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Journalists Face Physical Violence, Other Dangers in the United States and Abroad

In the late spring and early summer of 2018, several journalists faced different dangers in the United States and abroad. On June 28, a gunman opened fire at a Maryland newsroom, killing five people and injuring two more. Several observers condemned the attack while others speculated that President Donald Trump's anti-press rhetoric may have influenced the shooting. On April 30, ten journalists were killed in Afghanistan, nine in a suicide bomb attack near the capital city of Kabul and one in a shooting in an eastern province. The attacks marked the deadliest day for journalists in Afghanistan since 2001 and added to the growing number of journalists being deliberately attacked or killed worldwide. On May 14, 2018, seven Palestinian journalists were injured by Israel Defense Force (IDF) gunfire during protests over the new U.S. embassy in Jerusalem and Israel's refusal to allow Palestinian refugees to return to their pre-1948 homes. On May 28, two U.S. journalists were killed after a tree fell and struck their SUV while covering severe weather in North Carolina, prompting renewed concerns from some observers about journalists covering hazardous and dangerous weather. Finally, on May 30, a Russian journalist and vocal critic of Russian President Vladimir Putin and the Kremlin appeared at a news conference one day after he had reportedly been shot and killed. Several observers and reporters criticized the ruse, which was meant to expose an assassination plot, as undermining the credibility of journalists in an era of combatting fake news, among other claims.

Five Newspaper Staff Members Killed, Two Injured in Shooting at Local Maryland Newsroom

On June 28, 2018, multiple media outlets reported that five staff members, including four journalists and a sales assistant, had been killed in a "targeted" shooting at the Annapolis, Md. newsroom of the *Capital Gazette*, which is owned by *The Baltimore Sun* and publishes online local newspapers *The Capital* and the *Maryland Gazette*. Multiple observers condemned the attack while others pointed to President Donald Trump's anti-press rhetoric as a possible cause of the shooting. Additionally, Fox News and a conservative provocateur drew criticism for their comments prior to and following the shooting.

According to *The New York Times* on June 28, a man armed with a shotgun and smoke grenades entered the *Capital Gazette* newsroom and opened fire, killing five employees of the newspaper and injuring two others. One hundred and seventy people were evacuated from the building by police. Wes Adams, the State's Attorney for Anne Arundel County, said the shooter barricaded a back door to the office, which prevented some staffers from escaping, according to *USA Today*. The victims included:

- Gerald Fischman, the editorial page editor for the *Capital Gazette* who had also been an editorial writer for the paper since 1992.
- Rob Hiaasen, an editor and a features columnist who was hired as the assistant editor of the *Capital Gazette* in 2010.
- John McNamara, who held several jobs in the *Capital Gazette* newsroom for over 20 years, including covering daily news in Bowie, Md., a town west of Annapolis.
- Rebecca Smith, a sales assistant at the *Capital Gazette*, who was hired in November 2017.
- Wendi Winters, a local news reporter for the *Capital Gazette*, who also wrote recurring columns such as "Home of the Week."

According to *The Washington Post* on June 29, law enforcement identified the suspect, Jarrod W. Ramos, using facial recognition technology after he hid under a desk when the police entered the newsroom and refused to cooperate with the authorities or provide his name. Officers placed the suspect's photo into the Maryland Image Repository System (MIRS), which matched it against tens of millions of photos from state drivers' licenses, offender photos, and an FBI mug shot database, according to the *Post*. The system identified the photo as Ramos, marking "the most high-profile use to date of MIRS, a cutting-edge and controversial tool that has been used by the Maryland State Police and other law enforcement agencies across the state since it launched in 2011." The *Post* noted that the system was previously used to monitor protesters in Baltimore following the death of Freddie Gray in 2015, prompting civil liberties advocates, including the American Civil Liberties Union (ACLU), to raise concerns about its potential use in conjunction with surveillance cameras in public areas and streets.

During the attack, several journalists in the newsroom sent live tweets about what was happening. Anthony Messenger, a summer intern, tweeted "Active shooter 888 Bestgate please help us." Crime reporter Phil Davis tweeted that the gunman had "shot through the glass door to the office" before opening fire on employees.

In a later interview with *The Baltimore Sun*, Davis compared the newsroom to a "war zone." He continued, "I'm a police reporter. I write about this stuff — not necessarily to this extent, but shootings and death — all the time.. . . But as much as I'm going to try to articulate how traumatizing it is to be hiding

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Silha Center Staff

Jane E. Kirtley
Silha Center Director and Silha Professor of Media Ethics and Law

Scott Memmel
Silha *Bulletin* Editor

Kirsten Nordstrom
Silha Research Assistant

Elaine Hargrove
Silha Center Staff

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under your desk, you don't know until you're there and you feel helpless."

On June 29, Ramos was charged with five counts of first-degree murder. NBC News reported that U.S. District Court for the District of Maryland Judge Thomas J. Pryal ordered that Ramos be held without bail, determining that he was a flight risk and a danger to the community. On July 20, several news outlets reported that a grand jury had indicted Ramos on the five counts of first-degree murder. On July 30, Ramos pled not guilty through a court filing, according to *The Baltimore Sun*. As the *Bulletin* went to press, no further announcements had been made regarding the case.

COVER STORY

The New York Times reported that after the attack, several law enforcement agencies, including the New York Police Department (NYPD) dispatched officers to provide extra security to local newsrooms. The NYPD told the *Times* that its decision to deploy officers to news organizations was not based on any specific threat, "but rather out of an abundance of caution until we learn more about the suspect and motives behind the Maryland shooting." According to the *San Diego Union-Tribune*, police officers were posted outside of the *Times*, *The Washington Post*, and the *Huffington Post*, among others.

In an interview with *USA Today*, Bruce Alexander, a security expert who previously worked at the Office of Antiterrorism Assistance at the U.S. Department of State, said it is common to take extra precautions in the aftermath of a shooting. "There [is] always the concern in the short period thereafter that other media institutions will become the target," Alexander said. "Other attacks might embolden people who might not have been predisposed to do it."

However, local police eventually concluded that the shooting was likely an "isolated attack" because Ramos "had a history with the newspaper," suggesting that he may have had "some type of vendetta against the [*Capital Gazette*]" and had "specifically targeted" the newsroom. In a statement following the shooting, William Krampf, acting chief of the Anne Arundel County Police Department, said, "This was a targeted attack on the Capital Gazette.. . . This person was prepared to shoot people. His intent was to cause harm."

In an interview with *The New York Times*, Tom Marquardt, a former executive editor and publisher at the *Capital Gazette*, said, "Jarrod Ramos has a long history of being angry and taking action against The Capital newspaper.. . . I said at one time to my attorneys that this was a guy that was going to come and shoot us. I was concerned on my behalf and on behalf of my staff that he was going to take more than legal action."

Several media outlets noted that in July 2012, Ramos had filed a defamation lawsuit in Maryland's Prince George's County Circuit Court against the *Capital Gazette*, its then editor and publisher, and a former reporter. According to the *Times*, Ramos claimed that his reputation had been damaged by a *Capital* story in July 2011 titled "Jarrod Wants to Be Your Friend," which detailed a harassment charge against Ramos by a former high school classmate. The article claimed Ramos called the woman "vulgar names and told her to kill herself." It also alleged that he emailed her company to try "to get her fired." The article is available online at: https://www.scribd.com/document/382833355/Jarrod-Wants-To-Be-Your-Friend. According to ABC News on July 1, 2018, Ramos filed a longer complaint a few months later, adding a charge of invasion of privacy.

The article was published just days after Ramos pled guilty to harassment and was sentenced to 18 months of supervised probation and was ordered to attend counseling. In March 2013, Ramos' defamation lawsuit was dismissed with prejudice by Judge Maureen M. Lamasney, who found that Ramos could not provide any false reports by the newspaper or how he had been harmed.

On June 29, 2018, *The New York Times* noted that Ramos had also made several "general threats" against the *Capital Gazette* over social media. According to Krampf, the threats "indicated violence."

Following the shooting, several observers condemned the attack. Gabrielle Giffords, the former Arizona congresswoman who was shot in the head by a gunman in 2011 during a campaign event, said in a statement, "Reporters shouldn't have to hide from gunfire while doing their jobs. A summer intern in the newsroom shouldn't have to tweet for help." Giffords also criticized lawmakers for not taking more actions to address mass shootings in the United States. "We shouldn't have to live in a country where our lawmakers refuse to take any action to address this uniquely American crisis that's causing so much horror and heartbreak on what feels like a daily basis."

The Society of Professional Journalists (SPJ) wrote in a June 28 tweet, "SPJ is deeply saddened by the reports from Annapolis, Maryland, that a shooter entered the Annapolis Capital Gazette building and shot several people. Our hearts go out to the victims and their family, friends and colleagues."

The U.S. Naval Academy tweeted, "The Capital Gazette is our local newspaper and is often the first to tell our story. We are grieving with their staff and loved ones after the tragic events that occurred today." Gov. Larry Hogan wrote in a tweet, "Absolutely devastated to learn of this tragedy in Annapolis.. . . Please, heed all warnings and stay away from the area. Praying for those at the scene and for our community."

Marquardt said in an interview with *The New York Times*, "Everyone left there stuck to their profession because they loved what they did.. . . To die like this is a tragedy that you can't fathom."

Although President Trump refused to answer questions about the shooting during a visit to Wisconsin on June 28, he wrote in a tweet, "Prior to departing Wisconsin, I was briefed on the shooting at Capital Gazette in Annapolis, Maryland. My thoughts and prayers are with the victims and their families. Thank you to all of the First Responders who are currently on the scene." He added at a June 29 event at the White House, "Journalists, like all Americans, should be free from the fear of being violently attacked while doing their job."

Nevertheless, several observers criticized President Trump's negative rhetoric towards the press as potentially provoking violence against reporters. Vox noted on June 28 that President Trump had routinely called the news media the "enemy of the people" and "fake news media." President Trump also drew criticism in July 2017 when he tweeted a video that portrayed the president wrestling a man whose head was superimposed with the CNN logo, raising concerns about violence against members of the media, which several observers contended had increased during Trump's presidency. (For more information about the video and several examples of journalists being physically restrained or arrested, see "Journalists Face Physical Restraints and Arrests; Trump Video Raises Further Concerns about Violence Against the Media" in the Summer 2017 issue of the Silha *Bulletin*.)

The Trump administration further raised concerns from journalists and media organizations on July 25, 2018 when several news outlets reported that the administration had "banned" CNN reporter Kaitlan Collins from a press availability with President

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Trump and Jean-Claude Juncker, the president of the European Commission, who were meeting in the Rose Garden of the White House. Earlier that day, Collins had asked several questions at a photo op of the two leaders in the Oval Office, during which she was representing all television networks as the "pool reporter." Among Collins' questions were "Did Michael Cohen betray you, Mr. President?" and "Mr. President, are you worried about what Michael Cohen is about to say to the prosecutors?"

According to CNN on July 25, Bill Shine, the deputy chief of staff for communications, called Collins into his office, where press secretary Sarah Sanders was also present. In an interview with CNN, Collins alleged that they said, "'You are dis-invited from the press availability in the Rose Garden today,'" and provided the reasoning that Collins had asked "inappropriate" questions and was "shouting." Collins stated that she responded by telling Shine and Sanders, "You're banning me from an event because you didn't like the questions I asked," to which the two responded, "[W]e're not banning your network. Your photographers can still come. Your producers can still come. But you are not invited to the Rose Garden today."

In a July 25 statement, CNN wrote, "Just because the White House is uncomfortable with a question regarding the news of day doesn't mean the question isn't relevant and shouldn't be asked.. . . This decision to bar a member of the press is retaliatory in nature and not indicative of an open and free press. We demand better."

To the surprise of some observers, Fox News president Jay Wallace came to the defense of Collins and CNN in a July 25 statement. "We stand in strong solidarity with CNN for the right to full access for our journalists as part of a free and unfettered press," he said. On the July 25 edition of Fox News' "Special Report," chief political anchor Bret Baier said, "As a member of the White House press pool, Fox stands firmly with CNN on this issue of access."

Numerous journalists and news organizations criticized the Trump administration's actions, including White House Correspondents' Association President Oliver Knox, who said, "This type of retaliation is wholly inappropriate, wrong-headed, and weak. It cannot stand.. . . Reporters asking questions of powerful government officials, up to and including the President, helps hold those people accountable." A list of tweets by additional organizations and journalists is available online at: https://www.huffingtonpost.com/entry/white-house-bans-cnn-reporter_us_5b58fc0fe4b0fd5c73cb677d.

The Hill noted on July 26 that previously, in a July 13, 2018 joint news conference with British Prime Minister Theresa May, President Trump refused to answer questions from CNN's Jim Acosta, calling CNN "fake news." President Trump instead turned to Fox News reporter John Roberts, who then asked a question, according to *The Washington Post* on July 13. In selecting Roberts to ask a question, President Trump called Fox News a "real network."

In a July 13 statement following the press conference, and amidst criticism that he did not come to the defense of Acosta, Roberts offered support to CNN. "In today's press conference, I paused while my colleague from CNN went back and forth with President Trump over a question," Roberts said. "I also used to work at CNN.. . . There are some fine journalists who work there and risk their lives to report on stories around the world. To issue a blanket condemnation of the network as 'fake news' is also unfair." (For more information on President Trump's relationship with the press and Sessions' comments, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue of the Silha *Bulletin*, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

On June 28, freelance journalist Lauren Duca tweeted, "The shooting today in the Capital Gazette newsroom in Annapolis, Maryland cannot reasonably be separated from the President's mission to villainize the press as 'the enemy of the American people.'"

Washington Post columnist Brian Klaas tweeted, "When is it time to take violence against journalists seriously? . . . We should wait for the facts about this horrific shooting in Maryland. My point is that violence against journalists — and incitement to violence against journalists — isn't an isolated incident under Trump."

In a June 29 opinion piece on his left-leaning "The Plum Line" blog, Greg Sargent questioned whether President Trump will "now refrain from heaping abuse and vitriol on reporters, and from whipping up his supporters into frenzies of rage at them?" Sargent contended that the shooting should "at a minimum . . . also dissuade Trump from *future* attacks on the media, since he should feel an obligation to do all he can to ensure that this grisly horror is not a harbinger of more to come" (emphasis in original).

However, NBC News reported on June 29 that there was "no immediate indication the shooting was connected to [President Trump's anti-press] rhetoric," pointing to Ramos' connections to the *Capital Gazette*. In a June 29 interview with *The Atlantic*, Marquardt acknowledged Ramos' issues with the paper and that little was known about his state of mind. However, he still pointed to the shooting as evidence of a broader willingness to commit acts of violence against the press. "You have a president who says that everything we do is 'fake news,' who has no compunction about disparaging the people whose assignment is to go out and report what he does, and who gives us token sympathy and prayers," citing President Trump's June 28 tweet. Marquardt added, "The fact that this happened in a newspaper is no coincidence."

Fox News also drew criticism following the shooting. In a June 28 tweet, *BuzzFeed News* reporter and editor David Mack wrote that Fox News "[said] they 'checked in on the ideological bent' of the Capital Gazette but decided it was 'very local' with no 'major ideological bent' — then acknowledge[d] they don't yet know if this is at all relevant to the motive."

In a June 28 post on *The Washington Post*'s "Erik Wemple" blog, Wemple asserted that the commentary was part of the "infernal period" in which there is a "cable-news information gap . . . after a mass shooting has been confirmed and before there's any firm information about just what happened." Wemple wrote, "As with so many other things that 'we certainly don't know,' it's best to simply not talk about such stuff while information is still in flux."

Controversial British right-wing commentator Milo Yiannopoulos also drew significant criticism stemming from comments he made two days before the shooting. On June 26, Yiannopoulos sent a text message to two reporters, *Observer* reporter Davis Richardson and *Daily Beast* reporter Will Sommer, saying, "I can't wait for the vigilante squads to start gunning journalists down on sight," according to *The Washington Post* on June 28.

The Hill reported on the same day that Yiannopoulos, after the shooting, insisted that he "wasn't being serious." In a Facebook post, Yiannopoulos wrote

that he "sent a troll about 'vigilante death squads' as a *private* response to a few hostile journalists who were asking me for comment" (emphasis in original). He continued, "Amazed they were pretending to take my joke as a 'threat,' . . . The bodies are barely cold and left-wing journalists are already exploiting these deaths to score political points against me. It's disgusting. I regret nothing I said, though of course like any normal person I am saddened to hear of needless death."

Despite the tragedy and outside commentary, the *Capital Gazette*'s staff "got to work covering their own story right away," according to *The Atlantic*. Shortly after the shooting, when asked by reporters if the *Capital Gazette* would publish a paper the following day, E. B. Furgurson III, a reporter, said, "Hell, yes," according to *The New York Times*. Reporter Chase Cook tweeted, "I can tell you this: We are putting out a damn paper tomorrow." Joshua McKerrow, a photographer, said, "Our newspaper is one of the oldest newspapers in the U.S.. . . It's a real newspaper and like every newspaper, it is a family. We will be here tomorrow. We are not going anywhere."

As promised, late on June 28, the *Capital Gazette* published its Friday edition. The *Capital Gazette*'s opinion page was left nearly blank, except for a tribute to the victims, which read, "Today, we are speechless. This page is intentionally left blank today to commemorate the victims of Thursday's shooting at our office." The *Capital Gazette*'s coverage of the shooting and biographies of the five victims are available online at: http://www.capitalgazette.com/news/for_the_record/bs-md-ramos-charges-20180629-story.html.

