filed a defamation lawsuit against *BuzzFeed*, contending that he and his companies had been severely damaged by the false accusations and "some clear errors" in the dossier.

On June 4, 2018, Southern District of Florida Judge Ursula Ungaro ruled that *BuzzFeed* could claim New York's fair report privilege as a defense. *Gubarev v. BuzzFeed*, No. 1:17-cv-60426-UU (S.D. Fla. 2018). Ungaro held that the privilege, which is normally used to shield media outlets and journalists from defamation liability when they report on government investigations using official documents and statements by public officials, also extends to include classified intelligence briefings. (For more information on the previous ruling and the background of the case, see BuzzFeed *Allowed Fair Report Privilege in Trump Dossier Defamation 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*.)

On October 1, *BuzzFeed* requested that the Southern District of Florida find that Gubarev was a public figure, which would require that he show "actual malice," the standard created in *New York Times v. Sullivan*, 376 U.S. 254 (1964) requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

In an October 9 brief in response to Gubarev's October 1 motion for summary judgement on *BuzzFeed*'s use of the public figure defense, the news outlet argued that Gubarev and his company were "major players in the world of technology and web-hosting, and *the* major player in the Russian internet world" (emphasis in original), and, therefore, Gubarev should be considered a limited purpose public figure, as opposed to a "household name like Oprah or Facebook." *BuzzFeed* cited Gubarev's extensive efforts to gain publicity for his company in the year before the Dossier was published. "Plaintiffs spent more than a year before the Dossier was published aggressively seeking — and meaningfully receiving — worldwide publicity to position Gubarev

and XPT as "experts" and "thought leaders" on cybersecurity and "Russian tech," the brief read. As the *Bulletin* went to press, Ungaro had not ruled whether Gubarev was a public figure.

Meanwhile, on October 17, *The New York Times* filed a motion to intervene in the case in order to seek to unseal judicial records relating to the parties' previous summary judgement motions. The *Times* argued that the case was undeniably regarding a matter of public concern, and that the "widespread redaction of dispositive motions" prevents the public from effectively monitoring it. "Redactions block out, in full or part, such critical sections of the parties' briefs as those dealing with whether the plaintiffs are public figures and whether the fair report privilege, applicable to governmental documents, applies to the document," the brief stated. The *Times* also alleged that these documents are presumptively public, and that when "discovery material is filed in connection with pretrial motions that require judicial resolution of the merits, the right of access attaches."

The *Times* noted that it would use the information in order to report on the case, arguing that "[o]btaining court records for news purposes is clearly one which is legitimate and in fact *promotes* public understanding of these proceedings" (emphasis in original). Additionally, the motion contended that there was no interest in privacy that would be served by keeping the records sealed or redacted, as the dossier is already available to the public, and that most of the sealing relates to the ongoing debate about the plaintiff's status as a public figure. "Whether [Gubarev is a] public figure focuses on Plaintiff's involvement in a *public* controversy — the very antithesis of a matter that warrants privacy," the brief read. The *Times* also noted that there is no evidence that disclosure would not impede law enforcement, and that the existing and continuing coverage would not lead to an unfair trial. As the *Bulletin* went to press, Ungaro had not ruled on the motion.

BuzzFeed's lawyer, Roy Black of Black Srebnick Kornspan & Stumpf PA, told *Law360* on October 17 that the news outlet had not yet taken a position on the *Times*' motion. "While we are in favor of full disclosure of court proceedings, there are witnesses who have asked for privacy which we have to respect," he said.

Jonathan Manes, director of the Civil Liberties and Transparency Clinic at the University at Buffalo School of Law, told *McClatchy* in a November 21 article that it is important for the public to have access to court documents. "Court proceedings are public proceedings, and the public is entitled to see how the cases are progressing and why they turn out the way they turn out," he said. "If we can't read the papers the judge is reading, we don't know what is going on."

Meanwhile, on August 20, D.C. Superior Court Judge Anthony Epstein dismissed an April 16 lawsuit brought by Fridman, Aven, and Kahn against Steele in which they argued that the former MI6 agent defamed them in the dossier by detailing their ties with the Russian government and implying that they tried to influence the 2016 United States presidential election. *Khan v. Orbis Business Intelligence Ltd.*, No. 2018 CA 002667 B (2018).

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>
> **— Jonathan Manes,**
> **University at Buffalo School of Law**
> **Civil Liberties and Transparency Clinic director**

Steele countered that the lawsuit should be dismissed because it was frivolous and an attempt to silence him, citing the First Amendment and Washington, D.C.'s Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) Act. D.C. Code §§ 16-5501-5505. Anti-SLAPP laws are meant to provide a remedy for defendants against meritless claims brought by plaintiffs involving publications regarding matters of public concern or the defendant's right to free speech, right to petition the government, or right of association. The D.C. anti-SLAPP statute imposes a heightened pleading standard for claims related to "act[s] in furtherance of the right of advocacy on issues of public interest" by requiring plaintiffs to show that their claims are "likely to succeed on the merits."

In the August 20 court order, Epstein sided with Steele. He first wrote that the D.C. anti-SLAPP law is intended to prevent lawsuits designed to quell public participations by "extending substantive rights to defendants," that allow them to file special motions to dismiss in the early stages of a lawsuit. In the special motion, the defendant must first make a *prima facie* showing that the legal action resulted from "an act in furtherance of the right of advocacy on issues of public interest." Epstein noted that the law requires that the plaintiffs prove that their claim is likely to succeed on its merits, or the case is dismissed.

Second, Epstein held that Steele could claim First Amendment protections because D.C.'s anti-SLAPP law is presumed to cover only speech protected by the First Amendment, and the law does not limit its applicability to U.S. citizens. He continued by noting that "advocacy on issues of public interest has the capacity to inform public debate, and thereby furthers the purposes of the First Amendment, regardless of the citizenship or residency of the speaker." Epstein also pointed to Steele's extensive contact with the United States, and the fact that he was hired by Hillary Clinton's campaign, to determine that Steele's speech was protected by the First Amendment.

