THE SILHA Bulletin

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Russian War Against Ukraine Results in Numerous Challenges to International Media

After spending weeks building up a huge military force along the Ukrainian border, Russian President Vladimir Putin launched an invasion of Ukraine on Feb. 24, 2022.

The New York Times published a story on April 21, 2022, "The Roots of the Ukraine War: How the Crisis Developed," providing an historical and political overview of the crisis, describing how, after the Soviet Union collapsed in the 1990s, a number of nations that had been in its sphere joined the North Atlantic Treaty Organization (NATO). If diplomatic efforts fail, NATO has the military power to undertake crisis-management operations. When the Baltic republics of Lithuania, Latvia, and Estonia, together with Poland and Romania, among others, joined NATO, Russia perceived that its capital, Moscow, was put in a vulnerable position. Moreover, in 2008, NATO officials stated that they planned to add Ukraine to its members.

According to *The New York Times*, Putin views the disintegration of the Soviet Union as one of the greatest catastrophes of the 20th century, one that "robbed" Russia of its "rightful place among the world's great powers," and the possible loss of Ukraine to NATO as a "major threat."

The war in Ukraine has affected the media not only in those two countries, but internationally. *Bulletin* staff compiled the following highlights of some of the impacts on the media brought about by the war.

February 26 — Ukrainian National TV Channels Combine to Form United News and Urge Boycott of Russian News

According to *TVBEurope*, a monthly broadcast media trade publication in the United Kingdom, Ukraine's president Volodymyr Zelensky signed a decree combining all of that country's national TV channels into one in an effort to combat what Zelensky termed "misinformation." The channels 1+1 Media, StarLightMedia, Media Group Ukraine and Inter Media Group together formed United News, intended to provide comprehensive information from different regions of Ukraine. The *TVBEurope* article is available online at: https://www.tvbeurope.com/business/ukraines-president-zelensky-combines-all-national-tv-channels#:~:text=Ukraine's%20president%20Volodymyr%20Zelensky%20has,will%20be%20called%20United%20News.

According to *Deadline.com*, United News was created with the cooperation of the Ukrainian Ministry of Culture and Information Policy, the Ukrainian Armed Forces, the National Security and Defense Council, and the Office of the President of Ukraine, among other government entities. United News is broadcast without commercial advertising.

In a statement, the media groups said "It is extremely important that people around the world have access to reliable and truthful information relating to the [*sic*] Russia's war against Ukraine and the course of hostilities here." The media groups also urged other nations to impose "media sanctions" of Russian news channels and "turn off the broadcasting of Russian news channels on European satellites."

"We have been waging an information war for years, and such media sanctions are globally important to Ukraine. We understand how powerful the Russian propaganda machine is and what kind of effort the aggressor makes to spread fake news to cynically fool people. We absolutely oppose this." The statement is available online at: https://deadline.com/2022/02/ukraine-media-groups-join-together-for-united-news-urge-world-to-turn-off-russian-channels-1234960684/.

On Feb. 28, 2022, *Deadline* reported that 1+1 Media announced that providers in Poland, Australia, Slovakia, the Czech Republic, Canada, Estonia, Lithuania, Latvia, Bulgaria and Germany were no longer broadcasting "propagandistic TV channels" such as Russia Today (RT, available online at rt.com), RTR-TV, NTV, and 1 Channel. (RT, RTR-TV, and 1 Channel are controlled by the Russian state; NTV is controlled by Gazprom Media.) In some instances, the programming was replaced by United News. The *Deadline* report is available online at https://deadline.com/2022/02/russian-media-sanctions-tv-channels-1234961643/.

March 1 — National Association of Broadcasters Asks Members to Stop Carrying Russian State Media

On March 1, 2022, the U.S.-based National Association of Broadcasters (NAB) asked its members to stop carrying Russian state media. In a statement posted online at: https://www.nab.org/documents/newsroom/pressRelease.asp?id=6412, the organization stated: "The National Association of Broadcasters (NAB) is a fierce defender of the First Amendment and the critical importance of the ability to freely express views, both popular and unpopular. Although the First Amendment protects freedom of speech, it does not prevent private actors from exercising sound, moral judgment. To that end, given the

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unprovoked aggression exhibited by Russia against the free and sovereign people of Ukraine, NAB calls on broadcasters to cease carrying any state-sponsored programming with ties to the Russian government or its agents. While we know that airings of such programs are extremely limited, we believe that our nation must stand fully united against misinformation and for freedom and democracy across the globe."

Previously, on Sept. 10, 2021, the NAB, together with Multicultural Media, Telecom and Internet Council, Inc., and the National Association of Black Owned Broadcasters, asked the Federal Communication Commission (FCC) to postpone the effective date of its "Report and Order, Sponsorship Identification Requirements for Foreign Government-Provided Programming," 36 FCC Rcd 7702 (2021). The FCC's order would require broadcasters to provide standardized on-air and public inspection file disclosures when they air programming sourced from certain foreign governmental entities in exchange for some form of compensation.

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On Dec. 8, 2021, the FCC denied their request, so on December 22, the petitioners filed a motion for stay pending judicial review, arguing that "the new rules impose on every broadcaster — i.e., thousands of stations, some very small, which collectively have many thousands of contracts for the lease of time to air programming — onerous requirements to make specified inquiries of, and conduct independent research on, all the entities with whom broadcasters currently or will in the future have lease agreements." The petitioners argued that these requirements would be burdensome to small broadcasters owned by women or people of color. Additionally, petitioners maintained that the rules would do little to address the problem of foreign interference with elections. The September 10 motion is available online at: https://www.nab.org/documents/filings/FSID-FCC_Stay_Request.pdf, and the December 22 petition is available online at: https://www.nab.org/documents/newsRoom/pdfs/122221_FSID_DC_Circuit_stay_request.pdf.

On Feb. 25, 2022, the United States Court of Appeals, D.C. Circuit issued a *per curiam* opinion denying the motion in *Nat'l Ass'n of Broadcasters v. Fed. Commc'ns Comm'n*, 2022 WL 605730.

The new FCC regulations went into effect on March 15, 2022, according to a story posted by Reuters online at: https://www.reuters.com/article/us-usa-broadcasting-foreign-idCAKCN2LC1QL.

March 1 — European Union Adopts Regulation Restricting Russian Media

The European Union adopted Council Regulation (EU) 2022/350 forbidding European operators to transmit or distribute the contents of the Russian media outlets via cable, satellite, IP-TV, as well as internet content from Russian state-owned media outlets Russia Today (RT) and Sputnik (available online at sputniknews.com). In addition to Sputnik, the regulation targets five channels operated by RT, formerly known as Russia Today: RT English, RT UK, RT DE (for German-language reports), RT France, and RT en Español (for Spanish-language reports), according to *Politico*. *Politico*'s full article is available online at: https://www.politico.eu/article/rt-france-challenges-eu-ban-before-court/.

RT defines itself as "a global TV news network providing news, current affairs and documentaries" that "is an autonomous non-profit organization that is publicly financed from the budget of the Russian Federation." Information about RT's programming is available on its website at: https://www.rt.com/shows/.

According to its website at: https://sputniknews.com/docs/index.html, the Sputnik brand was launched in 2014 by the Russian media group Rossiya Segodnya. Sputnik covers global political and economic news targeting an international audience. Sputnik's headquarters is in Moscow.

Following the adoption of the regulation, neither Russian media outlet was available on online platforms in Europe including Facebook, YouTube, TikTok and Twitter.

The text of the EU's regulation is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2022.065.01.0001.01.ENG&toc=OJ:L:2022:065:TOC.

On March 8, RT France sued the Council of the European Union, asking that the regulation be annulled, citing infringement of freedom of expression and information. Information concerning the case is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022TN0125. However, on March 30, the court rejected RT France's request to temporarily remove the sanctions. The court's statement is available online at: https://z.umn.edu/EUCourtandRTFrance.

March 1 — Providers in the United States and Canada Drop RT America

According to CNN, on March 1, 2022, DirecTV and Dish announced that they were dropping RT America, and that two of Canada's largest television providers, Rogers Communications and Bell Canada, had also removed RT from their lineups. A spokesperson for Ofcom, the UK media regulator, said that it had launched 15 new investigations into the bias of news programs on the RT news channel.

The CNN report is available online at: https://www.cnn.com/2022/03/01/media/directv-rt-america/index.html.

RT America's programs include "I Don't Understand," hosted by William Shatner; "The World According to Jesse" with former Minnesota governor Jesse Ventura; "Dennis Miller + One" with Dennis Miller, and "On Contact" with Pulitzer Prize-winning journalist Chris Hedges. (Hedges presented the Silha Center's 2010 Spring Ethics Forum, "The Propaganda State: The Inordinate Influence of PR on the Press." Information about that forum is available online at: https://hsjmc.umn.edu/events/2010-04-15-2010-spring-ethics-forum-propaganda-state-inordinate-influence-pr-press.)

On March 28, 2022, Hedges posted an essay saying that the entire six years of his program that had been archived on YouTube had been removed by the platform without inquiry or notice. He claimed that despite the connection to RT, his program was "dedicated primarily to authors and their books," comparing the content to that of PBS and NPR. Hedges claimed that when the war in Ukraine had begun, he had denounced the action as a "criminal war of aggression." Nevertheless, he defended his work with RT, writing, "I was on RT for the same reason the dissident Vaclav Havel . . . was on Voice of America during the communist regime in Czechoslovakia. It was that or not be heard. Havel had no more love for the policies of Washington than I have for those of Moscow." Hedges' essay is available online at: https://scheerpost.com/2022/03/28/hedges-on-being-disappeared/. As the *Bulletin* went to press, there was no information on whether Hedges planned to sue YouTube for removing the videos.

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March 2 — BBC Initiates Shortwave Radio Use in Ukraine

HuffPost reported that the BBC reinstated two shortwave radio frequencies — 15735 kHz and 5875 kHz — to broadcast World Service news programming in English for four hours a day. The BBC's service is intended to make its content available to listeners in areas where Russian military operations have bombed TV towers and attacked internet services. Broadcasting reached Kyiv and even parts of Russia. According to *HuffPost*, the BBC had stopped broadcasting to Europe via shortwave radio in 2008. Shortwave radio has historically been used during international conflicts, most notably during World War II, offering reception via cheap portable receivers. *HuffPost*'s report is available online at: https://www.huffingtonpost.co.uk/entry/bbc-ukraine-shortwave-radio-frequencies_uk_621fa132e4b0a7784bb2808f.

"It's often said truth is the first casualty of war," Tim Davie, director-general of the BBC, said in a statement. "In a conflict where disinformation and propaganda is rife, there is a clear need for factual and independent news people can trust."

March 2 — CRTC Considers Removing RT and RT France from Canadian Airwaves; Russian Officials Close CBC's Moscow Office

On March 2, the Canadian Radio-Television and Telecommunications Commission (CRTC) received a request from the Governor in Council to determine whether RT and RT France "should be removed from the list of non-Canadian services authorized in Canada." The "Governor in Council" acts on advice given by a federal Cabinet — the Queen's Privy Council for Canada — which consists of Queen Elizabeth II's personal consultants on state and constitutional matters. The following day, the CRTC began a public consultation. A press release about the request and subsequent action by the CRTC is available online at: https://www.canada.ca/en/radio-television-telecommunications/news/2022/03/rt-and-rt-france-can-no-longer-be-distributed-by-canadian-television-service-providers.html.

On March 16, the CRTC issued its decision, concluding that continued distribution of RT and RT France was "not in the public interest as their content appears to constitute abusive comment since it tends or is likely to expose the Ukrainian people to hatred or contempt on the basis of their rate, national or ethnic origin[.]. .. Accordingly, the Commission removes Russia Today and RT France from the *List of non-Canadian programming services and stations authorized for distribution.*" (Emphasis in original.) (See Review of the Authorization to Distribute Russia Today (RT) and RT France Pursuant to the *List of Non-Canadian Programming Services and Stations Authorized for Distribution*, *Broadcasting Public Notice*, Can. Radio-Television & Telecomm. Comm'n 2022-68 (Can.), available online at: https://crtc.gc.ca/eng/archive/2022/2022-68.pdf)

The CRTC said in its decision that non-Canadian news services should be held to the same standards as Canadian news outlets. "Freedom of speech and a range of perspectives are a necessary part of our democracy. However, it is a privilege and not a right to be broadcast in Canada," CRTC CEO Ian Scott told the CBC.

Several weeks later, Russian officials reacted to the CRTC's decision. On May 18, Vladimir Proskuryakov, deputy chief of mission at Russia's Embassy in Canada, told CBC News that Russian officials were closing CBC/Radio-Canada's Moscow bureau, stripping its journalists of their visas and accreditation.

CBC News editor in chief Brodie Fenlon said "CBC News and its journalists are completely and entirely independent of any government or agency, so we don't have anything to do with those [regulatory] decisions. We were there to report what is happening within Russia — factually, [and] accurately." In another interview with the *Toronto Star*, Fenlon said members of the CBC were "deeply disappointed" after having maintained a bureau in Moscow for more than 44 years. He said that CBC would continue to cover Russia from outside the country. CBC's statement regarding the closure is available online at: https://cbc.radio-canada.ca/en/media-centre/closure-of-cbc-radio-canada-moscow-bureau.

March 3 — Russia's Roskomnadzor Cuts Access to Foreign News Websites

The Russian Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) cut off several foreign news organizations' websites, claiming they spread false information about the war in Ukraine. Roskomnadzor is Russia's federal executive body responsible for overseeing the media, including the electronic media, as well as mass communications, information technology and telecommunications; enforcing compliance with the law protecting the confidentiality of personal data; and organizing the work of the radio-frequency service, according to its website at http://government.ru/en/department/58/. According to the Committee to Protect Journalists (CPJ), Roskomnadzor blocked access to several news websites, including those of BBC Russian, German public broadcaster Deutsche Welle, Latvia-based independent Russian-language news site *Meduza*, the Russian-language service of U.S. Congress-funded Voice of America (VOA) and several services of Radio Free Europe/Radio Liberty (RFE/RL). CPJ's report is available online at: https://cpj.org/2022/03/russia-further-blocks-media-outlets-social-media/.

Meduza further reported that on March 3, Facebook users in Russia began to report difficulties accessing the social network and the website of RFE/RL's Russian service, *Radio Svoboda*. There were also reports that Apple's App Store and Google Play were also being blocked in Russia. *Meduza*'s report is available online at: https://meduza.io/en/news/2022/03/04/many-readers-in-russia-unable-to-access-meduza-s-website-official-block-unconfirmed-as-yet.

According to Radio Free Europe/Radio Liberty (RFE/RL), Roskomnadzor has ordered media across Russia to publish only information provided by official sources. It also forbids describing the Russian actions in Ukraine as an invasion or a war, instead insisting they are called "special military operations." The RFE/RL report is available online at: https://www.rferl.org/a/russia-military-false-news/31737627.html.

March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; *Novaya Gazeta* Editor Attacked

On March 3, Russia's Duma passed and on March 4 President Vladimir Putin signed into law a statute that calls for sentences of up to 15 years in prison for people who distribute "false news" about the Russian military. According to a post on the website for Present Time, a television channel created by

RFE/RL with the participation of Voice of America, the law amends Article 207.3 of the Criminal Code, "on the public dissemination of knowingly false information about the use of the Armed Forces of the Russian Federation in order to protect the interests of Russia and its citizens." According to Present Time, the punishment for violating the new law will be a fine of up to 5 million rubles (about $75,000) or imprisonment for up to ten years. If the spread of alleged false news results in "serious consequences," imprisonment may range between 10 to 15 years. Present Time further noted that the law includes criminal penalties for calling for sanctions against Russia, including a fine of up to 500,000 rubles, or restriction of freedom or imprisonment for up to three years with a fine of up to 200,000 rubles. According to the BBC, the law makes it illegal to call the action against Ukraine an "invasion," instead calling it a "special military operation."

Attempts to view the new legislation at the Russian Duma's website at kremlin.ru were not successful.

Present Time reported that not only their services, but those of several other news sites, were either blocked or chose to limit their services voluntarily, including: Crimea.Realii, New Times, Taiga.Info, DOXA, Ekho Moskvy, Dozhd (Rain), *Meduza*, and Deutsche Welle. Present Tense further noted that access to Facebook, Twitter, TikTok, and Instagram was limited. The Present Time article is available online at: https://www.currenttime.tv/a/putin-zakony-feiki/31736694.html.

NiemanLab also issued a report about the effect of the new Russian law. Bloomberg announced it would suspend the work of its journalists within Russia. Bloomberg's editor-in-chief John Micklethwait said the law "seems designed to turn any independent reporter into a criminal purely by association" and "makes it impossible to continue any semblance of normal journalism inside the country." The BCC similarly "temporarily suspend[ed] its journalists' work in Russia" but stated that "BBC News in Russian will still be produced from outside the country." *NiemanLab* quoted BBC director-general Tim Davie who said, "The safety of our staff is paramount and we are not prepared to expose them to the risk of criminal prosecution simply for doing their jobs." However, *NiemanLab* also noted that the interim director of BBC News, Jonathan Munro, had tweeted on March 4 that "We are not pulling out @ BBCNews journalists from Moscow, as some articles are suggesting. We cannot use their reporting for the time being but they remain valued members of our teams and we hope to get them back on our output as soon as possible." The public service broadcasters of Canada, Germany, and Italy all suspended their services, and RFE/RL also suspended operations in Russia. According to *NiemanLab*, RFE/RL faced potential bankruptcy because of millions of dollars of unpaid fines levied against them for "refusing to obey [another] Russian law that would cripple its editorial content."

By contrast, *NiemanLab* noted that other news organizations chose a different route, "keeping quiet or making smaller changes in how reporting in Russia is handled." *The Wall Street Journal* decided to continue its reporting from Russia, issuing a statement that read: "Our top priorities are the safety of our employees and covering this important story fairly and fully. Being in Moscow, freely able to talk to officials and capture the mood, is key to that mission." *The Washington Post* instituted a new policy of omitting bylines or datelines from any of its stories from Russia, offering a degree of anonymity to its reporters. ABC News and CBS News said they would refrain from broadcasting from Russia but did not clarify whether that meant their reporters would stop working there or would leave the country.

NiemanLab reported that *Novaya Gazeta* editor-in-chief Dmitry Muratov said the Russian-based opposition newspaper would remove information regarding Russia's military actions in Ukraine from its website. (Muratov was one of two journalists who was awarded the 2021 Nobel Peace Prize. To read more about him, see "2021 Nobel Peace Prize Awarded to Two Journalists" in the Fall 2021 issue of the Silha *Bulletin*.)

However, a March 4 statement on *Novaya Gazeta*'s website read, "We continue to report on the consequences that Russia is facing: the developing economic crisis, the rapid decline in living standards, problems with access to foreign medicines and technologies, and the persecution of dissidents, including for anti-war statements." *NiemanLab* reported that the information *Novaya Gazeta* removed from its website was still available on the Internet Archive's WayBack Machine, available online at: https://web.archive.org/web/*/novaya%20gazeta.

However, on March 28, following a warning from Roskomnadzor, *Novaya Gazeta* issued a statement on its website which read: "[W]e suspend the publication of the newspaper on the website, in networks and on paper — until the end of the 'special operation on the territory of Ukraine.' Sincerely, the editors of the Novaya Gazeta." The statement is available online at: https://novayagazeta.ru/articles/2022/03/28/my-priostanavlivaem-rabotu. The *NiemanLab* report is available online at: https://www.niemanlab.org/2022/03/an-information-dark-age-russias-new-fake-news-law-has-outlawed-most-independent-journalism-there/.

On April 7, Muratov was attacked as he was boarding a train departing from Moscow. According to *The Washington Post*, an assailant threw a mixture of red paint and acetone at him, resulting in chemical burns to Muratov's eyes. Muratov was able to take a photograph of his assailant, later identified as Nikolai Trifonov, a former Moscow State University student who *The Washington Post* identified as a member of Russian intelligence. Within hours, a video of the attack was posted on Telegram on the pro-Russian channel "Union Z of paratroopers," with a message to other Russians who supported Ukraine, saying "We will come for each of you!" *The Washington Post* reported that the video was deleted the following day.

According to *BusinessInsider*, Telegram is "a popular cross-platform messaging app that is widely used because it offers some enhanced privacy and encryption features as well as support for large group chat features. It also has no ties to other social media platforms [like Facebook Messenger and WhatsApp, both owned by Facebook]." Founded by Russian social media entrepreneur Pavel Durov, the app is free to use. Telegram offers end-to-end encryption when using its Secret Chat mode, and messages can be configured to self-destruct after a set period of time. Telegram is also regarded as a gathering place for conspiracy theorists and hate groups; however, its technicians are trying to identify and disable accounts run by hate groups and extremists, *BusinessInsider* noted. The *BusinessInsider* article is available online at: https://www.businessinsider.com/what-is-telegram.

Although *Novaya Gazeta* had announced that it would suspend operations, it published details of

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Muratov's attack on April 12. Meanwhile, several of the paper's journalists have launched *Novaya Gazeta Europe*, which is publishing outside Russia and is available online at https://novayagazeta.eu/en. *The Washington Post* identified it as a stand-alone project run by longtime *Novaya Gazeta* political editor Kirill Martynov. Muratov has said he has no plans to leave Russia and that he will resume publishing the original *Novaya Gazeta* once military operations in Ukraine end.

March 4 — Despite Passage of New Law, Some Russian Citizens Continue Protests

OVD-Info is a Russian organization which identifies itself as "an independent human rights media project dedicated to political persecution in Russia. We help those who are being persecuted for exercising the right to freedom of assembly and other basic political rights." OVD-Info is tracking Russians who are being persecuted for "exercising the right to freedom of assembly and other basic political rights." In addition to offering legal advice, the site also provides news updates and tracks the number of people detained for protesting the war in Ukraine. As of May 15, OVD-Info reported that 15,442 people were being detained for "anti-war actions" since the war began on Feb. 24, 2022. The information is available on the organization's website at: https://ovd.news/.

Another of OVD-Info's pages, "Chronicle of Political Persecution in March 2022: Essentials," lists many of the criminal cases brought against journalists and activists. The website is available online at: https://ovd.news/news/2022/04/09/hronika-politicheskih-presledovaniy-v-marte-2022-goda-glavnoe. Broken down by region, the page lists who has been charged, what crime they were charged with, and their current status, whether released or still imprisoned.

(For more information about endangered journalists in Russia, see "Numerous Journalists Endangered and Killed Covering War in Ukraine" on page 11 of this issue of the Silha *Bulletin*.)

March 4 — Russia Blocks Facebook

Roskomnadzor, the Russian federal agency responsible for monitoring and censoring media, posted a statement on its website that read: "On March 4, 2022, a decision was made to block access to the Facebook network (owned by Meta Platforms, Inc.) in the Russian Federation."

It continued, "Since October 2020, 26 cases of discrimination against Russian media and information resources by Facebook have been recorded. In recent days, the social network has restricted access to accounts: the Zvezda TV channel, the RIA Novosti news agency, Sputnik, Russia Today, the Lenta.ru and Gazeta.ru information resources."

"The above restrictions are prohibited by Federal Law No. 272-FZ 'On measures to influence persons involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation', adopted, among other things, to prevent violations of the key principles of the free flow of information and unhindered access Russian users to Russian media on foreign Internet platforms."

The statement is available online at https://rkn.gov.ru/news/rsoc/news74156.htm?utm_source=theverge.com&utm_medium=referral&utm_campaign=theverge.com&utm_referrer=theverge.com.

In a March 5 article, *The Washington Post* reported that Russia joined China and North Korea in blocking the social media platform. However, WhatsApp and Instagram, also owned by Meta, were not yet blocked by the Russian Federation.

The Washington Post further noted that although some internet users in Russia could get their news from Facebook, only about 7.3 percent of users in that country are on Facebook. By contrast, 51% use Instagram, and 66% use WhatsApp.

March 8 — *The New York Times* Pulls Staff Out of Russia; the BBC Returns

Following the passage of Russia's "False News" law, *The New York Times* announced on March 8 that it would pull its staff out of Russia in response to the increasing crackdown on independent journalism. *Times* spokesperson Danielle Rhoades Ha issued a statement which read in part, "For the safety and security of our editorial staff working in the region, we are moving them out of the country for now.. . . We look forward to them returning as soon as possible while we monitor the application of the new law. We will continue our live, robust coverage of the war, and our vigorous reporting on Russia's offensive in Ukraine and these attempts to stifle independent journalism."

In the same article, *The New York Times* reported that the BBC had announced that, "after careful deliberation," news organization would resume its English-language reporting from the area.

March 10 — Hacker Group Anonymous Breaks into Roskomnadzor

The hacker group Anonymous broke into Roskomnadzor, the Russian federal agency responsible for monitoring and censoring media, and released 360,000 files, according to a tweet available online at: https://z.umn.edu/AnonymousRoskomnadzorbreakin. Some of the documents show that Moscow censored anything that referred to the military action as a Russian invasion of Ukraine.

According to an article posted by CNBC, Anonymous launched "coordinated cyberattacks against various world governments, corporations or other groups, often in the name of social or political causes."

Anonymous, which began in 2003, arose from the online message forums of *4chan*, a social community website. Initially, the group organized group pranks called "raids," flooding chat rooms in online communities and causing disruptions. CNBC reported that "these raids formed the basis of Anonymous' operations: a decentralized movement of like-minded online users who could communicate in encrypted chat rooms to plan online disruptions. At first, those plans were largely about cheap entertainment. Eventually, they began to revolve around social or political aims.. . . Generally, Anonymous opposes governments and corporations that it views as participating in censorship or promoting inequality." CNBC noted that Anonymous' guiding principles are "freedom of information, freedom of speech, accountability for companies and governments, privacy and anonymity for private citizens." In 2012, *Time* magazine named Anonymous one of the world's "100 Most Influential People." However, that same year, the National Security Agency deemed Anonymous a threat to national security. The CNBC article is available online at: https://www.cnbc.com/2022/03/25/what-is-anonymous-the-group-went-from-4chan-to-cyberattacks-on-russia.html.

On Feb. 24, 2022, CNBC reported that a tweet from the Anonymous account "called on hackers around the world,

including Russia, to 'say NO' to Vladimir Putin's war." Since then, Anonymous has launched other attacks, including disabling the official Kremlin website, kremlin.ru; intercepting Russian TV transmissions to broadcast Ukrainian songs; exposing the names of members of Russia's secret service, and leaking numerous emails and other information from Russian corporate entities.

Hackread, a platform based in the United Kingdom and founded in 2011, is tracking Anonymous' activities on its website available online at: https://www.hackread.com/tag/anonymous/. Hackread describes itself as "a News Platform that centers on InfoSec, Cyber Crime, Privacy, Surveillance and Hacking News."

March 14 — *The New York Times* Launches Its Own Telegram Channel

On March 14, *The New York Times* announced that it launched its own Telegram channel, available online at: https://t.me/nytimes. The *Times* said that the channel "delivers reporting from our continuous live blog, where *Times* journalists are providing witness accounts, interviews and breaking news from the Russia-Ukraine conflict."

In a March 14 report, National Public Radio (NPR) noted that Telegram "has emerged as the go-to place for unfiltered live war updates for both Ukrainian refugees and increasingly isolated Russians alike." Because Telegram allows people or organizations to set up public or private feeds of photos and videos known as "channels," the app has been embraced by "on-the-ground journalists, aid workers and Ukrainian President Volodymyr Zelensky, who broadcasts on a Telegram channel."