In a show of support for the staff members at the *Capital Gazette* newsroom, members of the *San Diego Union-Tribune* changed their social media avatars to an adaptation of an editorial cartoon by its cartoonist Steve Breen depicting a hat commonly associated with reporters in the mid-twentieth century with a piece of paper sticking out stating "Capital Gazette." The *Union-Tribune* encouraged its readers and others to also use the image to "stand with everyday journalists everywhere." Breen's full cartoon is available online at: http://www.sandiegouniontribune.com/opinion/steve-breen/sd-steve-breen-cartoon-6-29-18-20180628-photo.html.

Breen was among the panelists at "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30," a symposium held April 20-21, 2018, co-sponsored by the Silha Center for the Study of Media Ethics and Law, the AAEC, the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communication. (For more information on the symposium, see "Spring Symposium Marks the 30th Anniversary of *Hustler Magazine, Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

Additionally, *The New York Times* reported on July 5, 2018 that the American Society of News Editors and the Associated Press Media Editors released a statement asking newsrooms across the United States to hold a moment of silence at 2:33 p.m. on July 5, exactly one week after the attack, "to honor those who lost their lives and to show support to those who lost family, friends, co-workers and peers."

Ten Reporters and Photographers Killed in Single Day in Afghanistan, Marking One of the Deadliest Days Ever for Journalists

On April 30, 2018, Reuters and Reporters Without Borders (RSF) reported that nine journalists and photographers were killed in a suicide bomb attack in the Afghanistan capital city of Kabul. An additional journalist was shot and killed the same morning in the eastern city of Khost. It marked the deadliest day for journalists in Afghanistan since at least 2001, and one of the deadliest days ever for journalists worldwide.

On the morning of April 30, several journalists gathered in Kabul near the headquarters of the National Directorate of Security (NDS), Afghanistan's main intelligence agency, to cover a bomb blast that had killed several people during the morning rush hour. *The New York Times* reported that it was the first of two blasts in a two-stage attack targeting emergency workers and journalists. According to Reuters, the journalists were gathered in a group when a suicide bomber detonated his device near them, instantly killing seven and injuring several more. Two additional journalists later died at the hospital. In total, the two blasts killed 30 people and injured at least 49 more, according to CNN on May 1. The Committee to Protect Journalists (CPJ) and the local media organization TOLO News published the names of the journalists killed, which included TOLO News camera operator Yar Mohammad Tokhi; Shah Marai, a veteran chief photographer for Agence France-Presse (AFP) in Afghanistan; 1TV reporter and camera operator Ghazi Rasooli and Nowroz Ali Rajabi; local television channel Mashal TV journalists Saleem Talash and Ali Saleemi; and Mahram Durani, Ebadullah Hananzai, and Sabawoon Kakar, journalists at Azadi Radio, which is part of U.S.-backed Radio Free Europe/Radio Liberty.

Reuters reported that the bomber appeared to have deliberately targeted journalists by presenting a press card to local police in order to join the group standing near the first blast site. According to CNN, the bomber was "disguised as a TV cameraman." A branch of the jihadist group Islamic State claimed responsibility for the attack.

According to RSF, the suicide bombing was the deadliest single attack in Afghanistan since 2001. Reuters reported that the bombing was the worst attack on journalists in a single incident since 31 reporters and photographers were killed in a massacre in the southern Philippines in 2009.

The same morning, multiple news outlets reported that BBC Afghan service reporter Ahmad Shah, who also contributed to Reuters, had been shot and killed by unidentified gunmen in the outskirts of Khost. According to Reuters, there was "no indication of any direct link between the attacks in Kabul and Khost."

On April 30, RSF and CPJ both reported that the two attacks marked the deadliest day for journalists since the fall of the Taliban government in December 2001. CPJ also stated that April 30 was the worst single day for journalist killings since the 2015 *Charlie Hebdo* attack in Paris, France in which brothers Said and Cherif Kouachi forced their way into the offices of the satirical French newspaper and opened fire with assault rifles, killing 12 people and injuring 11 more. Among the victims were *Charlie Hebdo* editor and cartoonist Stephane Charbonnier, as well as cartoonists Jean Cabut, Bernard Verlhac, Georges Wolinski, and Philippe Honore. (For more information on the attack, see "Charlie Hebdo Attack Leaves Several Dead, Sparks International Debate on Limits of Free Speech" in the Winter/Spring 2015 issue of the Silha *Bulletin* and "Journalists Abroad Face Uncertain Legal Challenges; U.S. Television News Reporters Slain During Live Report" in the Summer 2015 issue.)

According to the Afghanistan Journalists Safety Committee, at least 80 journalists and media workers have been killed working in Afghanistan since 2001. RSF reported that 34 journalists and media workers have been killed since the start of 2016 in attacks by the Islamic State and the Taliban. Additionally,

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CPJ and the International Federation of Journalists (IFJ) reported on August 7 that 51 journalists and media workers had been killed in 2018, including a Maltese journalist on July 22, two Mexican journalists on July 24, and three Russian journalists on July 31. Eighty-two journalists and media professionals were killed in 2017, the lowest number since 2005, though CPJ deputy executive director Robert Mahoney cautioned in a May 3 BBC story that more journalists are being deliberately attacked and killed than in the past, rather than being caught in crossfire. Since 1992, nearly 2,000 journalists and media workers had been killed worldwide, according to CPJ.

In an April 30 statement, U.S. Secretary of State Mike Pompeo condemned the attacks. "The United States strongly condemns today's senseless and barbaric attack in Kabul that killed 29 people and wounded dozens more, including several brave journalists and media professionals," he wrote. "We extend our deepest condolences to the families and friends of the victims who were injured and killed, and we mourn all those who lost their lives." He continued, "The independent media is a cornerstone of democracy. Despite today's attack, the vibrant media landscape that has developed in Afghanistan will endure, in large part due to those journalists and media professionals who tragically died in today's attack, but whose courageous and steadfast work helped lay the foundation for Afghanistan's thriving and resilient independent media." Pompeo's full statement is available online at: https://www.state.gov/secretary/remarks/2018/281338.htm.

In a separate statement, Human Rights Watch wrote, "Killing journalists is an attack on freedom of expression.. . . Under the laws of war, deliberate attacks on civilians are war crimes. Posing as a journalist to carry out an attack is also perfidious, a war crime in which the attacker assumes civilian status."

CPJ executive director Joel Simon told CNN on May 1 that the Kabul bombing "was an attack on the global media." He added, "Five of the journalists killed worked for international media outlets," Simon said. "These are the journalists who keep the world informed. This is true in Afghanistan, but it's true in conflict zones around the world. It's a terrible loss for the people of Afghanistan, but it's a loss for everyone around the globe who cares about the news."

In a May 2 opinion piece for the *Columbia Journalism Review* (*CJR*), Simon also cited data from CPJ that 262 journalists had been imprisoned across the world in 2017, marking the highest total ever recorded by the organization. The country with the most imprisoned journalists was Turkey with 73. China had the second highest total with 41. The full list of imprisoned journalists and additional data is available online at: https://cpj.org/data/imprisoned/2017/?status=Imprisoned&start_year=2017&end_year=2017&group_by=location.

Israeli Gunfire Injures Seven Palestinian Journalists During Gaza Protests Amidst Deadliest Day in Region Since 2014

On May 14, 2018, the Palestinian Journalists Syndicate (PJS) and the Committee to Protect Journalists (CPJ) reported that seven Palestinian journalists were injured after the Israel Defense Force (IDF), the military forces of the State of Israel, opened fire during protests over Israel's refusal to allow Palestinian refugees to return to their pre-1948 homes and the opening of the new U.S. embassy in Jerusalem. On May 15, Reporters Without Borders (RSF) "formally asked the International Criminal Court [(ICC)] to investigate what it regards as war crimes by the [IDF] against Palestinian journalists" who were covering the protests in Gaza.

On March 30, 2018, the "March of Return" protests began with thousands of Palestinians calling for Israel to allow Palestinian refugees to return to homes that they had been forced to leave in 1948 during the establishment of Israel. The protests continued through May 14, the 70th anniversary of Israel's independence day, which Palestinians commemorate as their 'nakba,' or catastrophe of displacement, according to CPJ. The protests were also related to President Donald Trump's Dec. 6, 2017 decision to recognize Jerusalem as the capital of Israel and to officially open the U.S. embassy there, which took place on May 14.

On the same day, Israeli forces killed 59 Palestinian on the Gaza border, marking the deadliest day in the region since 2014, according to *The Washington Post* and *The New Arab*, a pan-Arab media outlet headquartered in London. Several journalists were also injured, according to local reports and CPJ, including Omar Hamdan, a camera operator for the state-owned Algerian Television; Mohammed Abu Dahrouj, a camera operator for the media production company Zain Media; Abdullah al-Shorbagi, a reporter for the local Hamas-affiliated Khan Younis Media Network; Farhan Hashem Abu Hadayd, a reporter for the local news website *Safad Press*; Yasser Qudeih, a freelance photographer for the Hamas-affiliated daily *Palestine*; Nihad Fuad, a reporter for the community radio station Forsan al-Erada; and Wael Dahdouh, a reporter for Al-Jazeera. Additionally, Mohammed al-Duwaik, a camera operator for Itehad Press, a local news agency, was hit by shrapnel from an explosive device detonated during the protests east of Gaza City.

According to CPJ, 22 journalists have been injured by IDF gunfire since the protests began on March 30. Additionally, two journalists, Ahmed Abu Hussein, who worked for Gaza's Al-Shaab radio station, and Yaser Murtaja, a cameraman for Palestinian Ain Media, later died from their injuries. On May 15, RSF announced that it had "formally asked the [ICC] to investigate what it regards as war crimes by the [IDF] against Palestinian journalists covering protests in Gaza since 30 March." In particular, the RSF raised concerns about "the direct shots that IDF snipers have fired at some 20 Palestinian journalists during the 'March of Return' protests in Gaza."

RSF secretary-general Christophe Deloire wrote, "The Israeli authorities could not have been unaware of the presence of journalists among the civilian demonstrators, and therefore failed in the elementary duty of precaution and differentiation when targeting these protected persons with live rounds." He continued, "These deliberate and repeated violations of international humanitarian law constitute war crimes. While referring them to the International Criminal Court, RSF calls on the Israeli authorities to strictly respect international law."

As the *Bulletin* went to press, the ICC had not announced any actions related to the RSF request.

Two Journalists Killed Covering Hazardous Weather

On May 28, 2018, several news outlets reported that two South Carolina journalists had been killed while covering severe storms and heavy rain in North Carolina. The deaths of the journalists raised renewed questions from observers

about journalists covering hazardous weather, namely "live shots" in hurricane and other dangerous conditions.

Mike McCormick, an anchor with WYFF News 4, the NBC affiliate in Greenville, S.C., and Aaron Smeltzer, a photojournalist at the station, were driving on Highway 176 near Tryon, N.C. when a tree fell on their SUV, killing the two men. Tryon Fire Chief Geoffrey Tennant told WYFF that the tree was three feet in diameter and had fallen because the ground was saturated by the heavy rain, causing the root system to fail.

According to the *Las Vegas Review-Journal* on May 29, a woman had died in a mudslide on May 19 in the same area, which had prompted officials to ask people living in or near the area to leave voluntarily. The storms McCormick and Smeltzer were covering were part of the subtropical storm Alberto, which made landfall on Florida's panhandle on May 28 and had previously killed four people in Cuba.

Tennant stated that he had "never seen an event like this one" in his 44 years of fire service in Polk County. "It is a freak of nature," he said. "You know it's going to happen, or you can predict that it may happen, you don't know when." Tennant added, "It personally affected me a little bit because I had done an interview with Mr. McCormick about 10 minutes before we got the call. And we had talked a little bit about how he wanted us to stay safe and I wanted him to stay safe and of course 10 or 15 minutes later we got the call and it was him and his photographer.. . . It's the first time I ever met either one of those two gentleman, but you feel a sense of responsibility to them."

In its May 29 story, WYFF wrote, "All of us at WYFF News 4 are grieving. We are a family and we thank you, our extended family, for your comfort as we mourn and as we seek to comfort the families of Mike and Aaron."

In a May 28 statement, North Carolina Gov. Roy Cooper wrote, "Two journalists working to keep the public informed about this storm have tragically lost their lives, and we mourn with their families, friends and colleagues."

The New York Times noted on May 28 that the deaths of the journalists brought to mind the "longstanding tradition of television crews standing in the middle of dangerous storms, in part to exhibit their unflinching desire to be on the scene for a significant event" but that the practice is "increasingly being questioned."

Previously, in September 2017, media coverage of Hurricane Irma, which made landfall in Florida, raised questions about reporters or meteorologists standing in dangerous conditions after videos of reporters standing in hurricane-strength winds circulated widely on social media, according to the *Times*. In one video, CNN's Kyung Lah was nearly struck by a falling street sign while covering the storm in Miami Beach and said, "If I didn't have this steel railing, I'd be flying," according to the *Huffington Post* on September 10. Several more videos are available online at: https://www.huffingtonpost.com/entry/reporters-covering-hurricane-irma_us_59b5adade4b0b5e53106e62b.

On the Sept. 10, 2018 edition of CNN's "New Day," co-anchor Christopher C. Cuomo said, "There is a strong argument to be made that standing in a storm is not a smart thing to do." In October 2012, *The Atlantic* published a story arguing against sending reporters out in hurricanes, in that case Hurricane Sandy, stating, "With few exceptions, there's no news value gained by putting broadcasters in gale force winds and tidal floods. It just adds drama to see their safety imperiled." Conor Friedersdorf, a staff writer at *The Atlantic* wrote that "[t]here are a lot of journalists I respect for putting themselves in harm's way – journalists who chronicle wars, report on conditions in refugee camps, challenge the lies of repressive political regimes, or otherwise gather information that wouldn't be disseminated save for risking their lives." However, he contended that standing in severe weather is different. "If standing in hurricanes for hours at a time were necessary to report on them, newspaper staffers would do it too. On TV, a camera mounted on a street corner might not be as entertaining. It might lack the drama of a human being in danger. But it would adequately convey all the newsworthy information."

Despite the danger, several reporters defended the coverage of Hurricanes Irma and Sandy. Sam Champion, a weather contributor for MSNBC, said on Sept. 10, 2017, "Everyone says, 'Well, look, if you're standing out in the storm, Sam, then how come I can't stand out in the storm?'" Champion added, "And what I'm going to tell you is we do this so you can see what it's like outside."

In a May 28, 2018 interview with the *Times*, CBS News correspondent Mark Strassmann also acknowledged the danger, but defended the practice, "I think it's a fair question: Why would you have reporters standing potentially in harm's way who are telling people to do exactly the opposite?" He continued, "Part of that is that television is all about visual proof.. . . You want to persuade people that what they're seeing is real and matters to them. And if they can see me standing out there getting knocked around, it'll convince them that they should not do the same thing."

In June 2016, Journalist's Resource, a project based at Harvard's Shorenstein Center on Media, Politics and Public Policy meant to "curate scholarship relevant to media practitioners, bloggers, educators, students and general readers," compiled a list of resources for reporters covering hurricanes and tropical storms, contending that a "journalist's role is critical when it comes to reporting on tropical storms and hurricanes. The public relies on news reports for the most up-to-date weather information as well as guidance on how to prepare and when to start preparing for dangerous conditions." The story continued, "In the midst of weather-related emergencies, government agencies look to news organizations for help quickly distributing details about evacuations, school closures, shelters, medical care, transportation, food and clean water." The list of resources is available online at: https://journalistsresource.org/studies/government/hurricanes-tropical-storms-emergency-management-journalism.

Dave Jordan, a reporter who worked with Smeltzer at WSPA-TV in Spartanburg, S.C., noted that the deaths of McCormick and Smeltzer differed from the reporters standing in hurricane-force winds, but conceded that they were still taking a risk by traveling to the scene of severe weather. "This was not a flash flood or a hurricane. Just rain and a tree falling on a car," he said. "You leave your house to cover a story, and it never occurs to you that you won't be coming back if it's in not a war zone or bad neighborhood or police activity."

Beth Brotherton, a former WYFF anchor who worked with McCormick added in a May 29 interview with *USA Today*, "You understand as a reporter . . . that things can happen, but you don't necessarily think about that being a risk.. . . It's hard to comprehend."

Russian Journalist Fakes Own Death to Stop Assassination Plot

On May 30, 2018, several news outlets reported that Arkady Babchenko, a Russian journalist and vocal critic of the Kremlin and Russian President Vladimir Putin, had walked into a news conference one day after he was reportedly shot and killed. Babchenko explained that his death had been staged as part of an elaborate police operation to expose an

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alleged assassination plot against him. Some observers and media advocacy organizations raised concerns about the ruse, calling it especially problematic in an era of combatting fake news worldwide.

According to *The New York Times* on May 30, Babchenko, a former war correspondent, fled Russia in February 2017 after he criticized the Kremlin and Putin in a Facebook post regarding Russia's military role in Syria and seizure of Crimea from Ukraine. The post led to a "nationalist campaign of intimidation against [Babchenko]," as well as threats of legal persecution and death. Babchenko had also previously been a vocal participant in the demonstrations against purportedly falsified Russian elections in 2011 and 2012, according to *The New Yorker* on May 30.

On May 28, Ukrainian officials announced that Babchenko had been shot three times in the back by an assailant who had waited on a staircase in Babchenko's apartment building. Officials also stated that Babchenko's wife, Olechka, had found him bleeding to death in their apartment, according to CNN on May 30. *The New York Times*, among other news organizations, had reported on May 29 that Babchenko had died on his way to the hospital, citing the police officials in Kiev, Ukraine's capital. According to the *Times*, Andriy Krishchenko, Kiev's police chief, said on Ukrainian television that "the first and most obvious" reason for the attack was Babchenko's "professional activities," namely his criticism of the Kremlin and Putin. Anton Gerashchenko, a Ukrainian adviser to the interior minister, stated that Ukrainian investigators would investigate "the actions of Russian intelligence agencies to get rid of those who are trying to tell the truth." The *Times* added that Babchenko's history made it seem like his death was "just the latest in a series of attacks, many of them fatal, on outspoken foes of President Vladimir V. Putin, both inside Russia and beyond."