Third, Epstein held that Steele made an appropriate showing that the Plaintiff's claims arose from "an act in furtherance of the right of advocacy on issues of public interest." He found that Steele advocated by providing the dossier to the media with the understanding that it would be published, even though the information was "raw intelligence," and not necessarily Steele's personal opinions. Epstein wrote, "Protection under the Anti-SLAPP Act is at least as broad as protection under the First Amendment, so the Act applies to statements that consist of 'raw intelligence.'"

Epstein also found that Steele made a *prima facie* showing that the dossier

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involved an issue of public interest. He wrote, "The Steele Dossier *as a whole* plainly concerns an 'issue of public interest' within the meaning of [the anti-SLAPP law] because it relates to possible Russian interference with the 2016 presidential election" (emphasis in original). He also found the specific section at issue in this lawsuit of public interest because it involved Russian foreign policy towards the United States. Therefore, Epstein concluded that Steele made a valid claim under the anti-SLAPP law.

Fourth, Epstein held that the plaintiffs did not show that their case would be likely to succeed on the merits. He reasoned that they did not show actual malice, and that they did not offer any evidence that Steele knew or recklessly disregarded information relating to the dossier's falsity. Epstein further found that the plaintiffs did not offer evidence to prove that the statements were false. He concluded that "because Plaintiffs have not offered evidence supporting a clear and convincing inference that Defendants made any defamatory statement in [the dossier] with knowledge that it was false or with reckless disregard of its falsity, they have not offered evidence that their claims are likely to succeed on the merits."

Finally, Epstein clarified that the court did not determine the accuracy of the information contained in the dossier, or whether Steele defamed the plaintiffs. Instead, Epstein wrote that "[t]he Court concludes only that the Anti-SLAPP Act requires dismissal of this case because Defendants have made a prima facia case that the Act applies to their provision of this portion of the Steele Dossier to the media, and Plaintiffs have not submitted evidence that the Defendants knew any of this information was false or acted with reckless disregard of its falsity." The full order is available online at: https://www.documentcloud.org/documents/4779088-Khan-v-Orbis-Order-082018.html.

In an August 21 statement, Steele's attorney, Christy Hull Eikhoff, said that they were "thrilled" with the court's decision to dismiss the case. "We will continue to defend against baseless attacks on Chris and his company, Orbis, and hope that the result of this case will be a lesson to those who seek to intimidate Chris and his company," she said. Alan Lewis, an attorney representing the plaintiffs, said in an August 21 statement that they "strongly" disagreed with the court and stated that they would appeal the ruling. "We respectfully disagree with Judge Epstein on a number of points and are confident that the appellate court will reinstate the plaintiffs' claims," he said.

Former Arizona Sheriff Brings $147.5 Million Defamation Lawsuit Against *The New York Times*

On Oct. 16, 2018, former Arizona Sheriff Joe Arpaio filed a $147.5 million defamation lawsuit against *The New York Times* and Michelle Cottle, a *Times* editorial writer, in the U.S. District Court for the District of Columbia. *Arpaio v. Cottle*, No: 1:18-cv-02387 (D.D.C. 2018). Arpaio alleged that an Aug. 29, 2018 editorial article that referred to him as a "truly sadistic man" harmed his reputation and his ability to run for the U.S. Senate in 2020. Arpaio's attorney said the lawsuit was part of his "Leftist Media Strike Force," designed to "hold the dishonest and unhinged 'fake news' left accountable." Others suggested that the lawsuit was a stunt designed to garner publicity for Arpaio.

According to an Aug. 23, 2017 story by *The Washington Post*, Arpaio was elected sheriff in 1993 and soon became known for his unusual practices, including requiring inmates to wear pink underwear and setting up a "Tent City" jail that was kept open for more than 20 years, despite multiple lawsuits from former inmates. The story noted that when the recession hit in 2008, Arpaio was faced with political quarreling and legal disputes surrounding his budget for combatting illegal immigration. Also in 2008, President George W. Bush's administration began investigating the sheriff's office for possible civil rights violations, according to the *Post*. The article stated that the investigation continued until Arpaio's agency lost its immigration-enforcement authority in 2011, when the U.S. Department of Justice (DOJ) concluded that the sheriff's office participated in systematic racial profiling.

Arpaio was convicted of criminal contempt of court in 2017 after he refused a 2013 order by U.S. District Judge Murray Snow that required the agency to stop detaining people based on suspicions of their immigration status, according to the *Post*. President Trump pardoned Arpaio on Aug. 25, 2017, as reported by CNN two days later. In a statement released after the pardon, President Trump voiced his support for Arpaio. "Throughout his time as sheriff, Arpaio continued his life's work of protecting the public from the scourges of crime and illegal immigration," the statement said. "Sheriff Joe Arpaio is now 85 years old, and after more than 50 years of admirable service, he is [a] worthy candidate for a Presidential pardon."

The Aug. 29, 2018 *New York Times* editorial, titled "Well, at Least Sheriff Joe Isn't Going to Congress," accused Arpaio of "terrorizing immigrants" and "racial profiling on a mass scale," and referred to him as "a sadist masquerading as a public servant" and a "disgrace to law enforcement." The story asserted that Arpaio "brought back chain gangs" in Arizona detention centers, withheld medical care from detainees, and failed to investigate sex crimes involving children. The article also detailed Arpaio's relationship with President Trump, Arpaio's embrace of the birther movement that claimed former President Barack Obama's birth certificate was a forgery, and condemned the pardon President Trump granted Arpaio after he was found guilty of criminal contempt of court in July 2017. The full editorial is available online at https://www.nytimes.com/2018/08/29/opinion/sheriff-joe-arpaio-congress.html.

In the complaint, Arpaio alleged that the article contained several false, defamatory factual assertions that were designed to harm his political career, prevent him from securing political funding, and damage his reputation in the law enforcement community. "These false factual assertions are carefully and maliciously calculated to damage and injure plaintiff Arpaio both in the law enforcement community — which is centered in this judicial district — as well as with Republican establishment donors, which is also centered in this judicial district, in order to prevent him from a successfully run [*sic*] for U.S. Senate in 2020 or another public office as a Republican," the complaint read. Arpaio argued that although the editorial was "strategically titled as an opinion piece," its mixture of "false or misleading facts or false and misleading mixed opinion and fact" constituted outright lies.