NPR quoted "Andrey," a Russian entrepreneur living in Brazil who asked that his last name not be used, who said that Telegram is one of the few places Russians can access independent news about the war. "There are several million Russians who can lift their heads up from propaganda and try to look for other sources, and I'd say that most look for it on Telegram.. . . Russians are really disconnected from the reality of what [is] happening to their country. So Telegram has become essential for understanding what's going on to [*sic*] the Russian-speaking world." Nevertheless, NPR warned that Telegram does little to police its content, making it a "hub for Russian propaganda and misinformation."

NPR noted that Telegram's founder, Durov, fled Russia and now lives in Dubai. Durov claims that Telegram has 500 million monthly users.

The NPR story is available online at: https://www.npr.org/2022/03/14/1086483703/telegram-ukraine-war-russia.

March 14 — Russian Journalist Protests Invasion of Ukraine on Live Television

Marina Ovsyannikova, an editor at Russia's state-controlled television Channel One, interrupted the evening broadcast of "Vremya" ("Time") by standing behind the news anchor while holding a sign that read: "NO WAR. Stop the war, do not believe the propaganda, they lie to you here. Russians against war."

According to the *Faridaily* blog, posted by former BBC Russian Service journalist Farida Rustamova, Ovsyannikova had earlier released a video on social media in which she stated, "Regrettably, for a number of years, I worked on Channel One and worked on Kremlin propaganda, I am very ashamed of this right now. Ashamed that I was allowed to tell lies from the television screen. Ashamed that I allowed the zombification of the Russian people.. . . We are just silently watching this anti-human regime. And now the whole world has turned away from us and the next 10 generations won't be able to clean themselves from the shame of this fratricidal war. What is happening in Ukraine is a crime and Russia is the aggressor. The responsibility of this aggression lies on the shoulders of only one person: Vladimir Putin." Ovsyannikova urged other Russians to protest the war. "Only we have the power to stop all this madness. Go to the protests. Don't be afraid of anything. They can't imprison us all." The *Faridaily* blog post is available online at: https://faridaily.substack.com/p/she-never-talked-about-politics-who?s=r.

Ovsyannikova was fined 30,000 rubles ($280) after being questioned for 14 hours. According to NPR, Russia's federal Investigative Committee took over the handling of Ovsyannikova's case, and she could face charges under the newly adopted laws that make it a crime to spread "false news." On April 11, the BBC reported that Ovsyannikova had been hired as a freelance correspondent by German newspaper *Die Welt* and would report from Ukraine and Russia. Ovsyannikova will write for the paper as well as appear as a contributor to its television channel. Ulf Porschardt, editor-in-chief of Welt Group, told the BBC that Ovsyannikova's on-air protest "defended the most important journalistic ethics — despite the threat of state repression."

Although Ovsyannikova was offered asylum in France, she has decided to remain in Russia despite threats to her safety. (See *Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down;* Novaya Gazeta *Editor Attacked*, on page 4 of this edition of the Silha *Bulletin*.)

March 16 — Russian Journalists Resign From Their Jobs on State Television

Following Ovsyannikova's protest, other journalists resigned their jobs from state television, citing regret for their roles in promoting misleading information about the war in Ukraine according to a March 24 *New York Times* story. These included Dmitri Likin, art director for Channel One. Likin told the *Times*, "In Russia, television is made for people who for one reason or another are too lazy to use alternative sources of information. These are simply people who lack education, or who lack the habit of analysis." Likin said he planned to stay in Russia but leave the journalism profession in favor of a career as an architect. Zhanna Agalakova, correspondent for Channel One, also resigned. Agalakova was quoted as saying, "[My colleagues] are depressed — just clinically depressed. Many thinking people are sensing their own guilt. And there is no exit, you understand? Simply asking for forgiveness is not enough." Referring to the Kremlin's claims that Russia is fighting Nazis in Ukraine, Agalakova said, "This is a shameless game. This is a fraudulent game." Liliya Gildeyeva, anchor for state-run channel NTV also resigned. Gildeyeva told the Russian online newspaper *The Insider* that she acknowledged she had made one compromise after another. "When you gradually give in to yourself, you do not notice the depth of the fall," she said. Vadin Glusker, anchor for state-run channel NTV also resigned, according to the BBC. He had been with NTV for nearly 30 years.

The New York Times observed that "tens of thousands" of Russians are leaving the country in "a historic exodus." Those leaving include journalists, activists, as well as tech workers and

Media, *continued on page 8*

Media, *continued from page 7*

other young professionals who "suddenly no longer saw a future for themselves in Russia."

(For more information about endangered journalists in Russia, see see "Numerous Journalists Endangered and Killed Covering War in Ukraine" on page 11 of this issue of the Silha *Bulletin*.)

March 21 — Russia Bans Popular Apps, Platforms

On March 21, National Public Radio (NPR) reported that several popular apps and platforms were banned in the Russian Federation. At that time, NPR reported that Facebook and Instagram were banned by a Russian court on March 21, stating that Facebook's parent company Meta had committed "extremist activities" when it temporarily allowed posts that advocated violence against Russian soldiers. NPR reported that WhatsApp was not affected by the March 21 ban.

NPR further reported that despite the Russian government's restrictions on these apps, many Russian citizens were turning to virtual private networks (VPNs) to access blocked social media networks and news sites. A VPN encrypts a user's data and masks their location and personal information. NPR cited a report by privacy monitoring service Top10VPN, which stated that on March 14, demand for VPNs in Russia was 2,692% higher than the week prior.

May 9 — Ukrainian journalists awarded Pulitzer Prize

On May 9, the Pulitzer Board awarded a special citation to the journalists of Ukraine for "their courage, endurance, and commitment to truthful reporting during Vladimir Putin's ruthless invasion of their country and his propaganda war in Russia. Despite bombardment, abductions, occupation, and even deaths in their ranks, they have persisted in their effort to provide an accurate picture of a terrible reality, doing honor to Ukraine and to journalists around the world." The board's full statement is available online at: https://www.pulitzer.org/prize-winners-by-year.

However, on May 13, *The Fix*, which identifies itself as a trade magazine for media professionals, posted a statement regarding the Pulitzer Board's citation from Daryna Shevchenko, the CEO of *Kyiv Independent*, Ukraine's largest English-language online newspaper during Russia's invasion of Ukraine. (Shevchenko is also a co-founder of *The Fix*.)

Shevchenko wrote: "We are grateful but tired of reminding it's not Vladimir Putin's war, it's Russia's.. . . I have mixed feelings about our (very deserved) Pulitzer Prize mention. I am deeply disturbed by its annotation. . . .

"It's not even breaking news anymore that dozens of millions of Russians wholeheartedly support the war waged by their own (elected by them) Vladimir "the ultimate evil" Putin. They paint their newly discovered nazi [*sic*] Zs everywhere, they ride proudly with Russian flags through the streets of Berlin, they send their sons to go kill, torture and rape Ukrainians, they honor our killers as heroes. Not Vladimir Putin. All of that is on Russians."

Shevchenko went on to write that although there are some "good Russians" who "don't share the imperial aspirations of their motherland," other Russians nevertheless had access to the internet, Google, and Facebook. "But they chose to stay in their bubble," Shevchenko wrote. "It is and was a choice. And our blood is on their hands, not just Putin's.

Shevchenko compared Belarus's reporting on the war to Russia's, saying the efforts of Belarus's reporters resulted in less support for the war in that country. "[Belarus's] independent media played a role in capturing and sharing evidence of Russian troop movements and looting — sharing this information with Ukraine and the world." By contrast, Shevchenko said that Russian independent media "at first decided to make some empty gestures, lay low and wait things out . . . and then turned to endless whining."

Shevchenko mentioned Galina Timchenko, the publisher of *Meduza*, Russia's liberal online publication in exile, who called sanctions against Russia "a discrimination" when speaking at an international media event in Oslo, Norway, saying that the sanctions destroyed *Meduza*'s crowdfunding campaign. "That's too bad," Shevchenko wrote. "But let me remind you, those sanctions are the only thing helping weaken the state that murders people of Ukraine every day. I wouldn't call this standing up for Ukraine. I wouldn't call this standing up at all. That's just a good old fight for your own good."

Shevchenko continued, "Russia didn't become this monster state in a year or even five. It took time — time they had to fight it off. Instead, they complied. They adjusted to one authoritarian law after another, they swallowed the losses of their own, they left their beloved Russia to fight battles from cozy Europe. And now guess what? It's too late. Now we are paying for their compliance."

Shevchenko addressed complaints that there are too few independent media outlets in Russia to fight off authoritarian politics. "When I started working in the media some 11 years ago, there were maybe 5 or 6 independent media at a national level in Ukraine. Two of them were Radio Liberty and BBC Ukrainian. Now the independent media of Ukraine is a fire force. And that didn't just happen. It wasn't granted to us. It's not a coincidence. We made it happen. We fought for it. We lost ours and fought to get them justice. We didn't win all the battles, but we did win many. And it took us decades. That's why we got this award in the first place."

Shevchenko concluded, "So let's not fool ourselves, colleagues. It's not Vladimir Putin's war. It's Russia's and that whole country is responsible for it. And thank you for recognizing our efforts. It does mean a lot."

Shevchenko's statement is available online at: https://thefix.media/2022/5/13/why-i-have-mixed-feelings-about-our-pulitzer-prize-award.

May 17 — Russia Will Not Ban YouTube

On May 17, Maksut Shadayev, Russia's Digital Development, Communications and Mass Media Minister announced that the country would not ban YouTube, RFE/RL reported. "Russia must remain part of the global network," Shadayev said, but must "learn to filter information" on the internet.

"We do not plan to ban YouTube. First of all, when we restrict something, we must clearly understand that our users do not suffer," Shadayev said. "A ban is an extreme move that can be only possible, to my understanding, when we have a competitive alternative." He further noted that Russia "must build up barriers to avoid too much pressure on Internet users."

The RFE/RL report is available online at: https://www.rferl.org/a/russia-ban-youtube-shadayev/31854787.html.

— Elaine Hargrove
Silha Center Staff

War in Ukraine Raises Issues of Misinformation and Concerns Regarding Media Bias

As the war in Ukraine continues, social media platforms have facilitated the spread of misinformation from Russian state media and other actors. Meanwhile, Russian laws have impeded the ability of journalists to combat misinformation with truthful reporting. "Social media has given the masses the opportunity to become their own freelance reporter, to document and to opine on the war," Maryville University sociology professor Kent Bausman told *Forbes* on March 31, 2022. "Although this new reality gives greater documentation of events on [the] ground, we have yet to establish [the] necessary mechanism[s] to verify such documentation." Misinformation traveled quickly. "[P]ro-Russian narratives on English-language social media, cable TV, and print and online outlets soared 2,580 percent" between the first and last weeks of February, *The New York Times* reported on Feb. 25, 2022.

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"Misinformation" can refer to both intentional and unintentional falsehoods. "Far less insidious, unintentional misinformation is the perpetuation of memes, narratives, or tales that one finds interesting or amusing. A viral urban myth is misinformation but usually not dangerous," Virginia Commonwealth University professor William V. Pelfrey told *Forbes* on March 31. "Intentional misinformation is an ongoing battle, waged by both state and non-state actors. Russian news is providing a steady flow of intentional misinformation to the Russian population." Users across the world may unintentionally contribute to the problem by sharing unverified posts on social media. "People feel helpless, they feel like they want to do something and so they're online scrolling and they're sharing things that they think are true because they're trying to be helpful," Brown University professor Claire Wardle, who leads misinformation-fighting nonprofit First Draft News, told CNN on March 15, 2022. "[But] in these moments of upheaval and crisis, this is the time that we are worst at figuring out what's true or false."

It is not easy to track the origins of this misinformation. "Though Russian state-media has faced widespread de-platforming, many shady think tanks, anonymous websites and other outlets can easily continue to spread misinformation about the war," *Axios* reported on April 5, 2022. It can be "difficult to be precise on the scope of pro-Russian narratives on social media and online forums because bots and organized campaigns make them difficult to track," *The New York Times* reported on Feb. 25, 2022. Author David Robert Grimes, whose work focuses on health misinformation and conspiracy theories, wrote in *Scientific American* on March 28, 2022 that Russian misinformation campaigns aim to create confusion. "[R]ather than focusing effort on convincing people of a falsehood, the Russian strategy takes a tack reminiscent of a strategy long employed by the tobacco industry: to sow so much doubt about what is true that it sends people into decision paralysis," he wrote. "Faced with a cacophony of wild and conflicting claims, people do nothing, unsure of what is right."

> "[R]ather than focusing effort on convincing people of a falsehood, the Russian strategy takes a tack reminiscent of a strategy long employed by the tobacco industry: to sow so much doubt about what is true that it sends people into decision paralysis. Faced with a cacophony of wild and conflicting claims, people do nothing, unsure of what is right."
>
> **— David Robert Grimes, author**

Several critics argued that TikTok played an outsized role in spreading misinformation. TikTok videos have "unique features that allow the rapid spread of false information," Imran Ahmed, chief executive of the Center for Countering Digital Hate (CCDH), told *The Guardian* on March 5, 2022. "The algorithm is currently aggressively promoting Ukraine-related content, irrespective of whether it's true or not," he said. "Unlike other platforms, it also provides users with little metadata with which users can do their own verification work — or even find out where this footage is coming from." TikTok has one billion users around the world, and a quarter of U.S. adults say they "always" use the app for news, *The Guardian* reported. TikTok allows users to re-purpose audio from other users to create new videos. "Misinformers" are "taking advantage of the design, layering old or out-of-context audio on top of unrelated videos to create false footage purportedly captured amidst the chaos in Ukraine," *Poynter* reported on March 8. Abbie Richards, a TikTok researcher at the nonprofit Accelerationist Research Consortium, which studies online terrorism, told NBC News on Feb. 25, 2022 that the sheer volume of "raw footage" on TikTok makes it a vehicle for misinformation. "For some people, they genuinely feel like they're getting a more authentic experience that's not through the filter of a news agency," she said. "At the same time, there's just no verification." On March 6, 2022, TikTok announced it had banned new uploads from Russia. But on April 13, *TechCrunch* reported that the ban was "applied inconsistently" and that "new content uploads related to the war outnumbered anti-war content by 10:1."

Other social media platforms have taken more steps to eliminate false information from their platforms. Independent fact-checkers are working with Facebook in Ukraine to combat the spread of misinformation, *The Washington Post* reported on April 12, 2022. When fact-checkers "determine a post is false, Facebook decreases its visibility in users' news feeds and attaches a warning label pointing them to an explanation from the fact-checker," the *Post* reported. Ayobami Olugbemiga, spokesperson for Facebook parent company Meta, told the *Post* that the company has been "providing significant resources to

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Misinformation, *continued from page 9*
fact-checkers covering Eastern Europe to increase their capacity to help slow the spread of misinformation about the war in Ukraine and help ensure their safety."

In the early days of the conflict, Instagram removed several accounts falsely claiming to be reporting from the ground in Ukraine, *Input Mag*, an online magazine that covers technology, reported on Feb. 25, 2022. Several of these accounts drew hundreds of thousands of followers. Joan Donovan, research director at the Shorenstein Center for Media, Politics and Public Policy at the Harvard Kennedy School, told *Input* that large numbers of followers might lead people to incorrectly believe an account is credible. "[E]ngagement and numbers make people feel more comfortable with taking the account seriously," she said.

Meanwhile, the Russian government passed a law making it a major crime to publish "false news" about the country's military, *The Washington Post* reported March 11, 2022. Determining what counts as "false news" is "up to Russian authorities." The law includes "any references to Russia's invasion of Ukraine that call it an invasion, which would contradict the Kremlin's insistence that it's simply a 'special military operation,'" the *Post* reported. The new law led major Western outlets to stop reporting from Russia, the *Post* reported on March 5, 2022. Bloomberg, CBS, ABC, and BBC each announced that they would suspend coverage from Russia.

The law also impeded the ability of independent media outlets in Russia to continue operating. Dozhd (Rain), Russia's last independent television station, had its website blocked by the government, the *Post* reported March 4. TV Rain's chief editor, Tikhon Dyzadko, fled the country and told the *Post* he "mourned" the end of the work his station had done. "In a country which is free only on paper, but in reality has been becoming more repressive, in such a country, we were absolutely free and we were saying what we wanted to say and reporting about actually important things," he said. In the wake of the law, which "effectively criminalized accurate reporting on the war in Ukraine," journalists struggled to find a balance between reporting the news and staying safe, *The New York Times* reported March 15, 2022. "There is a constant minute-to-minute triage of that balance," Matthew Baise, director of digital strategy at Voice of America (VOA), told the *Times*. "Every day, we're attempting to adapt to the situation there while not jeopardizing people's lives, but we also have to have a way to get reporting out of the country." (For more about the new Russian law, see *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down;* Novaya Gazeta *Editor Attacked* in "Russian War Against Ukraine Results in Media Interruptions" on page 4 of this issue of the Silha *Bulletin*.)

War in Ukraine Exposes Biases and Raises Media Ethics Questions

Some critics argued that journalists have erred by treating the war in Ukraine differently from wars in the Middle East.

"This isn't a place, with all due respect, like Iraq or Afghanistan, that has seen conflict raging for decades," CBS News correspondent Charlie D'Agata said while reporting from Kyiv. "This is a relatively civilized, relatively European — I have to choose those words carefully, too — city where you wouldn't expect that or hope that it's going to happen." D'Agata later apologized for the comments, several outlets reported.

H.A. Hellyer, a Carnegie Endowment for International Peace scholar, wrote in an opinion piece for *The Washington Post* on Feb. 28, 2022 that this type of comment exposed "long-standing racist biases in Western media." The "implication for anyone reading or watching — particularly anyone with ties to a nation that has also seen foreign intervention, conflict, sanctions and mass migration — is clear: it's much worse when White Europeans suffer than when it's Arabs or other non-White people."

On Feb. 27, 2022, the Arab and Middle Eastern Journalists Association (AMEJA) issued a statement in response to media coverage of the war. "AMEJA stands in full solidarity with all civilians under military assault in any part of the world, and we deplore the difference in news coverage of people in one country versus another," the statement read. "Not only can such coverage decontextualize conflicts, but it contributes to the erasure of populations around the world who continue to experience violent occupation and aggression. In order to prevent such explicit bias, we call on newsrooms to train correspondents on the cultural and political nuances of regions they're reporting on, and not rely on American- or Euro-centric biases. Inaccurate and disingenuous comparisons only serve to inflame stereotypes and mislead viewers, and they ultimately perpetuate prejudicial responses to political and humanitarian crises."

Philip Seib, professor emeritus of journalism at the University of Southern California, told *The Washington Post* on Feb. 27, 2022 that this media coverage is part of a larger historical pattern. "One of the most striking examples came in the 1990s, when tens of thousands of White people were dying in the Balkans and hundreds of thousands of Black people were dying in Rwanda, and the Balkans got much more coverage," he said. "That's attributable in part to the fact that these news organizations' American constituencies feel closer to their roots in Europe." University of Chicago professor Christopher Blattman echoed these sentiments to National Public Radio (NPR) on March 4, 2022. "Generally speaking, it seems reasonable for any society to care more about conflicts that are geographically closer, share a social identity (which could include race and religion), share a language or share an imperial or colonial history," he said.

Some critics also argue that "the volume of coverage of the war in Ukraine itself represents a double standard when contrasted with the relative lack of attention that Western media pays to conflicts elsewhere in the world," *Columbia Journalism Review* (*CJR*) reported on March 15, 2022. At the same time, media outlets may "largely move on" once it becomes clear that the conflict will not end quickly, Stanford University communications professor Janine Zacharia told *Stanford News* on March 17. "I worry that in fact we will abandon the intensive coverage too soon," Zacharia said. "Right now, it's all Ukraine all the time. But gradually Ukraine could become like other conflicts that get only episodic coverage."

— Claire Colby
Silha *Bulletin* Editor

Numerous Journalists Endangered and Killed Covering the War in Ukraine

WAR IN UKRAINE

On Feb. 25, 2022, International Criminal Court Prosecutor Karim A. A. Khan QC, announced in a statement that he had decided to open an investigation into the allegations of war crimes being committed in the course of the war in Ukraine. The statement is available online at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening. According to Human Rights Watch (HRW), these crimes include: rape, summary execution, and other cases of unlawful violence and threats against civilians. Soldiers were also implicated in looting civilian property, including food, clothing, and firewood. The HRW statement is available online at: https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas. (See also https://www.pbs.org/wgbh/frontline/interactive/ap-russia-war-crimes-ukraine/ for PBS's tracking of all alleged war crimes.)

In a post dated April 5, 2022, Article 19, an organization which monitors threats to freedom of expression around the world, noted that the protection of journalists is critical as they report on these war crimes. Executive Director Quinn McKew stated, "It is journalists who are often the first ones to uncover and document these crimes and their reporting provides evidence that is crucial for accountability and justice. Their safety is essential to keep the flow of reliable information, counter disinformation and better understand the crimes committed against Ukrainian people. Under international humanitarian law, journalists must be protected and enjoy the same rights as civilians, even when accompanying military forces for the purpose of reporting.. . . Deliberate attacks on civilians, including journalists, constitute a war crime and must be investigated and trialed accordingly." The Article 19 post is available online at https://www.article19.org/resources/ukraine-war-crimes-journalists-civilians/.

Attacks on journalists have been tracked by a number of organizations, including:

- The Committee to Protect Journalists (CPJ), available online at cpj.org. CPJ's mission is to provide press criticism, analysis and reporting. Information on its website includes reports on media attacks listed by country.

> "It is journalists who are often the first ones to uncover and document [war] crimes and their reporting provides evidence that is crucial for accountability and justice. Their safety is essential to keep the flow of reliable information, counter disinformation and better understand the crimes committed against Ukrainian people."
>
> **— Quinn McKew, Executive Director, Article 19**

- Reporters Without Borders (RSF), available online at: https://rsf.org/en. RSF's mission is to defend the right of every human being to have access to free and reliable information. Information on its website includes reports by country.
- The International Press Institute (IPI), available online at: https://ipi.media/ipi-documents-356-media-freedom-attacks-amidst-russia-ukraine-war/. IPI's mission is to defend media freedom and the free flow of news wherever they are threatened. On its web page, "IPI Tracker: Media freedom alerts linked to the Russia-Ukraine war," IPI documented 356 attacks on journalists, acts of censorship and serious violations of media freedom since the beginning of Russia's invasion of Ukraine. That report is available online at: https://ipi.media/ipi-documents-356-media-freedom-attacks-amidst-russia-ukraine-war/?utm_campaign=wp_nl_pressfreedompartnership&utm_medium=email&utm_source=newsletter&wpisrc=nl_pressfreedompartnership.
- Article 19, available online at: https://www.article19.org/explore/. Article 19's mission is to bring attention to two interlocking freedoms: the Freedom to Speak, and the Freedom to Know, and to bring attention to the instances when either of these freedoms come under threat.
- Ukraine's Institute of Mass Information, available online at: https://imi.org.ua/en. According to its website, IMI is an independent, non-profit, non-governmental organization which was founded in 1995 by a group of Ukrainian and foreign journalists and states that it acts "exclusively in the interests of the civil society of Ukraine and . . . responsible journalists." On April 25, IMI posted a tweet stating that 243 crimes against the media and individual journalists have been committed by Russia since the beginning of the war. This includes 106 media organizations forced to stop their work due to the onset of the war; seven journalists killed; eight incidents of journalists being kidnapped; 15 journalists missing; nine journalists wounded; 19 journalists who received death threats; seven incidents of journalists being shot at; 11 television towers shelled; five editorial offices seized and ransacked by Russian forces; 28 cyberattacks against Ukrainian media; five digital blockades of Ukrainian media by Russia;

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and Ukrainian broadcasts shut down eight times. The tweet is available online at https://twitter.com/imiukraine/status/1518505121809842177/photo/1. IMI's list "Russia's War Crimes Against Media in Ukraine" is continuously updated and available online at: https://imi.org.ua/en/monitorings/russia-s-media-crimes-in-war-against-ukraine-to-be-updated-i44108.

It is beyond the scope of the *Bulletin* to recap all the information contained on these websites. Instead, what follows is a selected list of journalists — identified by CPJ and others — who were killed covering the war, as of May 31, 2022:

Ihor Hudenko

Freelance photojournalist and documentarian Ihor Hudenko died on Feb. 26, 2022, in the Ukrainian city of Kharkiv, according to a colleague, Kharkiv-based journalist Oleg Peregon. On February 26, Hudenko had traveled by bicycle to film the situation near the front line when friends and colleagues lost contact with the journalist and reported him missing, CPJ reported.

Peregon appealed to Kharkiv law enforcement to try to locate Hudenko, but it was not until May 20 that Peregon learned from the city's emergency medical service that Hudenko's body had been found on February 26 on Kharkiv's Natalia Uzhviy Street. Peregon told CPJ that "[Peregon] and Hudenko covered environmental issues in Kharkiv, and Hudenko worked at local TV broadcaster Glavnoe until 2016. Since then, Hudenko made documentary films, including on the 2014 anti-government protests, and covered events and protests held by [non-governmental environmental organization] Green Front." Peregon told CPJ that authorities could reveal any further information about Hudenko's death only to members of the journalist's family.

Yevhenii Sakun

On March 1, 2022, Yevhenii Sakun was killed when Russian forces shelled a television tower in Kyiv. Sakun was a camera operator for the Ukrainian television station LIVE, which had covered the Russian invasion of Ukraine.

Brent Renaud

American journalist and filmmaker Brent Renaud was killed on March 13, 2022, when Russian soldiers opened fire on his car at an Irpin, Ukraine checkpoint. According to *The New York Times*, Renaud had worked for a number of American news and media organizations in the past, including HBO, NBC, and the *Times* itself. At the time of his death, Renaud was not on assignment with the *Times*, but was working for TIME Studios on a project involving the state of refugees worldwide. Renaud frequently worked with his brother Craig, and their projects have included covering the wars in Iraq and Afghanistan, the earthquake in Haiti, political turmoil in Egypt and Libya, the fight for Mosul, extremism in Africa, cartel violence in Mexico, and the youth refugee crisis in Central America. Their work has won many top awards in television and journalism, including a Peabody Award, two Columbia DuPont Awards, two Overseas Press Club Awards, an Edward R. Murrow Award, an IDA Award, a DGA nomination for Best Directors and multiple Emmy nominations. The Renauds' website is available online at: https://www.renaudbrothers.com/bio.

Oleksandra Kuvshynova and Pierre Zakrzewski

On March 14, 2022, camera operator Pierre Zakrzewski and Ukrainian journalist Oleksandra Kuvshynova, both working for Fox News, were killed when their car was attacked by Russian forces near the village of Horenka, outside of Kyiv. Fox News correspondent Benjamin Hall was also injured in the attack, saying afterwards that he had lost half of one leg as well as his other foot. Hall also suffered injuries to one hand, hearing loss, and the vision in one eye.

Oksana Baulina

Journalist Oksana Baulina was killed on March 23, 2022, in the Ukrainian capital, Kyiv, while covering Russia's attack on the city. Baulina was working for the independent Latvia-based online newspaper *The Insider*, covering the destruction of a shopping center on the outskirts of Kyiv's Podilskyi district when Russians shelled the area.