At a May 30 news conference called by the Security Service of Ukraine (SBU) regarding the reported death of Babchenko, the 41-year-old journalist appeared. According to the *Times*, he said, "First of all, I would like to apologize that all of you had to live through this, because I know the horrible feeling when you have to bury your colleagues." He then apologized to his wife, who was unaware of the plot, according to NBC News, stating, "Separately, I want to apologize to my wife for all the hell she had to go through." He also addressed the reporters in the room, "I would like to apologize for what you all had to go through . . . because I've buried friends and colleagues many times, and I know it's a sickening-vomiting feeling when you have to bury your colleagues."

USA Today reported on May 30 that during the news conference, SBU head Vasily Gritsak and Babchenko explained their ruse. Gritsak and Babchenko claimed that Russian special services had allegedly paid an unnamed Ukrainian citizen, referred to only as "G," $40,000 to organize the killing of Babchenko. The SBU said that "G" then paid a potential gunman $30,000 to carry out the hit. The gunman was paid by the SBU to act as a double agent, faking the shooting in order to arrest the organizer, who had been apprehended, according to *USA Today.* Ukrainian authorities later released a video of security agents arresting "G." *The Washington Post* reported that killing Bachenko was part of a larger alleged plot by Russian security services in which "G" was supposed to procure large amounts of explosives and guns. According to *The Times* of London on June 1, Babchenko had hid in a mortuary still covered in pig's blood, which had been used to make his death more believable.

Several observers criticized the move by the Ukrainian Security Services, especially in an era of battling fake news. In a May 30 tweet, Reporters Without Borders (RSF) secretary-general Christophe Deloire wrote, "RSF expresses its deepest indignation after discovering the manipulation of the Ukrainian secret services, this new step of a war of information. It is always very dangerous for a government to play with the facts, especially using journalists for their fake stories."

The Committee to Protect Journalists (CPJ), said in a May 30 statement that it was relieved that Babchenko was alive, but that Ukrainian authorities "must disclose what necessitated the extreme measure of staging news of the Russian journalist's murder."

Harlem Desir, the representative on freedom of the media for the Organization for Security and Cooperation in Europe (OSCE), a European security and rights watchdog organization, wrote in a May 30 tweet that he was "relieved" that Babchenko was alive, but added, "I deplore the decision to spread false information on the life of a journalist. It is the duty of the state to provide correct information to the public."

Several independent Russian journalists were also critical of the stunt. "This is an embarrassing story; it's disgusting," wrote Ilya Krasilshchik, co-founder of the independent Russian news site Meduza, according to *The New York Times* on May 31. Andrei Soldatov, an investigative journalist who writes about the Russian secret services, said, "I'm glad he is alive, but he undermined even further the credibility of journalists and the media."

In a May 31 opinion piece for *The New York Times*, Julia Ioffe, a contributing writer for *The Atlantic*, contended that the ruse would have consequences beyond journalism. "Top Ukrainian officials who hadn't been in on the stunt had already raised Mr. Babchenko's murder at the United Nations, laying the blame at Russia's feet. What of their claim now? What of all their future legitimate claims?"

Ioffe quoted Tikhon Dzyadko, a journalist with the independent television channel RTVI, who had stated on May 29, "After Babchenko's stunt yesterday, it will be much harder to accuse Russian officials of anything," he said. "They will flaunt Babchenko as an example."

In the days following Babchenko's and SBU's ruse, Ukrainian journalists continued to face danger and imprisonment. On June 4, 2018, Reuters reported that Ukrainian journalist Roman Sushchenko had been sentenced by a Russian court to 12 years in prison. Sushchenko, who worked as a correspondent for Ukrainian state news agency Ukrinform, had been detained by Russia's FSB state security in 2016 and was later charged with and convicted of espionage, which he and his lawyer denied as being fabricated. On Aug. 6, 2018, the *Kiev Post* reported that the Russian Supreme Court would review Sushchenko's case in September.

On the same day, Radio Free Europe/Radio Liberty (RFE/RL) reported that the home of Kirill Vyshinsky, the director of Russian state-run news agency RIA Novosti-Ukraine, had been raided and ransacked by police, according to his attorney Andriy Domansky one day earlier. Vyshinsky, who has both Ukrainian and Russian citizenship, was being held by Ukrainian authorities on charges of treason after being detained on May 15 following a large-scale operation against RIA Novosti-Ukraine's staff members, according to RFE/RL. A Ukranian court ordered that Vyshinsky be kept in custody until Sept. 8, 2018.

As the *Bulletin* went to press, the litigation in both cases remained ongoing.

Scott Memmel
Silha *Bulletin* Editor

Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents

In the spring and summer of 2018, President Donald Trump's administration continued to target and prosecute leakers of government information, as well as individuals who took classified documents without authorization. On June 26, 2018, former National Security Agency (NSA) contractor Reality Winner changed her plea to guilty in the Trump administration's first prosecution of a leaker of classified documents under the Espionage Act. 18 U.S.C. § 793 *et seq.* On June 7, 2018, *The New York Times* reported that federal prosecutors secretly seized several years' worth of phone and email records of *Times* reporter Ali Watkins as part of an investigation into alleged classified leaks by former U.S. Senate aide, James A. Wolfe, who was arrested on June 7 on charges of lying to authorities. The seizure prompted significant criticism from media advocates and experts, who outlined several potential serious consequences. On May 15, 2018, *The New York Times* and *The Washington Post* reported that the U.S. government had identified a suspect in a March 2017 leak of Central Intelligence Agency (CIA) documents, the largest loss of confidential information in the agency's history. On June 18, federal prosecutors charged the suspect, former CIA and NSA contractor Joshua Adam Schulte, with 13 counts, including three under the Espionage Act.

LEAK INVESTIGATIONS

In December 2017 through the first half of 2018, President Trump's administration also targeted former government contractors or employees who took classified national defense information without authorization, including Harold T. Martin, a former contractor accused of stealing and hoarding thousands of documents from several government agencies. Martin offered to plead guilty to one count under the Espionage Act. A subsequent February 2018 order by a federal judge, who had not accepted the guilty plea, raised potential implications for other individuals charged under the Espionage Act, including those who leak classified documents to the media.

Former NSA Contractor Pleads Guilty to Violating the Espionage Act

On June 26, 2018, several news outlets reported that former Reality Winner, who was accused of leaking a classified National Security Agency (NSA) document to *The Intercept*, changed her plea to guilty, ending the Trump administration's first prosecution of a leaker under the Espionage Act, 18 U.S.C. § 793 *et seq.* Winner agreed to serve five years and three months in prison and to "never leak classified documents again."

Previously, on June 5, 2017, Winner was arrested on accusations of "removing classified material from a government facility and mailing it to a news outlet," which turned out to be *The Intercept*. The document was a classified report detailing two cyberattacks by Russia's Main Intelligence Agency (GRU) on a U.S. voting software supplier during the 2016 presidential election. *The Intercept* published a story based on the leaked document about an hour after Winner's arrest on June 5. The article is available online at: https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/.

On June 8, a federal grand jury in Savannah, Ga. indicted Winner on one count of "willful retention and transmission of national defense information" under the Espionage Act. According to a June 2017 statement by Assistant U.S. Attorney Jennifer Solari, Winner told Federal Bureau of Investigation (FBI) agents she was "mad about what she had recently seen in the media" and "wanted to set the facts right."

On June 9, 2017, Winner pled not guilty to the count under the Espionage Act. Winner faced 10 years in prison and/or a $250,000 fine if convicted under the Espionage Act. (For more information on the Winner case, see *Department of Justice Arrest of NSA Leaker Marks First Such Prosecution under Trump Administration* in "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue of the Silha *Bulletin*.)

On March 15, 2018, *Bloomberg* reported that Winner's trial had been delayed until October 2018. However, several news outlets reported on June 26 that Winner had accepted a plea bargain with prosecutors and pled guilty in federal court. According to NPR, Winner agreed to serve five years and three months in prison, as well as three years of supervised release. She also reportedly agreed "never to leak classified documents again." The court document showing Winner's change of plea is available online at: https://fas.org/sgp/news/2018/06/winner-change.pdf.

In a June 26 hearing in the U.S. District Court for the Southern District of Georgia, Winner told Chief Judge J. Randal Hall, "All of my actions I did willfully, meaning I did so of my own free will," according to *The New York Times* on the same day.

In an interview with the *Times*, Billie Winner-Davis, Winner's mother, said, "They're just coming down on her so tough.. . . I can only think that it's because she was the very first one: the one they wanted to make an example out of, the one they wanted to nail to the door as a message to others." She added, "She wouldn't have made this decision if she wasn't ready to accept the consequences and to accept responsibility."

The *Times* noted that Hall still had to decide whether to approve Winner's sentence, which was "unusually harsh for a leak case." On Aug. 23, 2018, several media outlets reported that Winner had been sentenced to 63 months in prison and three years of probation. Winner will also have to perform 100 hours of community service after being released. WBJF-TV, the ABC affiliate in Augusta, Ga., reported that the court also recommended that Winner be housed at the Federal Medical Facility in Fort Worth, Texas, or a similar facility, so she can receive mental health treatment. As the *Bulletin* went to press, the location had not yet been officially announced.

Previously, on March 28 and March 29, 2018, the U.S. Department of Justice (DOJ) National Security Division filed charges under the Espionage Act against Terry James Albury, a former

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Minneapolis FBI agent, marking the second such prosecution of an alleged leaker of government documents by the Trump administration. Between April 2016 and February 2017, the FBI identified "approximately 27 FBI and U.S. Government documents published online" by *The Intercept*, 16 of which were marked "classified." The FBI determined that the classified documents had been leaked by "someone with direct access to them," which included Albury, who had electronically accessed over two-thirds of the documents through FBI information systems. On April 17, 2018, Albury pled guilty to one count of "knowingly and willfully" disclosing information related to national security and one count of retaining national defense information. The Minneapolis *Star Tribune* reported on Aug. 4, 2018 that Albury's sentencing hearing was set for Oct. 18, 2018. As the *Bulletin* went to press, the hearing had not been held. (For more information on the prosecution of Albury, see *DOJ Charges Former Minneapolis FBI Agent under Espionage Act, Second Such Action by the Trump Administration* in "Federal Government Targets a Leaker and Backpage.com" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

Federal Prosecutors Seize Phone and Email Records of *New York Times* Reporter in Leak Investigation

On June 7, 2018, *The New York Times* reported that during a Federal Bureau of Investigation (FBI) investigation into alleged classified leaks by former U.S. Senate Select Committee on Intelligence (SSCI) director of security James A. Wolfe, who was charged and arrested in early June on three counts of lying to federal authorities, prosecutors secretly seized phone and email records of *Times* reporter Ali Watkins. The records spanned several years, including a period in which Watkins and Wolfe were dating. The revelations were met with criticism from media advocates and experts who called it an attack on the freedom of the press, a reflection of President Donald Trump's anti-media rhetoric, and a potential escalation of actions by President Barack Obama's administration's targeting of leakers, among other claims.

According to an indictment unsealed on June 7, the FBI's investigation into Wolfe and "multiple unauthorized disclosures of information to one or more members of the news media" began after several news outlets reported that Carter Page, President Trump's former campaign aide, had had contacts with Russian intelligence operatives, information that was previously only available in classified documents provided by law enforcement officials to the SSCI. *The Washington Post* reported on June 7 that Page had met with an FBI informant in July 2016 after returning from a trip to Moscow, prompting President Trump to call the meeting the beginning of a "Spygate" plot to implant a mole into his campaign. However, several politicians, news outlets, and court documents disputed that possibility.

In late October 2017, FBI agents met with Wolfe and notified him that they were investigating the "unauthorized disclosure of classified information that had been provided to the SSCI by the Executive Branch of the United States for official purposes" related to Page, though he was not named in the indictment. In December 2017, the agents conducted a "voluntary, noncustodial interview" with Wolfe. Prior to questioning, Wolfe was provided a "typewritten questionnaire . . . which contained blank lines to check indicating 'Yes' or 'No' answers as well as space to provide any requested explanation," according to the June 7 indictment. The questions generally pertained to Wolfe's communication with four reporters, including Watkins, who had published articles related to the classified SSCI information.

After Wolfe signed the questionnaire, the FBI agents further inquired about an article written by "Reporter #2," later revealed to be Watkins. Wolfe initially denied knowing the reporter's sources until the agents showed him a picture of himself and Watkins together. Wolfe then admitted, according to the indictment, that he had lied to the agents and that he had been in a relationship with her since 2014, though he maintained that he had never disclosed classified documents or information.

The indictment alleged that Watkins had published information in April 2017 related to Page after communicating with Wolfe, including through "82 text messages" and a March 17, 2017 "28-minute phone call." Around the April 3, 2017 publication of her article by *BuzzFeed*, where Watkins worked at the time, she and Wolfe "exchanged approximately 124 electronic communications," according to the indictment. Watkin's article is available online at: https://www.buzzfeed.com/alimwatkins/a-former-trump-adviser-met-with-a-russian-spy?utm_term=.ba1vyP6Vn#.widBzGmPq.

According to *The New York Times* on June 7, federal prosecutors learned this information after the U.S. Department of Justice (DOJ) seized Watkins' phone and email records during the investigation. The national security division of the U.S. attorney's office in Washington notified Watkins of the seizure in a February 2018 letter, which the *Times* learned of on June 7, 2018. According to the *Times*, prosecutors had "years of customer records and subscriber information from telecommunications companies, including Google and Verizon, for two email accounts and a phone number of hers," though they did not obtain the content of the messages. The *Times* noted that this was "the first known instance of the Justice Department going after a reporter's data under President Trump."

The *Times* also reported that Watkins was previously interviewed several times by the FBI while she worked for *BuzzFeed* and later *Politico* about claims that Wolfe had helped her with articles while they were dating. Watkins denied those claims in the interviews and also indicated that she had revealed to all three news outlets where she worked that she was in a relationship with Wolfe.

The indictment alleged that counter to his statements to FBI agents, Wolfe had "engaged in extensive contact with multiple reporters, including conveying to at least two reporters information" related to the alleged leaks, using "his personal cell phone, his SSCI-issued electronic mail account and anonymizing messaging applications, including Signal and WhatsApp." Wolfe was charged with three counts of "willfully and knowingly mak[ing] materially false, fictitious, and fraudulent statement[s] and representation[s] in a matter within the jurisdiction of the Executive Branch of the Government of the United States." Each count carries a maximum penalty of five years in prison, a $250,000 fine, and three years of supervised release. However, as the *Bulletin* went to press, Wolfe had not been charged under the Espionage Act, 18 U.S.C. § 793(e), for leaking the information. The full indictment is available online at: https://int.nyt.com/data/documenthelper/-wolfe-james-indictment-june-2018/2070aa7c6188a1042901/optimized/full.pdf#page=1.

On June 8, 2018, the *Los Angeles Times* reported that Wolfe was released without bail after appearing before U.S. District Court for the District of Maryland Magistrate Judge J. Mark Coulson on the same day. As the *Bulletin* went to press, no further announcements had been made regarding the legal proceedings.

Following the revelations that the DOJ had seized a journalist's phone and email records, several media experts and advocates criticized the move. Bruce Brown, executive director of the Reporters Committee for Freedom of the Press (RCFP), wrote in a statement that "[s]eizing a journalist's records sends a terrible message to the public and should never be considered except as the last resort in a truly essential investigation."

New York Times spokesperson Eileen Murphy stated in the *Times*' June 7 story, "Freedom of the press is a cornerstone of democracy, and communications between journalists and their sources demand protection." Ben Smith, the editor-in-chief of *BuzzFeed News*, said in a June 7 statement, "We're deeply troubled by what looks like a case of law enforcement interfering with a reporter's constitutional right to gather information about her own government."

In a June 9 interview with *Vox*, director of the Media Freedom and Information Access Clinic at Yale Law School David Schulz explained that there could be several consequences of the seizure, including that the "years' worth of records likely reference communications with a number of sources on a wide range of stories — information the government has no conceivable right to know.. . . The potential for misuse of the information is staggering and only compounds the need for an immediate accounting by the Department of Justice." (Schulz delivered the 29th Annual Silha Lecture, titled "See No Evil: Why We Need a New Approach to Government Transparency" on Oct. 16, 2014. For more on the lecture, see "29th Annual Silha Lecture Examines the Right to Access Government Information in the Wake of National Security and Privacy Concerns" in the Fall 2014 issue of the Silha *Bulletin*.)

However, the *Times* noted that the practice of DOJ investigators obtaining journalists' records was not new to the Trump administration and had occurred under President Barack Obama's administration, which pursued at least nine leak-related prosecutions, the most of any administration. For example, in May 2013, the DOJ notified the Associated Press (AP) that telephone records listing incoming and outgoing numbers of individual AP reporters, the general AP office numbers in New York, Washington, D.C., and Hartford, Conn., and the main number for AP reporters in the House of Representatives press gallery, had been obtained from the AP's telephone providers. The same year, the DOJ named Fox News reporter James Rosen as a co-conspirator during a leak investigation of a State Department official in order to obtain e-mails from Rosen's Google account. (For more information on the secret subpoenas of the AP, see "Justice Department Secretly Subpoenas Associated Press Phone Records" in the Winter/Spring 2013 issue of the Silha *Bulletin* and "Department of Justice Revises Guidelines for Investigating Journalists" in the Summer 2013 issue. For more information on the targeting of Rosen, see "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberty" in the Fall 2014 issue of the Silha *Bulletin*. For more on the Obama administration's prosecution of individuals under the Espionage Act, see "President Barack Obama Leaves Mixed Legacy on Government Transparency" in the Fall 2016 issue of the Silha *Bulletin*, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, "Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror" in the Winter/Spring 2013 issue, "Leaks: New Policies Emerge; Congress Gets Involved" in the Summer 2012 issue, "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue, "Judge Rebukes Government on Leak Prosecutions" in the Summer 2011 issue, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, and "The Media and the Military: Guantanamo Access Rules Loosened; Other Guidelines Set to Limit Leaks" in the Fall 2010 issue.)