Arpaio further claimed that the article harmed his "distinguished 55-year law enforcement and political career" and damaged his reputation with the

Republican establishment. He alleged that the article damaged his ability to run for elected office in 2020 and harmed him financially due to a decreased ability to secure political funding. Arpaio claimed defamation *per se*, tortious interference with prospective business relations, and false light. He sought $147,500,000 in actual, compensatory, and punitive damages, as well as attorney's fees and court costs. The full complaint is available online at: https://www.politico.com/f/?id=00000166-7fc5-d3f0-a1f7-ffc50e8b0002. As the *Bulletin* went to press, the court had not ruled in the case.

Larry Klayman, Arpaio's attorney and founder of conservative group Freedom Watch, said in an October 17 statement that the lawsuit was filed as part of Freedom Watch's "Leftist Media Strike Force." "The NYT and its hate filled reporter, Michelle Cottle, will be held accountable for their libelous acts, not just to bring about justice for my client, but all those who on a daily basis are demeaned, trashed and harmed by this venomous leftist publication and its staff" Klayman said. "By demanding and getting a jury verdict for large compensatory and punitive damages, we hope to bring this 'failing newspaper' to its knees and end its mission to destroy all who it disagrees with, most notably conservatives, including the current president of the United States, Donald J. Trump."

In an October 16 email to *Politico*, *Times* spokesperson Eileen Murphy said the news organization does not plan on settling. "We intend to vigorously defend against the lawsuit," she wrote.

Some believe that Arpaio's lawsuit is not about the $147.5 million he is seeking in damages. EJ Montini, a columnist at *AZCentral*, wrote on October 17, "Money isn't what he wants.. . . What Arpaio wanted, and has always wanted, and has always received, is attention."

Roy Moore Files Defamation Lawsuit Against Cohen, Showtime, and CBS for TV Stunt

On Sept. 5, 2018, former U.S. Senate candidate Roy Moore filed a lawsuit in the U.S. District Court for the District of Columbia against Sacha Baron Cohen, Showtime, and CBS for defamation, intentional infliction of emotional distress, and fraud stemming from a segment on Cohen's prank show "Who Is America?" that insinuated Moore was a pedophile. Legal experts contended that, even if the allegations were false, Moore would have a difficult time winning the case.

Moore, the former chief justice of the Alabama Supreme Court, had previously been accused of pursuing several teenage girls while he was in his 30s. On Nov. 9, 2017, *The Washington Post* reported that Roy Moore had approached several teenage girls in the 1970s, when Moore was a 32-year-old assistant district attorney, and attempted to initiate relationships with them. The *Post* reported that Moore took three underage girls on dates, and repeatedly asked out another. The youngest was 14-year-old Leigh Corfman, the only girl who reportedly had sexual contact with Moore. Moore denied the allegations and his campaign released a November 9 statement calling the *Post* story "the very definition of fake news and intentional defamation."

Moore asserted in his September 5 complaint, in which his wife, Kayla Moore, was included as a plaintiff, that Cohen "falsely and fraudulently induces unsuspecting victims, such as Judge Moore to be interviewed under dishonest, unethical, illegal and false pretenses." The complaint claimed that the interview "falsely painted, portrayed, mocked and with malice defamed Judge Moore as a sex offender, which he is not." Moore further alleged that Cohen does this in order to "severely humiliate" the guests so that he may promote and profit from his television show. The complaint also stated that Moore believed he was appearing on a different, nonexistent show, and that he thought he would be receiving an award for his "strong support of Israel in commemoration of its 70th anniversary as a nation state." Moore said that he would not have agreed to appear on Cohen's show if he knew he would appear on "Who Is America?" instead of receiving an award on the fictional show.

In the first cause of action for defamation, the complaint alleged that the depiction suggesting that Moore was a sex offender harmed his reputation and damaged him financially "by calling, representing and publishing within this district, the nation and the world, with malice, that Judge Moore [is] a pedophile and a sex offender." Moore claimed that the statements constituted defamation *per se* because they accused Moore of committing a serious crime and, therefore, damages were presumed as a matter of law.

In a second cause of action for intentional infliction of emotional distress, Moore asserted that Cohen's actions were "extreme and outrageous" and not based on any substantiated factual basis. "As a direct and proximate result of Defendants and their agents' extreme and outrageous conduct set forth above, Judge Moore has been the subject of widespread ridicule and has suffered severe loss of reputation, which has in turn also caused him, Mrs. Moore, and his entire family severe emotional distress and financial damage, especially given his status as a prominent conservative and a God fearing person of faith," the complaint stated.

In the final cause of action, Moore alleged that Cohen's misrepresentation of the television show and award constituted fraud. "Defendant Cohen, while in disguise, further made false and fraudulent representations that he was 'Erran Morad' in order to trick Judge Moore into speaking with and to be interviewed by him," the complaint read. It also contended that, because the defendants failed to take remedial action after being notified that the release Moore signed before appearing on the television show was obtained through fraud, all the defendants may be held jointly and severally liable.

Moore asked the court for $95 million in damages, as well as attorney's fees and costs. As the *Bulletin* went to press, the defendants had not filed a response to the complaint, but had moved to transfer the case to the Southern District of New York.

On the show "Who Is America?" Cohen is well known for duping celebrities and public figures, and assuming aliases in order to trick them into appearing on the show. Previous guests on the show include President Donald Trump, O.J. Simpson, Bernie Sanders, Buzz Aldrin, and Paula Abdul, among others. Previous guests have sued Cohen, but he has prevailed in nearly every case, largely thanks to the comprehensive release guests must sign before appearing on the show that releases Cohen from liability for defamation, according to *The New York Times* on August 19.