Maks Levin

Maks Levin was a freelance photojournalist and documentary filmmaker, who had covered Russia's invasions of Ukraine since 2014. Levin worked for various media outlets, including Reuters, the BBC, TRT World, and The Associated Press. Levin has been missing since March 13, 2022, when he drove to Huta-Mezhyhirska in Ukraine to cover clashes between Russian forces and Ukrainians. His body was found by police on April 1. On April 3, 2022, Ukrainian President Volodymyr Zelenskyy posthumously awarded Levin the country's Order of Courage.

Mantas Kvedaravicius

Documentary filmmaker Mantas Kvedaravicius was killed in the southeastern Ukrainian port city of Mariupol, according to an April 2, 2022 statement by ArmyInform of Ukraine's Ministry of Defense. The statement is available online at: https://z.umn.edu/KvedaraviciusArmyInform. Kvedaravicius had allegedly been killed by Russian forces, the ministry stated.

Frédéric Leclerc-Imhoff

On May 30, 2022, 24-hour French news channel BFM TV journalist, Frédéric Leclerc-Imhoff was killed when struck by shrapnel while covering an evacuation operation. He and another reporter, Maxime Brandstaetter, had been traveling on the road to Lysstchansk in the Severodonetsk region of Ukraine. Brandstaetter was also injured but was recovering.

According to a statement released by BFM TV, Leclerc-Imhoff had worked for the organization for six years. The BFM TV statement is available online at: https://www.bfmtv.com/international/bfmtv-a-l-immense-douleur-d-annoncer-la-disparition-de-frederic-leclerc-imhoff-journaliste-reporter-d-images-tue-en-ukraine_AV-202205300454.html.

— Elaine Hargrove
Silha Center Staff

Court Order, Settlement Prohibit Minnesota State Patrol From Arresting and Attacking Journalists, Require Improved Training, Technology

On Feb. 8, 2022, Judge Wilhelmina M. Wright of the U.S. District Court for the District of Minnesota approved a permanent injunction in a lawsuit filed by the American Civil Liberties Union (ACLU) of Minnesota on behalf of several members of the news media, among other individuals, who faced arrests, use of force, and threats by police during racial justice protests and demonstrations in the Twin Cities. *Goyette v. City of Minneapolis*, No. 20-cv-1302, 2022 WL 370161 (D. Minn. 2022). The ruling came as part of a settlement agreed to by the Minnesota State Patrol and the Minnesota Department of Public Safety, which includes a $825,000 payout to members of the press attacked and injured by the State Patrol, as well as requirements that the State Patrol improve its training related to journalists and that all State Troopers wear body-worn cameras by June 2022, among other provisions.

POLICE INJUNCTION

On May 25, 2020, George Floyd, a 46-year-old Black man, died while in the custody of Minneapolis Police Department officers. In April 2021, former Minneapolis Police Department (MPD) officer Derek Chauvin — the officer charged with second-degree murder, third-degree murder, and second-degree manslaughter after he pressed his knee into the neck of Floyd — was found guilty on all three counts.

Meanwhile, on April 11, 2021, Brooklyn Center, Minn. police officer Kimberly Potter shot and killed Daunte Wright, a 20-year-old Black man, during a traffic stop. Potter claimed to have accidentally grabbed and used her gun rather than a taser. On Dec. 23, 2021, Potter was convicted of first- and second-degree manslaughter.

Following the deaths of Floyd and Wright, protests arose across the Twin Cities, during which journalists, photographers, and members of the public, faced arrests, use of force, and threats by law enforcement, including the Minnesota State Patrol, whose personnel also issued broad dispersal orders, requiring members of the public and press alike to leave an area.

(For more information on the protests around the death of George Floyd, the incidents between the press and police, incidents between the press and demonstrators, and resulting lawsuits, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue of the Silha *Bulletin*, "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue. For more information on the protests surrounding Chauvin's trial and the death of Daunte Wright, see "Members of the Press Detained and Targeted with Use of Force by Law Enforcement Despite Court Order During Racial Justice Protests in April 2021" available on the Silha Center for the Study of Media Ethics and Law's website at: https://hsjmc.umn.edu/news/2021-04-18-members-press-detained-and-targeted-use-force-law-enforcement-despite-court-order.)

On June 2, 2020, the ACLU of Minnesota filed a motion in the District of Minnesota on behalf of a number of journalists, photographers, and other members of the news media seeking a temporary restraining order (TRO) to prohibit arrests, attacks, and threats by police during protests and demonstrations. The defendants included the City of Minneapolis and Minneapolis Chief of Police Medaria Arradondo (City Defendants), as well as Minnesota Department of Public Safety Commissioner John Harrington, in his individual and official capacity; Minnesota State Patrol Colonel Matthew Langer, in his individual and official capacity; and their agents, servants, employees, and representatives (State Defendants). On April 14, 2021, the plaintiffs filed a motion for a TRO following the events surrounding Wright's death.

On April 16, 2021, Judge Wright issued the TRO, which prevented law enforcement from arresting, threatening to arrest, or using physical force against members of the press unless the officer had probable cause to believe the individual had committed a crime. The order also expressly exempted journalists from dispersal orders, including during curfews from which members of the press were already exempt. (For more information on the background of the motion and Wright's granting of the TRO, see "Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order" in the Winter/Spring 2021 issue of the Silha *Bulletin*.)

On Oct. 28, 2021, Wright ruled on the plaintiffs' motion to convert the TRO into a preliminary injunction against the State Defendants. Among other findings, Wright concluded that "[a] person of ordinary firmness would be chilled" by the actions taken by law enforcement against the press during the protests in 2020 and 2021, including that "members of the press were directed by law enforcement to vacate protest areas, verbally and physically assaulted, struck by less-lethal projectiles and rubber bullets, pepper sprayed, and detained. In some instances, law enforcement officers confiscated or prohibited the use of cameras and other press equipment." (For more information on Wright's ruling converting the TRO into a preliminary injunction, see *Federal Court Grants Preliminary Injunction in Case Stemming from Police Targeting Members of the Press; Minnesota State Patrol Purges Texts and Emails after Summer 2020 Protests* in "Lawsuits, Court Rulings, and Other Developments in Minnesota Raise Important Media Law Questions and Problems" in the Fall 2021 issue of the Silha *Bulletin*.)

In her Feb. 8, 2022 opinion, Wright explained that the plaintiffs had "reached a mediated settlement agreement . . . with Defendants," namely Harrington, Langer, and Minnesota State Patrol Maj. Joseph Dwyer.

Injunction, *continued on page 14*

Injunction, *continued from page 13*

The publicly-available settlement agreement included several terms and conditions, including first that the preliminary injunction "be converted to a monitored permanent injunction ("the Monitored Injunction") and remain in effect for six (6) years from the Effective Date of this Agreement. The Court shall oversee compliance with the Monitored Injunction and take appropriate action in the event it is violated."

Second, the settlement agreement included some proposed minor changes to the terms laid out by Wright in the preliminary injunction, including the addition of the language, "State Defendants' agents and employees responding to civil unrest or protests covered by Journalists shall prominently display their agency name and badge number readable from a distance of twenty feet."

Third, the Minnesota State Patrol agreed to take several actions, including that all State Troopers "will be issued body worn cameras by June 2022," and that the agency would "amend its First Amendment policy to identify any allegation of a First Amendment violation regarding the press to be classified as "serious misconduct," which will automatically trigger an Internal Affairs investigation." The Minnesota State Patrol also agreed in the settlement agreement to "adopt a policy that whenever a State Patrol Officer detains or arrests a member of the media, the State Trooper must report this action immediately to a supervisor."

Fourth, the settlement agreement required that "[a]ll complaints regarding the treatment of media by the Minnesota State Patrol during the protests following the murder of George Floyd in May-June 2020 in Minneapolis and Daunte Wright in April 2021 in Brooklyn Center shall be subject to an Independent Expert Review" on a number of terms, including that "[t]he Independent Expert Review shall be conducted by an individual who is mutually agreeable to the Parties."

Fifth, the Minnesota State Patrol agreed to "engage in the following training and education of State Patrol:

- The Minnesota State Patrol will contract with a nationally recognized Media Expert to provide training on First Amendment considerations and interactions with media to all Minnesota State Troopers. The initial training shall be open to any member of the media who would like to attend.
- Following the initial training, the Minnesota State Patrol shall annually provide refresher training for Minnesota State Troopers on crowd control, which shall include treatment of the media and First Amendment rights.
- The Minnesota State Patrol shall also provide training on crowd control, including the treatment of the media and First Amendment rights for all cadets at the Minnesota State Patrol training academy.
- The Minnesota State Patrol shall provide data retention training to all Minnesota State Troopers."

Sixth, the settlement agreement required that the Minnesota State Patrol "pay a total of $825,000.00 in monetary relief for Plaintiffs' physical, First Amendment, and emotional distress damages and for costs incurred by the American Civil Liberties Union of Minnesota (the "ACLU") and any other attorney working on Plaintiffs' behalf."

Finally, the settlement agreement included additional requirements and terms, including that "[i]t is expressly understood and agreed as a condition hereof that this Agreement shall not constitute nor be construed to be an admission of any wrongdoing or liability on the part of State Defendants, the State of Minnesota, or any of their respective past or present agents, representatives, officers, or employees." The parties also agreed that "the release of information by State Defendants about this matter is governed by" the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01, *et seq.*, and the Official Records Act, Minn. Stat. § 15.17, *et seq.*

The full settlement agreement is available online at: https://dps.mn.gov/divisions/co/Documents/goyette-fully-executed-settlement-agreement-state-defendants.pdf.

In her February 8 decision, Wright converted the preliminary injunction into a permanent injunction "on terms substantially similar to those previously ordered by this Court." Wright wrote that the settlement agreement "implicate[d] significant public interests — namely, Plaintiffs' First Amendment and Fourth Amendment rights, the public's ability to learn about ongoing events of public importance, and public safety." She added that "the contemplated injunction includes obligations to be fulfilled over an extended period of time and may require continuing oversight and interpretation by a court."

Wright further held that in the case, there was both procedural fairness — meaning that "the government and the settling defendant were 'negotiating in good faith and at arm's length' when crafting the proposal — and substantive fairness — meaning that "the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." Wright further found that the proposed injunction was reasonable, holding that:

- "the legality of the proposed six-year injunction is clear and its terms are appropriate, proportionate and reflect a resolution of the actual claims in the operative complaint."
- the terms of the settlement "clearly define who may bring an enforcement action and in what manner"
- "there is no evidence that the Settlement Agreement is tainted by improper collusion or corruption, nor does the Settlement Agreement disserve the public interest."

Additionally, Wright concluded that the proposed injunction was "consistent with the overarching principles of the governing law," including because it was "consistent with the Court's prior legal conclusions."

Wright therefore granted the permanent injunction, which included largely the same terms as the preliminary injunction, including that "Defendants Minnesota Department of Public Safety Commissioner John Harrington, in his individual and official capacity; Minnesota State Patrol Colonel Matthew Langer, in his individual and official capacity; their agents, servants, employees and representatives (collectively, the State Defendants); and all other persons who are in active concert or participation with the State Defendants, are hereby enjoined from: arresting, threatening to arrest, or using physical force — including through

use of flash bang grenades, non-lethal projectiles, riot batons, or any other means — directed against any person whom they know or reasonably should know is a Journalist[,] . . . unless the State Defendants have probable cause to believe that such individual has committed a crime."

The injunction also prohibited the defendants from "using chemical agents directed against any person whom they know or reasonably should know is a Journalist, including but not limited to mace/oleoresin capsicum spray or mist/pepper spray/pepper gas, tear gas, skunk, inert smoke, pepper pellets, xylyl bromide, and similar substances, unless such Journalist presents an imminent threat of violence or bodily harm to persons or damage to property; and seizing or intentionally damaging any photographic equipment, audio-recording or video-recording equipment, or press passes in the possession of any person whom the State Defendants know or reasonably should know is a Journalist, or ordering such person to stop photographing, recording, or observing a protest, unless the State Defendants are lawfully seizing that person consistent with this Order."

The injunction also included a series of requirements for law enforcement if they seize a journalist's property in connection to a lawful arrest. Additionally, the injunction identified "indicia of being a Journalist," including visual identification as a member of the press, such as by carrying a professional or authorized press pass or wearing a professional or authorized press badge or other official press credentials or distinctive clothing that identifies the wearer as a member of the press."

The permanent injunction, as well as Wright's full ruling, are available online at: https://casetext.com/case/goyette-v-city-of-minneapolis-4.

In a statement following the ruling, Pari McGarraugh, an attorney with the Fredrikson & Byron P.A. law firm that represented the plaintiffs along with the ACLU of Minnesota and Apollo Law LLC, said, "We firmly believe in First Amendment rights and the role of a free press in protecting society and upholding our democracy[.]. . . Providing impartial information to the public about demonstrations, protests and other conflicts between law enforcement and the public is at the heart of journalism, and the right to witness and report must be protected and upheld."

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>
> **— Pari McGarraugh, Attorney**
> **Fredrikson & Byron P.A.**

On February 8, the Minneapolis *Star Tribune* quoted journalist Ed Ou, who was attacked by the State Patrol while documenting the Floyd protests, as saying, "I hope it sends a message to law enforcement that they can't do this and I hope this protects journalists in the future from being attacked for doing their job." He continued, "This injunction sends a message that freedom of the press is an ideal the United States continues to hold as one of its core values, and while the legal system is imperfect, I am glad there is still some semblance of accountability to address attacks like this[.]. . . I hope this case sets the precedent that any assault of a journalist is one too many."

Harrington said in a separate statement, "The ability of journalists to cover civil unrest in our communities must be protected and encouraged[.]. . . The hallmarks of this agreement are transparency, accountability and excellence in policing. Our agency is committed to those principles as we work with members of the media to implement the terms of this agreement."

As the *Bulletin* went to press, the portion of the lawsuit by the ACLU against the city of Minneapolis, Minneapolis Police Chief Medaria Arradondo, Hennepin County Sheriff's Office and former Minneapolis police union head Bob Kroll remained ongoing, as reported by the *Star Tribune*.

— Scott Memmel
Teaching Assistant Professor

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Please include "Silha Bulletin" in the subject line.
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Minnesota Journalists Fight for Court Access

Throughout the early months of 2022, media groups continued to fight for access to Minnesota courts. Lawyers representing a coalition of media organizations successfully asked that juror identities be revealed four months after the conclusion of the trial of former Brooklyn Center police officer Kimberly Potter. The Minnesota Supreme Court's Advisory Committee on the Rules of Criminal Procedure undertook a review process to determine whether to amend the rules governing cameras in criminal trials. A media coalition filed a motion to request audiovisual access to the upcoming state trials of the former Minneapolis police officers charged with aiding and abetting Derek Chauvin, but Hennepin County District Court judge Peter Cahill denied the request.

COURT ACCESS

Media Coalition Pushes for Access to Juror Information in Kim Potter Case

Lawyers representing a coalition of eighteen media organizations, including the Silha Center for the Study of Media Ethics and Law, filed a motion on Jan. 21, 2022 to unseal the identities of the jurors who served in the trial of former Brooklyn Center police officer Kimberly Potter. Potter mistakenly pulled a gun instead of a Taser during a traffic stop, fatally wounding Daunte Wright, a 20-year-old Black man, in April 2021. On Dec. 23, 2021, she was found guilty of first- and second-degree manslaughter and on Feb. 18, 2022, she was sentenced to two years in prison. On April 25, Hennepin County District Court judge Regina Chu agreed to file a public document with the names and juror numbers of the fourteen sworn and alternate jurors.

The media coalition motion came after the Minnesota District Court for the Fourth Judicial District ordered on Aug. 10, 2021 that the jurors' names be kept confidential indefinitely. Potter's trial represented the third officer-involved shooting case in Minnesota since 2016 to use an anonymous jury, *USA Today* reported Sept. 1, 2021. Judges had also ordered anonymous juries in the prosecutions of former Minneapolis police officers Mohamed Noor and Derek Chauvin. (For more about the Potter trial, see *Minnesota, Other State Courts Grapple with Court Access* in "COVID-19 Pandemic Continues to Affect Access to Courts" in the Fall 2021 issue of the Silha *Bulletin*. For more information about the Noor trial, see *Minneapolis* Star Tribune *and Hubbard Broadcasting Seek Juror Names in Noor Trial* in "Twin Cities Media Seek Juror Names in Noor Trial;" "Minneapolis Advisory Committee Allegedly Violated Minnesota Open Meeting Law," both in the Winter/Spring 2020 issue; "Judge Allows Media and Public to Make Copies of Evidence from Trial of Former Minneapolis Police Officer, Restricts Live Streaming of Noor Sentencing Hearing" in the Summer 2019 issue and "Media Coalition Wins Legal Victory to Access Body Camera Video in Trial of Former Minneapolis Police Officer" in the Winter/Spring 2019 issue.)

In an "abundance of caution" and "despite grave concerns about yet another anonymous jury in an important, officer-involved case" the media coalition waited until the trial concluded to file the motion. Under Rule 26.02 of the Minnesota Rules of Criminal Procedure, a court may "restrict access to prospective and selected jurors' names, addresses, and other identifying information if a strong reason exists to believe that the jury needs protection from external threats to its members' safety or impartiality."

In the Jan. 21, 2022 motion, attorneys Leita Walker and Emmy Parsons, who represent the media coalition, argued that the court failed to meet this standard. The coalition said that the court rules and First Amendment each favored a presumption of access to this information. Under the "high standards of proof" required to seal juror identities in Minnesota courts, "the common law presumption of access clearly prevails for the simple reasons that (1) trial is over such that juror impartiality is no longer a relevant issue and (2) the public has accepted the verdict, there was no unrest even in its immediate aftermath, and there is thus no reason to fear for jurors' safety at this time."

The First Amendment right of access to juror identities and "other juror materials" similarly favored access, the coalition argued. In cases like *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), the U.S. Supreme Court has held that press public "can be barred from a criminal trial (including *voir dire*) only when necessary to protect a 'compelling governmental interest' and only if the restriction on access is 'narrowly tailored to serve that interest.'" The motion contended that "many courts" have applied the *Press-Enterprise* finding to support a First Amendment right of access to juror identities as well. Here, the coalition argued that the August 10 order sealing juror identities did "not identify any interest in secrecy whatsoever, much less cite facts suggesting the interest was in jeopardy." Furthermore, the order was "not narrowly tailored, primarily because it purports to seal juror names *indefinitely* (emphasis in original.)"

The coalition also argued that the increase in anonymous juries in cases involving police shootings represented a troubling trend. "There is no basis in the law for treating a certain type of defendant categorically different (and with more secrecy) than all other defendants — certainly not when the category is comprised of former police officers whose prosecutions are of utmost public interest and concern," the media coalition attorneys wrote. "Yet the series of recent decisions from the district court threaten to do just that — to turn the long-established presumption of openness on its head, and to normalize the automatic sealing. or juror names and other juror information in cases involving former police officers." The full media coalition motion is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/JuryNamesMemo.pdf.

Minneapolis *Star Tribune* senior managing editor Suki Dardarian submitted an affidavit in support of the motion to unseal juror identities. "As an editor, I have paid close attention to all the high-profile trials happening in the coverage areas of the newspapers I oversee," Dardarian wrote. "I am only aware of two other instances in which a court kept sealed all names and information about empaneled jurors for such a lengthy period of time, and those were the Hennepin County judges overseeing the criminal prosecutions of former police officers Mohamed Noor and Derek Chauvin."

Dardarian wrote that her newspaper almost always received near-contemporaneous access to the names of jurors in high-profile trials. "I

do not believe this case merits different treatment," she wrote. "If anything, the degree of public interest and concern it attracted warrants more transparency." The full affidavit is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/DardarianAffidavit_1.pdf.

On Jan. 28, 2022, Minnesota Assistant Attorney General Matthew Frank filed a motion arguing the court should not unseal any information about juror identification until "at least six months from the sentencing hearing in this case." Frank cited *State v. Bowles*, 530 N.W.2d 521, 530–531 (Minn.1995) for precedent that Minnesota courts could "restrict access to jurors' identities to protect the jurors from harassment and to preserve juror impartiality." Frank argued that public interest in the case remained high and would likely continue as the cases involving former Minneapolis police officer Derek Chauvin's three co-defendants progressed through state and federal courts. Frank also argued that releasing juror information before those trials could dissuade people from serving as jurors if they saw jurors from the Potter case face public scrutiny. The full motion is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/StateResponseMotionUnsealIdentity.pdf.

On Feb. 25, 2022, the media coalition filed a motion in response to the State's objections. The State's motion "does little more than point to the public's understandable interest in this trial as well as other recent and pending trials of former police officers, while referencing a 'potential' for juror harassment," the motion said. The coalition argued that the public interest in the trial should lead to "*more* transparency, not less," (emphasis in original). Because Potter's trial had already concluded, releasing information on juror identities would not impact her right to a free trial. The coalition also argued that the decision to seal juror identities in the Potter case was incongruous with its decision to release this information in the "extremely high-profile trial of Derek Chauvin for the killing of George Floyd." The motion also noted that Potter herself had not objected to the unsealing of the juror identities. Finally, the media coalition noted that the court's initial order sealing juror names was "entirely open-ended and unrestricted" and sealed the juror identities and information indefinitely. Therefore, this order was not narrowly tailored for purposes of First Amendment analysis. The full motion is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/KP-ReplySupportMotionUnsealJurorID.pdf.

In an April 25 order, Judge Chu agreed to "file a public document with the names and juror numbers" of the fourteen sworn and alternate jurors. She also agreed to release the juror questionnaires of all 54 prospective jurors who were "formally evaluated and considered as potential jurors." These documents "will not be posted to the public website created for this case" and remote access "will not be allowed for any of these documents."

"Juror impartiality is not a concern at this point — the trial is over," Chu wrote in the order. "What's more, there is no objective evidence to believe continued anonymity is required to ensure juror safety." The order also stipulated that juror addresses and phone numbers would not be made public. Judge Chu's April 25 order is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-21-7460/KP-OrdertoUnsealJurorNames.pdf.

Minnesota Supreme Court Advisory Committee Considers Cameras in Court

The Minnesota Supreme Court's Advisory Committee on the Rules of Criminal Procedure held a public hearing Feb. 25, 2022 to consider changing the current requirements for audio and visual coverage of criminal court proceedings in the state. Advocates for open government and press access argued the rules should be expanded to allow more camera access, but victim advocates shared concerns. The hearing was part of a larger project to review rules governing camera access to criminal trials in Minnesota.

The Minnesota Supreme Court issued an order on June 18, 2021 directing the committee to review Rule 4 of the General Rules of Practice for the District Courts and "consider whether the requirements set forth in that rule for audio and video coverage of criminal proceedings should be modified or expanded." For the full order, see https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM10-8049_Order_6-18-2021.pdf. Rule 4 allows media cameras to record most criminal proceedings only after the prosecution, defense and judge all agree. Minn. Gen. R. Prac. 4.01 *et seq.* According to the Supreme Court order, the rule was enacted "first to govern a pilot project" in 2015 and later as a permanent rule in 2018. During this time, the Court found that "expanded media coverage of criminal proceedings — with unanimous party consent before a verdict or plea, or at the post-plea or post-verdict stage — can be allowed while maintaining an appropriate balance between the fundamental right to a fair trial, society's interest in public proceedings, and the judiciary's interest in the fair and impartial administration of justice." During the COVID-19 pandemic, "audio and visual coverage of all court proceedings, including some criminal proceedings" was a "critical component of public access." (For more information on the success of audiovisual coverage of criminal trials during the COVID-19 pandemic, see "Chauvin Trial Marks Key Moment in Minnesota Media Access to Court Proceedings During Pandemic" in the Summer 2021 issue of the Silha *Bulletin*.)

The February 25 hearing attracted both oral and written testimony from stakeholders with differing viewpoints. Nine people submitted written testimony in advance of the hearing, and five provided oral testimony, though there was significant overlap between the groups.

Joe Spear, managing editor of the *Mankato Free Press* and past president of the Minnesota-Pro Chapter of the Society of Professional Journalists, said in his written testimony that he supported expanding cameras in court. "In all my years of journalism, I have met face to face with many people who are angry at the courts or who do not understand the courts," he said. "These folks were both victims, the accused and the general public who often think sentences are too easy on criminals. I realize there are competing interests here with press freedom and victim privacy. But the committee should also consider damage done to the institution of the judiciary by the current lack of transparency."

Spear also testified during the hearing. He said that he has served as the media coordinator for the Fifth Judicial District and for counties in the First and Third Judicial Districts. In this role, he said he has heard "no complaints from victims, witnesses, lawyers, judges, or others

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Court Access, *continued from page 17*

involved in a trial where cameras were allowed." Spear also said that criminal courts have a significant impact on the public, and that transparency helps to combat misinformation. "The governed have a huge stake in the power of prosecutors and judges and the freedom of the people," he said. "The masses have a right to easily see how their courts work. In the end, the truth is the truth. A camera doesn't change that, it only sheds more light on it." Spear concluded, "[I]f we don't give them more correct information, more facts, social media disinformation will fill that void."

Jane E. Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center, argued in her written testimony that the Silha Center believed Rule 4 should be "modified and expanded to create a presumption allowing camera access to all criminal district court proceedings." Doing so would enhance public oversight and trust in the judicial system and support First Amendment rights of both the press and members of the public. She highlighted the successes of broadcasting the trials of former Minneapolis police officer Derek Chauvin and former Brooklyn Center police officer Kimberly Potter. "Abstract concerns about the presence of cameras intimidating witnesses or jurors, creating security problems, or violating privacy all proved to be unfounded during the Chauvin and Potter trials." Furthermore, she said that an amended Rule 4 could create a presumption of access but still allow "presiding judges to exercise appropriate discretion."

Kirtley also testified during the February 25 hearing. "In my opinion, it would be extremely unwise for the Minnesota courts to go back to the pre-COVID status quo," she said. "I would even suggest that it would be unacceptable to the public." She mentioned strong public reactions to recent high profile federal cases, such as Ghislaine Maxwell's sex trafficking trial and the federal trial of Chauvin's three co-defendants. "Even though it was explained over and over that federal court rules prohibit camera coverage and that the presiding judge had no discretion to admit them, social media chatter imagined all sorts of conspiracy theories about why the public was excluded." Kirtley noted that "Minnesotans now have an expectation that audio and visual coverage of criminal trials will be the norm in this state."

Fourth Judicial District judge Lois R. Conroy testified on behalf of the Minnesota District Judges Association (MDJA). She wrote that the association "objects to any change" of the existing rules. "Justice will not be served by the expansion of Rule 4.02," she said. "Judges must continue to retain the discretion to weight factors, such as the nature of the case, the procedural posture, the parties, the public's right to observe, the hardship of a victim, the hardship on the victim's family, and the Defendant's right to a fair trial. When judges stop examining these factors, a judge is no longer ensuring a result that is right and just." She provided similar oral testimony and said that decisions on allowing cameras in court need to be made "on a case-by-case basis, weighing factors that no rule could ever proscribe. There is no way to fashion a rule that encompasses all factors that comes to a fair and just result."

"Even though it was explained over and over that federal court rules prohibit camera coverage and that the presiding judge had no discretion to admit them, social media chatter imagined all sorts of conspiracy theories about why the public was excluded . . . Minnesotans now have an expectation that audio and visual coverage of criminal trials will be the norm in this state."

— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law

Similarly, Robert Smalls, executive director for the Minnesota County Attorneys Association (MCA), wrote that his organization opposed any expansion of Rule 4.02. "The Minnesota County Attorneys Association is deeply committed to protecting the rights of victims, witnesses and litigants in criminal cases," he wrote. "Prior to the adoption of a pilot program regarding cameras in the courtroom, the members of our association, along with a number of victim advocacy groups, expressed strong reservations about victims and witnesses being further traumatized by the presence of cameras during the proceedings." He said he "appreciate[d]" that the current rule "recognized these concerns," and that the MCA was "opposed to any further expansion of audio and video coverage in criminal cases." The MCA is "committed to implementing these current rules in a manner that assures they work for all of the stakeholders."

Several victim advocates submitted comments opposing any expansions to the rule. Artika Roller, executive director of the Minnesota Coalition Against Sexual Assault, wrote that her organization supported upholding Rule 4 as is. "The allowance of cameras often amplifies the backlash victims/survivors experience in the criminal legal system, potentially endangering and retraumatizing them," she said. "In addition, allowing cameras may discourage other survivors from reporting and may be triggering." Bobbi Holtberg, executive director of the Minnesota Alliance on Crime, also wrote in her comments that Rule 4 should not be expanded and that future rules should include "increased exclusions to most, if not all, person crimes." Expanding camera access feeds "a voyeuristic hunger that has no connection to achieving just outcomes for victims and/or their family members and further marginalizes the safety and accessibility of the criminal/legal system for victims and witnesses of crime."

Adrianne McMahon, assistant public defender for Ramsey County, also wrote that she was "strongly opposed to changing the rules to allow for cameras to be present in the courtrooms." She expressed concerns that cameras could have a chilling effect on witnesses and could put defendants and defense attorneys at risk of harassment or intimidation. "Adding cameras to the courtrooms to 'improve' transparency will do nothing more than create targets on defendants' and defense attorneys' backs," she wrote. "It will impede the ability for the defense to find witnesses, lay or expert, willing to work with the

defense for fear of retaliation. It will harm attorneys' mental health and well-being."

Hennepin County District Court Judge Peter A. Cahill, who presided over the Chauvin trial, submitted written testimony in favor of expanded camera access. "As a district court judge, I have opposed the use of cameras in the courtroom in criminal cases, but my recent experience in *State v. Chauvin* has changed my opinion such that I now believe camera in the courtroom can be helpful in promoting trust and confidence in the judicial process and are sometimes necessary to safeguard both the defendant's right to a public trial and the public's right of access to criminal trials."

Hal Davis also testified during the February 25 hearing on behalf of the Minnesota Coalition of Government Information (MNCOGI). "We believe the people of Minnesota should be able to see their criminal and civil justice system play out in court proceedings. More formally, it is our right as citizens to view the judicial process at work." He mentioned the success of televising verdicts in the Chauvin and Potter cases and noted the success of broadcasting proceedings with "reasonable restrictions" in other states. Though the Chauvin and Potter cases were "exemplary," he said he "had confidence in the Minnesota judiciary" and in the "ability of district judges to run their courtrooms in a manner that defends the rights of all parties." Davis also submitted written testimony. "MNCOGI supports expanding cameras in Minnesota courts as a way for the public to see what happens in its courtrooms. Cameras allow the public to observe government officials perform important duties that only a select few can witness in person. Such coverage provides the public with information vital to its role in a functioning democracy and helps ensure that the information disseminated is more complete and accurate," he wrote.

Attorney Leita Walker testified during the hearing on behalf of Hubbard Broadcasting and the Minnesota Broadcasters Association (MBA). She said that her experience in securing livestream access to the Chauvin and Potter trials supported her view that there should be a presumption of camera access to criminal trial proceedings.

Camera equipment is small and unobtrusive, she said. "These are not bulky cameras being wheeled around on giant tripods," she said. "We do not have cables and cords crisscrossing the courtroom and journalists buzzing around the perimeter. This is not O.J. Simpson. The cameras are small, remotely operated, and completely forgettable."

She said that cameras in the Chauvin trial "enhanced decorum" and maintained the solemnity of the proceedings. Camera access to high-profile proceedings avoids large crowds of journalists and a "nightmare for courtroom security" by allowing large numbers of reporters to watch the trial from home. Instead of encouraging judges and lawyers to grandstand, she said that cameras increased accountability and professionalism.

> "If the past couple years have shown us anything it is that large segments of the public have lost faith in the criminal justice system, not just in our police but in our courts. And that is a huge problem. If you want to fix it, the first step is making it easy for people to watch justice unfold."
>
> **— Leita Walker, attorney, Ballard Spahr LLP**

Walker testified that Hubbard Broadcasting and the MBA "encourage the committee to recommend a rule change that would create a presumption of camera access at the guilt/innocence phase of the trial similar to the presumption that exists for sentencing." Doing so would not "rob judges of all discretion" but would "require courts to be thoughtful, and not just bar cameras because they're not used to them, or they're a little worried about how it would go, or no one is quite sure of how it would work, or it creates an administrative headache."

Walker said that allowing cameras in court could meaningfully increase public trust in the judicial system. "If the past couple years have shown us anything it is that large segments of the public have lost faith in the criminal justice system, not just in our police but in our courts. And that is a huge problem. If you want to fix it, the first step is making it easy for people to watch justice unfold."

The rules committee will meet again June 10. The committee will release a report with recommendations to the Minnesota Supreme Court before its July 1 deadline, and the Court will have the final say.

Media Coalition Asks for Audiovisual to Trial of Chauvin

On April 8, 2022, attorneys representing a coalition of sixteen media organizations, including the Silha Center for the Study of Media Ethics and the Law, filed a motion requesting audiovisual access to the June trials of three former Minneapolis police officers charged with aiding and abetting Derek Chauvin in the murder of George Floyd. The state trial of former officers J. Alexander Kueng, Thomas Kiernan Lane, and Tou Thao is set to begin in June. On April 25, Cahill issued an order denying audio and visual recording and livestreaming of the trial.

According to the media coalition motion, the court reversed a Jan. 11, 2022 order that would have allowed audiovisual coverage of the trial. Though the court has "not yet officially explained its rationale" for prohibiting audiovisual coverage and livestreaming of the trial, the media coalition "assumes the decision is grounded in the Defendants' objection to such coverage, in the apparently retreating severity of the COVID-19 pandemic, and in the Court's belief that — absent the extenuating circumstances caused by the pandemic — its hands are tied by Minn. Gen. R. Prac. 4.02(d)."

Rule 4.02(d) gives "*carte blanche* to parties in a criminal proceeding — both prosecutors and defendants — *unchecked*, *unilateral power* to limit public access by keeping cameras out of the courtroom during trials of utmost public concerns and interest," the motion read (emphasis in original). The coalition argued that even if the trial takes place in a large courtroom, the number of people interested in observing may "far outstrip the number of seats." More than 23 million people watched the reading of the verdict in the Derek Chauvin trial,

Court Access, *continued on page 20*

Court Access, *continued from page 19*

and at least 16,000 watched the trial of former Brooklyn Center police officer Kimberly Potter. (For more information on camera access to the Chauvin trial, see "Chauvin Trial Marks Key Moment in Minnesota Media Access to Court Proceedings During Pandemic," in the Summer 2021 issue of the Silha *Bulletin*.) The coalition argued it was "absurd" that the defendants should be able to "single handedly prevent the press and public from fully monitoring the trial for one of the most notorious murders in State history." Because of "the enormous public interest in this case, its historic nature, the need for trust in the verdict, and the fact that people do not trust what they cannot see," the coalition urged the court to exercise its discretion to "prevent manifest injustice" and permit audio-visual coverage.

The full motion is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/KLT-MediaCoalitionSupplementalMemo.pdf.

On April 7, 2022, Minnesota Attorney General Keith Ellison and Assistant Attorney General Matthew Frank, arguing on behalf of the state, also filed a motion asking the court to maintain audiovisual access to the trial. In *State v. Chauvin*, the court "presided over one of the most consequential cases in this nation's history." The court "guaranteed the defendant a fair trial, minimized the burden on jurors, ensured widespread public access, protected the health of trial participants, and prevented disruptions to the proceedings." The state argued that media access policies "worked" and the court should "continue to use the same proven procedures in the second trial." The state argued that the court's "commendable transparency" in streaming the Potter and Chauvin trials "inspired public confidence in the proceedings and helped ensure calm in Minneapolis and across the country." The state was "particularly concerned about the message" the court could "send if it reverses course, after permitting such robust public access in the Chauvin trial and initially guaranteeing the public the same degree of access for Defendants' upcoming trial." If the court "eliminates audio-visual coverage at this late hour, the broader public may receive the unintended message that they no longer have the right to observe proceedings." The state also argued that the "dynamic challenges" to public health posed by the ongoing pandemic could be alleviated by allowing for remote access and potential remote participation. The full motion is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12953-JAK/KLT-StateMemo.pdf.

On April 11, 2022, Cahill said during a pretrial hearing that he was unsure whether he had the authority to permit livestreaming despite objections from the defendants. "COVID-19 is less of a pandemic and more of an endemic issue now," he said, according to an April 11 report from the *Star Tribune*. During the pretrial hearing, attorneys for all three defendants reiterated their opposition to allowing audiovisual coverage, the Associated Press (AP) reported. Thomas Plunkett, attorney for Kueng, said that witnesses may behave differently if they know they are on camera, the *Star Tribune* reported. Plunkett also said he was concerned by the large number of negative emails Chauvin's attorney Eric Nelson received, the *Star Tribune* reported.

Jane Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center, told the AP that the success of livestreaming the Chauvin and Potter trials should alleviate concerns about allowing audiovisual coverage of this trial.

"None of the bad things that critics feared transpired, and we had the huge benefit of giving the public at large an opportunity to observe the proceedings," she said.

On April 25, Cahill ruled that audio and video recording and livestreaming of the trial would not be permitted. Two media representatives selected by the media coalition will be allowed in to the courtroom, and at least three overflow courtrooms with an audio and video feed "from the court monitoring audio system currently in place" will be made available for trial participants, the media, and the general public Cahill wrote. In the order, Cahill wrote that the Minnesota Rules of Practice do not authorize livestreaming of trials over the objection of a party. He acknowledged that the "press and general public do have a First Amendment right of access to public trials," recognized in cases like *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982), and *Waller v. Georgia*, 407 U.S. 39 (1984). "While the right of the press and public to attend criminal trials is sacrosanct and carries with it the right to report what has occurred during the trial, the right does not include any right to televise the trial," he wrote. Minn. Gen. R. Prac. 4.02(d) allows for visual and/or audio recording of trial proceedings only with the consent of all parties. During the April 11 hearing, "counsel for all three Defendants maintained their opposition to livestreaming the trial," he wrote. "Because the current version of Rule 4 does not authorize a district court to permit livestreaming of a criminal trial over the objection of a party, this Court may not order livestreaming of the trial, absent compelling justification to depart from the mandates of that operative rule."

Cahill wrote that the "unusual and compelling circumstances of the COVID-19 pandemic at the time of the Chauvin trial" have "substantially abated."

"[A] manifest injustice is not visited upon the State, the public writ large, or the Media Coalition by this Court returning to the normal order of things in the courts of this State and not ordering the livestreaming of a trial — even one of whatever interest some segments of the general public, some members of the Media Coalition, and some of the family members and witnesses to the events of May 25, 2020 at the Cup Foods Store at 38th and Chicago Avenues in Minneapolis may retain after what will in effect be the third trial of the officers charged with the death of George Floyd," Cahill wrote in the order. The trial "will not be 'closed,' within the judicial meaning of that word for purposes of the First Amendment and public and media access; it will instead, as with every trial in Minnesota state history other than Chauvin and Potter — including many others of immense public or media — be open to family members and friends of the parties, the general public, and the media consistent with the demands on the Court to ensure a fair trial to former MPD officers Thao, Kueng, and Lane, and the available resources and facilities available to the Court in which to try the case." The full order is available online at: https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12949-TT/TT-TrialManagementOrder.pdf.

— Claire Colby
Silha *Bulletin* Editor

Subpoenas Target Minnesota Journalists with Connection to Police Actions at George Floyd Protests

On March 18, 2022, the City of Minneapolis served subpoenas on three local journalists in connection with a federal civil rights lawsuit filed by photojournalist Linda Tirado, who was blinded in one eye after being shot by police with a foam bullet during the unrest following the murder of George Floyd in May 2020. The Minneapolis City Council agreed to a settlement in Tirado's case on May 26, 2022. In April, two of the journalists challenged the subpoenas, contending that they were overbroad and in violation of statutory protections for journalists' materials.

SUBPOENAED JOURNALISTS

On May 25, 2020, George Floyd, a 46-year-old Black man, died while in the custody of Minneapolis Police Department officers. In April 2021, former Minneapolis Police Department (MPD) officer Derek Chauvin — the officer charged with second-degree murder, third-degree murder, and second-degree manslaughter after he pressed his knee into the neck of Floyd — was found guilty on all three counts. Following Floyd's murder, protests arose across the Twin Cities, during which journalists, photographers, and members of the public faced arrests, use of force, and threats by law enforcement.

One of the journalists hurt by police was Tirado, who in a series of tweets on May 30, 2020, wrote that she permanently lost vision in one eye after she was hit with a rubber bullet while covering the protests in Minneapolis. The full tweet string is available online at: https://twitter.com/KillerMartinis/status/1266786161143537669?s=20.

On June 10, 2020, Tirado filed a 42 U.S.C. § 1983 (federal civil rights) action against the City of Minneapolis, Minneapolis Police Department (MPD) Chief Medaria Arradondo, police union president Robert Kroll, Minnesota Department of Public Safety Commissioner John Harrington, Minnesota State Patrol Colonel Matthew Langer, and four John Doe MPD Officers. The complaint first stated that "[u]ntil recently, few Americans could have imagined police officers shooting at journalists reporting on civil protests."

Second, the complaint alleged that police tear gassed Tirado even though "her press credentials were displayed prominently around her neck" and was allowed to photograph the protests because news media were exempt from the city-wide curfew. The complaint also noted that Tirado yelled "I'm press, I'm press" as the police fired tear gas at protesters and herself. The complaint added that the police were acting under color of law and "acted with reckless indifference to the federally protected rights of Plaintiff." The complaint further contended that the police "acted with deliberate indifference to the constitutional rights of the members of the press as evidenced by the recurring use of excessive force against them, chilling the press' ability to cover the matters of public concern, including law enforcement's tactics during the protests."

Third, the complaint argued that "[w]hatever one's view of police conduct in relation to the protestors, and of protestors' actions, there can be no doubt that under the . . . First Amendment, the police must not shoot journalists reporting on civil protests. Journalists, like Linda Tirado, cover the protests and capture any tactics employed by law enforcement. If the press is silenced, the story does not get amplified, and nobody can see the police violence committed against citizens for exercising their First Amendment rights[.]. . . What is more, the public could not learn about any incidents of law enforcement's deliberate use of excessive force in violation of the Fourth Amendment."

Fourth, the complaint included several causes of action, including violations of the First Amendment. The complaint contended that the defendants "used excessive force against [Tirado] to prevent her coverage of the matters of public concern," therefore violating her "First Amendment rights to free press, speech and the right to peacefully assemble." The complaint further alleged that the defendants "retaliated against Plaintiff and other members of the press by use of excessive force in response to the exercise of their constitutional rights." Additionally, the complaint contended that the police's actions "chill[ed Tirado] from exercising her constitutional rights" because she was "not medically cleared to visit the protests because the tear gas utilized by law enforcement is a chemical irritant, and may further damage her eye."

Finally, the complaint called for the federal judge to declare that the defendants' actions were unconstitutional under the First and Fourth Amendments. The complaint also sought a permanent injunction "enjoining Defendants from engaging in the use of excessive force against Plaintiff in violation of her constitutional rights. Lastly, the complaint sought "[d]amages compensating Plaintiff for her injuries against all Defendants, jointly and severally," as well as punitive damages. The full complaint is available online at: https://www.courthousenews.com/wp-content/uploads/2020/06/Tirado-v-Minneapolis.pdf. On July 29, 2020, Tirado filed an amended complaint.

On May 26, 2022, MPR News reported that the Minneapolis City Council approved a $640,000 settlement for Tirado. The city of Minneapolis denied wrongdoing in reaching the settlement, the *Minnesota Reformer*, an independent, nonprofit news organization focused on government accountability, reported on May 26, 2022. (For more information on the protests around the death of George Floyd, the incidents between the press and police, and resulting lawsuits, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue of the Silha *Bulletin*, "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue. For more information on the protests surrounding Chauvin's trial, see "Members of the Press Detained and Targeted with Use of Force by Law Enforcement Despite Court Order During Racial Justice Protests in April 2021" available on the Silha Center for the Study of Media Ethics and Law's website at: https://hsjmc.umn.

Subpoenas, *continued on page 22*

Subpoenas, *continued from page 21*

edu/news/2021-04-18-members-press-detained-and-targeted-use-force-law-enforcement-despite-court-order.)

On July 8, 2020, Kroll filed a motion to dismiss, contending that Tirado had "fail[ed] to allege any conduct by [Kroll] which would cause liability to Defendant Kroll." A memorandum of law in support of the motion asserted that there was "no allegation that Defendant Kroll deployed the projectile that allegedly injured Plaintiff." The motion continued, "There is no allegation that Defendant Kroll directed MPD officers to deploy a projectile (or use force on Plaintiff). In fact, there is no allegation that Defendant Kroll was even on duty as a police officer at the time of the alleged injuries." The full memorandum is available online at: https://storage.courtlistener.com/recap/gov.uscourts.mnd.188119/gov.uscourts.mnd.188119.20.0.pdf.

Harrington and Langer filed a separate motion to dismiss on July 16, 2020. On Aug. 24, 2020, the City of Minneapolis and Arradondo filed a motion to dismiss in which they argued that they could not "be held liable merely because the John Does are employed by the Minneapolis Police Department." A memorandum of law in support of the motion further argued that the defendants "may only be held liable for their own conduct" and that Tirado failed to establish that they had conspired to deny her or anyone else their constitutional rights. The memorandum further contended that the City of Minneapolis' policy on the use of projectiles was constitutional and there was no custom of law enforcement targeting members of the press or protesters with projectiles. The memorandum added that Tirado's allegations "that the City Defendants failed to train, supervise and correct the wrongful conduct of officers . . . lack sufficient factual enhancement." The full memorandum is available online at: https://storage.courtlistener.com/recap/gov.uscourts.mnd.188119/gov.uscourts.mnd.188119.45.0.pdf.

On Feb. 22, 2022, District of Minnesota Chief Judge John Tunheim allowed Tirado's lawsuit to proceed. In his opinion, Tunheim first discussed Tirado's injury and its "[o]ngoing [i]mpact," including that "Tirado's blindness has altered her professional and everyday life. For example, her ability to drive and ride in a car is limited, she experiences severe headaches, and tires easily. Tirado's two children have also been affected. Professionally, Tirado has limited ability to focus on cameras, computer screens, or documents for long periods of time." Tunheim also noted that "numerous other journalists were subject to use of force and threats by MPD while covering the protests and civil unrest, despite being identifiable as press."

Second, Tunheim wrote that the City of Minneapolis and Arradondo (collectively "city defendants") did "not dispute that Tirado has sufficiently pleaded constitutional violations by the John Doe defendants, [namely the four unnamed Minneapolis Police Officers,] but instead moves to dismiss Counts I, II, and III for violations of the First Amendment, Fourth Amendment, and Fourteenth Amendment on the basis that Tirado has failed to sufficiently allege its liability" under relevant court precedent.

Tunheim explained that under § 1983, a plaintiff, in order to "maintain a claim for municipal liability based on an unofficial custom . . . must allege:

(1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;

(2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and

(3) The plaintiff's injury by acts pursuant to the governmental entity's custom, i.e., proof that the custom was the moving force behind the constitutional violation."

Regarding the first prong, Tunheim concluded that "all events described in the Amended Complaint bear sufficient factual similarity to Tirado's experience to potentially form a pattern. Although not every incident involved the use of foam bullets or projectiles, the alleged police misconduct toward journalists occurred under similar circumstances: journalists were identifiable as press, separated from protestors and at a distance from police, and were not engaging in any threatening or unlawful conduct." Tunheim also held that Tirado "plausibly asserted that the MPD engaged in a pattern of targeting journalists for reprisals during the George Floyd protests, as evidenced by the treatment of Tirado and at least nine other journalists" and that she had alleged a sufficiently long period of time so that the police were "on notice of the practice."

In terms of the second and third prong, Tunheim wrote that Tirado had "articulated specific allegations that the City knew about constitutional violations by MPD officers in the days before her injuries and took no corrective action," including "at least five incidents of use of force against journalists during this time, and explains how the City allegedly became aware of those incidents through broad reporting by news outlets, the City's own social media monitoring efforts, and direct outreach by media."

Tunheim further held that there should be "the possibility of municipal liability based on a pattern of unconstitutional conduct even in relation to a single police operation spanning ten days. The alternative is to suggest that, as a matter of law, so long as unconstitutional conduct only occurs during a single police operation — such as in response to a related series of protests — but ceases at the conclusion of the operation, the city or police department can be deliberately indifferent to that unconstitutional conduct, yet escape liability because the conduct did not last long enough." He therefore held that "Tirado had plausibly alleged that the City could have, but did not, take any action to curtail violations of journalists' rights, satisfying the deliberate indifference element."

Finally, Tunheim turned to the city defendants' and Kroll's motion to dismiss Tirado's civil conspiracy claim, which alleged that Kroll "acted on his publicly documented hostility toward the press . . . by conspiring with the City of Minneapolis, MPD, and/or one or more individual officers to vindicate his anti-press views by depriving Tirado of her First, Fourth, and Fourteenth Amendment rights in retaliation for her coverage of the protests or her presence there." According to Tunheim, the threshold requirement of a civil conspiracy claim under § 1983 is "a deprivation of a constitutional right or privilege." He found that the city defendants did not dispute that Tirado had plausibly alleged such a violation.

Tunheim turned to Kroll's contention that he could not be held liable for civil conspiracy because he was sued in his individual, rather than official, capacity. At the time of the protests, Kroll served as the president of the Minneapolis Police Federation. The judge found that "when a civil conspiracy claim

involves both state and private actors, the private party can be liable for conspiring with state officials if he was a willful participant in the conspiracy." The plaintiff is required to show that "at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor." Tunheim found that "Tirado allege[d] that Kroll initiated contact with senior MPD policymakers to make demands, that he had numerous conversations with politicians, and that he proposed an action plan to which the City agreed, which plausibly establishes that Kroll was a willful participant in any conspiracy entered with state actors."

However, Tunheim noted that Tirado had included "specific facts about Kroll's communications to the City, but not the City's response." He therefore held that the court would "allow an opportunity for discovery because Tirado has presented circumstantial allegations that are not entirely one-sided," but that "if, after discovery, Tirado cannot present at least circumstantial evidence of the City's or John Does' agreement or conduct in response to Kroll's communications, the claim may be ripe to be disposed of at summary judgment."

Regarding "the remaining elements of the civil conspiracy claim," Tunheim held that Tirado "plausibly allege[d] that the purported conspiracy was for an unlawful purpose — to deprive journalists of constitutional rights — because she pleads specific facts regarding Kroll's animus toward the press and that members of the press did, in fact, experience constitutional violations. Tirado has also identified overt conduct by the John Doe Defendants through specific allegations of use of force, and alleges that she was injured as a result of the overt actions."

Tunheim concluded by writing, "Plaintiff Tirado's experience as a journalist during the George Floyd protests and her injuries are serious and troubling. That numerous other journalists experienced similar, seemingly unjustified incidents involving less-lethal munitions and other measures is even more troubling, as the allegations plausibly suggest an unconstitutional custom carried out by MPD officers of targeting journalists for unlawful reprisals."

He continued, "Although the alleged custom is time-bound to a single police operation surrounding the George Floyd protests, the City cannot escape municipal liability if a plaintiff can plausibly allege that it was deliberately indifferent to widespread, consistent, unlawful use of force against the press. Tirado has done precisely this, and, accordingly, the Court will deny the City's Motion to Dismiss[.]" Tunheim added, "Additionally, the Court finds that Tirado has stated a plausible § 1983 civil conspiracy claim against the City and Kroll based on Kroll's alleged influence over the MPD and its rank-and-file officers, his communications during the protests, and the actions taken by MPD officers toward the press. While Tirado will ultimately bear a heavier burden to prove a conspiracy, the Court finds that moving to discovery is merited by the allegations in the Amended Complaint and denies the City's and Kroll's Motions to Dismiss with respect to the civil conspiracy claim as well."

The full ruling is available online at: https://casetext.com/case/tirado-v-city-of-minneapolis. As the *Bulletin* went to press, the case remained ongoing in the District of Minnesota.

On March 18, 2022, in a series of tweets, journalist Tony Webster reported that the Minneapolis City Attorney "served subpoenas at the homes of multiple Twin Cities journalists" in connection to the "protests, riots, and actions of police and press between May 26-31, 2020, following the murder of George Floyd." The subpoenas stemmed from the City of Minneapolis' defense in the lawsuit brought by Tirado.

City spokesperson Casper Hill told the Minneapolis *Star Tribune* in a March 18 email that the subpoenas were "served in connection with a case involving a journalist's lawsuit stemming from the unrest." Hill continued, "Those who were served were named by the plaintiff as persons with information.. . . Therefore, they are being deposed to determine what information they have regarding her lawsuit."

However, the *Star Tribune* reported on March 18 that the subpoenas "appeared to go beyond the events that led to Tirado's injuries. A subpoena served on *Star Tribune* reporter Andy Mannix sought materials related to his thigh injury from a projectile that hit him on May 26, 2020, the day after Floyd's death."

On March 18, J. Patrick Coolican, the editor-in-chief of *Minnesota Reformer* confirmed that Deputy Editor Max Nesterak was served at his home with a subpoena "for a broad range of materials related to his reporting" during the 2020 protests. The same day, MPR News confirmed that Jared Goyette, who was covering the George Floyd protests as a freelance journalist and who now works for Fox 9, the Twin Cities' affiliate, was also served a subpoena. Goyette was the named plaintiff in another, separate lawsuit in the District of Minnesota arising from police targeting the press during the protests surrounding the murder of Floyd. (For more information on the lawsuit and ensuing court rulings, see "Court Order, Settlement Prohibit Minnesota State Patrol From Arresting and Attacking Journalists, Require Improved Training, Technology" on page 13 of this issue of the Silha *Bulletin*.

The subpoenas requested that the journalists appear for depositions on March 30, 2022 via Zoom teleconferences. They sought "all videos, recording, emails, texts, and documents" related to "any protests, riots, members of the press, or law enforcement actions between May 26-31," as well as all materials related to Tirado or her counsel.

On April 23, 2022, the *Minnesota Reformer* reported that it and the *Star Tribune* were "fighting Minneapolis over the city's broad subpoenas issued to Reformer deputy editor Max Nesterak and *Star Tribune* reporter Andy Mannix."

In a joint memorandum of law (memo) in support of motions to quash the respective subpoenas, the news organizations detailed the sequence of events following the issuance of the subpoenas. According to the memo, Mannix and Nesterak responded to the subpoenas on March 23 through a letter sent by Ballard Spahr attorney Leita Walker to the City of Minneapolis, Interim Chief of Police for the Minneapolis Police Department Amelia Huffman, and Police Officer Andrew Braun (collectively "city defendants"). According to the memo, the journalists "provided City Defendants more than 20 links to publicly available articles and social media posts responsive to City Defendants' document requests. With respect to all other, unpublished information, both journalists asserted a good faith belief that those materials were protected by the reporter's privilege and therefore were not responsive to City Defendants' Subpoenas[.]" Additionally, the memo stated that "[w]ithout any context

Subpoenas, *continued on page 24*

Subpoenas, *continued from page 23*

provided by City Defendants for their need to depose Mannix or Nesterak beyond what could be gleaned from the Subpoenas' document requests, both journalists further informed City Defendants that any testimony by them would involve unpublished, privileged (and therefore non-responsive) information and that they therefore did not plan to appear for the noticed depositions" on March 30.