> "Freedom of the press is a cornerstone of democracy, and communications between journalists and their sources demand protection."
>
> **— Eileen Murphy, *New York Times* spokesperson**

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

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

According to the *Times*, it was "not clear whether investigators exhausted all of their avenues of information before confiscating Ms. Watkins's information. She was not notified before they gained access to her information from the telecommunications companies." DOJ spokeswoman Sarah Isgur Flores said in a June 10 statement

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that the department had "fully complied" with its internal guidelines in deciding to seize Ms. Watkins's records." She added, "Leak investigations are absolutely intended to have a chilling effect on leaks.. . . That's a perfectly legitimate objective from the government's point of view. You don't want people to leak classified information."

Schulz argued that the regulations may not have been followed. He wrote, "[W]hy were so many years of records taken? [DOJ] regulations require that, in all cases and without exception, a subpoena for a reporter's telephone records must be 'as narrowly drawn as possible.'" He continued, "And why was no advance notice given to the reporter, so that a judge — and not a prosecutor alone — could decide whether the seizure would violate the constitutional protection of the press?"

In a June 8 interview with *The Washington Post*, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley also raised concerns about whether the regulations had been followed and argued that the DOJ should have been required to follow its regulations even though Watkins had been in a relationship with Wolfe. "A romantic relationship seems to be 'noise,' not substance," she said. "I don't see any exceptions in the [attorney general] guidelines for situations where the reporter has a multidimensional relationship with her source."

In a July 15 interview with *The Intercept*, Kirtley argued that prosecutors may use Watkins' personal conduct to make her motives and journalistic practices seem less honorable. "Because of the questions of her personal conduct, [prosecutors] are able to plant the seed that her motives were not honorable, maybe they were to advance her career. None of this is relevant from a legal perspective," Kirtley said. "[Prosecutors] don't want the reporter to be portrayed as seeking truth and reporting it to the public. They want to characterize her as someone lacking in morality."

Kirtley added in her *Washington Post* interview, "Certainly there are media ethics considerations here. It's hard to act independently, to use the [Society of Professional Journalists' (SPJ) code of journalism ethics] words, if you are romantically involved with a source. But from a purely legal perspective, I don't think it is relevant, based on what we know now." She continued, "I do think the [Justice Department] acts strategically. They bring cases where the law is unsettled but do so when they think other factors will influence judges and the public."

SPJ ethics committee chairman Andrew M. Seaman agreed. "SPJ's stance is that the code of journalism ethics are not and cannot be legally enforceable under the First Amendment to the U.S. Constitution," Seaman told the *Post*. "As a result, they should not be used against journalists or news organizations in legal actions or proceedings."

"Certainly there are media ethics considerations here. It's hard to act independently, to use the [Society of Professional Journalists' (SPJ) code of journalism ethics] words, if you are romantically involved with a source. But from a purely legal perspective, I don't think it is relevant, based on what we know now."

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

The *Times* argued in a June 10 story that seizing Watkins' records "backs [President] Trump's anti-press rhetoric," including a May 14, 2018 tweet in which President Trump wrote, "The so-called leaks coming out of the White House are a massive over exaggeration put out by the Fake News Media in order to make us look as bad as possible. With that being said, leakers are traitors and cowards, and we will find out who they are!" Additionally, Attorney General Jeff Sessions previously stated in August 2017 that the DOJ had "more than tripled" leak investigations compared to the Obama administration. In November 2017, he stated "We intend to get to the bottom of these leaks. I think it has reached epidemic proportions.. . . It cannot be allowed to continue, and we will do our best effort to ensure it does not continue."

The Trump administration further raised concerns on July 25, 2018 when several news outlets reported that the administration had "banned" CNN and "pool" reporter Kaitlan Collins from a press availability with President Trump and president of the European Commission Jean-Claude Juncker, who were meeting at the White House. (For more information on the banning of Collins, see *Five Newspaper Staff Members Killed, Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Dangers in the United States and Abroad" on page 1 of this issue of the Silha *Bulletin*. For more information on President Trump's relationship more generally with the press, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

Other observers expressed concern that the Trump administration would escalate the practices of the Obama administration. Smith said on a June 10 episode of CNN's "Reliable Sources," "This could be the beginning of an escalation. They could be looking at other reporters' phone records. We don't have any way of knowing that."

In a June 9 interview with *Vox*, Julian Sanchez, a senior fellow at the Cato Institute, stated that he "[didn't] think it can be argued that the DOJ is breaking fundamentally new ground here, in light of the subpoenas for phone records directed at the Associated Press and [other actions by] the Obama administration." However, he contended that the "scope of the information-gathering on Watkins seems quite extraordinary, . . . encompassing both telephone and email records reportedly stretching back . . . several years." Sanchez continued, "That strikes me as significant because it means they're not just getting a snapshot of what a reporter was working on at one particular moment, which is fraught enough, but in effect a detailed map of the source network she's built up over the whole of her career."

Alexandra Ellerbeck, the North America program coordinator for the Committee to Protect Journalists (CPJ), added in an interview with *Vox*,

"It's deeply alarming that the Trump administration has decided to build off of the worst of the Obama legacy on leak investigations and reporter source protection."

Prominent First Amendment attorney Floyd Abrams told *The New York Times* on June 10 that he was surprised the Trump administration had not seized a journalist's records sooner. He said that he "expected more than this torrent of rhetorical attacks on the press" because "[w]e've had other presidents who took action against the press.. . . But we've never had a president who was more publicly engaged in the denigration on a daily basis of the press, in attacking its product and its good faith." (Abrams delivered the 20th Annual Silha Lecture, titled "Confidential Sources of Journalists: Protection or Prohibition?" on Oct. 24, 2005. For more on the lecture, see "2005 Silha Lecture Features First Amendment Attorney Floyd Abrams" in the Fall 2005 issue of the Silha *Bulletin*.)

On June 24, 2018, the *Times* reported that Watkins' relationship with Wolfe was an affair and that she largely hid it from editors at *BuzzFeed*, the *Huffington Post*, *Politico*, and the *Times*. Additionally, the *Times* stated that the paper's officials were "examining [Watkins'] work history and what influence [her relationship with Wolfe] may have had on her reporting." The *Times* was also reviewing "her decision, on advice of her personal lawyer, not to immediately tell her editors about a letter she received in February informing her that her records had been seized." On July 3, *Mediaite* tweeted that the *Times* had reassigned Watkins. As the *Bulletin* went to press, the *Times* had not announced the results of its review.

Suspect Identified in Largest Leak of CIA Documents in History, Charged under the Espionage Act

On May 15, 2018, *The New York Times* and *The Washington Post* reported that the U.S. government had identified a prime suspect in a March 2017 leak of Central Intelligence Agency (CIA) documents, the largest loss of confidential information in the CIA's history. On June 18, several news outlets reported that Joshua A. Schulte, who formerly worked for the CIA and National Security Agency (NSA), was charged with 13 counts, including three under the Espionage Act, 18 U.S.C. § 793 *et seq*., in addition to previous charges for possession of child pornography.

In March 2017, WikiLeaks published over 8,000 documents exposing various types of software hacking programs, lines of computer code, malware, and viruses, among other tools, that the CIA could use to steal data from intelligence targets. In a March 7 press release, WikiLeaks claimed that the leak, known as the "Vault 7" leak, was "the largest ever publication of confidential documents on the [CIA]." The press release also included WikiLeaks' interpretations of many of the documents, prompting questions from experts about the organization's analysis of the information. Additionally, WikiLeaks announced that it was providing redacted technical details from the documents to technology firms in an effort to combat the CIA's exploitation of security vulnerabilities, though multiple companies appeared reluctant to partner with WikiLeaks. (For more information on the Vault 7 leak, see "WikiLeaks Publishes Documents Revealing CIA Hacking Tools, Faces Government Blowback" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

The New York Times reported on May 15, 2018 that one week after the documents were released by WikiLeaks, the Federal Bureau of Investigation (FBI) identified Schulte as a suspect. According to the *Times*, Schulte previously had an internship at the NSA while a student at University of Texas, Austin. He also worked for the CIA's Engineering Development Group, which designed the hacking tools used by its Center for Cyber Intelligence. Schulte left the agency in November 2016 to work for Bloomberg L.P. in New York City as a software engineer, as reported by the *Times*.

According to a search warrant application obtained by the *Times* and *The Washington Post*, Schulte was suspected of "distribution of national defense information," prompting FBI agents to search his Manhattan apartment in March 2017. Agents stated in court documents that they had retrieved "NSA and CIA paperwork" in addition to a personal computer, tablet, and phone, among other electronic devices. Schulte was prohibited from flying to Mexico on a previously planned vacation, according to the *Times*.

In August 2017, federal prosecutors charged Schulte with possession of child pornography after finding over 10,000 illicit images stored on a server Schulte had created while a student at the University of Texas in 2009. In an Aug. 23, 2017 sealed complaint in the U.S. District Court for the Southern District of New York, FBI Special Agent Jeff David Donaldson alleged three counts against Schulte. First, Donaldson asserted that Schulte "knowingly did receive and attempt to receive material that contains child pornography that had been mailed, and using a means and facility of interstate and foreign commerce shipped and transported in and affecting interstate and foreign commerce." Second, Donaldson alleged that Schulte "knowingly did possess and access with intent to view . . . a book, magazine, periodical, film, videotape, computer disk, and other material that contained an image of child pornography." Finally, Donaldson claimed that Schulte "did mail and transport and ship" child pornography, including via the Internet. The full complaint is available online at: https://www.courtlistener.com/recap/gov.uscourts.nysd.480183/gov.uscourts.nysd.480183.1.0.pdf.

According to a Dec. 7, 2017 letter to Southern District of New York Judge Paul A. Crotty from acting U.S. attorney Joon H. Kim, a grand jury returned an indictment against Schulte in September 2017 on all three counts. On September 15, Magistrate Judge Henry B. Pitman released Schulte on bail, but imposed "strict conditions including, among others, home incarceration with electronic monitoring and no use of computers or the Internet in the absence of express authorization from Pretrial Services."

However, in December 2017, the government obtained evidence that Schulte had used the Internet in violation of the bail agreement, including evidence from Schulte's internet service provider (ISP) that he had regularly logged into his email account and had accessed a "TOR" network, which allows for anonymous communications on the Internet via a global network of linked computer servers and multiple layers of data encryption. Kim summarily requested that Pitman "reconsider its bail determination and remand the defendant." Kim's full letter is available online at: https://www.courtlistener.com/recap/gov.uscourts.nysd.480183/gov.uscourts.nysd.480183.21.0.pdf.

The *Times* reported on May 15, 2018 that following Kim's letter, Schulte was detained and held at Metropolitan Correctional Center in Manhattan,

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Leakers, *continued from page 13*

where he remained throughout the first half of 2018. As the *Bulletin* went to press, Schulte remained at the facility.

In addition to the charges of child pornography, Schulte was charged in Loudoun County (Va.), where he lived when he worked with the CIA, with "(i) object sexual penetration, a felony, in violation Virginia Code Section 18.2-67.2; and (ii) the unlawful creation of an image of another, a misdemeanor, in violation of Virginia Code Section 18.2-386.1," according to Kim. The charges arose after federal prosecutors found a photograph on Schulte's phone that "depicted an unknown individual using his hands to sexually assault an unconscious female woman." According to the *Huffington Post* on May 15, 2018, prosecutors referred to the unnamed woman in an Aug. 24, 2017 court proceeding in the Southern District of New York as Schulte's friend and former roommate, and also alleged that the assault took place in Loudoun County. Additionally, during the proceeding, prosecutors said that Loudon County was conducting its own investigation and had confirmed that the pair of hands in the photo were Schulte's.

During the hearing, Schulte's previous lawyer, Kenneth Smith, asserted that "Virginia just didn't do anything in this case" and that state prosecutors were "just sitting back and waiting to see what happens" with the case and that the state had "no interest in Mr. Schulte." As the *Bulletin* went to press, no further announcements had been made regarding the charges in Virginia. The transcript of the August 24, 2017 court proceeding is available online at: https://www.courtlistener.com/recap/gov.uscourts.nysd.479525/gov.uscourts.nysd.479525.6.0.pdf.

In its May 15, 2018 story, *The New York Times* stated that "[i]t is unclear why, more than a year after he was arrested, [Schulte] ha[d] not been charged or cleared in connection with [the] Vault 7 [leak]." Assistant U.S. Attorney Matthew J. Laroche said in a Jan. 8, 2018 court proceeding that although "the government immediately had enough evidence" to make Schulte a "target of th[e] investigation," the investigation was ongoing and Schulte "remains a target of that investigation." The full transcript of the January 8 proceeding is available online at: https://www.scribd.com/document/379348294/Schulte-Transcript.

However, on June 18, 2018, a superseding indictment returned by a federal grand jury charged Schulte with 13 counts, including three under the Espionage Act in connection to the Vault 7 leaks. The charges under the Espionage Act included one count each of: "(i) illegal gathering of national defense information, (ii) illegal transmission of lawfully possessed national defense information, [and] (iii) illegal transmission of unlawfully possessed national defense information."

The indictment also included new charges for "unauthorized access to a computer to obtain classified information," "theft of Government property," "unauthorized access of a computer to obtain information from [the federal government]," and "causing transmission of a harmful computer program, information, code, or command." Additionally, Schulte was charged with "making material false statements to representatives of the FBI," and "obstruction of justice" during questioning over the Vault 7 leak. Finally, Schulte was charged with one count of copyright infringement. The charge came after Schulte allegedly made a computer network with thousands of copyrighted movies, television shows, and audio recordings available to the public, according to *Time* magazine on June 18. The full indictment, which also included the three previous counts of receipt, possession, and transportation of child pornography, is available online at: https://static01.nyt.com/files/2018/us/politics/cia-wikileaks-indictment.pdf?authuser=1.

According to *The Washington Post* on June 18, Schulte faced up to 135 years in prison. On June 20, NBC News reported that Schulte had pled not guilty to the charges. On June 28, *Bloomberg* reported that Schulte had asked Crotty in a 138-page handwritten bail application to free him from federal custody on bail while he awaited trial. Schulte asserted that he was "innocent" and an "entrepreneur being held criminally liable for the storage of other people's data in an astounding assault on the free markets and technology." He added, "The FBI, with reckless disregard for the truth and no oversight or accountability, have wrongfully attacked an American patriot who has served his country for years and even prevented terrorist attacks from this great city," Schulte wrote. As the *Bulletin* went to press, Crotty had not responded to the bail application.

In a June 18 statement released by the DOJ, Manhattan U.S. Attorney Geoffrey S. Berman wrote, "We and our law enforcement partners are committed to protecting national security information and ensuring that those trusted to handle it honor their important responsibilities. Unlawful disclosure of classified intelligence can pose a grave threat to our national security, potentially endangering the safety of Americans."

FBI assistant director-in-charge William F. Sweeney, Jr. wrote, "As alleged, Schulte utterly betrayed this nation and downright violated his victims. As an employee of the CIA, Schulte took an oath to protect this country, but he blatantly endangered it by the transmission of Classified Information." He continued, "To further endanger those around him, Schulte allegedly received, possessed, and transmitted thousands of child pornographic photos and videos. In an effort to protect this nation against crimes such as these, the FBI's Counterintelligence Division in New York will continue to keep our mission at the forefront of our investigations in protecting the American public."

In a June 18 interview with *The New York Times*, Schulte's new lawyer, Sabrina P. Shroff, who works for the federal public defender's office, said, "As the evidence is flushed out, it will become clear that Mr. Schulte is hardly the villain the government makes him out to be."

In a statement previously sent to *The Washington Post*, Schulte stated, "Due to these unfortunate coincidences the FBI ultimately made the snap judgment that I was guilty of the leaks and targeted me."

Prosecution of Former Government Contractor Raises Questions about Espionage Act Cases; Trump Administration Targets Two Additional Contractors

On Jan. 4, 2018 several media outlets reported that former government contractor Harold T. Martin, accused of removing and hoarding thousands of documents from several government agencies, had offered to plead guilty to one count of "willful retention" of a single National Security Agency (NSA) document regarding national defense information under the Espionage Act, 18 U.S.C. § 793(e), but would continue to face 19 additional felony counts related to other classified documents. However, on February 16, U.S. District Court for the District of Maryland Judge Marvin J. Garbis, who had not accepted

the guilty plea, raised new questions about charges under the Espionage Act, specifically the degree to which federal prosecutors must demonstrate that the defendant knew he or she had stolen or leaked a particular classified document. Additionally, in December 2017 and May 2018, President Donald Trump's administration targeted two other former government contractors accused of stealing classified information.

According to a Dec. 22, 2017 letter from acting U.S. attorney Stephen M. Schenning to Judge Garbis, Martin served on active duty in the U.S. Navy from 1988 to 1992, after which he served in the U.S. Naval Reserve through March 2000. From December 1993 to Aug. 29, 2016, Martin was employed by at least seven private companies as a contractor to components of the U.S. Department of Defense (DoD) and the U.S. Intelligence Community (USIC), including the NSA. Marin held high security clearance at various points through 2016 and signed several agreements agreeing to abide by the conditions of "handling, marking, transportation, and storage of classified materials" as revealing "Top Secret" information "could be expected to cause exceptionally grave damage to the national security of the United States."