Kirsten Nordstrom
Silha Research Assistant

Ninth Circuit Declines a Second Look at the Monkey Selfie Case

On Aug. 31, 2018, the U.S. Court of Appeals for the Ninth Circuit declined to rehear *en banc* what became known as the "Monkey Selfie" case, which arose after an Indonesian monkey named Naruto took a selfie of himself using photographer David John Slater's camera in 2011. *Naruto v. Slater*, No. 3:15-cv-04324-WHO (9th Cir. 2018). People for the Ethical Treatment of Animals (PETA) argued that Naruto's rights under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, were violated when Slater published the photographs. The Ninth Circuit previously ruled on April 23, 2018 that Naruto had standing under Article III of the U.S. Constitution to bring a case to federal court, but did not have statutory standing under the Copyright Act. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

COPYRIGHT

The case arose in 2011 when the 6-year-old crested macaque used Slater's unattended camera to take several pictures, including of himself. Slater later published photographs taken by Naruto in his book, "Wildlife Personalities," which was published by Wildlife Personalities, Ltd. PETA summarily filed a lawsuit on behalf of Naruto against Slater, alleging that publishing the photographs had infringed on the macaque's rights under the Copyright Act.

Judge William Orrick of the U.S. District Court for the Northern District of California wrote a tentative opinion in January 2016 in which he held that the Copyright Act did not apply to animals. *Naruto v. Slater*, 15-cv-04324-WHO (N.D. Cal. 2016). The parties reached a settlement in September 2017 in which Slater agreed to donate 25 percent of future revenue from the photograph to charitable organizations that protect crested macaques, like Naruto.

Despite the settlement, on April 23, 2018, the Ninth Circuit affirmed Orrick's ruling that Naruto had Article III standing to bring a case based on economic harms as a result of alleged copyright infringement, but lacked statutory standing to claim copyright infringement under the Copyright Act.

Judge Carlos Bea wrote the majority opinion in which he held that PETA did not have next friend standing to bring the lawsuit, an argument normally used when a party seeks to appear in court on behalf of an individual who is not competent to do so, such a minor or someone with cognitive disabilities.

Bea held that Naruto did have Article III standing to bring the case in federal court because he was, according to the complaint, the author and owner of the photographs he had taken using Slater's camera, and had perhaps suffered "concrete or particularized harms," as required by the U.S. Supreme Court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). (For more information on *Spokeo, Inc. v. Robins*, see "Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Court Splits on Article III Standing Bar Following *Spokeo* in the Summer 2017 issue of the Silha *Bulletin*, "Supreme Court Issues Long-Awaited *Spokeo* Ruling" in the Summer 2016 issue, and "U.S. Supreme Court Accepts Review of *Robins v. Spokeo, Inc.*" in the Summer 2015 issue.)

However, Bea held that Naruto did not have statutory standing under the Copyright Act, finding that it "does not expressly authorize animals to follow copyright infringement suits under the statute." Thus, the Ninth Circuit concluded that *if* Naruto had a valid federal claim, he would have Article III standing to sue (emphasis added). However, because Naruto did not have standing under the Copyright Act, he did not have a valid federal claim.

In an opinion concurring in part, Judge N. Randy Smith agreed "that this case must be dismissed" because "[f]ederal courts do not have jurisdiction to hear this case at all." However, he disagreed with the majority's conclusion that the lack of next friend standing in the case "does not destroy [Naruto's] standing to sue" and that Article III standing is not dependent on PETA's relationship with Naruto. Smith contended that this conclusion was problematic because it allowed the court to reach the merits of the Copyright Act question, whereas PETA's lack of next friend status should have been the end of the lawsuit.

The Ninth Circuit's full ruling is available online at: https://www.documentcloud.org/documents/4444209-Naruto-Monkey-PETA-v-Slater-CA9-Opinion-04-23-18.html. (For more information on the background of the case and the Ninth Circuit's April ruling, see "No More Monkey Business: Settlement Ends 'Monkey Selfie' Copyright Lawsuit" in the Fall 2017 issue of the Silha *Bulletin* and "U.S. Court of Appeals Calls PETA Bananas in Monkey Selfie Case" in the Summer 2018 issue.)

On May 25, 2018, *The Recorder* and *Law360* reported that at least one member of the three-judge panel that decided the case had *sua sponte* requested that the court reconsider the decision *en banc*. The judge(s) were not identified.

On August 31, the Ninth Circuit denied rehearing the case *en banc*, writing that "[a] vote was taken, and the matter failed to receive the majority of the votes of the non-recused active judges in favor of *en banc* consideration." The one-page decision is available online at: https://www.techdirt.com/articles/20180831/18170340560/ninth-circuit-stops-monkeying-around-denies-en-banc-review-monkey-selfie-case.shtml.

In a statement following the order, PETA spokesperson David Perle said, "PETA's groundbreaking 'monkey selfie' case sparked a massive international discussion about the need to extend fundamental rights to animals for their own sake, not in relation to how they can be exploited by humans. Naruto the macaque should be entitled to the copyright of the photos that he undeniably took, just like any other photographer."

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

Scott Memmel
Silha *Bulletin* Editor

Fourth Circuit Allows Lawsuit Targeting North Carolina Ag-Gag Law to Continue; District Court Rules Wyoming Law Unconstitutional

In summer and fall 2018, two federal courts ruled on North Carolina's and Wyoming's "ag-gag" laws, which generally prohibited individuals or organizations from gaining access to areas restricted to the general public, among other provisions. On June 5, the U.S. Court of Appeals for the Fourth Circuit allowed a lawsuit brought by several animal-rights groups against North Carolina's ag-gag law to continue, finding that the organizations had alleged a plausible "injury-in-fact," namely that they could not conduct undercover investigations of public and private facilities in North Carolina for alleged animal cruelty. On October 29, U.S. District Court for the District of Wyoming Judge Scott W. Skavdahl ruled on remand from the Tenth Circuit that Wyoming's two "Data Trespass laws," which were modeled after other states' ag-gag laws, were unconstitutional, finding that they specifically punished individuals for engaging in protected speech.

AG-GAG LAWS

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

Similarly, ag-gag laws can also take the form of agriculture disparagement laws, which establish a cause of action for damages arising from disparaging statements or dissemination of false information about the safety of food products.