The memo reported that the city defendants claimed in a letter to Walker that "despite the Subpoenas' plain requests for 'all videos, recordings, emails, texts, and documents in your possession relating to any protests, riots, members of the press, or law enforcement actions' . . . they were 'not inquiring into Mr. Mannix's or Mr. Nesterak's sources or work product.'" Instead, the city defendants contended that the subpoenas sought "information that [Mannix and Nesterak] possess because they were first-hand witnesses to their own treatment as journalists by law enforcement during this period of civil unrest."

According to the memo, on March 24 and 25, the city defendants met with Nesterak and Mannix, respectively, "regarding [their] appearances for their depositions." During his conference, Mannix "attempted to discern what information the City Defendants could possibly hope to obtain from him[.]" The city defendants stated that although they did not need him to attest that he was shot, they instead "wanted to depose him about his 'experience' of being shot and how this 'affected him.'" According to the memo, the city defendants "offered to drop their document requests to Mannix . . . *only* if he would voluntarily appear to testify" (emphasis in original), which Mannix refused to do. At Nesterak's meeting, the city defendants "proposed to narrow the Subpoena request to documents and testimony related to Nesterak's 'personal experience' as a journalist interacting with law enforcement during the May 2020 protests," to which Nesterak objected. Both journalists summarily filed motions to quash the subpoenas.

The news organizations' memo clarified that discovery in the *Tirado* case was closed except for a "very limited purpose," namely "Tirado's right to pursue a supposedly new claim for affirmative, injunctive relief."

Meanwhile, on April 4, the city defendants "proceeded to depose journalist Jared Goyette[.]" The memo contended that although the city defendants "ostensibly subpoenaed Goyette for the same purpose as Mannix and Nesterak — to somehow test Tirado's standing to seek affirmative injunctive relief — the transcript of Goyette's deposition reveals City Defendants' questions were wide ranging and invasive." The memo added that "in the nearly four hours of questioning, City Defendants asked Goyette *no* questions related to Tirado's standing to seek injunctive relief" (emphasis in original).

The memo therefore argued that "compelling Mannix and Nesterak to testify would subject them to a completely inappropriate and illegal fishing expedition regarding their journalistic work product and thought processes." The memo walked through several legal arguments, including first related to discovery in the *Tirado* case. The memo contended that the subpoenas sought "testimony and materials that fall beyond the limited scope of additional discovery permitted by the Court and that are disproportionate to the needs of the case," including because "[n]either Mannix nor Nesterak is in possession of *any* information relevant to Tirado's standing to pursue a claim for prospective injunctive relief" (emphasis in original).

The memo continued, "This case is *not* even a class action; Mannix and Nesterak are not putative class members. Their 'experiences' and states of mind have no bearing on Tirado's standing to seek injunctive relief — *i.e.*, *her* ability to establish real and immediate threats of future injury by City Defendants. The discovery City Defendants seek from them is irrelevant and disproportionate to the issue on which City Defendants were permitted to conduct limited additional discovery. As such, the Subpoenas must be quashed" (emphasis in original).

The memo asserted that the subpoenas sought "testimony and materials that are privileged under the First Amendment, and non-responsive according to the terms of City Defendants' own subpoenas." In particular, the complaint contended that Mannix and Nesterak have a good faith belief that all of their unpublished work product — including their internal thoughts and impressions — are protected by the reporter's privilege, and therefore are not responsive to the Subpoena."

For example, according to the memo, the subpoenas sought "[a]ll videos, photographs, recording, communications or other documents in your possession (including social media posts) that are related to you being hit in the thigh . . . ; all videos, recordings, emails, texts, and documents in your possession relating to any protests, riots, members of the press, or law enforcement actions between May 26, 2020 and May 31, 2020" and, as a result, "clearly seek Mannix's and Nesterak's unpublished materials, thoughts, impressions, interview notes, and the like which they both gathered or formulated through the course of their reporting on the George Floyd protests. And based on the Goyette deposition, Mannix and Nesterak expect any questioning of them by City Defendants to be equally invasive." The memo added that the city defendants' "stated interest in deposing Mannix — to procure testimony about his 'experience' being shot by City Defendants (a fact which City Defendants do not contest) and how this experience 'affected him' — also seeks privileged information."

Thus, according to the memo, it could "hardly be contested that City Defendants intend to examine both journalists on topics squarely protected from compelled disclosure by the reporter's privilege — namely, their observations of protesters and law enforcement gathered while reporting on the May 2020 protests."

The Minnesota Free Flow of Information Act, the state's reporter's privilege shield law, provides that "no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through

which the information was obtained." Minn. Stat. § 595.023 (2019).

The statute does include exceptions, including if a "court determines after hearing the parties that the person making application, by clear and convincing evidence, has met all three of the following conditions:

(1) that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained,

(2) that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights, and

(3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice."

The full statute is available online at: https://www.revisor.mn.gov/statutes/cite/595.021.

Finally, the memo argued that the subpoenas were "overbroad and unduly burdensome," namely because they sought "irrelevant, disproportionate, untimely, and privileged discovery." In the introduction, the memo stated, "Mannix and Nesterak both received subpoenas commanding them to appear to be deposed and to disclose virtually *all* materials in their possession related to the George Floyd demonstrations of May 2020, which they attended and observed solely in their capacities as journalists. Suffice to say, in a case alleging that City Defendants violated the civil rights of a journalist who was assaulted and blinded by police, it is more than a little ironic for those same defendants to now use the Court's subpoena power to strong arm other journalists who have studiously avoided involvement in this and other, similar cases so they can do their jobs without the distraction of litigation and without jeopardizing their professional reputations or the trust of their sources and readers" (emphasis in original).

The memo added, "The Subpoenas tread on Mannix's and Nesterak's First Amendment rights to gather and report news free from government interference. For this reason, they would be improper even if they were timely and narrowly tailored and sought documents and testimony relevant to the issues before the Court. But the Subpoenas are none of these things. Rather, they are untimely, incredibly (and admittedly) overbroad, and in no way relevant to the one issue for which the Court recently extended the discovery deadline: Tirado's right to pursue a supposedly new claim for affirmative, injunctive relief. Further, City Defendants . . . claim to seek discovery on how the 'experience' of being shot 'affected' Mannix and Nesterak — information that goes to their state of mind toward the very individuals and agencies they are tasked with covering fairly and objectively. Such information is squarely protected by the reporter's privilege recognized by the First Amendment, common law, and Minnesota Free Flow of Information Act[.]"

The memo ultimately requested that the court quash the subpoenas "compelling [Mannix's and Nesterak's] testimony and the production of documents." The memo further requested that the court "sanction City Defendants, awarding both journalists their reasonable attorneys' fees and costs and all other relief which this Court deems necessary . . . pursuant to Federal Rule of Civil Procedure 45(d)(1) as the appropriate sanction for City Defendants' unduly broad and burdensome Subpoenas[.]" The memo reasoned that "[n]o efforts have been made by City Defendants to spare either Mannix or Nesterak any cost, burden, or expense incurred as a result of City Defendants' Subpoenas. Indeed, it appears harassment was precisely the point."

> "My immediate reaction [is] that th[e subpoenas are] very overbroad.. . . [They are] not specific enough to indicate why this material is needed from this reporter or that news organization as opposed to other bystanders. Journalists have to be independent and cannot be, or be perceived as, independent if they are turned into the investigative arm of the government."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

In a March 18, 2022 interview with the *Star Tribune*, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said, "My immediate reaction [is] that th[e subpoenas are] very overbroad.. . . [They are] not specific enough to indicate why this material is needed from this reporter or that news organization as opposed to other bystanders." Kirtley added, "Journalists have to be independent and cannot be, or be perceived as, independent if they are turned into the investigative arm of the government."

In a June 2, 2022 *Minnesota Reformer* column discussing the settlement, Coolican wrote: "I can't be the only person to recognize the bizarre coincidence that the city sought to fish into the work product of the two reporters [Mannix and Nesterak] digging into MPD, and then force them to sit for a deposition. . . . Maybe this bit of legal harassment would get the reporters to ease up, encourage them to think twice about leaning into tough stories on the city and the police department. I can only speak for the *Reformer*, but I can assure our readers that this third-rate bullying will have only the opposite effect."

— Scott Memmel
Teaching Assistant Professor

State Legislatures Restrict Press Access; Arkansas Senate Creates New Media Credentialing Process, Drops Ban on Cellphone Recording and Livestreaming by the Public

In the first half of 2022, at least three states approved new rules restricting press access to the legislature. In Kansas and Iowa, Republican leaders in the states' respective Senates informed members of the news media that they would no longer have access to the Senate floor and would instead be required to cover the legislative body from a press gallery. In Utah, resolutions in the Senate and House of Representatives required journalists to obtain permission in order to enter certain parts of the Capitol, including the Senate and House floors. The moves in each state prompted significant criticism from members of the news media, press advocacy groups, and open government organizations. Meanwhile, the Arkansas Senate dropped a ban on public use of cellphones to record or livestream its sessions. It also created a process for credentialing media organizations covering the Senate.

JOURNALISM REGULATION

Kansas Senate Issues New Rules Removing Journalists From Senate Floor

On Jan. 4, 2022, Republican leaders in the Kansas Senate issued new rules barring journalists from the Senate floor, according to several media reports. The move was met by significant criticism by press freedom and open government advocates.

According to the U.S. Press Freedom Tracker on Jan. 20, 2022, Mike Pirner, the director of communications for Kansas Senate President Ty Masterson (R-Wichita) sent the new media rules to several reporters in a January 4 email, explaining that reporters, photographers, and others could only use a specific designated section of a gallery overlooking the Senate floor. The email noted that "when the public gallery is full they will provide floor access to journalists, and . . . photographers and videographers may seek permission for floor access during a session." The U.S. Press Freedom Tracker is a database of press freedom violations in the United States and around the world managed by the Freedom of the Press Foundation.

In a Jan. 13, 2022 opinion piece for the *Kansas Reflector*, former Kansas Sen. Steve Morris, also a Republican, criticized the decision to remove members of the press from the Senate floor. "During my eight years as president of the Kansas Senate, I had frequent dealings with journalists who covered the Statehouse," he wrote. "It wasn't always easy. Journalists ask tough questions, and they often make their sources uncomfortable. But I knew I had an obligation to accommodate their questions and requests for information because I very much respected the role of journalists in our democracy."

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>
> **— Steve Morris, Former Kansas Senator**

Morris continued, "Kansas Senate leadership now is restricting press access. Instead of allowing journalists on the Senate floor during the legislative session, they have been relegated to the gallery, where it would be much more difficult to closely observe the interactions, pick up on nuances and get a good feel for the direction of the debate.. . . The news media have had a place on the Senate floor for decades. There is no compelling reason to change the time-honored policy of allowing their close access to debates and other public workings of the Senate." Morris concluded by writing, "Instead of limiting access, leadership in the Kansas Senate should embrace the importance of journalist access — and allow them to do their job from their usual, longstanding vantage point on the Senate floor."

In a January 14 editorial, *The Kansas City Star* editorial board also criticized the move, writing, "Journalists work for the public, so when our access is limited, so is yours. Reporters have been relegated to the gallery of the Kansas Senate. And this is just is [*sic*] the latest in the nationwide push to keep the public in the dark about important issues affecting Americans daily." The editorial continued, "Journalists do more than observe. They ask follow-up questions. They dig for more information. They fact-check. To do so requires more access to officials, not more attempts to hide."

Iowa Senate Bars Reporters From Senate Floor

On Jan. 7, 2022, the *Des Moines Register* reported that Republican leaders in the Iowa Senate would no longer allow journalists access to the Senate floor. The move meant that reporters, photographers, and others would no longer be allowed to work from press benches along the front wall of the chamber facing senators' desks, prompting criticism from observers.

The *Des Moines Register* noted that the Iowa Senate has control over who is allowed into the Senate chamber. Republican leaders elected to have journalists "be seated in the public gallery on an upper level, without access to the Senate floor."

The Washington Post reported on January 8 that in an email the previous week, Senate leaders informed journalists of the change, which "breaks

with a more than 140-year tradition in the Iowa Capitol." In the email, which was obtained by the *Post* and the *Des Moines Register*, Senate Republican spokesperson Caleb Hunter said the new rule arose from the "evolving nature and definition of 'media.'" The email continued, "As nontraditional media outlets proliferate, it creates an increasingly difficult scenario for the Senate, as a governmental entity, to define the criteria of a media outlet."

According to the *Post*, several current and former statehouse reporters said access to the press benches "is crucial for the most accurate and nuanced coverage" because "[t]he position allows reporters to see and hear everything clearly on the Senate floor and to get real-time answers and clarifications during debates."

In a statement following the email, Randy Evans, executive director of the Iowa Freedom of Information Council, a government transparency watchdog, wrote, "When you take journalists and restrict their access and then you couple that with changes that have occurred in the past couple of years with procedures in Iowa, it makes it that much harder for the public to know what's going on."

In a separate statement, Kathie Obradovich, editor in chief of the *Iowa Capital Dispatch* and vice president of the Iowa Capitol Press Association (ICPA), similarly wrote, "Keeping reporters out doesn't make reporters more accurate or fair. [Senators] would be better off letting those folks in and getting to know them." Obradovich contended that the Iowa House of Representatives, the judiciary, and the governor's office were all able to define criteria for media outlets.

In a January 18 editorial, Hannah Pinski, the Opinions and Amplify Editor of *The Daily Iowan*, an independent newspaper based at the University of Iowa in Iowa City, explained why it is "a big deal" for the Iowa Senate to restrict press access to the chamber floor. "Iowa Republicans' decision . . . harms not only the fourth estate, but also the value of transparency in our democratic system," she wrote. "One of the primary responsibilities of a journalist is to serve as a watchdog, meaning to hold political figures and the government accountable, when necessary. We take pride in our principles, including that of public accountability." Pinski continued, "But it's not just about letting us do our job. When journalists face barriers to their ability to accurately report, Americans — who rely on us for information — suffer. As journalists, we work as the eyes and ears for the public. So, when access is restricted and information is unattainable, we're left with no choice but to provide little information to Americans about issues that may affect them."

New Rules in Utah Require Journalists to Get Permission to Enter Senate Floor, Private Hallways

On Feb. 14, 2022, KUTV, the CBS affiliate in Salt Lake City, Utah, reported that the Utah Senate had adopted new rules requiring journalists to obtain permission in order to enter the Senate floor, private hallways, and other areas of the Senate. The following day, the Senate voted to pass the resolution. On February 16, the Utah House of Representatives passed a resolution requiring members of the press to get permission from a committee chairperson before accessing certain parts of the House chamber. On March 1, the Utah House went a step further and adopted a resolution almost identical to that of the Senate.

> "One of the primary responsibilities of a journalist is to serve as a watchdog, meaning to hold political figures and the government accountable, when necessary.. . . When journalists face barriers to their ability to accurately report, Americans — who rely on us for information — suffer. As journalists, we work as the eyes and ears for the public."
>
> **— Hannah Pinski, Opinions and Amplify Editor, *The Daily Iowan***

Senate Rules Resolution 1 – Senate Access Procedures (S.R. 1) provided that the "[n]ews media may access non-public areas of the Senate, including the chamber, floor, halls, lounge, and committee rooms, if the news media: (a) have permission from the Senate media designee; (b) hold a Utah Capitol media credential; and (c) comply with the Senate's media access and credentialing policy." S.R. 1 further provided that when the news media, with permission, "enter[s] a designated, non-public area of the Senate for the purpose of conducting a specific interview, a senator or the Senate media designee shall: (a) accompany the news media while in the designated area; and (b) after the news media complete the specific interview, ensure that the news media promptly exit the designated area."

S.R. 1 also limited access to Senate committees, stating that "[w]hen present for a meeting of a Senate standing committee, a Senate confirmation committee meeting, or any other special committee of the Senate, news media may not enter the area behind the dais without the permission of the committee chair."

The full text of S.R. 1 is available online at: https://le.utah.gov/~2022/bills/static/SR0001.html. On February 15, the Senate passed the new rules after a third reading, which was required for the rules to officially take effect.

On Feb. 16, 2022, the *Deseret News* reported that the Utah House had passed H.J.R. 14 House Joint Rules Resolution – Legislative Procedure Revisions. In particular, the resolution would enact Section JR7-1-103, titled "News media." The provision would state, "When present for a meeting of a legislative committee, news media may not enter the area behind the dais without the permission of the chair." The Senate, which was required to approve the resolution, voted on Feb. 28, 2022 to do so. The full resolution is available online at: https://le.utah.gov/~2022/bills/static/HJR014.html.

On March 1, 2022, the Utah House passed H.R. 2, which included almost identical language to S.R. 1. The resolution read, "News media may access non-public areas of the House, including the chamber, halls, and conference rooms, if the news media: (i) have permission from the speaker or the speaker's designee; and (ii) hold a Utah Capitol media credential." The resolution further provided that "[w]hile the House is convened in the House [chambers] chamber, news media shall remain in the area designated for the

Regulation, *continued on page 28*

Regulation, *continued from page 27*
news media and may not enter the floor of the House, the circle, lounge, or the speaker's dais." The full resolution is available online at: https://le.utah.gov/~2022/bills/static/HR0002.html.

According to the *Deseret News* on March 1, "[i]n past years, Utah Capitol credentialed journalists have been able to access the House floor to interview lawmakers immediately after adjournment, but HR2 requires media members to seek and receive permission from the House speaker or the speaker's media designee before gaining access to the floor, whether or not the House is in session." The *Deseret News* added that because H.R. 2 is a House rule, it did not require Senate approval and took effect immediately.

During a February 14 hearing, several senators defended the new rules. According to KUTV, Sen. Scott Sandall (R-Tremonton) contended that given the live-streaming put in place as a result of the COVID-19 pandemic, "[t]here is way more access, and not a chilling effect whatsoever."

Sen. Evan Vickers (R-Cedar City) added, "It doesn't seem like it's changing our policy that much.. . . The only thing I see different is there are some reporters that maybe like to linger, and that wouldn't be available."

KUER 90.1, Utah's largest National Public Radio (NPR) affiliate, reported that the hearing was contentious at different points, with some senators taking "the opportunity to criticize the media generally." Sen. Dan McCay (R-Riverton) reportedly asked KUTV news director, Mike Friedrich, "Would you agree with the statement that more and more journalism is taking a position on issues and less and less [is] reporting what's going on?"

However, journalists, press advocates, and others previously pushed against the resolution during a February 9 committee meeting, according to KUTV. "We're not interested in gotcha journalism," said Katie McKellar, a *Deseret News* reporter. "We are interested in unfiltered in-person access to lawmakers so we can ask quick, often clarifying questions. Free flow of information is crucial to getting the story right."

Friedrich said, "This bill gives the impression that you are limiting openness and transparency.. . . It just sends the wrong message all the way around, not just for journalists, but for generally the people of Utah." KUTV also cited Ben Winslow, a reporter for FOX 13, who argued that obtaining permission from the committee chair is not always practical or possible, such as if a journalist "shows up late to a committee hearing where several bills are on the agenda."

KUER added that *Salt Lake Tribune* Executive Editor Lauren Gustus suggested collaboration between the media and the Legislature to discuss some of those other ideas. "Might we come together to have that conversation about what the rules are such that we are not walking into offices without knocking first, such that we are not entering places that I think in a sensible, logical conversation we would all agree is not a suitable spot for us to be," she said. "I've worked in other states with similar organizations. They have successfully navigated thorny issues without ratcheting up the level of frustration that I think we all feel here."

> "We're not interested in gotcha journalism. We are interested in unfiltered in-person access to lawmakers so we can ask quick, often clarifying questions. Free flow of information is crucial to getting the story right."
>
> **— Katie McKellar, reporter, *Deseret News***

Arkansas Senate Creates Credentialing Process for Media Organizations, Allows Cellphone Recording and Livestreaming of Senate Chamber

On Feb. 16, 2022, the *Arkansas Democrat Gazette* and Associated Press (AP), among other media outlets, reported that the Arkansas Senate Efficiency Committee had voted to approve a credentialing process for reporters and photographers covering the chamber. The Senate Efficiency Committee also removed a ban on the public's use of cellphones to record and livestream Senate proceedings from the gallery.

The new media credentialing policy provided that media organizations would be issued two press credentials for the Arkansas Senate to accommodate both a reporter and a photographer. The policy also provided that "[c]redentialed media may be granted access to the Senate Chamber floor" where there are two seats for reporters. Any additional reporters would stand in the first row of the Senate West Gallery. Under the policy, "[p]hotographers shall set-up in the West Gallery along the glass, following instructions of the Senate Sergeant at Arms."

Additionally, the policy requires that the press passes be worn at all times in the Senate galleries, on the Senate floor, and in the Senate office hallways. The passes must be shown if requested by a senator, Senate staffer, the Senate sergeant at arms, or a state Capitol police officer, according to the *Arkansas Democrat Gazette*.

According to the AP, the Senate Efficiency Committee "removed a provision that would have made the credentials available only to media organizations filed with the state as a limited liability corporation or sponsored by taxpayers' dollars."

The *Arkansas Democrat Gazette* and AP also reported that the Senate Efficiency Committee had voted to drop a ban on members of the public using cellphones to record and livestream its sessions from the gallery. According to the AP, the ban was "issued following heated debates last year where Senate leaders admonished audience members for clapping or other outbursts."

Sen. Linda Chesterfield (D-Little Rock) told the *Arkansas Democrat Gazette* that "in this day and time people are going to livestream," emphasizing the need for transparency in Senate proceedings. Sen. Jason Rapert (R-Conway) similarly said, "This is not a time we need to be hiding people's business."

— Scott Memmel
Teaching Assistant Professor

SCOTUS Clears the Way for Release of White House Documents Connected to Capitol Insurrection; House Committee Suggests It Has Evidence of Illegal Actions by President Trump, Others

On Feb. 22, 2022, the U.S. Supreme Court formally declined to hear former President Donald Trump's effort to block the release of some White House records sought by the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol (Committee). *Trump v. Thompson*, No. 21-932, 2022 WL 516395 (Feb. 22, 2022). Previously, on January 19, the Court had rejected President Trump's emergency motion to prevent the release of the records while the Court considered whether to take his case. *Trump v. Thompson*, 142 S. Ct. 680 (Mem) (Jan. 19, 2022). Meanwhile, a March 2, 2022 federal court filing by the Committee suggested that it had evidence of illegal actions by President Trump and some of his associates in their efforts to overturn the 2020 presidential election results.

ACCESS

On Jan. 6, 2021, hundreds of President Trump's supporters forced their way into the Capitol, causing significant property damage and forcing members of Congress — who were set to confirm the election results despite opposition from some Republican representatives and senators — to retreat to safety elsewhere in the Capitol. (For more information on the insurrection and the media law issues and questions it raised, see "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" in the Fall 2020 issue of the Silha *Bulletin*.)

Following the 2020 presidential election, Congress created the Committee under H.R. 503 to investigate the events surrounding the January 6 insurrection. According to President Trump's complaint, on Aug. 25, 2021, the Committee sent requests for documents and records to Archivist of the United States David S. Ferriero seeking information from the Executive Office of the President (EOP) and the Office of the Vice President (OVP).

On Oct. 13, 2021, Ferriero notified President Trump that, "[a]fter consultation with Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden" he had "determined to disclose to the Select Committee" all responsive records that President Trump determined were subject to executive privilege on Nov. 12, 2021.

On Oct. 18, 2021, President Trump filed a lawsuit in the U.S. District Court for the District of Columbia against the Committee, Committee Chairman Bennie G. Thompson (D-Miss.), the National Archives and Records Administration (NARA), and Ferriero. The complaint aimed to keep secret certain presidential records and communications sought by the Committee.

On November 9, the U.S. District Court for the District of Columbia denied the motion, holding that President Trump's "assertion of privilege is outweighed by President Biden's decision not to uphold the privilege." *Trump v. Thompson*, No. 21-cv-2769 (TSC), 2021 WL 5218398 (2021).

On Dec. 9, 2021, the U.S. Court of Appeals for the D.C. Circuit upheld the lower court ruling. Judge Patricia Millett concluded that "[o]n the record before us, former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents." *Trump v. Thompson*, No. 21-5254, 2021 WL 5832713 (D.C. Cir. 2021).

On Dec. 29, 2021, *The New York Times* reported that the House Committee "agreed to delay or withdraw demands for hundreds of Trump White House Records at the request of the Biden administration," which argued that they should remain sealed. According to CBS News, the White House elected to shield certain documents in the interest of protecting national security and executive privilege. (For more information on President Trump's complaint, the District of Columbia and D.C. Circuit rulings, and the White House's decision to protect certain records, see "Lawsuit Seeks to Keep Records Secret Regarding Jan. 6, 2021 Insurrection" in the Fall 2021 issue of the Silha *Bulletin*.)

On Jan. 19, 2022, the Supreme Court rejected President Trump's emergency motion to block the release of the requested records until the Court had decided whether to take his case, for which he filed a petition for *certiorari* on Dec. 23, 2021. The January 19 order noted that "[a]ny discussion of the Court of Appeals concerning President Trump's status as a former President must therefore be regarded as nonbinding *dicta*" because the D.C. Circuit had "analyzed and rejected President Trump's privilege claims 'under any of the tests [he] advocated,' without regard to his status as a former President." The order added that "[b]ecause the Court of Appeals concluded that President Trump's claims would have failed even if he were the incumbent, his status as a former President necessarily made no difference to the court's decision."

Justice Clarence Thomas would have granted the application, without comment. Justice Brett Kavanaugh included a statement "respecting denial of application," in which he wrote that "the Court of Appeals suggested that a former President may not successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, at least if the current President does not support the privilege claim. As this Court's order today makes clear, those portions of the Court of Appeals' opinion were *dicta* and should not be considered binding precedent going forward."

Justice Kavanaugh also "respectfully disagree[d] with the Court of Appeals on that point. A former President must be able to successfully invoke

Committee, *continued on page 30*

Committee, *continued from page 29*

the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications." The full order is available online at: https://www.documentcloud.org/documents/21182369-order-21a272.

Following the ruling, *The Guardian* and other news outlets noted that the Supreme Court's rejection of President Trump's motion "cleared the way for the select committee to start receiving Trump White House documents," which they had "already started combing through."

According to *The Washington Post* on January 31, NARA transmitted over 700 pages of documents to the Committee. The *Post* also reported that "some of the . . . records had been ripped up and then taped back together," noting that President Trump "was known inside the White House for his unusual and potentially unlawful habit of tearing presidential records into shreds and tossing them on the floor — creating a headache for records management analysts who meticulously used Scotch tape to piece together fragments of paper that were sometimes as small as confetti, as *Politico* reported in 2018."

According to the *Post*, NARA "took the unusual step of confirming the habit, saying in a statement that records turned over from the Trump White House 'included paper records that had been torn up by former President Trump.'" NARA's statement read, "White House records management officials during the Trump Administration recovered and taped together some of the torn-up records. These were turned over to the National Archives at the end of the Trump Administration, along with a number of torn-up records that had not been reconstructed by the White House. The Presidential Records Act requires that all records created by presidents be turned over to the National Archives at the end of their administrations."