Schenning alleged that beginning in the late 1990's, Martin took classified national defense information from several secure locations, and subsequently stored the documents at his residence, in his vehicle, and on his person. The "vast quantity of documents and other information" in hard copy and digital form amounted to over 50 terabytes of data and contained numerous classification markings. The documents spanned two decades and were related to a number of subject areas, but were primarily taken from the NSA. Among the documents was a "March 2014 NSA leadership briefing outlining the development and plans for a specific NSA organization," according to Schenning.

On Aug. 27, 2016, federal investigators executed search warrants of Martin's home. Martin voluntarily agreed to be interviewed by investigators the same day, initially denying that he had stolen classified documents. However, after being confronted with specific documents, Martin admitted to taking classified digital files and hard copy documents to his home and vehicle. According to *Politico* on Jan. 3, 2018, investigators initially suspected that Martin's removal of classified files from NSA headquarters led to a public disclosure of U.S. hacking tools by a group that refers to itself as the Shadow Brokers, though prosecutors could not prove a connection between Martin and the group, which is suspected of having ties to Russian intelligence, according to *The New York Times* on Jan. 3, 2018. Schenning's letter is available online at: https://www.politico.com/f/?id=00000160-bd19-da22-ad65-fffbab07000.

According to an August 29 criminal complaint, Martin was charged with "theft of government property" and "unauthorized removal and retention of classified materials." Prosecutors later added one count of "Willful Retention of National Defense Information" under the Espionage Act, which carried a maximum prison sentence of 10 years. On Feb. 14, 2017, *The Washington Post* reported that Martin had been indicted by a grand jury in Maryland. The full criminal complaint is available online at: http://apps.washingtonpost.com/g/documents/national/read-the-criminal-complaint-filed-against-government-contractor-harold-thomas-martin-iii/2174/.

On Jan. 3, 2018, *Politico* and *The New York Times* reported that Martin had offered to plead guilty to the charge under the Espionage Act. However, the *Times* noted that Martin would still face an addition 19 felony charges related to 12 additional NSA documents, five from the military's Cyber Command, one from the Central Intelligence Agency (CIA), and one from the National Reconnaissance Office, unless the U.S. Department of Justice (DOJ) dropped the charges.

In a short order on Feb. 16, 2018, Garbis, who had not accepted the guilty plea, further complicated the litigation, writing that he "[found] the need for a hearing addressing specifically what it is the Government must prove to establish the Defendant's requisite knowledge and/or intent." More specifically, Garbis stated that "[o]f course, the Government must prove that Martin possessed [the NSA document] without authority," but asked what the government "must . . . prove regarding Martin's knowledge of that possession? Must it prove that Martin knew that he possessed [the document]?" He further questioned, "What must the Government prove regarding Martin's specific knowledge of his possession of [the document]," pointing to the fact that Martin had possessed a large "pile of documents" and it would have been difficult for him to have knowledge of a "specific document." The order is available online at: https://www.politico.com/f/?id=00000161-d016-d933-a3e9-d7b705090001.

In its February 23 response to Garbis' order, the DOJ contended that it was not required to prove "whether the Government must prove that the Defendant knew that he possessed the specific documents listed in the Indictment, and whether he was aware that the contents of those specific documents constituted national defense information." The DOJ argued that such requirements "would be inconsistent with the statute and case law" and "would cause the absurd result that a defendant could avoid culpability merely by committing a crime of such magnitude that he could claim ignorance of the details." Instead, the DOJ argued that it only had to prove that "(1) the Defendant had unauthorized possession of the documents underlying the Indictment; (2) the documents underlying the Indictment contained information related to the national defense; and (3) the Defendant willfully retained the documents and failed to deliver them to the officer or employee of the United States entitled to receive them."

The DOJ also presented a hypothetical that an individual "[who] took [a] binder or box [labeled 'TOP SECRET'] home . . . would know that his or her retention of the documents within the binder or box was prohibited — and therefore would act willfully in retaining them — even if the individual did not examine the contents of the binder or box." The DOJ's full response is available online at: https://www.politico.com/f/?id=00000161-d018-d933-a3e9-d7b9120b0000.

On the same day, Martin also filed a response, contending that the government did, in fact, have to prove that he "knew he possessed the particular documents charged in the Indictment and . . . knew that those documents contained national defense information." The response argued that not requiring the government to meet these requirements "would mean that the government need not prove Mr. Martin's state of mind and would permit a conviction for possessing a pile of papers, some of which may contain [national defense information] and some of which may not."

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Leakers, *continued from page 15*

The response further asserted that the government must "prove [Martin] 'willfully' retained a document containing national defense information," meaning the DOJ must show that he acted with the "specific intent to do something the law forbids." The response stated that because "[t]he law does not forbid the mere retention of a document that Mr. Martin was not authorized to possess," the government would be required to show that Martin knew he had the specific document in question containing national security information out of the "pile of papers" he had accumulated. The full response is available online at: https://www.politico.com/f/?id=00000161-d018-d829-a37b-db7c98c70000.

As the *Bulletin* went to press, there were no further developments in the case.

In a Feb. 26, 2018 interview with *Politico*, Steven Aftergood, a classified information expert with the Federation of American Scientists, contended that the short order could have implications for future Espionage Act cases. "It's a fascinating and, for the prosecution, a rather alarming order from the court," he said. "It is partly a reflection of the notoriously confusing language of the Espionage Act. It may also reflect the court's unfamiliarity with, or skepticism towards, similar cases."

University of Texas law professor Stephen Vladeck told *Politico*, "There has not been a lot of really sophisticated litigation about the awkwardness of treating piles of information as being subject to the Espionage Act because of one piece of that pile.. . . It's a rare situation where the defendant has a plausible argument that he grabbed the wrong pile of documents." He added, "Even if Martin is able to get the judge to side with him, he's not out of jeopardy.. . . The reality is the Espionage Act is remarkably capacious, and I don't think this going to end well for Mr. Martin."

Also in December 2017, and through the first half of 2018, the Trump administration targeted two additional former government contractors, who both agreed to plead guilty to charges under the Espionage Act.

On Dec. 2, 2017, several media outlets reported that former NSA employee Nghia H. Pho pled guilty to one count under the Espionage Act of "willful retention of national defense information." According to a statement released by the DOJ on December 1, Pho was employed as a Tailored Access Operations (TAO) developer for the NSA beginning in April 2006, a group that "involved operations and intelligence collection to gather data from target or foreign automated information systems or networks and also involved actions taken to prevent, detect, and respond to unauthorized activity within Department of Defense information systems and computer networks." The DOJ asserted that Pho held various security clearances and had access to classified documents and information, especially given his involvement in several "highly classified, specialized projects."

> "Even if [Harold] Martin is able to get the judge to side with him, he's not out of jeopardy.. . . The reality is the Espionage Act is remarkably capacious, and I don't think this going to end well for Mr. Martin."
>
> **— Stephen Vladeck, University of Texas law professor**

In a Nov. 29, 2017 complaint in the U.S. District Court for the District of Maryland, the DOJ alleged that Pho removed and retained several hard copy and digital NSA documents between 2010 and 2015, storing them at his Maryland residence. The documents were classified as "Top Secret," "Secret," and "Confidential." The DOJ further alleged that Pho "knew the documents and writings contained classified information that related to the national defense" and was "never authorized to retain these documents and writings at his residence." Pho faced a maximum sentence of 10 years in prison. The full DOJ statement is available online at: https://www.justice.gov/opa/pr/maryland-man-pleads-guilty-willful-retention-national-defense-information. The full complaint is available online at: https://www.cyberscoop.com/nsa-employee-charged-nghia-pho-classified-information-kaspersky/.

According to *The New York Times* on Dec. 1, 2017, Pho saved the digital documents on his computer, which contained the antivirus software made by Kaspersky Lab, a top Russian software company, and Russian hackers were believed to have exploited the software to steal the documents. The *Times* noted that additional details of the case remained "super-sealed" and that it was not clear whether anyone at Kaspersky Lab was aware of the document theft. As the *Bulletin* went to press, the terms of Pho's plea agreement had not been released.

An additional case brought by the Trump administration under the Espionage Act targeted Reynaldo B. Regis, a former CIA employee and contractor, who pled guilty to removing and retaining classified information, as well as to lying to investigators on May 11, 2018. According to a May 11 statement by the DOJ, Regis was previously an employee and contractor at the CIA from August 2006 through November 2016, where he had access to classified national security databases. The DOJ alleged that during his tenure at the CIA, Regis copied classified information into approximately 60 notebooks that he stored in his home without authorization.

Additionally, the DOJ stated that in preliminary interviews with federal investigators, Regis had initially denied having copied the classified information, until the notebooks were discovered during a search of his home. Regis was summarily charged with "unauthorized removal and retention of classified materials, and making material false statements to federal law enforcement officers." Regis faced a maximum sentence of six years in prison, according to *Politico* on May 11.

In its May 11 statement, the DOJ announced that Regis had pled guilty on both counts. The DOJ's full statement is available online at: https://www.justice.gov/opa/pr/former-cia-contractor-pleads-guilty-illegally-retaining-classified-materials. The plea agreement is available online at: https://www.scribd.com/document/379013268/USA-v-Regis-Plea-Agreement.

U.S. District Court of the Eastern District of Virginia Judge Liam O'Grady accepted the plea of Regis and scheduled sentencing for Sept. 21, 2018. As the *Bulletin* went to press, Regis had not been sentenced.

Scott Memmel
Silha *Bulletin* Editor

U.S. Supreme Court Justice Anthony Kennedy Retires, Leaves Strong Legacy on First Amendment Jurisprudence, Mixed Legacy on Fourth Amendment

On June 27, 2018, U.S. Supreme Court Associate Justice Anthony Kennedy sent a letter to President Donald Trump announcing that he was retiring after 30 years on the Court. Justice Kennedy, who was nominated to the Court by President Ronald Reagan in 1987 and was sworn in on Feb. 18, 1988, wrote, "For a member of the legal profession it is the highest of honors to serve on this Court. Please permit me by this letter to express my profound gratitude for having had the privilege to seek in each case how best to know, interpret and defend the Constitution and the laws that must always conform to its mandates and promises." While on the Court, Justice Kennedy authored or joined several important opinions in significant First and Fourth Amendment cases. Observers contended that Justice Kennedy was a strong advocate for free expression, though his legacy on Fourth Amendment and privacy matters was more mixed.

SUPREME COURT NEWS

During his tenure on the Supreme Court, Justice Kennedy authored several majority and plurality opinions outlining key First Amendment and free speech protections. Perhaps his most notable opinion was in *Citizens United v. FEC* in which the Court struck down portions of the Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U.S.C. § 441b, a federal campaign finance law, because it impermissibly discriminated against the First Amendment rights of corporations to expressly support political candidates for political office. 130 S.Ct. 876 (2010).

Justice Kennedy wrote in his 5-4 majority opinion, "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.. . . Factions will necessarily form in our Republic, but . . . factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false." (For more information on *Citizens United*, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue of the Silha *Bulletin*.)

In 2012, Justice Kennedy wrote for a plurality of the Court in *United States v. Alvarez*. 132 S.Ct. 2537 (June 28, 2012). In the 5-4 ruling, the Court struck down the "Stolen Valor Act," a federal statute passed in 2006 which made lying about receiving military awards or medals, especially the Congressional Medal of Honor, a crime punishable by a fine and up to a year in jail. Justice Kennedy held that the government failed to meet its burden under the First Amendment to show "a direct causal link between the restriction imposed and the injury to be prevented." He added that "the remedy for speech that is false is speech that is true," not government suppression, even when the speech "can disparage, or attempt to steal, honor that belongs to those who fought for this nation in battle." (For more information on *Alvarez*, see "Supreme Court Strikes Down Stolen Valor Act" in the Summer 2012 issue of the Silha *Bulletin*.)

In 2017, Justice Kennedy delivered the opinion for a unanimous Court in *Packingham v. North Carolina*, in which the Court held that a North Carolina statute banning registered sex offenders from accessing a commercial social networking website that allows access to minor children violated the First Amendment. 137 S.Ct. 1730 (2017).

Justice Kennedy found that the statute failed to pass intermediate scrutiny because "the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens, [including the ability to] access to information and communicate with one another about it on any subject that might come to mind." He added, "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." (For more information on *Packingham*, see Packingham v. North Carolina *Strikes Down Law Barring Sex Offenders from Social Media Websites* in "U.S. Supreme Court Rules in Two Significant First Amendment Cases" in the Summer 2017 issue of the Silha *Bulletin*.)

Justice Kennedy was also the author of the unanimous opinion in *National Archives and Records Administration v. Favish* in which he held that the privacy rights of the family of a high-ranking White House official who committed suicide outweighed the public interest in disclosing photos taken during the government's investigation of the death. 541 U.S. 157 (2004). The court adopted an expansive interpretation of the government's ability to refuse to disclose documents under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which allows the government to deny requests for law enforcement records when dissemination "could reasonably be expected to constitute an unwarranted invasion of personal privacy." (For more on *Nat'l Archives and 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*, "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, and Brief for Respondent Allan J. Favish as *Amicus Curiae* Supporting Respondent, *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (No. 02-954) available at http://silha.umn.edu/assets/pdf/iocvfavishamicusbrieffinal.pdf.)

In a 2012 article for the *McGeorge Law Review* titled "Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis," University of California-Davis School of Law professor Ashutosh Bhagwat and then-Juris Doctor candidate Matthew Struhar wrote that Justice Kennedy had written majority opinions favoring several additional types of speech, including:

- Religious speech in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)
- Speech of government employees and contractors in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996)

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- Legal advocacy in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001)
- Commercial speech in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) and *Edenfield v. Fane*, 507 U.S. 761 (1993)
- Sexually explicit speech in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *United States v. Playboy Entertainment Group Ass'n*, 529 U.S. 803 (2000)

Bhagwat and Struhar argued that although their list was far from exhaustive, it confirmed that "unlike many of his colleagues, Justice Kennedy is an equal-opportunity defender of free speech, and does not play favorites among different kinds of speech." The full paper and explanations of the cases is available online at: http://www.mcgeorge.edu/Documents/Publications/06_Bhagwat%20et%20al_ver_01_5-18-12_FINAL.pdf.

Justice Kennedy also wrote several concurring opinions supporting First Amendment rights and protections. In the Supreme Court's 2017 case *Matal v. Tam*, Justice Kennedy, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, wrote that the Disparagement Clause of the Lanham Act of 1946, 15 U.S.C.A. § 1052(a), violated the First Amendment. The clause, which prohibits trademarks that "[consist] of or [comprise] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute," constituted viewpoint discrimination, which Justice Kennedy called "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny."

Justice Kennedy added, "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society." (For more information on *Matal*, see *Individuals and Organizations Have The Right to Utilize Potentially Disparaging Terms as Trademarked Names* in "U.S. Supreme Court Rules in Two Significant First Amendment Cases" in the Summer 2017 issue of the Silha *Bulletin* and "United States Supreme Court Set to Hear Oral Arguments on Disparaging Trademarks" in the Fall 2016 issue.)

In 2002, Justice Kennedy wrote a concurring opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765, 792 (2002), in which he agreed with the majority that the Minnesota Code of Judicial Conduct's prohibition of candidates for judicial office announcing views on legal or political issues was "an unconstitutional abridgment of the freedom of speech." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). However, Justice Kennedy went a step further and wrote that "content-based speech restrictions that do not fall within any traditional exception [to the First Amendment] should be invalidated without inquiry into narrow tailoring or compelling government interests." He added, "The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose."

Finally, Justice Kennedy also joined majority or dissenting opinions siding in favor of free speech protections. In 2011, he joined the majority opinion written by Chief Justice John Roberts in *Snyder v. Phelps*, in which the Court held that the First Amendment protects the "hurtful" picketing of military funerals by the Westboro (Kan.) Baptist Church. 131 S.Ct. 1207 (2011). Justice Roberts wrote that although the church's messages "may fall short of refined social or political commentary . . . the issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import." He therefore concluded, "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (For more information on *Snyder v. Phelps*, see "Supreme Court Ruling Protects Funeral Picketers" in the Winter/Spring 2011 issue of the Silha *Bulletin*.)

In 1992, Justice Kennedy joined Justice Antonin Scalia's opinion for the unanimous Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Court struck down a St. Paul, Minn. ordinance that criminalized the knowing display of symbols that "arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," finding that the government could not create viewpoint-based restrictions on certain subcategories of unprotected speech, such as "fighting words" expressing racism, even though the entire category of speech, such as "fighting words" as a whole, may constitutionally be regulated.

In 1989, one year after being sworn into the Court, Kennedy joined the majority opinion in *Texas v. Johnson* in which the Court held that the burning of an American flag constituted "expressive, overtly political . . . conduct" and was therefore protected by the First Amendment.

However, Justice Kennedy ruled in favor of greater restrictions on expression in some instances. In an Aug. 4, 2017 opinion piece for *Slate* magazine, David L. Hudson Jr., a co-editor of *The Encyclopedia of the First Amendment* and First Amendment ombudsman for the Newseum Institute First Amendment Center, wrote that Justice Kennedy's "worst anti-First Amendment decision" was *Garcetti v. Ceballos*, 547 U.S. 410 (2006) in which he created a categorical rule that "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." As a result, according to Hudson, public employees, who engage in official, job-duty speech, do not have First Amendment protection and may be fired for their speech, including if they are a whistleblower. Hudson quoted civil rights attorney Larry Watts who said, "Garcetti has effectively applauded official oppression, trimmed truth in the public workplace, and done so without moral or workplace-efficiency justification.. . . Garcetti is the greatest, judicial enemy of clean government I have seen in my 50 years at the Bar."