Previously, in 2017 and 2018, two states' ag-gag laws were struck down by federal courts. On July 7, 2017, U.S. District Court for the District of Utah Judge Robert Shelby ruled that Utah's law, Utah Code § 76-6-112 (2012), which criminalizes both lying to gain access to an agricultural operation and filming once inside, violated the First Amendment rights of the People for the Ethical Treatment of Animals (PETA), the Animal Legal Defense Fund (ALDF), and Amy Meyer, the first individual charged under the law. *Animal Legal Defense Fund v. Herbert*, 263 F.Supp.3d 1193 (D. Utah 2017). Finally, on Jan. 4, 2018, the Ninth Circuit ruled that two portions of Idaho's Interference with Agricultural Production law, Idaho Code § 18-7042, violated the First Amendment. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

(For more information on the conflict between journalism and ag-gag laws, as well as the federal court rulings, see "Minneapolis Legislature Introduces an 'Ag-Gag' Law; Federal Appeals Courts Strike Down Two States' Laws" in the Winter/Spring 2018 issue of the Silha *Bulletin*, *Journalists Face Evolving, Uncertain Legal Landscape*, in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue, and "States Consider Banning Undercover Recording at Agricultural Operations" in the Summer 2011 issue.)

Federal Appellate Court Allows Lawsuit to Continue Against North Carolina Ag-Gag Law

On June 5, 2018, the Associated Press (AP) reported that the U.S. Court of Appeals for the Fourth Circuit had reversed a federal district court's dismissal of a lawsuit brought by several animal-rights groups against North Carolina's "ag-gag" law, which prohibits individuals from gaining access to areas otherwise not accessible to the general public, among other provisions. *People for the Ethical Treatment of Animals v. Stein*, 737 Fed.Appx. 122 (4th Cir. 2018). The court held that the organizations had alleged a plausible "injury-in-fact," namely that they could not conduct undercover investigations of public and private facilities in North Carolina for alleged animal cruelty, causing a "chilling effect" and "self-censorship."

The North Carolina Property Protection Act, N.C. Gen. Stat. § 99A-2 (2016), provides that "[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained." "Non-public" areas are defined as "those areas not accessible to or not intended to be accessed by the general public."

The statute provides several scenarios where this may occur, including an individual "[k]nowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data." The Act provides for equitable relief, as well as the recovery of compensatory damages, costs and attorneys' fees, and exemplary damages in the amount of $5,000 for each day that the person has acted in violation of the Act.

Shortly after the law was passed in 2016, PETA and the ALDF, among other animal-rights organizations, filed a lawsuit against North Carolina Attorney General Joshua Stein and University of North Carolina, Chapel Hill (UNC) Chancellor Carol L. Folt, alleging that North Carolina's ag-gag law "interfere[d] with their plans to conduct undercover investigations of government facilities in North Carolina for the purpose of gathering evidence of unethical and illegal animal practices and to disseminate this information to the public, in violation of the First and Fourteenth Amendments." The plaintiffs further alleged that they "fear[ed] liability under the [North Carolina Property Protection] Act" if they continued such investigations.

On May 2, 2017, Judge Thomas D. Schroeder of the U.S. District Court for the Middle District of North Carolina ruled against the organizations. *People for the Ethical Treatment of Animals v. Stein*, 259 F.Supp.3d 369 (M.D.N.C. 2017). He found that they could not show an "injury-in-fact" and, thus, did not have standing to bring the case. Schroeder wrote that the lawsuit "contain[ed] not a single allegation" that the defendants, which included the state and the University of North Carolina, "had ever sued or threatened to sue PETA or [the]

Ag-Gag Laws, *continued on page 60*

Ag-Gag Laws, *continued from page 59*

ALDF for investigatory conduct." PETA, the ALDF, and other plaintiffs summarily appealed the case to the Fourth Circuit, which held oral arguments in January 2018.

On June 5, 2018, the Fourth Circuit unanimously overturned Schroeder's ruling and allowed the case to proceed. In an unpublished *per curiam* opinion, the court first stated that PETA and ALDF has "a long history of conducting undercover investigations, including in North Carolina, to accomplish their missions." The court explained that the organizations recruit individuals to secure employment at companies that they have reason to believe are engaged in acts of animal cruelty. Those individuals then conduct undercover investigations, including collecting incriminating information. According to the court, both organizations have "had success with these investigative techniques," including an investigation by PETA that revealed illegal and unethical abuse of animals at UNC from 2001 to 2003.

Next, the court considered whether the organizations had adequately alleged an "injury-in-fact," which plaintiffs must demonstrate in order to have standing under Article III of the U.S. Constitution to bring a federal lawsuit.

Citing the U.S. Supreme Court's 2016 opinion in *Spokeo, Inc. v. Robins*, the Fourth Circuit stated that it must determine whether the organizations had sufficiently alleged that they have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. 1540, 1548 (2016). (For more information on *Spokeo, Inc. v. Robins*, see "Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Court Splits on Article III Standing Bar Following *Spokeo*" in the Summer 2017 issue of the Silha *Bulletin*, "Supreme Court Issues Long-Awaited *Spokeo* Ruling" in the Summer 2016 issue, and "U.S. Supreme Court Accepts Review of *Robins v. Spokeo, Inc.*" in the Summer 2015 issue.)

The Fourth Circuit also noted that in First Amendment cases, "standing requirements are somewhat relaxed." According to the court, under the "First Amendment standing framework," plaintiffs must "'sufficiently satisf[y] the . . . injury-in-fact requirement by showing that [the challenged statute] had an *objectively reasonable chilling effect*' on the exercise of their rights" (emphasis in original). One such cognizable injury would be "self-censorship," which occurs "when a claimant is chilled from exercising her right to free expression." Such claims require a "credible threat of enforcement against the plaintiff," such as under the North Carolina ag-gag law.

The Fourth Circuit held that the plaintiffs had sufficiently alleged an injury-in-fact for purposes of their First Amendment challenge. The court first reasoned that the plaintiffs had plausibly alleged that they wished to continue their undercover investigations of public and private facilities and were "fully prepared to go forward but for their fear of liability under the [North Carolina Property Protection] Act."