The *Post* clarified that it was "unclear what documents in the tranche delivered to the Jan. 6 committee were damaged," but that "legal records indicate that the documents over which Trump sought to assert privilege included presidential diaries, schedules, appointment information, handwritten notes concerning the events of Jan. 6 from White House chief of staff Mark Meadows, speeches, remarks, and more."

In an interview with the *Post*, New York University law professor Stephen Gillers contended that the White House documents torn up by Trump are the property of the government under the Presidential Records Act. "So destroying them could be a crime under several statutes that make it a crime to destroy government property if that was the intent of the defendant," Gillers said. "A president does not own the records generated by his own administration. The definition of presidential records is broad. Trump's own notes to himself could qualify and destroying them could be the criminal destruction of government property."

On February 7, *The Washington Post* reported that NARA had to retrieve some records from Mar-a-Lago, President Trump's Florida resort. The records, which were contained in 15 boxes, included letters from former President Barack Obama and Supreme Leader of North Korea Kim Jong Un.

On February 9, *The New York Times* reported that NARA had found classified material in the boxes retrieved from Mar-a-Lago. "NARA has identified items marked as classified national security information within the boxes," Ferriero acknowledged in a letter to the Committee. The full letter is available online at: https://www.archives.gov/files/foia/ferriero-response-to-02.09.2022-maloney-letter.02.18.2022.pdf. Attorney General Merrick Garland confirmed that classified materials were found among the records, according to a February 22 National Public Radio (NPR) report.

On Feb. 22, 2022, the Supreme Court formally rejected President Trump's appeal of the D.C. Circuit ruling. The order denied President Trump's petition for writ of *certiorari* without further explanation. The list of orders that were denied *cert* is available online at: https://www.supremecourt.gov/orders/courtorders/022222zor_bq7d.pdf.

Three days later, several media outlets, including ABC News, reported that the House Oversight and Reform Committee had expanded its probe into President Trump's handling of White House documents and materials. In a letter to Ferriero, Rep. Carolyn Maloney (D-N.Y.), the chair of the House Oversight and Reform Committee, requested a "detailed" inventory of the 15 boxes of White House records retrieved from Mar-a-Lago, as well as "all presidential records" that the agency discovered President Trump had "torn up, destroyed, mutilated, or attempted to tear up, destroy, or mutilate" while in office.

"I am deeply concerned that former President Trump may have violated the law through his intentional efforts to remove and destroy records that belong to the American people," Maloney wrote in the letter. "Th[e House Oversight and Reform] Committee plans to get to the bottom of what happened and assess whether further action is needed to prevent the destruction of additional presidential records and recover those records that are still missing." The full letter is available online at: https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2022-02-24.CBM%20to%20Ferriero-NARA%20re%20Document%20Request.pdf.

On March 8, *Politico* reported that NARA had sent another batch of White House documents to the Select Committee.

Six days earlier, on March 2, 2022, several media outlets reported that in a Central District of California court filing, the Committee revealed that it believed it had evidence of several illegal actions taken by President Trump and some of his associates in connection with their efforts to refute the 2020 presidential election results. The filing, a "brief in opposition to plaintiff's privilege assertions," was filed by the Committee against an effort by President Trump's former lawyer John Eastman to assert attorney-client privilege and therefore block investigators from obtaining 111 emails he sent or received though his Chapman University email account, where he was previously a law school dean. Eastman was subpoenaed by the committee in January 2022 for his role in crafting two legal memos that argued Vice President Mike Pence had the authority to overturn the election results, according to ABC News on March 2.

The brief first suggested that the Committee had evidence that President Trump and some of his associates had "obstruct[ed] Congress's count of the electoral votes." The brief contended that "[t]he evidence . . . provides, at minimum, a good-faith basis for concluding that President Trump has violated section 18 U.S.C. § 1512(c)(2). The elements of the offense under 1512(c)(2) are: (1) the defendant obstructed, influenced or impeded, or attempted to obstruct, influence or impede, (2) an official proceeding of the United States, and (3) that the defendant did so corruptly."

The brief claimed that President Trump had "repeatedly asked the Vice President Mike Pence to exercise unilateral authority illegally, as presiding officer of the Joint Session of Congress, to refuse to count electoral votes.. . . In service of this effort, he and Plaintiff met with the Vice President and his staff several times to advocate that he unilaterally reject and refuse to count or prevent the counting of certified electoral votes, and both also engaged in a public campaign to pressure the Vice President."

The brief added that President Trump and Eastman "also took steps to alter the certification of electors from various states. For example, the President called and met with state officials, met numerous times with officials in the Department of Justice, tweeted and spoke about these issues publicly, and engaged in a personal campaign to persuade the public that the election had been tainted by widespread fraud."

Second, the brief argued that President Trump and some of his associates had "engaged in a criminal conspiracy to defraud the United States in violation of 18 U.S.C. § 371" in their efforts to challenge and overturn the 2020 election results. The brief read, "The evidence supports an inference that President Trump, Plaintiff, and several others entered into an agreement to defraud the United States by interfering with the election certification process, disseminating false information about election fraud, and pressuring state officials to alter state election results and federal officials to assist in that effort." The brief asserted that President Trump and his associates had crafted a plan before meeting with Vice President Pence and continued efforts to persuade him.

The brief further contended that "[i]n addition to the legal effort to delay the certification, there is also evidence that the conspiracy extended to the rioters engaged in acts of violence at the Capitol." The brief stated that "[e]vidence also indicates that the violent rioters who attacked police, breached the Capitol, and obstructed and impeded the electoral vote were provoked by President Trump's fraudulent campaign to persuade the American people that the election was in fact stolen."

Finally, the brief contended that there was "also evidence to support a good-faith, reasonable belief that *in camera* review of the materials may reveal that the President and members of his Campaign engaged in common law fraud," which is defined in the District of Columbia as "(1) a false representation; (2) in reference to material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) action is taken in reliance upon the representation." The brief asserted that "the evidence shows that the President made numerous false statements regarding election fraud, both personally and through his associates, to the public at-large and to various state and federal officials.. . . And the evidence supports a good-faith inference that the President did so with knowledge of the falsity of these statements and an intent to deceive his listeners in hopes they would take steps in reliance thereon."

The brief added, "As the courts were overwhelmingly ruling against President Trump's claims of election misconduct, he and his associates began to plan extra-judicial efforts to overturn the results of the election and prevent the president-elect from assuming office.. . . At the heart of these efforts was an aggressive public misinformation campaign to persuade millions of Americans that the election had in fact been stolen. The president and his associates persisted in making 'stolen election' claims even after the president's own appointees at the Department of Justice and the Department of Homeland Security, along with his own campaign staff, had informed the president that his claims were wrong."

The full brief is available online at: https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf.

On March 2, Thompson and Vice Chair Rep. Liz Cheney (R-Wyo.) released a joint statement clarifying that although the court filing "refute[d] on numerous grounds the privilege claims Dr. Eastman has made to try to keep hidden records critical to our investigation," including alleging possible illegal conduct by President Trump, Eastman, and others, the Committee was "not conducting a criminal investigation." The statement continued, "The facts we've gathered strongly suggest that Dr. Eastman's emails may show that he helped Donald Trump advance a corrupt scheme to obstruct the counting of electoral college ballots and a conspiracy to impede the transfer of power." The full statement is available online at: https://january6th.house.gov/news/press-releases/thompson-cheney-statement-filing-eastman-lawsuit.

ABC News noted on March 2 that the court filing "mark[ed] the first time the committee has accused Trump of specific criminal activities, by working to disrupt the joint session of Congress on Jan. 6 and by waging a campaign to overturn the results in key states and promote unfounded claims of widespread voter fraud." NPR noted that the Committee's allegations "could ramp up pressure on the [U.S.] Department of Justice [(DOJ)] to pursue charges on its own." As the *Bulletin* went to press, the DOJ had not brought any criminal charges against President Trump or his associates.

On March 28, 2022, federal Judge David Carter of the Central District of California ordered the release of 101 emails sent or received by Eastman to be turned over to the Committee. *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. 2022). Carter, who had personally reviewed all 111 emails at issue in the case, also ordered that 10 emails remain shielded by attorney-client privilege.

In his ruling, Carter wrote, "Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct

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Committee, *continued from page 31*

the Joint Session of Congress on January 6, 2021." Carter reasoned that "[b]ecause President Trump likely knew that the plan to disrupt the electoral count was wrongful, his mindset exceeds the threshold for acting 'corruptly' under § 1512(c)," a necessary element to determine whether he obstructed an official proceeding. Carter continued, "The illegality of the plan [to disrupt the electoral count] was obvious. Our nation was founded on the peaceful transition of power, epitomized by George Washington laying down his sword to make way for democratic elections. Ignoring this history, President Trump vigorously campaigned for the Vice President to single-handedly determine the results of the 2020 election. As Vice President Pence stated, 'no Vice President in American history has ever asserted such authority.' Every American — and certainly the President of the United States — knows that in a democracy, leaders are elected, not installed. With a plan this 'BOLD,' President Trump knowingly tried to subvert this fundamental principle."

Carter concluded his ruling by writing, "More than a year after the attack on our Capitol, the public is still searching for accountability. This case cannot provide it. The Court is tasked only with deciding a dispute over a handful of emails. This is not a criminal prosecution; this is not even a civil liability suit. At most, this case is a warning about the dangers of 'legal theories' gone wrong, the powerful abusing public platforms, and desperation to win at all costs. If Dr. Eastman and President Trump's plan had worked, it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution. If the country does not commit to investigating and pursuing accountability for those responsible, the Court fears January 6 will repeat itself."

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— U.S. District Court for the Central District of California Judge David Carter

The full 44-page ruling is available online at: https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.260.0.pdf. As the *Bulletin* went to press, Eastman had not announced whether he would appeal the ruling.

The same day, *Politico* wrote that "[t]he remarkable ruling may be the first in history in which a federal judge determined a president, while in office, appeared to commit a crime. The decision has no direct role in whether Trump will be charged criminally but could increase pressure on the Justice Department and its chief, Attorney General Merrick Garland, to conduct an aggressive investigation that could lead to such charges."

In addition to the records sought in connection to President Trump and his associates, the Committee has also targeted social media companies. On Jan. 13, 2022, several media outlets reported that the committee subpoenaed four major social media companies — Alphabet, Meta, Reddit, and Twitter — after initial responses by the companies were "inadequate." The AP reported on January 13 that the Committee sought the records in relation to their role in spreading misinformation about the 2020 election and the January 6 attacks.

The Washington Post reported on April 7, 2022 that "[t]he committee had set its sights on social media's role in the attack from the get-go. Part of panel's mandate, according to the legislation that created the special committee, was to investigate 'influencing factors that contributed to the domestic terrorist attack on the Capitol and how technology, including online platforms . . . may have factored into the motivation, organization, and execution.'" The *Post* added that "[i]t remains unclear whether tech companies have complied with the subpoenas and what data the panel was able to obtain."

— Scott Memmel
Teaching Assistant Professor

Silha Center Lectures and Forums
Are Available on YouTube

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

Media Organizations Raise Ethics Concerns about Conflicts of Interest, Reporting Inaccuracies, and Omitted Context

A number of media ethics issues surrounding conflicts of interest, litigation over a retraction involving allegedly inaccurate reporting, and misrepresentation of the statements of an interview subject have arisen in the first few months of 2022.

ETHICS

BBC News hosted attorney Alan Dershowitz on air as an analyst for the Ghislaine Maxwell case, without noting that Dershowitz himself was implicated in the crimes of which Maxwell was convicted. White House Press Secretary Jen Psaki was under consideration to become a host for MSNBC while still employed by the White House. Ruth Shalit Barrett, a freelance writer who wrote "The Mad, Mad World of Niche Sports Among Ivy League-Obsessed Parents," in *The Atlantic*'s November 2020 issue, sued the publication for $1 million over its retraction of her article that was allegedly filled with inaccuracies. Finally, ABC News selectively edited an interview with Centers for Disease Control and Prevention (CDC) Director Rochelle Walensky to make her appear to imply that those who have died from COVID-19 were mostly people with preexisting medical problems, and that this was "really encouraging news."

BBC Hosts Dershowitz As Maxwell Case Analyst Without Noting His Ties To The Case

On Dec. 29, 2021, shortly after Ghislaine Maxwell was convicted of sex-trafficking charges for assisting financier Jeffrey Epstein in abusing young girls, BBC News brought Alan Dershowitz on air to analyze Maxwell's guilty verdict. However, the outlet did not indicate that Dershowitz not only had served as Epstein's attorney, but has also been accused of having sex with Virginia Roberts Giuffre, a witness in the Maxwell case, when she was as young as 16, according to *The Washington Post* on Dec. 30, 2021. Commentators heavily criticized the choice, saying it reflected poorly on the BBC's ability to avoid even the most obvious conflicts of interest.

According to the *Post*, Giuffre alleged that "Epstein and Maxwell forced her to have sex with public figures, such as Dershowitz," Timothy Bella reported. "She asserted to the Miami Herald and the New Yorker that she had sex with Dershowitz at least six times in Epstein's various residences. In denying her claims, Dershowitz, who represented Epstein and helped negotiate a lenient non-prosecution agreement for his client in 2008, called Giuffre a 'prostitute' and a 'bad mother' to her children. Giuffre sued Dershowitz for defamation in 2019. He countersued Giuffre, claiming she had made false claims about him so that she could extort money from a member of Epstein's inner circle."

Dershowitz has denied Guiffre's allegations, and he used his time on air to say Giuffre was not a credible witness in the Maxwell case. Public officials and legal experts criticized the BBC on social media for giving Dershowitz a platform and called for the BBC to explain why Dershowitz appeared on air at all.

On Dec. 30, 2021, the BBC said it would investigate the breach of its own editorial standards. "Last night's interview with Alan Dershowitz after the Ghislaine Maxwell verdict did not meet the BBC's editorial standards, as Mr. Dershowitz was not a suitable person to interview as an impartial analyst, and we did not make that background clear to our audience," the network said in a statement on Twitter. "We will look into how this happened."

On Dec. 30, 2021, the staff of the newsmagazine *Current Affairs* wrote on Twitter that the BBC did not actually provide relevant background, specifically that "one of Epstein's accusers has said Dershowitz was one of the people she had to have sex with when she was trafficked."

Dershowitz also appeared on Fox News as an analyst in the Maxwell case, but Fox did specify his connection to the case. Commentators like Aaron Rupar, an independent journalist covering U.S. politics and media, noted the contrast, writing on Twitter, "Fox News at least acknowledged Dershowitz's connections with Epstein. Unfathomable that the BBC thought this was a good idea."

Sandra Glab, a producer for Times Radio, a digital radio station operated by News UK, a subsidiary of Rupert Murdoch's News Corp, said the BBC's mistake was indicative of a broader problem in journalism. "A real blow for the BBC," Glab wrote on Twitter. "Unfortunately, this is what happens when bosses follow the 'bums on seats' approach to staffing in order to save money."Glab continued, "Whatever happened that night, I hope whoever made that booking isn't just thrown under the bus. Senior editors need to take responsibility."

Caoilfhionn Gallagher, a human rights lawyer, wrote on Twitter that the BBC's choice was an "utterly bizarre decision and does the audience a disservice."

British Member of Parliament Nadia Whittome said the BBC's decision was unbelievable. "I can't believe this needs to be said but the BBC should not give a platform to people accused of child sexual abuse," she wrote on Twitter. "We have a responsibility to believe people when they disclose sexual abuse and to create conditions in which they can in the first place. All details of Epstein's network should be published and all victims/survivors are owed justice. This is clearly the tip of the iceberg."

On Jan. 12, 2022, BBC director general Tim Davie said in a panel before the House of Lords Communications and Digital Committee that the BBC has undergone job cuts and restructuring, which has amplified editorial errors. "We looked at what happened but there was no investigation," Davie said. "You can argue a little bit in terms of the amount of seniority and cover we had during Christmas, during Covid." Davie concluded, "[T]his was simply about the amount of due diligence that was done by the planner and the knowledge level of the person who was putting the person on air."

(For more information on the Jeffrey Epstein saga, see *Harvard Law Professor Sues The New York Times Over 'Clickbait Defamation,' Later*

Ethics, *continued on page 34*

Ethics, *continued from page 33*

Withdraws Lawsuit in "High-Profile Defamation Lawsuits Target National and Local Media Outlets," in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

White House Press Secretary Jen Psaki Accepts Position As Host For MSNBC

On May 24, 2022, several news outlets reported that former White House press secretary Jen Psaki had accepted a job at MSNBC as a program host and analyst. Critics questioned the ethics of Psaki continuing to brief reporters while negotiating with a news outlet about a paid host position.

The *Times* noted that although it may be standard practice for former White House press secretaries to go on to pursue cable news jobs, it is "unusual for a White House press secretary to be linked to a news organization before formally leaving their government post." CNN was also widely reported to be seeking to secure Psaki for post-White House employment, but has since dropped out of negotiations. Prior to courting Psaki, MSNBC hired Symone Sanders, the former chief spokeswoman for Vice President Kamala Harris, for a host position that will begin in May 2022.

Reporters like Kristen Welker, co-chief White House correspondent for NBC News, questioned whether Psaki has considered the ethics and optics of the talks with MSNBC. "How is it ethical to have these conversations with media outlets while you continue to have a job standing behind that podium?" Welker asked in the April 1, 2022 White House Press briefing. Psaki responded, saying, "Well, there are a range of stringent ethical and legal requirements that are imposed on everybody in this administration and any administrations past about any conversations you are having with future employers. That is true of any industry you are working in, and I have abided by those and have tried to take steps that go beyond that as well."

Numerous NBC News reporters were disappointed in the outlet's decision to court Psaki. NBC News President Noah Oppenheim held an impromptu conference call on April 1 to address the Washington bureau's complaints that Psaki's actions would tarnish the NBC News brand. Oppenheim reminded the reporters that NBC News did not have a role in hiring Psaki, because MSNBC's opinion arm is separate from the news operation.

David Bauder, writing for the Associated Press (AP) on April 12, 2022, said the distinction falls a little flat, however. "NBC News has taken pains to draw distinctions between its journalists and MSNBC, which has beefed up its opinion programming, although that's awkward when journalists like Andrea Mitchell and Chuck Todd both have shows on the cable network."

Jack Shafer, a senior media writer for *Politico*, wrote on April 7, 2022 that "Psaki's hiring has become a crime against journalism in the eyes of journalists because it places somebody they consider to be an amateur (or even an anti-journalist) in a place that should go to a professional. But perhaps the greatest thing about journalism is its observance of an open door. Anybody who wants to pick up a pen or a camera and wants to perform an act of journalism can be as much of a journo as the guy or gal who has covered city hall for 40 years. Journalism's openness to new voices and new approaches distinguishes it from other professions, many of which discourage the entry of new competitors through licensing, credentialing, or other means. The only thing you must do to qualify as a journalist is to get the story."

Niall Stanage, writing for *The Hill* on April 8, 2022, said the optics nevertheless leave something to be desired. "At a minimum, it gives rise to the perception that Psaki has had an incentive to treat potential future employers favorably — and that CNN and MSNBC, both competing to land her, have had their own incentives to ingratiate themselves with her," Stanage wrote. "The Psaki-MSNBC furor will probably die down in due course [], even if she ends up behind an anchor desk rather than the White House lectern. But the controversies eat away at the public's remaining trust in the media — and that's bad news for everyone."

Ruth Shalit Barrett Sues *The Atlantic* For Retracting Her Article Due to Alleged Inaccuracies

On Jan. 7, 2022, Ruth Shalit Barrett filed lawsuit against *The Atlantic* for $1 million in damages, alleging that the outlet's retraction of her article and accompanying editor's note that disavowed her and mentioned incidents of plagiarism in her past "destroyed her reputation and career." Commentators insinuated that Barrett's claims rang hollow, given her confirmed history of plagiarizing throughout her journalistic career.

In response to the suit, *The Atlantic* said in a statement, "We stand by our full retraction and editor's note from November 2020. We completely reject the allegations and believe the suit is meritless, will be filing a motion to dismiss, and are confident we will ultimately prevail."

After a 25-year hiatus from journalism after she was caught plagiarizing in the mid-1990s, Barrett wrote, "The Mad, Mad World of Niche Sports Among Ivy League-Obsessed Parents," for *The Atlantic*'s November 2020 issue, which was published online in October that year.

Erik Wemple, writing for *The Washington Post* on Oct. 24, 2021, wrote that "[a]nyone steeped in this history reads a Ruth S. Barrett story with great caution." Wemple was one of the first to identify inconsistencies in Barrett's 2020 reporting.

He spoke to a fencing expert who doubted that a fencing injury Barrett detailed in the story could actually be as gruesome as she described. Barrett had also reported that one could commonly find Olympic-sized ice rinks in the backyards of the wealthy families living in Fairfield County, Conn. Wemple consulted the founder of a company that builds ice rinks in the area, who said he knew of "nobody who's built an Olympic sheet, not even the hedge-fund guys." Wemple also reported that the woman identified as "Sloane" in the article did not in fact have a son, despite Barrett's reporting to the contrary.

As reported by *The Washington Post* on Jan. 9, 2022, *The Atlantic* then redid its fact-checking and confirmed "Sloane" did not have a son. "Sloane told The Atlantic that Barrett had proposed inventing a son as a way to shroud her identity; Barrett denied doing so but admitted that she was 'complicit' in the fabrication," Bryan Pietsch reported.

In the complaint filed in January, Barrett alleged causes of action for defamation, defamation *per se*, invasion of privacy-false light, and tortious interference with business expectancy against *The Atlantic* and Don Peck, *The*

Atlantic's former print magazine editor and current editor-at-large. Barrett also accused the outlet of changing a quote within the story, stating "she was told that the change was at the instigation of the magazine's legal department" in an effort "to make [the coach] less identifiable.'"

The full complaint is available online at: https://context-cdn.washingtonpost.com/notes/prod/default/documents/f6752132-d307-4c2d-ba1c-99ff9b2c31b4/note/c3b0bf9c-2a7b-42cd-8162-99593e0588ea.#page=1.

Erik Wemple, writing for *The Washington Post* on Jan. 13, 2022, questioned why Barrett would want to focus more attention on the situation. "It appears that Barrett wants the public to know more about the story's collapse. And the question is: Why?" Wemple continued, "The problem with this litigation is that the narrative's admissions sting the plaintiff more than the allegations puncture the defendant."

Tom Scocca, an independent journalist, noted on Twitter that Barrett's allegations against *The Atlantic*, particularly regarding the altered quote, were not very convincing. "This would be pretty damning for The Atlantic if it were coming from someone without a long history of making s--- up," he wrote.

Cathy Young, writing for *Arc Digital* on Jan. 8, 2022, described how even a generous reading of the situation put Barrett's ethics in question. "Even assuming that Barrett's version of the events is completely accurate, one can certainly still question her professional and personal judgment: allowing even a very minor 'fictoid' to get into print without informing your editors is an obvious no-no, and doing this when you're trying to rebuild a career after some notorious lapses is mind-bogglingly reckless," Young wrote. "Barrett had to know she would be under extra scrutiny. It also sounds like she compounded the problem by initially denying knowledge of the deception."

ABC News Selectively Edited An Interview With CDC Director

On Jan. 7, 2022, ABC's "Good Morning America" aired an edited clip of an interview with Centers for Disease Control and Prevention (CDC) Director Rochelle Walensky, omitting context so that Walensky appeared to say that those who have died from COVID-19 were mostly people with preexisting medical problems, and that this was "really encouraging news." Commentators said editing decisions like these to fit time and space constraints can distort and confuse the words of the interviewee.

In the edited clip, the interviewer, Cecilia Vega, asked Walensky, "Is it time to start rethinking how we're living with this virus — that it's potentially here to stay?" Walensky responded: "The overwhelming number of deaths — over 75 percent — occurred in people who had at least four comorbidities. So really, these are people who were unwell to begin with. And yes: really encouraging news in the context of omicron."

Viewers were concerned by the apparent callousness of the CDC director. But in the full exchange, Walensky prefaced her reply first by citing "a really important study" of 1.2 million vaccinated people, which found that only 0.003 percent of those people died of COVID-19. Of those who died, over 75 percent of them had underlying health conditions. Nonetheless, right-wing figures like Donald Trump Jr., Tucker Carlson, and Laura Ingraham all promoted the edited clip saying it proved the Biden administration has overstated the importance of vaccines. But after CDC officials obtained the full version of the interview and complained to the network, ABC took down the misleading clip and posted the full version with an editorial addendum.

Paul Farhi, writing for *The Washington Post* on Jan. 12, 2022, outlined how important it is for journalists to provide context. "Improper editing can distort, confuse or even present the opposite of what an interview subject said or intended to say," Farhi wrote. "The Society of Professional Journalists, in its code of ethics, cautions news organizations to 'provide context.' It states, 'Take special care not to misrepresent or oversimplify in promoting, previewing or summarizing a story.'"

Other experts, like Yotam Ophir, a State University at Buffalo (N.Y.) professor who studies misinformation in health and science, said ABC News had a responsibility to explain how the edits were made and why they were wrong. Without an explanation, "[ABC] provide[s] fuel to those adhering to conspiracy theories, who found an opportunity in the unfortunate mistake to spread additional misinformation," Ophir said. "Remaining silent here doesn't do good to both ABC and science."

— Samantha Brunn
Silha Research Assistant

Courts Continue to Grapple with Defamation Cases Involving Sarah Palin, Former President Trump, and Election Misinformation

In the early months of 2022, courts considered a number of high-profile defamation cases. In February, former Alaska governor Sarah Palin's libel suit against *The New York Times* was dismissed in an unusual judgment as a matter of law; the jury also found the *Times* not liable. In March, a judge dismissed former President Donald Trump's countersuit against E. Jean Carroll, who sued him for defamation after he publicly denied her claims that he had raped her. Also in March, a judge ruled that most counts in a defamation suit by voting technology company Smartmatic against Fox News could continue.

DEFAMATION

Judge, Jury Find *New York Times* Not Liable in Palin Libel Suit

On Feb. 14, 2022, U.S. District Court Judge for the Southern District of New York Jed S. Rakoff announced that he would dismiss former Alaska governor Sarah Palin's libel suit after she "wholly failed to prove her case even to the minimum standard required by law." *Palin v. The New York Times*, 17-cv-4853 (S.D.N.Y. March 1, 2022). *The New York Times* and editor James Bennet had moved to dismiss the case before jury deliberations, and the Court granted this motion "shortly after the jury had begun its decisions," according to the opinion. The jury also returned a verdict of "not liable," several media outlets reported. The decision came several years after Palin filed suit against the *Times* for an editorial titled "America's Lethal Politics," connecting her political rhetoric to a mass shooting, published on June 14, 2017.

According to Rakoff's opinion, "several sentences in the Editorial could be read to suggest" that the 2011 shooting in Tucson, Ariz. that wounded Congresswoman Gabrielle Giffords and killed several others was prompted by a "graphic advertisement circulated some months earlier" by a political action committee (PAC) associated with Palin. The graphic showed a map with "stylized rifle crosshairs superimposed over congressional districts" where the PAC hoped to replace incumbent Democratic congress members with Republicans in the 2010 midterms. Giffords' district was one of 20 covered by the crosshairs. James Bennet, who at the time was the *Times* editorial page editor, "added language asserting a 'clear' and 'direct' link between the 2011 shooting and the 'political incitement' generated by the crosshairs map." After receiving criticism for this language, the *Times* issued two corrections stating that no clear link had been established.