Justice Kennedy also sided against First Amendment protections in *Morse v. Frederick*. He joined the 5-4 majority, which found that a public high school principal did not violate a student's First Amendment rights when she punished the student for displaying a banner stating "BONG HiTS 4 JESUS" during an off-campus, school-sponsored event. 551 U.S. 393 (2007). (For more on *Morse*, see "In *Morse v. Frederick*, Court Places Limits on Student Expression" in the Summer 2007 issue of the Silha *Bulletin*.)

Despite *Garcetti* and *Morse*, multiple observers contended that Justice Kennedy was a strong advocate for freedom of expression. In a 2001 article for the *University of California, Los Angeles* (*UCLA*) *Law Review* titled "How the Justices Voted in Free Speech Cases, 1994-2000," Eugene Volokh, the Gary T. Schwartz Professor of Law at the UCLA School of Law, found that Justice Kennedy was the most speech-protective justice on the Supreme Court at the time, ruling in favor of free speech in 74.5% of cases. The full article is available online at: http://www2.law.ucla.edu/volokh/howvoted.htm#_ftn1.

In a July 2, 2018 piece for SCOTUSblog, Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law, wrote that Justice Kennedy "clearly saw himself as a strong advocate for freedom of speech and was part of many majorities protecting expression." Chemerinsky added that Justice Kennedy was part of an ideological shift regarding free speech by the Supreme Court. "Kennedy's time on the court also saw a transformation in ideology with regard to speech" he wrote. "Traditionally, it has been liberals who have been the strong advocates for speech and conservatives who have supported regulation. This, for example, was the pattern when the court considered efforts by the government to restrict speech that it saw as advancing communism or when it came to obscenity and the First Amendment." Chemerinsky continued, "Over the last 30 years, conservatives increasingly have taken a deregulatory approach to speech, as exemplified by their rulings to strike down campaign-finance regulations, while liberals at times have been more willing to allow restrictions to serve other important interests. Kennedy played a key role in this shift."

However, Chemerinsky noted that Kennedy was also "instrumental" in decisions by conservatives who "have sided with government regulations, particularly when the interests of the government have been at stake."

In a June 28, 2018 interview with *Legaltech News*, Mutchler Lyons partner Terry Mutchler expressed concern about First Amendment protections in a post-Kennedy court. "For me as a First Amendment lawyer, I felt like there was an earthquake under my feet," Mutchler said. "The practical reality is that Justice Kennedy stood in the breach between the First Amendment and the loss of significant privacy, both in terms of privacy, the digital age, the internet. I think that basically we need a legal Richter scale to measure the consequence of this, and I don't think that's an overstatement."

The *Legaltech News* story, written by reporter Gabrielle Orum Hernández, noted that Justice Kennedy had "a somewhat variable track record around how and where citizens can expect privacy in their technology." A July 5 *Washington Post* story agreed, contending that Justice Kennedy "leaves behind a varied legacy on privacy matters, siding with law enforcement in cases involving digital surveillance while also joining majorities in decisions that expanded privacy protections against unreasonable searches."

Justice Kennedy favored Fourth Amendment and privacy interests when he joined the unanimous Supreme Court in *Riley v. California* in which the Court held that "what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant." 134 S.Ct. 2477 (2014). (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

Justice Kennedy also joined the majority in *United States v. Jones*, in which five justices, though not all in the majority opinion, concluded that "longer term GPS monitoring in government investigations of most offenses impinges on expectations of privacy." 565 U.S. 400, 412 (2012). (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*.)

However, in a June 29, 2018 *Law360* story, reporter Allison Grande wrote that Justice Kennedy "regularly sided with law enforcement in disputes over whether crime-fighting tactics spurred by advances in technology crossed Fourth Amendment privacy lines." For example, Justice Kennedy joined Justice John Paul Stevens' dissent in *Kyllo v. United States* in which the majority found that law enforcement authorities violated the Fourth Amendment when they used a thermal-imaging device to determine the amount of heat that was emanating from a suspected marijuana grower's house. 533 U.S. 27 (2001). Justice Stevens argued that the case "involve[d] nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted[.]"

Additionally, Justice Kennedy filed a dissenting opinion in the Court's 2018 case *Carpenter v. United States* in which the majority held in a 5-4 decision that government actors need a warrant to obtain historical data from cell phone carriers detailing the movements of a cellphone user, known as cell site location information (CSLI). 585 U.S. ___, 138 S.Ct. 2206 (2018).

Justice Kennedy, joined by Justices Clarence Thomas and Samuel Alito contended that law enforcement should have access to such data because "[c]ell-site records . . . are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process." He further contended that the majority opinion "will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations." (For more information on *Carpenter*, see "U.S. Supreme Court Rules Law Enforcement Must Obtain Warrant To Access Individuals' Historical Cell Site Records" on page 34 of this issue of the Silha *Bulletin*.)

In a June 27, 2018 article for *Wired* magazine, staff writer Louise Matsakis contended that Justice Kennedy's stance in *Kyllo* and dissent in *Carpenter* were part of his jurisprudence in which he has "repeatedly declined to expand the Fourth Amendment to accommodate a broader view of privacy rights in light of developing surveillance technology." She added, "In several cases, he argued that newer forms of tech don't always change how the Fourth Amendment should be interpreted."

Matsakis quoted Joshua Matz, a former law clerk to Justice Kennedy, who said, "He did not always embrace a broad view of privacy rights, and dissented from a number of the court's major Fourth Amendment rulings, including the recent decision in Carpenter. But he understood in a profound way that striking the right

Kennedy, *continued on page 20*

Federal Courts and State Governors Deal with First Amendment Implications of Politicians Blocking Social Media Users

In the spring and early summer of 2018, two federal judges reached different rulings in cases raising First Amendment questions about politicians blocking social media users. On May 23, 2018, U.S. District Court for the Southern District of New York Judge Naomi Reice Buchwald held that President Donald Trump had engaged in viewpoint discrimination in violation of the First Amendment by blocking Twitter users who had previously criticized him or his policies. Conversely, on March 30, 2018, U.S. District Court for the Eastern District of Kentucky Judge Gregory Frederick Van Tatenhove ruled that Kentucky Gov. Matt Bevin had not violated the First Amendment when he blocked individuals on his official Facebook and Twitter accounts, finding that the accounts were not subject to forum doctrine and that Bevin did not suppress speech by blocking users.

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Meanwhile, on April 2, 2018, several news outlets reported that Maryland Gov. Larry Hogan had reached a settlement with the American Civil Liberties Union (ACLU) of Maryland after the organization filed a lawsuit in August 2017 alleging that the governor and his staff had blocked users from his official Facebook page and deleted their comments after they criticized the governor or his policies.

Buchwald's and Van Tatenhove's rulings were not the first to address the First Amendment implications of politicians blocking social media users. On July 25, 2017, U.S. District Court for the Eastern District of Virginia Judge James C. Cacheris ruled in favor of plaintiff Brian Davison, finding that Phyllis Randall, Chair of the Loudoun County (Va.) Board of Supervisors, had engaged in viewpoint discrimination in violation of the First Amendment and the Virginia Constitution after she blocked Davison from her public Facebook page. *Davison v. Loudoun County Board of Supervisors*, 267 F.Supp.3d 702 (E.D. Va. 2017). The Knight Institute announced on May 2 that it was representing Davison as the case proceeded to the U.S. Court of Appeals for the Fourth Circuit. As the *Bulletin* went to press, the Fourth Circuit had not ruled in the case. (For more information on *Davison v. Randall*, see *Twitter Users Critical of President Trump are Blocked by the President, Raising First Amendment Concerns* in "President Trump and His Administration Spark Debate Over Media Law Issues" in the Summer 2017 issue of the Silha *Bulletin*.)

Federal Judge Rules President Trump Cannot Block Twitter Users, Violated First Amendment

On May 23, 2018, U.S. District Court for the Southern District of New York Judge Naomi Reice Buchwald ruled that President Donald Trump and Daniel Scavino, the White House Director of Social Media and Assistant to the President, had violated the First Amendment by blocking Twitter users who had criticized the president or his policies. *Knight First Amendment Institute v. Trump*, 2018 WL 2327290 (S.D.N.Y. 2018). Previously, in a March 8 hearing, Buchwald suggested that the case could be settled if President Trump "muted" Twitter users, rather than blocking them. Several media lawyers and experts praised the ruling, calling it a significant victory for free speech in the digital age, while some questioned the extent to which the ruling would affect other government officials' decisions to block social media users.

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

Kennedy, *continued from page 19*

balance between privacy and other values is essential to the flourishing of American democracy." Matz noted Justice Kennedy's majority opinion in *City of Ontario v. Quon* in which he ruled that "it does not violate a person's Fourth Amendment rights for a workplace to monitor text messages sent on a company-owned device," but was also "careful to ensure his ruling was narrow, allowing for future cases to be interpreted differently." 560 U.S. 746 (2010).

On July 9, 2018, President Trump nominated U.S. Court of Appeals for the D.C. Circuit Judge Brett Kavanaugh, Justice Kennedy's former law clerk, to fill the vacant seat on the Court. As the *Bulletin* went to press, Kavanaugh had not been confirmed by the U.S. Senate.

On the same day, *Politico* reported that President Trump "emerged from [a] private meeting with [Justice Kennedy]" after the justice retired "focused on one candidate to name as his successor: Judge Brett Kavanaugh." *Politico* further alleged that President Trump, although he "helped stoke anticipation by interviewing . . . other contenders" and "dispatched his top lawyers to comb though Kavanaugh's rulings and quizzed allies about whether he was too close to the Bush family," President Trump "was always leaning toward accepting Kennedy's partiality for Kavanaugh while preserving the secret until his formal announcement" on July 9. The story clarified that President Trump "was taken with Kavanaugh even before his conversation with Kennedy" but that Kennedy "[left] the impression with Trump that Kavanaugh would be a great candidate for the job, helping the president make up his mind."

Scott Memmel
Silha *Bulletin* Editor

On July 11, the Knight Institute filed a complaint seeking declaratory and injunctive relief in the Southern District of New York after President Trump or his aides failed to unblock several Twitter users. In addition to the Knight Institute, the individual plaintiffs included Twitter users Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas, all of whom had criticized President Trump or his policies before being blocked. The defendants named in the initial lawsuit were President Trump, Scavino, Hope Hicks, who was then the White House Communications Director, and White House Press Secretary Sarah Huckabee Sanders. The U.S. Department of Justice (DOJ) represented the defendants.

Media experts and observers identified multiple issues with the lawsuit, including whether the First Amendment applied to President Trump's personal Twitter account, whether President Trump had engaged in viewpoint discrimination, and whether individuals blocked by President Trump have alternative ways to see his tweets and to express their views, among other concerns. (For more information on the Knight Foundation's letter and lawsuit, as well as the debate amongst media experts and observers, see *Twitter Users Critical of President Trump are Blocked by the President, Raising First Amendment Concerns* in "President Trump and His Administration Spark Debate Over Media Law Issues" in the Summer 2017 issue of the Silha *Bulletin*.)

On March 8, 2018, Reuters reported that during a hearing in which Buchwald considered whether to grant President Trump's request to dismiss the lawsuit, she encouraged both parties to settle the case. Buchwald suggested that President Trump could "mute" Twitter users rather than block them in order to resolve the legal dispute. On its "Help Center" webpage, Twitter states that "[m]ute is a feature that allows you to remove an account's Tweets from your timeline without unfollowing or blocking that account. Muted accounts will not know that you've muted them and you can unmute them at any time." One key difference from blocking is that muted accounts can still follow and send direct messages to the account that muted them, according to Twitter. CNN reported on March 8 that Buchwald asked, "Why are we here? Don't we have a solution that serves the interests of the plaintiffs, serves the interests of the president?" She also encouraged both parties to "consider [her] earlier suggestion" and added, "It might be better to resolve it in a practical fashion."

Following the hearing, Katharine Fallow, an attorney for the plaintiffs, stated that muting could be a potential solution. "We have made our arguments that this is an official account the president uses in an official capacity and that him blocking people simply because they criticize him is viewpoint discrimination that violates the First Amendment," Fallow said according to CNN. "As to the muting, I think that is an option. That is much less restrictive and burdensome on the plaintiffs' speech rights."

Philip Cohen, one of the plaintiffs who had been blocked by President Trump, stated that he was not convinced muting would be a proper solution. "I don't know if muting is really the solution, but if all they really care about, which they say, is that he just doesn't want to hear from us, then he would mute, but obviously he wants to suppress our speech," Cohen said. Conversely, Nick Pappas, another plaintiff in the case, was more optimistic about Buchwald's proposal. "I think that would be a great solution for me," Pappas said. "I never thought that Trump would be reading my tweets. It was never my point. I wanted other people to read my tweets, other citizens to read my tweets. So as long as they can read them, I would be completely fine with him never hearing anything I say."

On May 23, 2018, Buchwald ruled in favor of the Knight Institute, finding that President Trump and Scavino, by blocking Twitter users who criticized the president or his policies, had engaged in viewpoint discrimination in violation of the First Amendment. Buchwald first addressed the standing and jurisdictional questions in the case, finding that President Trump's blocking of the plaintiffs' accounts created "a number of limitations on the individual plaintiffs' use of Twitter," including that they could not "view the President's tweets; directly reply to these tweets; or use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets while they are logged in to their verified accounts." She added that "as long as the individual plaintiffs remain[ed] blocked, their ability to communicate using Twitter [would] continue to be . . . limited."

Buchwald held that these limitations were "cognizable injuries-in-fact" and were "concrete and particularized" as required by the U.S. Supreme Court in *Spokeo, Inc. v. Robins* for plaintiffs to have Article III standing under the U.S. Constitution. 136 S.Ct. 1540 (2016). (For more information on *Spokeo, Inc. v. Robins*, see "Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Court Splits on Article III Standing Bar Following Spokeo in the Summer 2017 issue of the Silha *Bulletin*, "Supreme Court Issues Long-Awaited *Spokeo* Ruling" in the Summer 2016 issue, and "U.S. Supreme Court Accepts Review of *Robins v. Spokeo, Inc.*" in the Summer 2015 issue.)

Buchwald further found that the individual plaintiffs and the Knight Institute had satisfied the "causation and redressability elements" to have standing in the case against President Trump and Scavino, but found that the plaintiffs had not established standing against Sarah Huckabee Sanders because she "does not have access to the @realDonaldTrump account." Buchwald granted summary judgment in favor of Sanders, but allowed the case to move forward against President Trump and Scavino. Because Hicks had left her position as White House Communications Director, Buchwald also granted summary judgment in her favor. On July 5, 2018, President Trump named former co-president of Fox News Channel and Fox Business Network Bill Shine as the new Communications Director.

Buchwald then turned to "the First Amendment's application to the distinctly 21st century medium of Twitter" and "whether a public official's blocking of the individual plaintiffs on Twitter implicates a forum for First Amendment purposes." First, Buchwald considered whether "the speech in which the individual plaintiffs seek to engage 'is speech protected by the First Amendment.'" She found that the plaintiffs were seeking to engage in political speech, namely "speech on matters of public concern," which "fall[s] within the core of First Amendment protection."

Second, Buchwald addressed the applicability of forum doctrine, namely whether President Trump's Twitter account represents a public forum, which requires that the space "be owned or controlled by the government." Additionally, the application of forum doctrine must "be consistent with the

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purpose, structure, and intended use of the space."

Regarding the first requirement, Buchwald found that "[although] Twitter is a private . . . company that is not government-owned, the President and Scavino nonetheless exercise control over various aspects of the @realDonaldTrump account," particularly "the content of tweets, the timeline comprised of the account's tweets, and the interactive space of each tweet." Thus, she found that President Trump and Scavino "can, and do, exercise control over aspects of the @realDonaldTrump account . . . sufficient to establish the government-control element."

Buchwald added that the control is "governmental" because the account is presented as being "registered to Donald J. Trump, '45th President of the United States of America, Washington, D.C.,'" his tweets "are official records that must be preserved under the Presidential Records Act," and the account was used in the appointment of officers and in foreign policy. For these reasons, @realDonaldTrump is a "presidential account," not a "personal account," even though that was its original purpose, according to Buchwald.

Turning to the second requirement, Buchwald found that the "*content* of [President Trump's] tweets" (emphasis in original) was not subject to forum analysis because the content is "solely the speech of the President or of other government officials," making it "government speech," which is not protected by the First Amendment. However, Buchwald ruled that "the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account" (interactive space) constitutes a public forum because individual tweets sent by others users are "private" and "political" speech. She contended that the ability to interact directly with tweets "cannot be completely reestablished, and that ability – i.e., access to the interactive space – is therefore best described as the access that the individual plaintiffs seek."

Third, Buchwald concluded that the interactive space is not a "traditional public forum" because "[t]here is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter." However, Buchwald found that the interactive space is a "designated public forum" because it is "generally accessible to the public . . . regard[less] of political affiliation" and is "designed to allow users 'to interact with other [users.]'" Thus, Buchwald held that the interactive space "accommodates a substantial body of expressive activity."

> "While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him."
>
> **— Judge Naomi Reice Buchwald, U.S. District Court for the Southern District of New York**

Fourth, Buchwald ruled that President Trump's blocking of Twitter users constituted viewpoint discrimination, finding that President Trump had blocked users shortly after they had criticized him or his policies. She wrote, "While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him."

Additionally, Buchwald discussed the differences between muting and blocking, which she had also raised at the March 8, 2018 hearing. She stated that blocking "goes further" than muting because a Twitter user's reply to a tweet by President Trump is seen not only by the president, but also by others who would otherwise be able to see and reply to the tweet had the user not been blocked.