Second, the court reasoned that the plaintiffs had "alleged a reasonable and well-founded fear that the Act *will be* enforced against them if they carry out their plans" (emphasis in original). The court determined that the ag-gag law would prohibit the plaintiffs' planned activities and potentially subject them to "severe exemplary damages." The result was that the plaintiffs were forced to "self-censor" themselves, constituting a "chilling effect."

Finally, the court wrote that it could not conclude that the alleged chilling effect was "objectively unreasonable" or that the plaintiffs' claims of injury were "too speculative" to satisfy the First Amendment standing framework.

Thus, the court held that the organizations had "sufficiently alleged, at least at this stage of the litigation, an injury-in-fact sufficient to meet the first prong of the First Amendment standing framework." The case was remanded to the district court for further proceedings. The full *per curiam* opinion is available online at: http://www.ca4.uscourts.gov/opinions/171669.U.pdf.

As the *Bulletin* went to press, no further action had been taken in the case.

Federal District Court Strikes Down Wyoming Ag-Gag Law

On Oct. 29, 2018, Judge Scott W. Skavdahl of the U.S. District Court for the District of Wyoming held that Wyoming's two "Data Trespass laws," which were modeled after ag-gag laws in other states, were unconstitutional on their face. *Western Watersheds Project v. Michael*, No. 15-CV-169-SWS (D. Wyo. 2018). He wrote that the laws were not "content neutral" and could not survive strict scrutiny because "[t]here [was] simply no plausible reason for the specific curtailment of speech in the statutes beyond a clear attempt to punish individuals for engaging in protected speech that at least some find unpleasant." Several observers praised the ruling as a victory for the First Amendment and for undercover investigations.

In 2015, Wyoming enacted a pair of statutes prohibiting individuals from entering "open land for the purpose of collecting [or recording] resource data" without permission from the owner and with the intention of submitting the data to a government agency. The laws were largely identical except that one imposed criminal penalties, Wyo. Stat. §§ 6-3-414 (2015), while the other imposes civil liability, Wyo. Stat. §§ 40-27-101 (2015). The term "collect" was defined as taking a "sample of material" or a "photograph," or "otherwise preserv[ing] information in any form" that is "submitted or intended to be submitted to any agency of the state or federal government." Violations of the criminal statute carried a maximum prison term of one year and a $1,000 fine for first-time offenders. Repeat offenders faced a mandatory minimum sentence of 10 days in prison, a maximum of one year, and a $5,000 fine. The civil statute imposed liability for proximate damages and "litigation costs," including attorney's fees.

After the passage of the two laws, Western Watersheds Project, an environmental watchdog organization; the National Press Photographers Association (NPPA); and the Natural Resources Defense Council (NRDC) filed a federal lawsuit challenging the statutes, arguing that they violated the First and Fourteenth Amendments, and were preempted by federal law. The defendants of the lawsuit included Peter Michael, the attorney general of Wyoming; Todd Parfitt, the director of the Wyoming Department of Environmental Quality; Patrick Lebrun, County Attorney of Fremont County; Joshua Smith, County Attorney of Lincoln County; and Clay Kainer, County and Prosecuting Attorney of Sublette County.

On July 6, 2016, Judge Skavdahl issued a written order, which held the plaintiffs "(1) had standing to challenge the civil statute; (2) stated a plausible First Amendment Free Speech and

Petition claim; (3) stated a plausible Equal Protection claim; (4) failed to state a Supremacy Clause or preemption claim; and (5) failed to state a claim against Defendant Governor Matthew Mead."

Wyoming summarily amended the statutes, eliminating references to "open land." However, subsection (c) still stated that an individual is guilty of trespassing or commits a civil trespass to "access adjacent or proximate land" if he or she: "(i) Crosses private land to access adjacent or proximate land where he collects resource data; and (ii) Does not have: (A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or (B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land." The plaintiffs amended their complaint, contending that even as revised, the statutes were unconstitutional as applied and on their face.

On Sept. 7, 2017, the U.S. Court of Appeals for the Tenth Circuit ruled that Wyoming's statutes regulated expressive activities protected under the First Amendment. *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). Although the court did not rule on the constitutionality of the laws, it remanded the case to the district court to determine what level of constitutional scrutiny should apply and whether the laws will survive that review. Following the Tenth Circuit ruling, both parties filed cross-motions for summary judgment. (For more information on the background of the case and the Tenth Circuit's ruling, see *Tenth Circuit Rules Wyoming Ag-Gag Laws Regulate Protected Speech* in "Minnesota Legislature Introduces an 'Ag-Gag' Law; Federal Appeals Courts Strike Down Two States' Laws" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

In his Oct. 29, 2018 opinion, Skavdahl first determined that the plaintiffs had sufficiently established standing to bring a First Amendment claim, finding that the advocacy groups had "engaged in the past in the type of speech affected by the challenged government action" and had "provided affidavits stating a present desire, though no specific plans, to engage in such speech." Skavdahl held that the affidavits were sufficient to prove "self-censorship" and the "chilling" of the plaintiffs' speech and ability to conduct undercover investigations. He added, "Plaintiffs have made a plausible claim that they presently have no intention to carry out their desired speech activities because of a credible threat that the statutes will be enforced."

Second, Skavdahl concluded that although the plaintiffs alleged an "as-applied" challenge, as well as a "facial" challenge to the Wyoming statutes, the "end relief sought and primary analysis is facial in nature."

Third, Skavdahl found that the two statutes were a "clear case of content-based statutes" because they, "on their face, penalize only the collection of resource data relating to land or land use." He continued, "[T]he Wyoming laws do not attempt to penalize *any* data collection after crossing private land to access adjacent lands, but only the collection of data *relating to land or land use*. The laws, on their face, are content based" (emphasis in original).

Finally, Skavdahl turned to whether the laws survive strict scrutiny, meaning the restriction of speech must be necessary to serve a compelling state interest and be narrowly tailored to achieve that interest. Skavdahl wrote that the state interest in this case was "to protect private citizens' property rights," but found that the statutes made "no attempt at regulating trespass by anyone other than those that subsequently engage in land related data collection, i.e., other than those that subsequently engage in protected speech."