In 2017, Palin sued the *Times* and Bennet. According to her complaint, the *Times* "exceeded the bounds of legality, decency and civility" by publishing the article and sharing it on Twitter. The complaint argued the "underlying premise of the Palin Article is that there is a 'sickening' pattern of politically incited violence against members of Congress and that this pattern stems from Mrs. Palin's direct and clear incitement," of the 2011 Tucson shooting. The complaint alleged that there was "no legitimate reason or factual basis" for this link and that the *Times* was aware the claims were false. Palin's attorneys claimed that the defamatory statements in the article "caused Mrs. Palin to suffer significant damages, including damages to her reputation, humiliation, embarrassment, mental suffering, shame and emotional distress." (For more information about Palin's libel suit, see *Jury Trial Ordered in Sarah Palin's Lawsuit Against* The New York Times in "Courts Rule on Defamation Lawsuits against *The New York Times*, Fox News, President Donald Trump" in the Fall 2020 issue of the Silha *Bulletin*.)

The case faced a long and complicated road to trial. Palin filed her complaint on June 27, 2017, and the *Times* moved to dismiss the complaint on July 14, 2017. The Southern District of New York dismissed the case after an evidentiary hearing on Aug. 16, 2017. Palin appealed the dismissal, and the Second Circuit reinstated the case in 2019. Palin filed an amended complaint on Dec. 30, 2019. On June 12, 2020, each party filed for summary judgment, and the Southern District of New York denied both motions on Aug. 28, 2020 and set trial for Feb. 1, 2021. The *Times* filed a new motion asking the case to be reconsidered in light of an "intervening change in substantive law: New York State's November 10, 2020 amendment of its libel statute to expressly require a public figure such as Palin to prove actual malice by clear and convincing evidence," according to Rakoff's opinion. On Dec. 29, 2020, the Court granted the *Times*' motion for reconsideration and held that Palin therefore had to prove actual malice by clear and convincing evidence under both the First Amendment and the New York statute. After "extensive delays occasioned by an intervening appeal and constraints arising from the COVID-19 pandemic," the Southern District of New York began a jury trial on Feb. 3, 2022.

Following "the close of evidence but before the start of jury deliberations," defendants filed a motion for judgment as a matter of law under Fed. R. Civ. P 50(a). Rule 50(a) states that "if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may resolve that issue against the party; and grant a motion for a judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue."

According to Rakoff's opinion, the Court "reached the firm conclusion that it would have to grant the motion for judgment as a matter of law," on Feb. 14, 2022. However, the court continued to "allow the jury to continue its deliberations, so that, if the Court of Appeals were to disagree with the Court's determination to dismiss the case as a matter of law, the appellate court would not have to send the case back for trial."

In the 68-page opinion, Rakoff established the four "essential elements" Palin would need to prove for a successful libel claim under New York law. First, the statement needed to be a "statement of fact that the ordinary reader of the publication would understand, when taken in the context in which it appears, to convey a defamatory meaning." Second, an ordinary reader must "reasonably understand the statement to be 'of and concerning' the plaintiff personally, rather than referring to another person or entity." Third, the

statement must be "materially false." Finally, Palin would need to prove that at the time of publication, the *Times* and Bennet had the "state of mind known as 'actual malice'." Rakoff also turned to First Amendment precedent, including *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which established the actual malice standard requiring public officials to prove that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

Rakoff wrote that it is "undisputed" that Palin was a public figure for the purpose of the lawsuit. Palin "was not seriously contending" that Bennet published the editorial with actual knowledge that the statements were false. Instead, Palin "argued that she established actual malice by virtue of reckless disregard." Under New York case law, "the cornerstone of the reckless disregard standard for actual malice is that the plaintiff must prove by clear and convincing evidence that the 'defendant in fact entertained serious doubts as to the truth of his publication.'" There is a "critical difference" between "not knowing whether something is true" and "being highly aware it is probably false," but only the latter "establishes reckless disregard in a defamation action." The opinion clarified that proof of negligence is not enough to establish actual malice. The "essential question" therefore was whether "the record reflects any evidence that could give rise to the conclusion that Benet knew or consciously disregarded" that the challenged statements were false.

Palin's lawyers pointed to "two categories of evidence" that they argued foreclosed judgment as a matter of law on the actual malice standard: research gathered in writing the editorial and Bennet's prior awareness of the Tucson gunman's motivations. The Court "assumed" that Bennet read the *Times* prior coverage of the Tucson shooting in researching the editorial. "Even on the assumption that Bennet read and understood" all of the *Times*' prior coverage, none of the articles presented "any definitive facts about the Arizona shooting that would have put Bennet on notice (or led him to strongly suspect) that no link had been established between the crosshairs map" and the Tucson shooting. The record also "belie[d]" the possibility that Bennet had prior knowledge about the controversies surrounding the crosshairs map before publishing the editorial. Bennet testified that he was unaware of the details of this case, and Palin "offered no admissible evidence that would undermine Bennet's testimony on this point." Accordingly, the Court determined that "Palin failed to offer any affirmative evidence supporting the inference that Bennet knew or suspected" that his contributions to the editorial were false. Therefore, "the Court was obliged to grant Defendant's Rule 50 motion and dismiss the action with prejudice."

Legal commentators noted it was strange that Rakoff announced the Court's ruling the day before the jury verdict. Attorney Charles Harder told *The Washington Post* on Feb. 17, 2022 that the timing was "unusual" and said that "jurors can be easily influenced by what the judge says and does." 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.)

New York Times attorney David L. Axelrod "expressed concern" that jurors would see push notifications about the ruling on their phones, *Politico* reported Feb. 14, 2022. *Poynter* reported on Feb. 17, 2022 that several jurors did involuntarily receive such push notifications.

On March 17, 2022, Palin filed a notice that she would appeal the judgment to the U.S. Court of Appeals for the Second Circuit. On March 23, 2022, Palin requested a new trial, arguing in part that the jury verdict was "tainted" by Rakoff's judgment as a matter of law. The full motion is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.476650/gov.uscourts.nysd.476650.198.0.pdf.

Several legal scholars noted that the case could have significant implications for the "actual malice" standard set forth in *New York Times v. Sullivan*. Palin's case "may be the first case attacking Sullivan to reach the Supreme Court," attorney Martin Garbus wrote in the *L.A. Progressive* on Feb. 19, 2022. Even if Sullivan is not "wholly" rejected, the Court could "keep the case alive as it kills it" through incremental changes to the burden of proof or definition of public figure, Garbus wrote. *Palin v. New York Times* is "at its heart about the limits of First Amendment protections and the standard set in the landmark New York Times vs. Sullivan case," media reporter Oliver Darcy wrote for CNN on Feb. 8, 2022.

Changing the "actual malice" standard for public figures could have a chilling effect on media coverage of influential people, like Facebook co-founder Mark Zuckerberg, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley told *Bloomberg Law* on Feb. 14, 2022. "I would argue that people like a Zuckerberg have so much power and so much impact on citizens around the world, in some respects more than their elected officials, that the standard should apply to people like him," Kirtley said.

Previously, Supreme Court Justices Clarence Thomas and Neil Gorsuch signaled their willingness to revisit the standard in light of the modern media landscape, *The New York Times* reported on July 2, 2021. (For more information on Justice Thomas' and Justice Gorsuch's opinions regarding the *Sullivan* standard, see *Justices Thomas and Gorsuch Call for Reevaluation of* New York Times v. Sullivan *Standard* in "Special Report: U.S. Supreme Court Rulings and Opinions Raise Numerous Freedom of Speech and Press, Privacy Issues and Questions" in the Summer 2021 issue of the Silha *Bulletin* and "Justice Thomas Calls for Supreme Court to Reconsider the Actual Malice Standard" in the Winter/Spring 2019 issue.)

Federal Judge Dismisses Trump Countersuit Against Rape Accuser

On March 11, 2022, U.S. District Court for the Southern District of New York Judge Lewis Kaplan denied former President Donald Trump's motion to countersue magazine writer E. Jean Carroll under New York's "anti-SLAPP" law. In 2019, Carroll filed her initial complaint in a state trial court, the Supreme Court for New York County.

In her complaint, Carroll accused President Trump of raping her in a New York City department store in the late 1990s. After remaining silent for more

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than 20 years, Carroll "decided to describe Trump's rape in a book she had already begun to write about her experiences with various men." According to the complaint, she "did not want to tell her story to the police, a newspaper, an elected official, or a fellow journalist and be treated as a 'victim.'"

New York magazine published an excerpt from Carroll's then-forthcoming book on June 21, 2019. After the account was published, "Trump lashed out with a series of false and defamatory statements," the complaint alleged, including outright denying the rape and also denying having ever met Carroll or knowing who she was. Through "express statements and deliberate implications" Trump "accused Carroll of lying about the rape in order to increase book sales, carry out a political agenda, advance a conspiracy with the Democratic Party, and make money." The complaint alleged Trump made these statements to journalists with "knowledge of their falsity and/or with reckless disregard for the truth." The statements "caused Carroll emotional pain and suffering at the hands of the man who raped her, as well as injury to her reputation, honor, and dignity." The full complaint is available online at: https://z.umn.edu/Carrollcomplaint.

The case progressed slowly through the court system. Although initially filed in state court, the case was removed to federal court in the Southern District of New York in 2020. The Department of Justice filed to move the case to federal court and filed a motion to replace President Trump with the U.S. Department of Justice (DOJ) as defendant in the suit. The DOJ argued that Trump was acting in the scope of his duties as president when he denied Carroll's claims and that he was therefore shielded from liability under the Federal Torts Claims Act. The full motion for removal is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.6.0.pdf.

On Oct. 27, 2020, Judge Kaplan issued an opinion refusing to allow the Department of Justice to replace Trump in the suit, because President Trump was "not an 'employee of the Government' within the meaning of the relevant statutes" and because even if he were an employee under that analysis, his statements were made outside of the scope of that employment. The full opinion is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.32.0_3.pdf.

On Jan. 15, 2021, Reuters reported that the Department of Justice filed an appeal with the U.S. Court of Appeals for the Second Circuit claiming that Trump was a government employee entitled to immunity from Carroll's claims under federal law because he had spoken about her in his official capacity as president. On Feb. 22, 2022, Reuters reported that "both sides" were waiting for the appellate court's decision as to "whether Carroll's lawsuit should be dismissed because Trump was immune from being sued."

In January 2022, Trump submitted a motion to countersue Carroll under New York's amended Anti-Strategic Lawsuit Against Public Participation law (anti-SLAPP), N.Y. Civ. Rts. L. §§70-a, 76-a, and N.Y. CLPR 3211-12. According to the motion, the law is "broadly intended to deter bad-faith actors from commencing and/or continuing vexatious or malicious lawsuits, particularly those designed to inhibit an individual's ability to speak freely on matters of public concern." The 2020 amendment "significantly broadened the statute by expanding the definition of an 'action involving public petition and participation," according to the complaint. The amended statute includes "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." According to the motion, the amendment further explained that the term "public interest" is "meant to be 'construed broadly and shall mean any subject *other than a purely private matter*" (emphasis in original).

The motion contended that the anti-SLAPP amendments should apply "retroactively" to include Trump's 2019 statements. The motion argued that Trump's denials of Carroll's accusations, as "public statements made by a then-sitting president" were "of momentous public interest." Once it is established that an action is covered by the amended anti-SLAPP law, the burden of proof "shifts away from the defendant and lies solely with the plaintiff who must demonstrate that the cause of action has a 'substantial basis in law'" or a "'substantial basis in fact and law.'" The full motion is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.64.0.pdf.

On March 11, 2022, Judge Kaplan denied the motion. In his opinion, Kaplan contended that President Trump's proposed amendment would be "futile." Although the motion did "assert the new argument that the amended anti-SLAPP law bars plaintiff's claim," Kaplan wrote that this argument "is without merit," holding that New York's amended anti-SLAPP law does not create "a defense that would knock plaintiff out of court if all the allegations of her complaint are true." Assuming that Carroll's complaint was truthful, "then this action would not have been 'commenced or continued without a substantial basis in fact and law,'" Kaplan wrote.

In the alternative, Kaplan denied the motion because the filing of the countersuit was unduly delayed. The current version of the anti-SLAPP statute became effective Nov. 10, 2020, and Trump did not offer a "satisfactory reason for the length of his delay" in filing the countersuit. He wrote that the motion to assert a counterclaim was part of a pattern of litigation tactics that have had a "dilatory effect, and indeed, strongly suggest that he is acting out of a strong desire to delay any opportunity [Carroll] may have to present her case against him." According to the opinion, Trump previously "attempted to delay the progress of the lawsuit through frivolous motions practice." Carroll's "only claim in this case is a single count of defamation" that "could have been tried and decided — one way or the other — long ago."

New York Judge Rules that Much of Smartmatic Defamation Case Against Fox News Can Continue

On March 8, 2022, Supreme Court of New York, New York County Judge David Cohen denied a motion from Fox News Network to dismiss a defamation case brought by voting machine company "Smartmatic." *Smartmatic USA Corp. v. Fox Corporation*, 2022 WL 685407 (N.Y. Sup. 2022). Smartmatic filed the defamation lawsuit against Fox News in February 2021 centering on 13 reports "stating and implying that Smartmatic had stolen the 2020 U.S. election." Smartmatic sued several other defendants including Fox News Network parent company Fox

Corporation, former Fox News Host Lou Dobbs, Fox News hosts Maria Bartiromo and Jeanine Pirro, and attorneys Rudolph Giuliani and Sidney Powell, who appeared on Fox programs.

The complaint alleged that these broadcasts centered on several key themes: that Smartmatic's software was "used to steal the 2020 U.S. election by rigging and fixing the vote," that the technology sent the votes "to foreign countries for tabulation and manipulation," and that Smartmatic was a "Venezuelan company that was founded and funded by corrupt dictators from socialist and community countries." Smartmatic sought $2.7 billion in "economic and non-economic damage caused by the Defendant's disinformation campaign as well as punitive damages" and a declaration "fully and completely" retracting the false statements. The full complaint is available online at: https://www.smartmatic.com/uploads/Smartmatic_Complaint_Against_Fox_Corporation.pdf. (For more information about the initial complaint and related election misinformation lawsuits, see *Voting Technology Companies Continue to Allege Defamation* in "Courts Consider Defamation Lawsuits Involving Right-Wing Radio Host, Politician, and Election Technology Companies" in the Fall 2021 issue of the Silha *Bulletin*.)

In April 2021, Fox moved to dismiss the lawsuit. The motion argued that "when a sitting President claims an election was stolen and assembles a legal team to challenge it, the public has a right to know about those allegations." The motion also asserted that the claims were "inherently newsworthy because of who is leveling them and what they concern" and that seeking nearly $3 billion in damages "goes beyond a chilling effect." The full motion is available online at: https://z.umn.edu/FoxMotion.

The March 8, 2022 opinion denied the motion to dismiss claims against Fox Corporation, Fox news, Bartiromo, and Dobbs. The court did grant motions to dismiss some claims against Pirro, Powell, and Giuliani.

According to the opinion, Fox News moved to dismiss the case, asserting there was "no viable claim against it since it merely reported on newsworthy events surrounding President Trump's unconventional efforts to challenge the results of the election." Furthermore, because Smartmatic is a "limited purpose public figure," Fox argued that the company must prove actual malice, the standard created in *New York Times v. Sullivan* in 1964 requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. 376 U.S. 254 (1964).

Fox also argued that the speech was subject to New York's anti-SLAPP law and that therefore the case "cannot proceed unless plaintiffs allege that Fox News knowingly or recklessly falsified its coverage." Fox maintained "that it repeatedly pressed Powell and Giuliani to substantiate their claims regarding [Smartmatic] and that they failed to do so."

Bartiromo "reiterat[ed] arguments made by Fox News" surrounding actual malice, newsworthiness, and the anti-SLAPP statute. She separately argued that "since she repeatedly pressed Powell and Giuliani regarding whether they would be able to prove their claims of wrongdoing by [Smartmatic], she did not defame the company." She also argued her reporting was balanced because she interviewed a software engineer who said the Smartmatic software was not used to change votes. Finally, she argued that Smartmatic "did not allege that she had actual knowledge that what Powell and Giuliani said was false."

Similarly, Dobbs echoed Fox News's arguments. He also added that he "advised his viewers that [Smartmatic] had denied some of the allegations against it, and that he asked Powell during an interview if she would be able to support her claims with evidence. He did not dispute that he tweeted that Powell claimed to have "firsthand evidence" that Smartmatic software was designed to change votes and that Giuliani claimed votes were counted outside the U.S. He claimed the tweets were "simply reporting a matter of public interest," and also maintained that his interview of the software expert who denied claims against Smartmatic evidenced his balanced reporting.

Pirro "incorporate[d] by references made by Fox news and her contentions substantially reiterate those made by Bartiromo and Dobbs. She also argued that she did not represent that Smartmatic did anything improper, but merely asked Powell and Giuliani about their claims.

Powell argued the New York court did not have jurisdiction over her, a Texas resident. She also argued that "any failure on her part to investigate the veracity of her statements does not constitute actual malice" and that the claims against her "must be dismissed since her statements about [Smartmatic] expressed only her opinions." Giuliani asserted that his statements were "absolutely privileged because they were made during the scope of his representation of President Trump in litigation related to the election." Giuliani also maintained that many of the charges against him must be dismissed because "they sound in product disparagement and not defamation." He asserted that Smartmatic did not properly identify customers it claims to have lost, as would be required to receive special damages in a product disparagement claim.

In opposition to the defendants' motions to dismiss, Smartmatic argued that the First Amendment "does not protect" the defamatory statements. Smartmatic asserted actual malice by alleging that the Fox defendants "had no support for the published claims" about Smartmatic, "knew that the statements they made about [Smartmatic' were false" and had "obvious reasons to doubt the information they obtained from Powell and Giuliani including, but not limited to, the fact that neither of those attorneys provided any evidence of their claims" and because the Fox defendants "knew the said attorneys' claims had been refuted by election specialists and officials." According to the opinion, Smartmatic also asserted that the Fox defendants "violated accepted journalistic standards" and "had improper motives for publishing their reports" about Smartmatic. Smartmatic also argued it was not required to meet the actual malice standard since it was neither a public figure nor a limited purpose public figure.

Cohen analyzed claims against each defendant separately. According to the opinion, Smartmatic "adequately pleaded that their claims against Fox News have a sufficient basis in law," to withstand the burden set forth in defamation case law and under New York's anti-SLAPP law. "Even assuming that Fox News did not intentionally allow this false narrative to be broadcasted, there is a substantial basis for plaintiffs' claims that, at a minimum, Fox news turned a blind eye to a litany of outrageous claims about plaintiffs, unprecedented in the history of American elections, so inherently improbable that it evinced a reckless disregard for the truth." Cohen identified a Nov. 16, 2020 public statement from a group of election security specialists

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Defamation, *continued from page 39*

claiming there was "no credible evidence of fraud" in the election and said that this alone "was enough to put any reputable news organization on notice that the claims against [Smartmatic] could be dubious." Additionally, Cohen said that "the statements of Tucker Carlson, perhaps the most popular Fox News host, militate most strongly in favor of a possible finding that there is a substantial basis that Fox News acted with actual malice." According to the opinion, Carlson wrote an article on Nov. 19, 2020 asking Powell to substantiate her comments about the alleged fraud with evidence. She did not. Cohen wrote that there are therefore "sufficient allegations that Fox News knew, or should have known, that Powell's claim was false, and purposefully ignored the efforts of its most prominent anchor to obtain substantiation of claims of wrongdoing" by Smartmatic. Cohen also wrote that Fox could be liable even if the network itself did not make "any specific defamatory statements" about Smartmatic because the network allowed the statements to be repeated on air.

Cohen then analyzed the claims against Bartiromo and found that Smartmatic "adequately pleaded a substantial basis for their claim that Bartiromo acted with reckless disregard for the truth or falsity of the statements she made, and/or with a high degree of belief that the information was false." He noted that she spoke of a "back door" into the software that would allow votes to be changed, and that this "may be a fabrication insofar as she did not name the 'source' she referred to." Additionally, he wrote that her claim that the software converted votes for former President Trump to votes for President Biden could be found "so inherently improbable that only a reckless person would have put [it] in circulation." Therefore, Cohen denied Bartiromo's motion to dismiss the claims against her.

Dobbs' motion to dismiss was similarly denied. Dobbs repeated on his show and on Twitter that Powell had revealed "groundbreaking new evidence indicating that the election came under massive cyberattack" coordinated by Smartmatic and others. According to the opinion, Dobbs "was conspicuously silent regarding what this evidence was or who provided it," and therefore "could be found to have had obvious reasons to doubt the truthfulness of what Powell told him. Cohen found that Dobbs could not be exculpated from blame "simply because he mentioned that [Smartmatic] denied his comments or because he was merely expressing his own opinion. Accordingly, the claims against Dobbs survived the motion to dismiss.

Cohen did dismiss the claims against Pirro. In her broadcast, she said that Trump's lawyers alleged that "a company called Dominion, which they say started in Venezuela with Cuban money and with the assistance of [Smartmatic] software, [has] a backdoor [which] is capable of flipping votes." This statement was the only mention of Smartmatic in her show, and in the context of the show's entire transcript, "is not reasonably susceptible of a meaning defamatory to plaintiffs." Cohen did acknowledge that Pirro had stated elsewhere that Democrats "stole votes," but because she did not "specify that the votes were stolen using [Smartmatic] software," the complaint against her was dismissed.

The claims against Powell were severed from the case and dismissed because "there is no jurisdiction over Powell in New York." According to Cohen, Powell's "only defamation-related contacts" to New York involved her appearances on Fox News, which is broadcast from New York City, and "there is no allegation that she came to New York to personally appear on Fox News."

Cohen dismissed product disparagement claims against Giuliani because Smartmatic did not provide enough information about damages and lost customers. He specified that this dismissal was without prejudice and that plaintiffs could replead the product disparagement claim with more details "given the quantity and seemingly outrageous character of the accusations made by Giuliani." The judge allowed the defamation claims to continue against Giuliani because he found that the "barrage of statements" about Smartmatic adequately provided a basis to find that he "acted with actual malice insofar as he evinced a reckless disregard for the truth of his statements and/or a high degree of belief that the said information was false." Cohen found Giuliani's claim that his statements were protected by an "absolute litigation privilege" to be without merit as he made his claims on Fox News and not during a judicial proceeding. For the full opinion, see: https://www.law360.com/articles/1472061/attachments/0.

On March 17, 2022, Fox News filed a countersuit against Smartmatic, arguing that the company had inflated its loss calculations. "While the recovery of fees and costs will not undo all the damage this First Amendment-defying lawsuit has wrought, at least it may cause the next plaintiff to think twice before trying to penalize the press to the tune of billions of dollars in nonexistent damages," the complaint read.

A preliminary conference between the parties, scheduled for May 18, 2022, was the next step in the case.

Smartmatic's lawsuit against Fox News is not the only lawsuit aimed at election misinformation. Smartmatic has also sued Newsmax Media, Inc., One American News Network (OANN) parent company Herring Networks, and MyPillow CEO Mike Lindell on similar defamation claims. Dominion Voting has filed similar lawsuits against Fox News and Fox Corporation, Newsmax, OANN, Mike Lindell, Rudy Giuliani and Sidney Powell. (For more information about these lawsuits, see *Voting Technology Companies Continue to Allege Defamation* in "Courts Consider Defamation Lawsuits Involving Right-Wing Radio Host, Politician, and Election Technology Companies" in the Fall 2021 issue of the Silha *Bulletin*.)

Several First Amendment scholars have voiced support for plaintiffs in these cases. Attorney Lee Levine told *The New York Times* on March 13, 2022 that a finding of liability in these cases "could demonstrate that the bar set by the Sullivan case did what it was supposed to do: make it possible to punish the intentional or extremely reckless dissemination of false information while protecting the press from lawsuits over inadvertent errors." (Levine, who served as counsel for Vopper in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), delivered the 16th Annual Silha Lecture, titled "Newsgathering on Trial: The Supreme Court and the Press in the 21st Century." For more information on the lecture, see "*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue of the Silha *Bulletin*.)

George Freeman, executive director of the Media Law Resource Center, told the *Times* on March 13, 2022 that if Fox were to win, it could support the assertion that the actual malice standard is too onerous and needs to be reconsidered. "If Fox wins on these grounds, then really they will have moved the needle too far," he said.

— Claire Colby
Silha *Bulletin* Editor

Retrospective: Justice Breyer's Jurisprudence, Legacy

On Jan. 27, 2022, U.S. Supreme Court Justice Stephen Breyer announced in a letter to President Joe Biden that he would retire in summer 2022 after nearly 28 years on the Court. Commentators noted Justice Breyer's tenure was marked by pragmatism, moderation, and his affinity for balancing tests, and the same can be said of his First and Fourth Amendment jurisprudence.

SUPREME COURT

Justice Breyer graduated from Harvard Law School in 1964. He later taught administrative law there and was appointed to the First Circuit U.S. Court of Appeals in 1980 by former President Jimmy Carter. He served as Chief Judge from 1990 until 1994, when he was appointed to the Supreme Court of the United States by former President Bill Clinton. The Senate confirmed Justice Breyer with an 87 to 9 vote on July 29, 1994, and he joined the Court on Aug. 3, 1994. As a Democrat, Justice Breyer often voted with the Court's progressive Justices, except in many cases involving Fourth Amendment questions.

First Amendment Jurisprudence: Press

Justice Breyer concurred with the Court's ruling in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), holding that the First Amendment protects from liability those who lawfully obtain and publish an intercepted private conversation, even when the initial interception was unlawfully made by an independent third party, provided the information is a matter of legitimate public concern. He wrote in his concurrence that "the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy." Commentators have said the *Bartnicki* decision is one of the most press-friendly decisions ever to come from the Supreme Court, as Eriq Gardner wrote for *The Hollywood Reporter* on May 20, 2021. (For more information on *Bartnicki v. Vopper*, see "U.S. Supreme Court Rules in Historic *Bartnicki* Case" in the Summer 2001 issue of the Silha *Bulletin*, "*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue, and "Hack of Sony Pictures Raises Legal, Ethical Questions for Reporting Stolen Information" in the Winter/Spring 2015 issue. Attorney Lee Levine, who served as counsel for and argued the case on behalf of Vopper, delivered the 16th Annual Silha Lecture, "Newsgathering on Trial: The Supreme Court and the Press in the 21st Century.")

First Amendment Jurisprudence: Student Speech

Justice Breyer wrote for a nearly unanimous court in *Mahanoy Area School District v. B. L.*, 141 S. Ct. 2038 (2021). In an 8-1 decision, the Court concluded that a public school violated a cheerleader's free speech rights when she was suspended for cursing in a Snapchat sent while off-campus. Justice Breyer's opinion established several broad free speech guidelines, but left room for future courts to decide other student free speech disputes. "It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary," Justice Breyer concluded.

Commentators hailed the *Mahanoy* decision as a win for student free speech rights. "[S]tudents . . . will have a little more freedom to be themselves on social media — at least when they're beyond the schoolhouse gate," Cristian Farias wrote for *Vanity Fair* on June 24, 2021. Farias observed that Justice Breyer may have been the ideal justice to write the majority opinion, because "Breyer is the kind of judge who enjoys the work of judging — balancing tests, cost-benefit analyses, things other than bright-line rules and strict constructionism. Law is hard, and *Mahanoy*, which asked the Supreme Court to determine whether the First Amendment protects the speech of a cheerleader who expressed a few choice words about cheer on Snapchat, seemed well-suited for a pragmatist, Breyer-like solution."