Finally, Buchwald turned to the appropriate remedy to be afforded to the individual plaintiffs. She concluded, "Because no government official is above the law and because all government officials are presumed to follow the law once the judiciary has said what the law is, we must assume that the President and Scavino will remedy the blocking we have held to be unconstitutional." Buchwald's full decision is available online at: https://knightcolumbia.org/sites/default/files/content/Cases/Wikimedia/2018.05.23%20Order%20on%20motions%20for%20summary%20judgment.pdf.

In a May 23 statement, Jameel Jaffer, the Knight Institute's executive director, praised the ruling. "We're pleased with the court's decision, which reflects a careful application of core First Amendment principles to government censorship on a new communications platform," he said. "The president's practice of blocking critics on Twitter is pernicious and unconstitutional, and we hope this ruling will bring it to an end."

In a May 25, 2018 interview with *MinnPost*, Christopher Terry, a media law professor at the University of Minnesota's Hubbard School of Journalism and Mass Communication, explained the significance of the ruling. "If there's anything notable about this decision it's the declaration that Twitter, and by extension, other forms of social media, [can] constitute a public forum," he said. "I think the muting and blocking distinction is going to be big in future cases.. . . They're saying it's not that you, in the case of being Donald Trump, have to listen to these people, but you also can't, at the same time, shut them off from access to what constitutes an official form of communication from the government." Terry added that it would be "interesting to see" whether more government officials start posting personal and official business on separate social media accounts.

Josh Geltzer, executive director of Georgetown Law's Institute for Constitutional Advocacy and Protection, argued that Buchwald's ruling was a critical victory in preserving free speech online. "The court's thorough decision recognizes that the President's use of @realDonaldTrump on Twitter makes it the type of public forum in which the government may not, under the First Amendment, silence its critics," he said in a May 23 statement.

In a May 23 interview with *Bloomberg*, Clay Calvert, the Brechner Eminent Scholar of Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida College of Journalism and Communications, called the ruling a "groundbreaking decision." He added,

"It establishes that social media accounts operated by a government official — even the president of the United States — constitutes a public forum."

Fallow wrote in the Knight Institute's statement that the decision "should guide all of the public officials who are communicating with their constituents through social media," according to CNN on May 23.

However, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley told *MinnPost* in a May 25 email that the ruling may not mean that all elected officials' Twitter feeds are public fora. She pointed out that President Trump, as president, is the leader of the executive branch, his administration had declared that his tweets represent official statements, the White House staff sometimes manages his account, and that the DOJ defended him in the case. "Change any of those facts, and the result could be different," Kirtley wrote.

In a May 31 piece for *Law360*, Lyrissa Lidsky, dean of the University of Missouri School of Law, wrote that there are limits to Buchwald's ruling. "It is important to understand the limits of this decision," she wrote. "The contents of Trump's tweets are government speech, and this decision does not alter that. Moreover, the decision does not bar government officials from personal use of social media; only 'state action' violates the First Amendment. Likewise, celebrities or others who are not government actors may block or mute critics at will." She continued, "[I]t is important to note that government actors may set the parameters of discussion when they open a forum in ways that give them discretion to block some speakers. For example, if a government official opens a Facebook page solely to discuss environmental policy, that official will be able to block discussion of abortion within the forum because it strays from the page's designated purpose."

However, Lidsky still acknowledged the importance of the ruling. "Nonetheless, the significance of the opinion lies in its recognition of the way we talk now. Physical spaces . . . allow people to engage with each other about the events of the day," she wrote. "[T]he message to government actors using social media is clear: If you use social media, you better be thick-skinned."

In a June 4 tweet, the Knight Institute announced that President Trump had unblocked all seven individual plaintiffs. On the same day, the DOJ filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. As the *Bulletin* went to press, no further actions had been taken in the case.

Federal Judge Rules in Favor of Kentucky Governor, Allows for Continued Blocking of Critics on Social Media

On March 30, 2018, U.S. District Court for the Eastern District of Kentucky Judge Gregory Frederick Van Tatenhove ruled that Kentucky Gov. Matt Bevin had not violated the First Amendment rights of individuals he blocked on his official Facebook and Twitter accounts, denying the plaintiffs' request for a preliminary injunction. *Morgan v. Bevin*, No. 3:17-cv-00060-GFVT (E.D. Ky. 2018). Van Tatenhove held that because Bevin did not intend for his pages to be "truly open for[a]," he did not suppress speech by blocking users and the forum doctrine did not apply.

The case revolved around "official" Facebook and Twitter accounts, @GovMattBevin, created by Bevin and his staff in order to "communicate [Bevin's] vision, policies, and activities to constituents and receive feedback from them on the specific topics that he chooses to address in his posts." Bevin stated that the accounts were not meant to be an "open forum for general discussion of all issues by the public" in order to avoid off-topic comments that "detract from the conversation by obscuring the chosen subject of Governor Bevin's communication and diverting the public's attention to different matters."

In August 2017, ProPublica filed public records requests with every U.S. governor and 22 federal agencies, asking for a list of the accounts blocked by their Facebook and Twitter accounts. The nonprofit investigative newsroom reported in December 2017 that the governors and agencies were blocking at least 1,298 Facebook and Twitter accounts, with 652 of those accounts blocked by Bevin. ProPublica's full results are available online at: https://www.propublica.org/article/governors-and-federal-agencies-are-blocking-accounts-on-facebook-and-twitter.

In July 2017, Kentucky citizens Drew Morgan and Mary Hargis filed a lawsuit against Bevin, alleging that he had blocked them from his official Facebook and Twitter accounts. Morgan was blocked on Twitter in early 2017 after he commented on Bevin's then-overdue property taxes. Hargis was blocked on Facebook after criticizing Bevin's right-to-work policies. Each asserted that their First Amendment rights had been violated because they could not comment on posts on Bevin's official Facebook page and could not view or reply to tweets by his official Twitter account. They sought a declaration that blocking them was unconstitutional, as well as preliminary and permanent injunctions preventing Bevin from blocking additional users and requiring him to restore not only their accounts, but also the accounts of other blocked users.

In his March 30 ruling, Van Tatenhove first acknowledged that the court was "one of the first to wrestle with the intersections of the application of free speech to developing technology and First Amendment rights of access to public officials using privately-owned channels of communication" and that, at the time of the case, only the Eastern District of Virginia had ruled on the matter, which Van Tatenhove stated was "not binding" and "decline[d] to follow."

Second, Van Tatenhove found that the public forum doctrine did not apply in this case because Bevin's use of his privately-owned Facebook and Twitter pages was "personal speech" in that they were intended for "communicating his own speech, not for the speech of his constituents." Citing the 2015 U.S. Supreme Court case *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, Van Tatenhove held that "because [Bevin was] speaking on his own behalf, even on his own behalf as a public official, 'the First Amendment strictures that attend the various types of government-established forums do not apply.'" 135 S.Ct. 2239, 2250 (2015).

Van Tatenhove further held that the First Amendment does not require Bevin to create "a truly open forum where everyone could post or comment." He wrote that Bevin "never intended his Facebook or Twitter accounts to be like a public park, where anyone is welcome to enter and say whatever they want; he has a specific agenda of what he wants his pages to look like and what the discussion on those pages will be." Rather, Bevin had set up his accounts so that only he could post to them and users were permitted to comment on whatever posts he had written, according to Van Tatenhove. Thus, he concluded that Bevin's Facebook and Twitter accounts, because they are "privately owned channels of communication and are not converted

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to public property by the use of a public official" were "unlike any type of property typically protected by First Amendment forum analysis law."

Third, Van Tatenhove wrote that prohibiting Bevin from blocking individuals on Facebook and Twitter could lead to his accounts "be[ing] flooded with internet spam such that the purpose of conveying his message to his constituents would be impossible and the accounts would effectively, or actually, be closed."

Fourth, Van Tatenhove noted that the First Amendment does not provide Bevin's constituents "a right to be heard and Governor Bevin has no obligation to listen to everyone who wishes to speak to him." He cited *Minn. State Bd. for Cmty Colleges v. Knight*, in which the Supreme Court held that a "person's right to speak is not infringed when government simply ignores that person while listening to others." 465 U.S. 271, 286 (1984).

Finally, Van Tatenhove held that Bevin did not suppress speech by blocking Facebook or Twitter users, but instead "merely cull[ed] his Facebook and Twitter accounts to present a public image that he desires." He added that users blocked by Bevin "are still free to post on their own walls and on friends' walls whatever they want about Governor Bevin" and that "[n]o one is being blocked from speaking on Facebook or Twitter." Additionally, Van Tatenhove asserted that the public may still view his accounts and can "choose to elect someone else if they are unhappy with how he administers his social media accounts."

Thus, Van Tatenhove denied the plaintiffs' request for a preliminary injunction because it was "not clearly needed" and that no "substantial harm" or "irreparable harm w[ould] occur if the injunction [was] not issued." The full opinion is available online at: https://scholar.google.com/scholar_case?case=6931073641925505468&hl=en&as_sdt=6&as_vis=1&oi=scholarr. As the *Bulletin* went to press, no further announcements had been made in the case.

In an April 5 post on the "Technology & Marketing Law Blog," Eric Goldman, a professor of law at Santa Clara University School of Law, wrote that there were three primary problems with Van Tatenhove's ruling. First, Goldman contended that although politicians "should be able to retain private spheres," an account "used for political purposes shouldn't qualify." Second, Goldman criticized Van Tatenhove's conclusion that "Governor Bevin is not suppressing speech, but is merely culling his Facebook and Twitter accounts to present a public image that he desires." Goldman argued that the court was "trying to justify the governor's censorious efforts by euphemistically saying the governor isn't 'suppressing' speech (though that's exactly what the governor is doing)." Finally, Goldman asserted that it is "the government's job . . . to give constituents the maximum opportunity for petitioning the government and redressing their concerns" and that "constituents should be allowed to communicate with other constituents in places where constituents are talking to each other, which is what the public forum doctrine is designed to protect." He added that Bevin could shut down all comments, but should not be allowed to "pick-and-choose who can listen or comment," because by allowing comments, "he has created a public forum and he needs to comply with the First Amendment when making those choices."

As the *Bulletin* went to press, Morgan and Hargis had not announced whether they would appeal the ruling.

Maryland Governor Agrees to Settlement with ACLU Over Blocking Facebook Users and Deleting Comments Criticizing Him

On April 2, 2018, several news outlets reported that Maryland Gov. Larry Hogan had reached a settlement with the American Civil Liberties Union (ACLU) of Maryland after the organization filed a lawsuit in August 2017 alleging that the governor and his staff had blocked Facebook users from his official page, as well as removing comments that were critical of him or his policies. Several observers praised the settlement as a victory for free speech on the internet.

The case arose after Hogan and his staff, including Douglass Mayer and Robert Windley, created an official Facebook page for the governor's office. They also drafted and posted a "Social Media Policy" (social media policy) authorizing them to delete "inappropriate" comments or those not concerning what Hogan had posted. According to the policy, the page was designed to "permit and encourage constituents to communicate directly with the Governor's office and to post comments on public issues," as well as to serve as a "forum[] for constructive and respectful discussion with and among users."

On Aug. 1, 2017, the ACLU of Maryland, on behalf of Facebook users James Laurenson, Meredith Phillips, Janice Lepore, and Molly Handley, filed a complaint for injunctive and declaratory relief and damages in the U.S. District Court for the District of Maryland, alleging "repeated and ongoing censorship of Plaintiffs' constitutionally protected speech by Governor Larry Hogan and members of his staff."

The complaint explained in detail how each of the plaintiffs had criticized Hogan or his policies, such as opposing President Barack Obama's plan to allow Syrian refugees to resettle in the United States, and were summarily blocked from the page or had their comments deleted. The lawsuit claimed that Hogan and his staff had "censored [the individual plaintiffs] and other citizens by deleting their comments from [Hogan's] Facebook [p]age" and by "'blocking' them from making any further posts on the Facebook page and blocking them from expressing an opinion using the reaction feature (e.g., 'Likes')." The complaint further alleged that Hogan had censored the plaintiffs and other citizens by "temporarily removing the Governor's posts to the Facebook Page, which has the effect of clearing/removing all previously posted comments, and then re-posting the same post to allow new, more favored comments to be posted by other users."

The complaint noted that on Feb. 8, 2017, *The Baltimore Sun* had reported that Hogan or his staff had deleted Facebook comments requesting that Hogan condemn President Donald Trump's travel ban for people from seven predominantly Muslim countries. According to *The Baltimore Sun*, Hogan's staff labeled the comments spam and banned posters from making future comments on his official page. According to *The Washington Post* on Feb. 8, 2017, Mayer estimated that 450 users had been banned from posting on the governor's Facebook page since he took office in January 2015, half of whom were deemed to be part of a "coordinated political spam attack."

The lawsuit contended that blocking Facebook users and deleting their comments "directly and implicitly chilled Plaintiffs' free expression, as well as that of all Maryland citizens." The ACLU of Maryland asserted that Hogan and his staff had "violated a

clearly established constitutional right — the right to speak freely on topics relevant to the government in a government-established forum, and particularly an online social-media-based forum — of which all reasonable government officials should have known." Additionally, the lawsuit argued that the social media policy "exert[ed] a profoundly chilling effect on speech and specifically censors constituents who 'petition' the Governor."

Second, the complaint contended that the social media policy was "an open invitation in practice to arbitrary, viewpoint-based censorship" in violation of the First Amendment. The lawsuit argued that such viewpoint discrimination had occurred when Hogan and his staff blocked Facebook users and deleted comments, therefore violating the First Amendment. The complaint cited several cases, including the U.S. Supreme Court case *Street v. New York*, in which the Court held that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." 394 U.S. 576, 592 (1969).

The lawsuit further asserted that the social media policy "impermissibly imposes 'special prohibitions on those speakers who express views on disfavored subjects,'" citing the 1992 Supreme Court case *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Thus, the complaint argued that the policy was also an "egregious form of content discrimination" and prevented Maryland citizens from engaging in First Amendment protected activity of petitioning Hogan.

Finally, the lawsuit contended that the social media policy was unconstitutional "because it is overly broad and vague." The complaint provided several examples, including that the policy prohibited "inappropriate," "similar," or "repetitive" speech, but did not provide specific definitions. According to the complaint, the social media policy also broadly stated that "comments may be removed or access may be restricted at any time without prior notice or without providing justification." The lawsuit alleged that "subjecting speech to review and censorship based on such expansive terms . . . stifles robust debate and disregards the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The plaintiffs requested that the district court provide a declaratory ruling that the social media policy was unconstitutional and that efforts to block Facebook users and deleting comments violated the plaintiffs' and other citizens' First Amendment rights. Additionally, the complaint requested a permanent injunction of the social media policy and an injunction requiring Hogan and his staff to "cease blocking all Plaintiffs currently prohibited from posting comments" on his Facebook page. Finally, the lawsuit called for monetary damages "in an amount to be determined by the Court to compensate Plaintiffs for the impact of a deprivation of fundamental rights," as well as legal fees. The complaint also requested a jury trial. The full complaint is available online at: http://www.aclu-md.org/uploaded_files/0000/0945/20170801_hoganfb_complaint.pdf.

On April 2, 2018, Hogan and the ACLU of Maryland announced that they had reached a settlement in the case. According to *The Baltimore Sun* on the same day, the settlement included a $65,000 payment by the state to the plaintiffs and required Hogan to rewrite his social media policy, though he stated that his office had already drafted a new version about a year prior to the settlement. The ACLU also announced that Hogan would create a second Facebook page designated to serve as a "constituent message page," according to NBC News on April 2. The ACLU also stated that Hogan would create an appeals process for any individual who claims their posts were wrongfully deleted or if they are blocked. Hogan's office continued to deny any liability or violations of the plaintiffs' First Amendment rights.

In a statement, the ACLU of Maryland called the settlement a "victory for the free speech rights of constituents." Neil Richards, a professor at Washington University Law School who specializes in First Amendment theory, told NBC News in an email that the settlement was "good for free speech and for our democracy." He added, "When the government opens up a place (whether it's a park, or a meeting space, or a digital forum) for public discussion, they can't exclude (or delete) speakers that they don't like.. . . That's censorship and it's unconstitutional."

Conversely, in an interview with *The Baltimore Sun*, Hogan's spokesperson Shareese DeLeaver Churchill said, "We are pleased that the ACLU has decided to drop this frivolous and politically motivated lawsuit and reach a settlement with the state.. . . Ultimately, it was much better for Maryland taxpayers to resolve this than to continue wasting everyone's time and resources in court."

The ACLU has also filed lawsuits in other states against government officials for blocking social media users. On Aug. 8, 2017, *The Verge* reported that the ACLU had sued Maine Gov. Paul LePage for deleting comments from his official Facebook page that were critical of him or his policies, as well as for blocking several users.

On Feb. 27, 2018, the Associated Press (AP) reported that the ACLU had filed a lawsuit against Florida Rep. Chuck Clemons (R-Newberry) on behalf of one of his constituents, Peter Attwood, for blocking the Gainesville, Fla. man from Clemons' Facebook and Twitter accounts after he criticized Clemons' voting against a motion to debate a bill banning assault weapons. On May 20, 2018, Chief Judge Mark Walker of the Northern District of Florida denied Clemons' motion to dismiss the case, finding that Clemons Facebook and Twitter posts constituted "state action," meaning Attwood had "pleaded sufficient facts for his First Amendment claim to survive Clemons's motion to dismiss." *Attwood v. Clemons*, No. 1:18cv38-MW/GRJ (N.D. Fla. 2018). The ruling prompted Clemons to file an appeal in the U.S. Court of Appeals for the Eleventh Circuit. As the *Bulletin* went to press, no further announcements had been made regarding either lawsuit.