Skavdahl further found that the defendants had "an even greater problem when it comes to narrow tailoring," namely that they "failed to identify any reason why the curtailment of speech is 'actually necessary to the solution' of the identified problem." He added, "Trespass can be regulated and criminalized without any requirement of subsequent engagement in protected speech activities.. . . There is simply no plausible reason for the specific curtailment of speech in the statutes beyond a clear attempt to punish individuals for engaging in protected speech that at least some find unpleasant. The laws are not narrowly tailored and fail strict scrutiny."

Skavdahl granted the plaintiffs' motion for summary judgement and rejected the defendants' motion. His opinion is available online at: https://www.westernwatersheds.org/wp-content/uploads/2018/10/2018.10.29-DKt.-No.-113.pdf. As the *Bulletin* went to press, the defendants had not announced whether the state would appeal the case.

Following the ruling, Jonathan Ratner, the director of Western Watersheds Project in Wyoming, praised Skavdahl's decision. "The 'data trespass' statutes were a blatant attempt by the Wyoming legislature to block data collection on public lands and take away the public's constitutionally guaranteed freedom of speech and freedom of expression," Ratner said in an October 29 statement. "For years, Western Watersheds Project has collected scientific data showing that the majority of streams on federal public lands are contaminated by fecal bacteria from livestock, and the legislature clearly intended to suppress that information in order to protect the livestock industry from accountability under the Clean Water Act."

Michael Wall, litigation director of the NRDC, said in a separate statement, "The state tried to criminalize environmental advocacy.. . . That's un-American. And as the federal court ruled, it's unconstitutional."

Mickey H. Osterreicher, general counsel for the NPPA, also praised the ruling. "We are also very pleased that the court recognized the chilling effect that these laws have on citizens and journalists seeking to gather information on matters of public concern and we hope that other legislatures will think long and hard before proposing and enacting constitutionally infirm statutes," he said.

David Muraskin, the Food Project attorney for Public Justice, a nonprofit legal advocacy organization that represented the plaintiffs, was quoted in an October 30 NRDC press release as saying, "This is a sweeping victory for the First Amendment, and a scathing rebuke of the industrial agriculture industry's brazen attempt to hide the ways factory farms impact communities and the environment." He continued, "Wyoming's attempt to silence and intimidate citizens, advocates and the media has now met the same demise as similar laws in Idaho and Utah, sending a clear message to industrial agriculture's lobbyists that their dependence on secrecy to sell their product will not survive. These laws are unjust and unconstitutional, and we'll continue to fight them from coast to coast until they have all been defeated or repealed."

Scott Memmel
Silha *Bulletin* Editor

33rd Annual Silha Lecture Addresses the Free Speech Implications of the #MeToo Movement

On Oct. 17, 2018, First Amendment attorney Theodore J. Boutrous Jr., the global co-chair of Gibson, Dunn & Crutcher LLP's Litigation Group, discussed the interplay between the First Amendment and the #MeToo movement during the 33rd Annual Silha Lecture, "The First Amendment and #MeToo," at the University of Minnesota's Cowles Auditorium, with more than 250 people in attendance. Boutrous, who is representing actor Ashley Judd in her defamation lawsuit against film producer Harvey Weinstein, argued that Judd's case could produce a strong legal precedent that would allow victims of sexual harassment to stand up to their attackers and help catalyze the next stage of the #MeToo movement.

SILHA CENTER EVENTS

Boutrous began the lecture by noting that he had spent most of his career defending news organizations from defamation claims and advocating for broad First Amendment protections. He said it was not until he began representing Judd that he realized the importance of the First Amendment in the #MeToo movement. "It really shows how speech and individuals, famous people and private people, speaking out about an issue, bringing it out from the shadows, having a global dialogue about an issue, can change society," he said. "The #MeToo movement is all about speech." (For more information on Boutrous, see "Theodore J. Boutrous, Jr. to Deliver 33rd Annual Silha Lecture: 'The First Amendment and #MeToo'" in the Summer 2018 issue of the Silha *Bulletin*.)

Boutrous gave a brief overview of Judd's case against Weinstein, which claims that Weinstein "defamed Ashley Judd, trashed her professionalism to retaliate against her for rebuffing his inappropriate sexual advances, [which] really changed the trajectory of her career in a serious way." Boutrous elaborated on the retaliation, explaining that Judd was denied a role in the *Lord of the Rings* trilogy because Weinstein had told others in the industry that he had a bad experience with her and that she was a "nightmare to work with." Boutrous said that when it came to light that Judd was harmed professionally and economically by Weinstein's comments, she brought a defamation suit to redress the injury, even though the statute of limitations for her sexual harassment claim had already expired. Judd ultimately decided to bring the lawsuit in order to set a legal precedent that would help those who experience retaliation in the workplace bring their own lawsuits in the future, according to Boutrous. "The reason that Ashley wanted to bring this lawsuit was to take all this energy and momentum from the #MeToo movement and take the next step and have legal action that can really continue to change the world and improve the professional arc for all women and all men who might confront harassment and retaliation in the workplace," he contended.

> "[The #MeToo movement] really shows how speech and individuals, famous people and private people, speaking out about an issue, bringing it out from the shadows, having a global dialogue about an issue, can change society."
>
> **— Theodore J. Boutrous, Jr., Gibson, Dunn & Crutcher's Litigation Group global co-chair**

Boutrous then explained why he believed Judd's case raises completely different First Amendment issues than defamation lawsuits brought against media organizations. "The defamation claim is easy for me to reconcile because it doesn't involve public debate or public controversy," he argued, "but rather it was a purely — we allege — malicious effort to injure someone for inappropriate reasons." When defamation law was first developed, he said, it was intended to address situations just like Judd's — where blatantly false statements damage someone professionally.

Next, Boutrous detailed the #MeToo movement's origin. He said that the movement began to gain traction when former Fox News host Gretchen Carlson sued then-Fox News CEO Roger Ailes for defamation in 2016. He argued that Carlson's case, and the $20 million settlement, brought attention to the prevalence of sexual harassment in the workplace.