Others, however, were more critical of Justice Breyer's approach. "To be sure, incrementalism can go too far," David B. Rivkin Jr. and Andrew M. Grossman wrote for *The Wall Street Journal* on July 1, 2021. "Justice Stephen Breyer's 8-1 opinion in the student-speech case *Mahanoy Area School District v. B.L* . . . provides little guidance for lower courts or school administrators."

(For more information on *Mahanoy Area School District v. B. L.*, see *Supreme Court Rules in Favor of Student in Latest Student Speech Case*, in "Special Report: U.S. Supreme Court Rulings and Opinions Raise Numerous Freedom of Speech and Press, Privacy Issues and Questions," in the Summer 2021 issue of the Silha *Bulletin*.)

Justice Breyer dissented in *Morse v. Frederick*, 551 U.S. 393 (2007), in which the Court allowed a school to punish a student for displaying a banner that allegedly encouraged illegal drug use ("Bong Hits 4 Jesus"). Justice Breyer sided with the majority in supporting a principal's right to suspend the student, but he concluded the case was primarily a question of qualified immunity for the school, and not about the First Amendment.

(For more information on *Morse v. Frederick*, see *U.S. Supreme Court First Amendment Rulings*, in "In *Morse v. Frederick*, Court Places Limits on Student Expression," in the Summer 2007 issue of the Silha *Bulletin*.)

First Amendment Jurisprudence: Corporate Campaign Contributions and Commercial Speech

Justice Breyer's votes typically disfavored corporate campaign contributions and commercial speech. He joined the dissenting opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), where, together with Justices John Paul Stevens, Ruth Bader Ginsburg, and Sonia Sotomayor, Breyer agreed that the "ruling [allowing unlimited corporate campaign contributions] threatens to undermine the integrity of elected institutions across the Nation." He voted similarly in *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014). (For more information on *Citizens United v. Federal Election Commission*, see *Ninth Circuit*

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Upholds Montana's Campaign Contribution Limits; U.S. Supreme Court Refuses to Overturn in "State Limits on Campaign Contributions Remain in Effect for 2012 Election Season; Voters Call for Amendment to Overturn *Citizens United*" in the Fall 2012 issue of the Silha *Bulletin*; for more about the *McCutcheon* decision, see "Supreme Court Strikes Down Campaign Finance Limits on Total Contributions by Individuals" in the Winter/Spring 2014 issue of the Silha *Bulletin*.)

Regarding commercial speech, Justice Breyer dissented in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), writing, "The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical and data-mining companies of data, collected pursuant to the government's regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech." (For more information on *Sorrell v. IMS Health Inc.*, see "U.S. Supreme Court Invalidates Vermont Prescription Confidentiality Law," in the Summer 2011 issue of the Silha *Bulletin*; for more information on campaign contributions as speech, see "Ken Starr Presents 18th Annual Silha Lecture," in the Fall 2003 issue.)

Other Aspects of First Amendment Jurisprudence

Justice Breyer wrote for the majority in *Beard v. Banks*, 548 U.S. 521 (2006), upholding prison officials' broad restrictions on inmates' reading materials. In that case, the plaintiff contended the Pennsylvania Department of Corrections policy restricting prisoners in its long-term segregation unit from reading newspapers and magazines and viewing photographs violated their free expression rights. Justice Breyer pointed to prior precedents — *Turner v. Safley*, 482 U.S. 78 (1987) and *Overton v. Bazzetta*, 539 U.S. 126 (2003) — which both required a broad degree of deference to prison officials in their task of administering prisons. After applying the reasonableness standard from *Turner*, he found the prison's policy was reasonable on its face because the prison's reading materials policy for the more restricted Level 2 prisoners was reasonably related to legitimate penological interests, including the safety of prison guards and incentivizing prisoners' positive behavior. But he noted the restriction was "severe," and he left room for an as-applied challenge to be filed in the future if the restrictions amounted to a "*de facto* ban."

Justice Breyer dissented in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), writing that the majority's categorical denial of First Amendment protection for government employees was too broad. The majority recognized the state's interest, as an employer, "in promoting the efficiency of the public services it performs through its employees," thereby allowing governmental employers to impose certain restrictions on the speech of its employees, which are restraints that would be unconstitutional if applied to the general public. Justice Breyer wrote that there are special interests raised by Ceballos' status as a lawyer — a profession whose "canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished." Furthermore, Justice Breyer wrote, Ceballos' employment as a prosecutor raises constitutional issues, given that "a prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession." (For more information on *Garcetti v. Ceballos*, see "Government Interference with Speech" in the Spring 2006 issue of the Silha *Bulletin*).

In *Barr v. American Association of Political Consultants Inc.*, 140 S. Ct. 2335 (2020), Justice Breyer both concurred and dissented in part, saying that the exception under the Telephone Consumer Privacy Act that allows government debt collectors to robocall Americans was not a violation of the First Amendment. Justice Breyer wrote that "[t]o reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. And in this case, strict scrutiny is inappropriate."

In *United States v. Alvarez*, 567 U.S. 709 (2012), a case where Xavier Alvarez claimed to have served in the U.S. Marines and been awarded the Congressional Medal of Honor when he had not, Justice Breyer's concurring opinion agreed with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. "But I do not rest my conclusion upon a strict categorical analysis," Justice Breyer wrote separately. "Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways." (For more information on *United States v. Alvarez*, see "Supreme Court Strikes Down Stolen Valor Act," in the Summer 2012 issue of the Silha *Bulletin*.)

In the Transcript of Oral Argument at 18, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111), Justice Breyer said that accepting the plaintiff's speech argument would create a basis for an exception to every civil rights law ever adopted. In that case, the owner of the cakeshop argued that if the state were to require him to create a cake for a same-sex wedding, it would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to "express a message" with which he disagreed. Erwin Chemerinsky, writing for the *American Bar Association Magazine*, Vol. 43 Number 4, expanded upon Justice Breyer's thinking. "An inherent tension exists between liberty and equality," Chemerinsky wrote. "The application of all antidiscrimination laws infringes the freedom to discriminate. But for decades, the law has made the choice that ensuring equality is worth sacrificing the liberty to discriminate. Put in constitutional terms, ending discrimination is a compelling government interest. Enforcing antidiscrimination laws thus should not be seen as a violation of free exercise of religion or freedom of speech." Ultimately, though, a majority of the Court, including Justice Breyer, held that enforcing an antidiscrimination law

against the plaintiffs in this case was a violation of the Free Exercise clause.

First Amendment Jurisprudence: Religion

Justice Breyer's was the deciding vote in a pair of seminal First Amendment cases dealing with displays of religious monuments in public spaces, *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005).

In *Van Orden v. Perry*, Justice Breyer voted to uphold a long-standing display of the Ten Commandments in a public park, but in *McCreary County v. ACLU* he voted against the display of two religious plaques in county courthouses. His concurrence in *Van Orden* distinguished between that case and *McCreary County*, writing, "This display [in Texas] has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one," Justice Breyer wrote. "This case . . . differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them."

FOIA Jurisprudence

In *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Supreme Court held that Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), allows a federal agency to withhold "confidential" commercial or financial information when it is "customarily and actually" treated as private by the owner of the information and is provided to the government under an assurance of privacy. Justice Breyer concurred in part and dissented in part with the decision. "The majority spells out two conditions [that must be met to fall under FOIA Exemption 4], but in my view there is a third: Release of such information must also cause genuine harm to the owner's economic or business interests," Justice Breyer wrote. "I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia." (For more information on *Food Marketing Institute v. Argus Leader Media*, see *Supreme Court Rulings Address First Amendment and FOIA Questions* in "Supreme Court Holds FOIA Exemption 4 Protects Confidential Financial Information 'Customarily and Actually' Treated as Private," in the Summer 2019 issue of the Silha *Bulletin*.)

In *U.S. Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021), the Court held that the deliberative process privilege under FOIA protected the agency's draft biological opinions from disclosure because they reflected a preliminary view — not a final decision — about the EPA's proposed 2013 rule. Justice Breyer wrote the dissenting opinion which suggested that, in light of the Court's ruling in this case, it will now be particularly hard to prove that documents marked as "draft" fall outside of the deliberative process privilege.

Justice Breyer joined the Court's unanimous opinion in *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. (2004), which rejected a narrow reading of the federal FOIA personal privacy exemption for law enforcement records, allowing the government to withhold information about deceased persons by invoking the privacy rights of surviving family members. (For more information on *Nat'l Archives & Records Admin. v. Favish*, see "Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos," in the Spring 2004 issue of the Silha *Bulletin*; see also the *Breyer's Legacy* section in this story below.)

Fourth Amendment Jurisprudence

When former President Bill Clinton chose Justice Breyer for the Supreme Court in 1994, he said Justice Breyer would "strike the right balance between the need for discipline and order, be . . . firm on law enforcement issues but really sticking in there for the Bill of Rights."

However, some Supreme Court commentators, like the hosts of the podcast *5-4*, argue that Justice Breyer's deference to law enforcement authorities changed the trajectory of Americans' rights under the Fourth Amendment. "Liberalism and the left are often associated with a big, powerful state, a big central government, and a big powerful police force . . . goes well with that," *5-4* said in an episode in February 2021. "Breyer is very much in that sort of mode, and his trust in the federal government to get the welfare state right and to get all this other stuff right extends to his trust in the police, and that makes him very conservative in a country that's so racially and class stratified, where the police are used to hold the hierarchies in place and hold the poor and minorities down."

Jordan Rubin, writing for *Bloomberg Law* on Jan. 26, 2022, noted Justice Breyer's Fourth Amendment jurisprudence "doesn't leave [a] clear 'Liberal' criminal law legacy indicates his sometimes illiberal views on the law." Rubin continued, "Breyer's tendency to defer to the government means he sometimes sides with the authorities in close cases, including on matters of search and seizure, trial rights, and sentencing."

Justice Breyer joined Justice Samuel Alito's concurrence in the 2012 case of *United States v. Jones*, 132 S. Ct. 945 (2012). In that case, the Court overturned a drug conviction of a nightclub owner who law enforcement officials tracked for 28 days with a GPS monitor placed on his car, which went beyond the bounds of a warrant they had initially obtained. Justice Alito wrote, "This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial." (For more 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*.)

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

In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), he joined Chief Justice

Justice Breyer, *continued on page 44*

Justice Breyer, *continued from page 43*
John Roberts' majority opinion holding that government actors need a warrant to obtain historical data from cell phone carriers detailing the movements of a cell phone user, known as cell site location information (CSLI). (For more information on *Carpenter v. United States*, 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*.)

Breyer's Legacy

Adam Liptak, writing for *The New York Times* on Jan. 31, 2022, paid homage to Breyer's style of questioning advocates appearing before the nation's highest court. "Justice Stephen G. Breyer has a mild temperament, and he writes cautious opinions. But his questions from the bench can be wild flights of fancy, enlivening the proceedings with musings about marshmallow guns, aspirin fingers, tomato children and the Pussycat Burglar," Liptak wrote. "Jay D. Wexler, a law professor at Boston University and the leading empiricist of humor at the Supreme Court, [said that] for years, Justice Breyer trailed only Justice Antonin Scalia in court reporters' notations of '[laughter]' in transcripts of Supreme Court arguments."

In oral arguments in *Nat'l Archives & Records Admin. v. Favish*, the aforementioned FOIA case in which the Silha Center filed an *amicus* brief, Justice Breyer related the Greek tragedy of Antigone to Congress' legislative intent. "You can go back to Antigone, Euripides, every major religion, respect for the dead, respect for survivors, and that runs through every religion, through Greek myth, tragedy, and why isn't that important enough to human life to believe that Congress also intended to encompass that?" Breyer asked Favish. Later, Favish expressed confusion with how the case's issue had anything to do with someone's right to a private burial. "No, I know," Justice Breyer said. "I'm speaking metaphorically. I have Antigone in my mind." (For more information on the Silha Center's *amicus* brief regarding *Nat'l Archives & Records Admin. v. Favish*, see "The Silha Center Files *Amicus* Brief With the United States Supreme Court, Comments with the Council of Europe, and Department of Homeland Security" in the Summer 2003 issue of the Silha *Bulletin*.) The brief is available online at: https://drive.google.com/file/d/1U4T9pDet8ysSB8J9avgDWBWcrQoITZbz/view.

"His pragmatism, encyclopedic knowledge, and varied government experience have enriched the Court's deliberations. And his fanciful hypotheticals during oral argument have befuddled counsel and colleagues alike.. . . He is also a reliable antidote to dead airtime at our lunches, moving seamlessly from modern architecture to French cinema, to old radio shows, to a surprisingly comprehensive collection of riddles and knock-knock jokes."

— Chief Justice John Roberts

In a statement released on Jan. 27, 2022, Chief Justice John Roberts commended Justice Breyer's career. "His pragmatism, encyclopedic knowledge, and varied government experience have enriched the Court's deliberations," Roberts said. "And his fanciful hypotheticals during oral argument have befuddled counsel and colleagues alike[.]. . . He is also a reliable antidote to dead airtime at our lunches, moving seamlessly from modern architecture to French cinema, to old radio shows, to a surprisingly comprehensive collection of riddles and knock-knock jokes."

Ian Millhiser, writing for *Vox* on Jan. 27, 2022, noted that the Supreme Court as an institution has changed since Justice Breyer joined the Court. "The retiring justice will leave behind a Court that is much more factional, and much more confident in its own authority to make decisions on behalf of the American people, than the one he joined a quarter-century ago," Millhiser wrote. "But Breyer, at least, remained committed to pluralism, compromise, and the democratic process that makes pluralism and compromise possible."

— Samantha Brunn
Silha Research Assistant

A video of the 2022 Silha Center Spring Forum,
"One in Four: The Ethics of Covering People with Disabilities"
is available online at:
https://www.youtube.com/watch?v=g2i_38bMpX4

2022 Silha Center Spring Forum Focuses on the Ethical Considerations of Covering and Depicting People with Disabilities

During the 2022 Silha Center Spring Ethics Forum, "One in Four: The Ethics of Covering People with Disabilities," on April 4, 2022, award-winning journalist Jane McClure, editor of *Access Press*, which describes itself as "the upper Midwest's disability community news source," contended that "writing about disability is complicated. It requires a lot of sensitivity and that's a must for any form of journalism that involves people, which is what most of us write about. And if you're in doubt about how to refer to a person, ask that person, and if you can't ask the person, don't avoid writing about disability, just use your judgment. Do your best. Be fair, and think too, for the journalists listening tonight, about the stories that aren't getting covered."

SILHA CENTER EVENTS

The Silha Spring Forum attracted over 80 attendees from the United States and abroad, including members of the media, Hubbard School of Journalism and Mass Communication (HSJMC) students and faculty, and the general public. The forum panel, consisting of McClure and three other speakers, was sponsored by the Silha Center for the Study of Media Ethics and Law and the Minnesota-Pro Chapter of the Society of Professional Journalists (SPJ) as a virtual webinar.

In her opening remarks, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley described how "[b]oth the Silha Center and SPJ consider media ethics to be fundamental to their mission of education and public discussion and debate. We are also dedicated to promoting diversity in the media." Kirtley continued, "Tonight's webinar does both. Our topic is the ethics of covering people with disabilities — and the issues they face. But people with disabilities are frequently left out of diversity and inclusion discussions. We hope to take a small step to rectify that omission tonight."

In his opening comments, SPJ Chapter President and Minneapolis *Star Tribune* reporter Chris Snowbeck called the Silha Forum "an opportunity for us all to reflect on . . . how to avoid cliché and to tell stories that are powerful because they're true, which seems like an obvious calling, but sometimes in developing stories we lose sight of things."

McClure began her presentation by discussing "ableism," which she defined as "discrimination and social prejudice against people with disabilities. It's based on the belief that people with so-called 'typical abilities' are superior to those of us with disabilities, including people like me[.]. . . [It] is a lot like sexism and racism. It categorizes entire groups of people [as] lesser, inferior beings, and it includes negative and harmful stereotypes." McClure continued, "We people with disabilities talk about ableism in the same context as we talk about equity, social justice, and inclusion . . . When we talk about coverage of disability issues and of coverage of people with disabilities themselves, we need to keep ableism at the forefront."

Second, McClure revealed that she "wear[s] two hats here. I am a person with lifelong disabilities . . . And I'm also a journalist." She discussed how on one hand, journalists are "supposed to be fair, we're supposed to look at an issue, draw forth all sides, and provide readers with information to make their own conclusions," yet the press, when "covering issues involving people with disabilities, . . . drag[s] out . . . tired old stereotypes." At the same time, according to McClure, journalists still "have to acknowledge that there are people with disabilities and, of course, audiences that welcome inspirational coverage, what we call 'inspiration porn' or 'pity stories.'"

McClure then turned to several considerations the media face, including that "when we refer to the disability community, it's by no means a monolith. There [are] thousands of disabilities [and] tons of advocacy groups and self-advocates." McClure also discussed the differences between "person- or people-first language" and "identity-first language." Person-first language, according to McClure, refers to "language that puts a person before their diagnosis, such as being a person with a disability or disabilities." Identity-first language refers to "language that leads with the disability, as in John is an autistic man." McClure noted that "there's a lot of debate among some advocates" regarding which form of language to use. In terms of person-first language, the concern with emphasizing or reinforcing that someone is a human being is that "we're already human. I don't know why we need to say that, we're not robots." However, in terms of identity-first language, McClure questioned, "How do you deal with [a situation in which] somebody doesn't want to self-disclose their disability?"

Finally, McClure cited guidelines developed by the National Center on Disability and Journalism (NCDJ), which is headquartered at the Walter Cronkite School of Journalism and Mass Communication at Arizona State University. The goal of the NCDJ, according to its website, "is to provide support and guidance for journalists as they cover people with disabilities." In its "Disability Language Style Guide," the NCDJ offers several "basic guidelines," including that journalists should "[r]efer to a disability only when it's relevant to the story and, when possible, confirm the diagnosis with a reputable source, such as a medical professional or other licensed professional."

The guidelines also state that "[w]hen possible, ask sources how they would like to be described. If the source is not available or unable to communicate, ask a trusted family member, advocate, medical professional or relevant organization that represents people with disabilities." The guidelines further recommend being "sensitive when using words like 'disorder,' 'impairment,' 'abnormality' and 'special' to describe the nature of a disability. The word 'condition' is often a good substitute that avoids judgement. But note that there is no universal agreement on the use of these terms — not even close. 'Disorder' is ubiquitous when it comes to medical references; and the same is true for 'special' when used in 'special education,' so there may be times when it's appropriate to use them. But proceed

Silha Forum, *continued on page 46*

Silha Forum, *continued from page 45*

with extra caution." The full guidelines are available online at: https://ncdj.org/style-guide/.

Following McClure's presentation, the other panelists spoke. Scott Libin, an HSJMC Senior Fellow and former news director at KSTP and WCCO, the Twin Cities' ABC and CBS affiliates, asserted that "it's important that journalists bring to their coverage of those with disabilities some of the same skills and values that apply to reporting on other traditionally marginalized communities. And that means neither making assumptions based on stereotypes, nor treating people with disabilities as some exotic species[.]"

Libin continued, "Knowing someone with a disability or actually . . . having one yourself doesn't mean you really know what it's like. That's my belief[.]. . . [W]ords matter. And decisions about the best way to describe a person or a disability are not always as simple as just asking. But asking is a really good start." He added, "Ultimately, journalists need to make their own informed decisions about language. They should be prepared to explain how and why they've made those decisions based on accuracy, based on clarity, based on consistency, and based on editorial independence, as well as minimizing harm by showing respect for those they cover."

Libin also discussed and showed a student-produced news story demonstrating these values and principles. Hannah Flood, then a student of Libin's and now a reporter at Fox 9 in Minneapolis-St. Paul, produced the story for the Murphy News Service within the HSJMC. The story focused on the City of Minneapolis announcing that it was giving "a break to certain taxicab services that had promised to serve better people with mobility disabilities." Libin explained that "everybody . . . in town covered the announcement, the press conference. And the city was very proud, and representatives of the taxi companies came forward and talked about how this was the right thing to do and they were getting a break on their license fees . . . by promising that they would make their taxi cabs more accessible. That's as far as most reporting went." However, Flood, in Libin's view, "decided to do two really important things," including "to humanize this story and help us understand . . . why this might be an issue" and to "exercise some healthy skepticism." Flood's piece covered the shortcomings of the plan, including that, in practice, it remained challenging for individuals with mobility disabilities to find a reliable service through these taxi companies despite their promise.

Peter Tressel, a creative director with 38 years of experience at advertising agencies around Minneapolis, discussed how he "strive[s] to do the kind of advertising that does not get ignored." He cited the example of a website he helped create called "Make It OK," which, "is a campaign to reduce the stigma of mental illnesses." Tressel continued, "I bring this up because I think destigmatization is a component of normalizing and developing a relationship with people who are different [from] you. In the case of 'Make It OK' it was for neurodiverse folks." The full website is available at: https://makeitok.org/.

Tressel also cited a statistic from Nielsen, a marketing research company, documenting that only 1% of 450,000 advertisements the company examined included a mention or depiction of a disability. He added that advertising agencies still treat disabilities as "rare," which for Tressel "is a form of stigmatization. It's creating a sense of the other and I think that's a huge mistake." Marketers, according to Tressel, also "develop audience profiles that by nature are meant to focus attention on a primary target." He contended that "[w]hen you're focused on a single target, that's the definition of an exclusion."

Tressel asked, "How do we change this?" and presented several options and ideas, including that "[o]ne way to do that is just change the strategic framework where a better audience persona is created, one that includes a richer picture of the consumer. It's not a single person, it's a range of people. That richer picture could or should probably take into account the prevalence of disabilities in everyday life either for that consumer or for someone who's part of that consumer's life."

Sophia Schmaltz, a first-year student at the University of Minnesota College of Liberal Arts, discussed her personal experience as a dyslexic. "I found out that I have dyslexia in fifth grade," she said. "However, my journey was difficult because people never assumed that I could have a disability because I had good grades. And my teachers didn't think . . . I needed help because I was doing just fine in school. However, in the background I was still struggling. My parents found a way, or kept pushing, and figured out that I did have dyslexia, and this was the best news that I could have found because it opened a door for me to get help . . . so that I could not struggle as much as I did before."

Schmaltz said that she believed that "the problem with a lot of the portrayal of disabilities in the media is that it's over-stereotyped, and people assume that disabilities [are] something very negative that hurts every person and is not something that ends up helping them." She also contended that "social media has both positive and negative aspects for people with disabilities." On one hand, according to Schmaltz, "social media gives people a platform to share advice and ideas with other people[.]. . . It also gives people exposure to people with disabilities so that they can better understand." However, social media also "gives the opportunity for negative stereotypes for people with disabilities. It also gives the opportunity for people to be attacked or hurt."

Schmaltz therefore asserted that "the best thing to do is to eliminate those stereotypes, and to continually portray ourselves in the media as successful individuals that also have a disability so that people can begin to see that we're more than just these simple stereotypes." She added that "something that needs to be better understood in the media is that there are lots of ways to help people with disabilities that are different, but they're not wrong. People can be successful in their own way . . . and we have to be more accepting of those things that [some] people think are different or wrong and understand them."

During a Q&A session moderated by Kirtley, the panelists were asked about features and commercials airing during the Olympics depicting athletes "achieving a great deal despite their disabilities." Libin said, "This isn't easy . . . It's sometimes tough to strike exactly the right balance. It is possible to go too far toward inspiration. And verging on the sort of pity that I think we've heard [about] tonight is not the goal here." He continued, "I wouldn't want journalists to feel that this is just too tough for me to take on and I'm not going to try. We all make mistakes. The key is not to make the same mistakes

over and over again, and to learn from those mistakes when we make them, and to be open to feedback, to be willing to exhibit some transparency and talk about how we make our decisions so that we can learn from the response we get."

Tressel responded that "[i]t's commonplace to put people in ads that are meant to inspire. That's inherent in advertising." He emphasized that the best ads were those that avoided pandering, but instead were inspirational because of the stories they told. Tressel added, "However people get [to the Olympics or other athletic achievements], and whatever grit and determination they've got, I think is fair fodder for an ad."

McClure was asked about "the best way for a journalist to develop or approach sources in the disabled community in a respectful and inclusive way." McClure responded that journalists should "[t]alk to us like you talk to anybody else[.]. . . I'd have to say the broadcast media have gotten a lot better at approaching people and talking to people themselves instead of the leaders of the organizations. But just relate to people. If you're a good journalist, or you're trying to become a good journalist, read people and get on their level." She added, "Don't be afraid of us."

When asked about how the media can and should depict disabilities that may not be outwardly apparent to the naked eye, McClure said that "self-disclosure is number one[.]. . . Use your judgement as a journalist. But again, consider self-disclosure. I've known people who have been outed who have hidden disabilities and didn't want the world to know that they lived with a mental illness or they live with a learning disability. So it really is going to vary by the person, the situation, and self-disclosure."

Schmaltz responded, "Add to that, I think it's important that we create an open space where people can talk about this because if people are going to self-disclose themselves, they want to be in a place where they're accepted[.]"

The webinar also included clips from "The Real Story: Media Coverage of Disability Issues in Minnesota," a 2013 documentary exploring "the biases, stereotypes and misperceptions about people with disabilities in the media in the last 20 to 30 years," according to IMDb. The full documentary is available online at: https://vimeo.com/365053655.

A link to a video of the webinar is available online at: https://www.youtube.com/watch?v=g2i_38bMpX4. Silha Center activities, including the Silha Forum, are made possible by a generous endowment from the late Otto and Helen Silha.

— Scott Memmel
Teaching Assistant Professor

Save the Date!

Tuesday, October 25, 2022
7:00 pm at Cowles Auditorium
The 37th Annual Silha Lecture
Featuring

Robert Corn-Revere

Partner, Davis Wright Tremaine LLP (Washington, D.C.)

Robert Corn-Revere's latest book, *The Mind of the Censor and the Eye of the Beholder: The First Amendment and the Censor's Dilemma*, brings to life the absurdities of censorship and the dangers they pose to American liberty and democracy.

Based in Washington, D.C., Corn-Revere is a leading First Amendment and media law practitioner.

Formerly Chief Counsel to FCC Chairman James H. Quello, Corn-Revere served as chief counsel to CBS Broadcasting in the "wardrobe malfunction" case arising from the 2004 Super Bowl halftime show. He also argued *United States v. Playboy Entertainment Group, Inc.* before the U.S. Supreme Court, which struck down part of the Telecommunications Act of 1996 regulating adult cable television networks, and served as co-counsel in *United States v. Stevens*, in which the Supreme Court held that a federal statute prohibiting depictions of animal cruelty violates the First Amendment.

In 2003, Corn-Revere petitioned Governor George E. Pataki to grant the first posthumous pardon in New York history to the late comedian Lenny Bruce who was convicted for "obscene" comedy routines. As lead counsel to a group of Virginia citizens, Corn-Revere also successfully challenged a restrictive Internet policy at a public library in *Mainstream Loudoun v. Board of Trustees*.

Corn-Revere is co-author of a three-volume treatise published by West Group entitled *Modern Communications Law*.

More details coming soon!

SILHA CENTER
FOR THE STUDY OF MEDIA ETHICS & LAW

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