The next major moment in the movement, according to Boutrous, happened during the 2016 presidential campaign, when then-candidate Donald Trump vowed to file defamation lawsuits against the women who accused him of sexual assault and harassment. In response to President Trump's threats, Boutrous tweeted on Oct. 22, 2016 that he would "represent *pro bono* anyone [President Trump] sues for exercising their free speech rights." Boutrous explained that "[t]he reason [he] thought it was important to do this is because the threats of lawsuits can deter people from speaking and can deter journalists from engaging in journalism." He continued, "I thought it was important for the women who had spoken out and were now threatened with these suits to know that there were lawyers in the world who would represent them." President Trump's eventual election, he said, prompted women to become more vocal about the problems they face with sexual harassment and sexual assault.

Boutrous said that the increase in women coming forward against their assaulters led Judd to accuse Weinstein of sexual harassment in an Oct. 5, 2017 *New York Times* article. Soon after the story broke, the #MeToo movement "exploded" on social media, according to Boutrous. "The fact that more and more women were coming forward with their stories about what happened to them brought all these horrible events out of the shadows and created this dialogue," he said. He added that the movement culminated in the *Time* magazine "Person of the Year" award being given to "The Silence Breakers," demonstrating how the #MeToo movement is a "free speech movement" because it celebrated bringing harassment issues to light and finding avenues to redress them.

Boutrous noted that although the #MeToo movement was largely about speech, some of the accused used various tactics in order to try to stop accusers from coming forward. He alleged that Weinstein and others used threats of defamation lawsuits, nondisclosure agreements, and harassment in order to suppress speech. According to Boutrous, this is an example of why First Amendment protections need to be strengthened in order to protect the people

who were speaking out and the news organizations who were reporting on the accusations.

To explain how he believes First Amendment protections need to be expanded, Boutrous first discussed the history of defamation rulings — beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964). Boutrous loosely quoted the U.S. Supreme Court's finding that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

According to Boutrous, social media's surge in popularity has led to an increase in public speech and allows individuals to reach larger audiences than ever before, undercutting one of the underlying doctrines of the *Sullivan* actual malice standard, which requires proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. According to Boutrous, the Supreme Court created this standard because public figures had a platform to respond to and correct defamatory statements, whereas private individuals did not have the same reach. Conversely, in the social media age, Boutrous asserted, both private and public figures involved in matters of public concern have access to large audiences, and have the ability to correct any false statements, therefore making *Sullivan*'s speaker-distinction less persuasive.

Boutrous advocated for a move away from the *Sullivan*'s speaker-distinction, and argued instead for a "public concern test." According to Boutrous, the actual malice standard should apply in matters of public concern, when all individuals, regardless of their notoriety, have access to large audiences in order to correct false speech. The negligence standard, conversely, would apply in matters of private concern. "It seems to me with the platforms that we have and with social media, the public concern test . . . really makes a lot more sense because there is a way for private individuals to correct the record," he said. "So, instead of lawsuits, which can be terribly ineffective . . . there's a way to correct the record through speech on these social media platforms." Boutrous predicted that the Supreme Court would eventually move towards this standard and broaden the First Amendment protections for matters of public discussion and public concern – regardless of the speaker.

Boutrous also noted that social media has greatly increased the amount of speech, joking that 1,000 defamations had likely occurred on social media during his 45-minute lecture. Although he noted that the increase in defamatory speech may cause some observers to advocate for looser defamation laws allowing more lawsuits, he argued that the speech is overall less damaging because social media allows for corrections to be almost instantaneously. "There has been this, I think, really powerful ability to both make false statements, but then to correct the false statements much faster than you ever could before we had these social media platforms," he said. Boutrous argued that in the cases where speech is blatantly false and extremely damaging, like in Judd's case, his proposed changes to defamation law would still allow for meaningful lawsuits to recover damages.

Boutrous concluded by asserting that the #MeToo movement was a product of brave women who decided to come forward, journalists who covered the allegations with integrity, and the First Amendment. "At the same time," he continued, "when a powerful man retaliates against a woman for rebuffing his sexual advances and then secretly defames her, that's a defamation case and I don't think the First Amendment has much of any concern with that, and time's up for that kind of behavior in this country."

During a Q&A session moderated by Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, Boutrous suggested that there could be legal repercussions for individuals who are complicit in sexual harassment cases. "There are allegations, for example, that Harvey Weinstein's production company . . . knew what was going on," he said. "I think, if there is that sort of situation, under tort law . . . there could be liability." He also noted that legal actions stemming from the #MeToo movement law could shape how courts view nondisclosure agreements with extremely high liquidated damages clauses. "I do think courts are going to be more skeptical of those sorts of clauses," he said. "Sometimes they are used as a device to muzzle speech and to conceal a pattern of downright evil behavior."

Boutrous concluded the Q&A session by stating that businesses need to provide their employees with a way to report sexual harassment without fear of retaliation. "The most important thing that employers and companies can do is to have a system where women feel that they are free to go report things and that they will not be retaliated against," he said. "Every company and organization needs to look at their system and say 'let's make this a really good system, let's make it fair and responsive,' so people will come forward."

A link to a video of the lecture is available on the Silha Center website at silha.umn.edu. Silha Center activities, including the annual lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

Kirsten Nordstrom
Silha Research Assistant

The video of the 33rd annual Silha Lecture,
"The First Amendment and #MeToo,"
with Theodore J. Boutrous, Jr., is available online at:
https://www.youtube.com/watch?v=VThcal2VdJc&t=855s.

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The Silha Center offers Research Assistantships to outstanding law and graduate students with an interest in media law and media ethics. Silha Research Assistants are responsible for writing, editing and producing the Silha *Bulletin* during the academic year and the summer semester. They also assist Silha Professor Jane Kirtley with a variety of research projects, such as preparing a comprehensive outline on global privacy for the Practising Law Institute's annual Communications Law in the Digital Age conference handbook; *amicus* briefs (including before the Supreme Court of the United States); and comments on proposed rules and regulations submitted to federal, state and international bodies.

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Applications for Summer 2019 and for the 2019-20 academic year will be due on March 18, 2019.

For more information, please visit the Silha Center website at http://www.silha.umn.edu.