Scott Memmel
Silha *Bulletin* Editor

Minnesota and Federal Courts Grapple with Defamation Questions; Right-Wing Radio Host Faces Several Defamation Lawsuits

In the first half of 2018, the Minnesota Court of Appeals and a federal district court grappled with questions arising in defamation cases. On Feb. 12, 2018, the Minnesota Court of Appeals ruled that plaintiff Kurt Maethner had demonstrated that statements made by his ex-wife and an advocacy group about him regarding domestic violence constituted defamation *per se*, allowing Maethner to recover presumed damages without having to prove actual damages or demonstrate that the defendants made the statements with "malice." On May 7, 2018, the Minnesota Court of Appeals ruled that the fair report privilege, which generally provides immunity to individuals who fairly and accurately report otherwise defamatory information based on official documents or statements by public officials, extends to protect journalists and news organizations that report false information relayed by law enforcement at a press conference or in a news release. Finally, on June 4, 2018, a U.S. District Court for the Southern District of Florida judge allowed *BuzzFeed* to claim the fair report privilege under New York law in a defamation lawsuit brought by Russian businessman Aleksej Gubarev regarding a dossier detailing alleged ties between the then-Republican presidential candidate Donald Trump's campaign and the Russian government.

DEFAMATION

Additionally, in April and May 2018, right-wing radio host Alex Jones and his conspiracy theory website, "InfoWars," were the target of several defamation lawsuits stemming from his claims and comments about past school shootings. On April 2, Marcel Fontaine sued Jones after the radio host falsely claimed Fontaine was the attacker in the February 2018 shooting at Marjory Stoneman Douglas High School in Florida. On April 17, three parents of children killed in the December 2012 shooting at Sandy Hook Elementary School (Sandy Hook) in Newton, Conn. sued Jones for defamation and defamation *per se*, seeking $1 million in damages. Finally, on May 23, six additional families of Sandy Hook victims, as well as a Federal Bureau of Investigation (FBI) agent, filed a separate lawsuit against Jones, "InfoWars," and others alleging that numerous false statements and conspiracy theories by the defendants constituted defamation, among other claims.

Minnesota Court of Appeals Holds Plaintiff Can Recover Damages without Showing of Malice; Minnesota Supreme Court Agrees to Hear Case

On Feb. 12, 2018, the Minnesota Court of Appeals ruled in *Maethner v. Someplace Safe* that plaintiff Kurt Maethner had demonstrated that statements about him regarding domestic violence constituted defamation *per se.* 907 N.W.2d 665 (Minn. Ct. App. 2018). The court held that Maethner could therefore recover presumed damages without having to prove actual damages or demonstrating that the defendants, Jaquelin Jorud, his ex-wife, and Someplace Safe, an advocacy group that offers services to victims and survivors of domestic abuse, made the statements with common law "malice," meaning "ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff," as defined by the Minnesota Supreme Court in its 1980 case *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). On April 25, 2018, the Minnesota Supreme Court agreed to hear *Maethner v. Someplace Safe*, presenting the Court with the opportunity to revisit its 1980 ruling that the Free Speech Clause of the First Amendment does not provide equal protection to non-media individuals and entities.

The case arose in October 2010 after Maethner and Jorud ended their 15-year marriage. Although Jorud made no accusations of domestic abuse during the marriage, she sought assistance from Someplace Safe during the separation and divorce proceedings. In May 2014, for its 35th Anniversary celebration, Someplace Safe awarded Jorud a "Survivor Award" as a "survivor of domestic abuse" at a fundraising banquet. Someplace Safe issued a press release about the banquet and the award recipients, and published statements and photographs of the event on its Facebook page. The post included Jorud's name and a photograph of her receiving the award. Jorud also posted about the banquet and award on her Facebook page. Additionally, she wrote a one-page story about her experience "surviving domestic violence" and "thriving through recovery" for Someplace Safe's newsletter. In the story, Jorud mentioned "being stalked and watched" and "liv[ing] in a constant state of fear," though Someplace Safe said that it did not attempt to investigate the claims. Someplace Safe and Jorud's statements never mentioned Maethner by name.

In October 2015, Maethner filed a complaint in the Otter Tail County (Minn.) District Court alleging that Someplace Safe and Jorud had defamed him in the Facebook posts, press release, and newsletter article. He argued that a reasonable member of the community would understand the statements to mean he had committed domestic violence and other crimes. Maethner further claimed that the statements had damaged his reputation. Additionally, Maethner alleged that Someplace Safe was negligent in publishing the article in its newsletter and breached its duty by failing to investigate Jorud's claims before publishing the article.

The district court granted summary judgement to the defendants for three reasons. First, the court held that the allegedly defamatory statements were protected by a "conditional or qualified privilege," meaning, under Minnesota law, that an individual "who makes a defamatory statement is not liable if a qualified privilege applies and the privilege is not abused." If a statement is protected by a qualified privilege, the plaintiff must "show that the allegedly defamatory statements were made with malice" as part of his or her defamation claim. However, the court found that Maethner had failed to establish that there was "a genuine issue of material fact" on malice. Second, the district court held that Someplace Safe had no legal duty to investigate the statements before publishing them. Finally, the court concluded that Maethner did not show sufficient evidence of actual damages.

On Feb. 12, 2018, the Minnesota Court of Appeals reversed the district court's ruling on all three counts. Writing for a three-judge panel, Judge Diane Bratvold first concluded that the district court erred in granting summary judgment

on the defamation. Although the court did not rule on the truth of Jorud's statements, it did hold that qualified privilege did not apply to the statements. Bratvold reasoned that "[a]ffording a qualified privilege for allegedly defamatory statements made to raise funds would decrease any incentive to exercise reasonable care in publishing similar information and would increase the risk of defamation." Because the court held that the alleged defamatory statements were not protected by a qualified privilege, it did not consider whether Maethner had provided sufficient evidence of malice otherwise necessary to overcome the privilege.

Second, Bratvold held that Someplace Safe had a duty to exercise "reasonable care" before publishing the statements and was therefore "negligent in publishing allegedly defamatory statements about Maethner in its press release and in its newsletter." She disagreed with Someplace Safe's contention that it could not be held liable for negligence because it had only printed Jorud's article and did not directly make the alleged defamatory statements. Additionally, Bratvold held that there was no "reputable wire . . . or other news service" involved, which was necessary for the narrow exception to apply. Thus, she wrote that the organization had "solicited, published, and disseminated Jorud's article containing the allegedly defamatory matters."

Bratvold also rejected Someplace Safe's contention that it could not verify the accuracy of the newsletter because of data-privacy statutes, including the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.*, which, according to Someplace Safe, precluded it from "collecting data" about Jorud about the alleged abuse. However, Bratvold held that the statutes "prohibit the *disclosure* of private information by government organizations or grantees, not the investigation or collection of information" (emphasis in original). Thus, she held that "Someplace Safe was not prohibited by law from taking reasonable care to investigate Jorud's statements before issuing a press release or publishing her article in its newsletter" and had "breached its duty of reasonable care."

Finally, the court held that Maethner did not have to prove actual damages in order to recover for his emotional injuries, although it suggested that there may be sufficient evidence of actual damages anyway. Bratvold wrote that a private plaintiff in defamation ordinarily "may only recover compensation for actual injury supported by competent evidence when he or she proves only that the defendant acted negligently in publishing the defamatory matter." However, she noted that some false statements can constitute defamation *per se*, or statements that accuse an individual of crimes or immoral acts and are presumed to be harmful.

The test for determining whether a statement is defamation *per se* is "whether a reasonable person under similar circumstances would understand the statement as making an accusation or imputing criminal or serious sexual misconduct to another." Bratvold ruled that "a reasonable person encountering references to 'surviving domestic violence,' 'being stalked,' and 'getting out of an unhealthy, threatening and dangerous relationship' would understand them to be accusations of criminal activity," therefore making them defamation *per se* and "actionable without proof of actual damages."

Previously, in *Richie v. Paramount Pictures Corp.*, the Minnesota Supreme Court held that defamatory statements made by the media and "involved a matter of public concern" required the plaintiffs to prove actual damages, meaning damages that repay actual losses. 544 N.W.2d 21 (Minn. 1996). However, in the current case, the Minnesota Court of Appeals reasoned that, because the statements were published by a non-profit organization in order to solicit donations, "[t]he media, and related concerns to protect constitutional rights under the First Amendment, were not involved." The full ruling is available online at: https://scholar.google.com/scholar_case?case=4790929991393210855&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Observers noted that the ruling meant that in a case of defamation *per se* in Minnesota where the defendant is not a media organization, harm is presumed, and claims based on emotional distress are sufficient to recover damages. Conversely, when trying to recover damages from a media organization, a plaintiff will have to prove actual losses in order to recover damages.

On April 25, 2018 the Minnesota Supreme Court agreed to hear the appeal of *Maethner v. Someplace Safe*. As the *Bulletin* went to press, the Court had not held oral arguments.

In an April 26, 2018 post on his blog "The Volokh Conspiracy," Eugene Volokh, the Gary T. Schwartz Professor of Law at the University of California, Los Angeles (UCLA) School of Law, wrote that the Minnesota Court of Appeals ruling contradicted the U.S. Supreme Court's ruling in *Gertz v. Robert Welch, Inc.* in which the Court held that in cases regarding statements on matters of public concern, even by private figures, plaintiffs cannot recover presumed damages absent a showing of "actual malice," the standard created in *New York Times v. Sullivan*, 376 U.S. 254 (1964) requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity.

Volokh added that by agreeing to review this case, the Minnesota Supreme Court would have the opportunity to revisit the holding in *Stuempges v. Parke, Davis & Co.* that set the original precedent that the Free Press Clause of the First Amendment applies differently to media and nonmedia speakers in Minnesota. 297 N.W.2d 252 (Minn. 1980). In *Stuempges*, the Court held that presumed and punitive damages can be awarded without proof of actual malice when the defendant is a non-media entity, but there must be proof of actual malice when the defendant is a media entity.

Finally, Volokh stated that Minnesota is unique in that it denies non-institutional-media speakers the same First Amendment protections that the media receive. He cited several cases as precedent, including *Citizens United v. FEC*, 558 U.S. 310 (2010), in which the Supreme Court found that "the institutional press" has no "constitutional privilege beyond that of other speakers." In his blog post, Volokh stated that he hoped the Minnesota Supreme Court would abolish the distinction between media and non-media entities and apply the same First Amendment rules to the *Maethner* case as it would to a case against media defendants. (For more information on how other jurisdictions grapple with defamation *per se*, see *Iowa Supreme Court Redefines "Media Defendants" in* Bierman v. Weier, in "Recent Cases Put Online Defamation in the Spotlight," in the Spring 2013 issue of the Silha *Bulletin*.)

Minnesota Court of Appeals Says Fair Report Privilege Extends to Cover Law Enforcement Press Conferences and News Releases

On May 7, 2018, the Minnesota Court of Appeals ruled in *Larson v. Gannett Company, Inc.* that the fair report privilege extends to protect

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news reports that fairly and accurately summarize information relayed by a law enforcement agency at an official press conference or in an official press release. No. A17-1068, 2018 WL 2090538 (Minn. Ct. App. 2018). The court blocked a new trial ordered by the Hennepin County District Court that would have allowed Ryan Larson, who was falsely accused of killing police officer Tom Decker, another chance to bring defamation claims against KARE 11 News and the *St. Cloud Times*. Observers praised the appellate court's decision for upholding the media's ability to effectively cover law enforcement actions.

The case arose on Nov. 29, 2012 after Decker was fatally shot behind a bar in Cold Spring, Minn. Decker was sent to conduct a welfare check on Larson, who was reportedly suicidal and lived above the bar. Shortly after the shooting, police arrested Larson in connection with Decker's murder. The next day, law enforcement officials held a joint press conference about the shooting and issued a press release stating that "[w]ithin an hour" of the shooting, a SWAT team arrested Larson, who "was booked into the Stearns County Jail on murder charges." Multiple news outlets, including KARE 11 and the *St. Cloud Times*, covered the shooting and subsequent investigation, focusing heavily on statements given during the press conference and information in the press release. In August 2013, Larson was officially cleared as a suspect, although police had identified Eric Thomes as the lead suspect several months earlier in January 2013. Thomes committed suicide after agents arrived at his home to question him.

On May 28, 2015, Larson sued KARE 11 and the *St. Cloud Times*, alleging the coverage of his arrest was defamatory. Larson identified 11 allegedly defamatory statements made in the coverage. One group of statements, numbered 1-5, attributed information to what police investigators said or believed. A second group, numbered 6-8, referred to accusations against Larson, and a final group, numbered 9-11, communicated other information about Larson, such as his criminal history and community members' opinions of the case.

Generally, the fair report privilege provides immunity for individuals who publish false, defamatory information so long as the individual relied on an official public document or a statement by a public official, made clear that the document or statement was their source, and fairly and accurately used the source.

On May 19, 2016, the district court granted summary judgment, in part, in favor of KARE 11 and the *St. Cloud Times*, ruling that "to the extent the news conference and news release only communicated the fact of Mr. Larson's arrest or the charge of crime made by the officer in making or returning his arrest, these sources are entitled to the [fair report] privilege." However, on Nov. 7, 2016, the district court amended its decision, finding that statements 1-5 were not protected by the fair report privilege and that statements 6-8 were not substantially accurate regarding accusations against Larson. On November 16, the court dismissed the defamation claims regarding statements 9-11, finding that they were "not capable of defamatory meeting."

The case proceeded before a jury, which found on November 21 that although the statements were defamatory, the news organizations were not liable because they only reported on what they were told by law enforcement. After the jury verdict, Larson moved for a new trial, contending that the jury had misapplied the law. The district court partially granted Larson's motions, reasoning that the statements went "beyond the mere fact of arrest or charge," and that they were "as a matter of law . . . defamatory in nature and false." The district court granted a new trial concerning all 11 statements.

In a June 29, 2016 request to participate in *Larson v. Gannett Company, Inc.* as *amicus curiae*, the Reporters Committee for Freedom of the Press (RCFP) wrote that "[t]he fair report privilege serves the greater goal of ensuring that the press can safely inform the public about official proceedings and alert the public of accusations being made in public controversies." The request continued, "The trial court's ruling that much of that information is not protected by the fair report privilege, if allowed to stand, will mean that media organizations will not be able to simply relay to the public what the police are saying without taking on the risk of defamation litigation and liability if any of that information turns out to be wrong, or is even alleged to be wrong." RCFP concluded, "The ability to report this truthful information — that police had arrested a suspect, not that the suspect was actually guilty of a crime — must be protected." The full brief is available online at: https://www.rcfp.org/sites/default/files/2016-06-29-larson-v-gannett-company-inc.pdf.

On May 7, 2018, the Minnesota Court of Appeals reversed the district court's decision. Writing for the three-judge panel, Judge Diane Bratvold held that the fair report privilege "applies to fair and accurate reports of statements by law enforcement during an official press conference and in a news release."

Bratvold first held that the district court erred in concluding that the fair report privilege did not apply in this case. She wrote that Minnesota "has recognized the privilege for over a century." She cited *Moreno v. Crookston Times Printing Co.* in which the Minnesota Supreme Court held that the fair report privilege applies to an "accurate and complete report or a fair abridgement of events that are part of the regular business of a city council meeting." 610 N.W.2d 321 (Minn. 2000). The Court held that the privilege was based on two principles, including that "because the meeting was public, a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting" and that there is an "obvious public interest in having public affairs made known to all." Thus, the Minnesota Supreme Court reasoned that the press must be able to cover meetings open to the public and cover topics of public interest without fear of liability.

Bratvold applied the same framework to statements made by law enforcement officials. She held that because "[t]he press conference and news release were public, . . . 'a fair and accurate report would simply relay information to the reader that she would have seen or heard herself were she present at the meeting.'" She also concluded that there was arguably more of an "obvious public interest" in relaying information about a police officer's death than reporting on citizens' comments at a city council meeting.

Bratvold also noted that comments to the Restatement (Second) of Torts § 611 also support the idea that the fair report privilege should extend to official law enforcement statements. She provided the example of comment (i), which states that the privilege "extends to a report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern." Similarly, comment (d) extends the privilege to cover reports of official proceedings or actions taken by a government officer.

Finally, Bratvold reasoned that, because Minnesota's criminal defamation statute contains a justification for defamation when the statement is "a fair and true report or a fair summary . . . [of] public or official proceedings," the privilege should be extended to the context of police investigations. Minn. Stat. § 609.765, subd. 3(4). In May 2015, the Minnesota Court of Appeals ruled in *State v. Turner* that the criminal defamation statute violated the First Amendment's protections of speech because it had the potential to criminalize true statements. No. A14-1408 (Minn. Ct. App. May 26, 2015). (For more information on the 2015 ruling, see "Minnesota Court of Appeals Declares Defamation Statute Unconstitutional" in the Summer 2015 Silha *Bulletin* and *Minnesota Legislature Considers Criminalizing "Revenge Porn"* in "Media Law Issues at Forefront in Several States" in the Winter/Spring 2016 issue.) However, rather than repeal the law, the Minnesota legislature amended the it to criminalize "false and defamatory" statements, removing only language that placed limitations on truth as a defense. 2016 Minn. Laws ch. 126 § 8.

Bratvold then addressed three arguments made by the district court in rejecting application of the fair report privilege. First, she found that the district court misinterpreted Restatement comment (h), which states, "An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege." However, the comment continues to say that "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged."

Bratvold argued that the district court read comment (h) to say that any reporting beyond the charge of arrest was not covered by the fair report privilege. However, Bratvold wrote that the comment "should be understood to mean that the privilege does not apply to unofficial police comments that are not part of an official meeting or statement by law enforcement," and that any other interpretation would not be consistent with *Moreno*.

Second, Bratvold held that the district court erred in determining that "extra-judicial" statements, or statements made outside judicial proceedings, could not be covered by the fair report privilege. She wrote that "no state or federal Minnesota case has held the fair report privilege applies only to news reports that summarize statements in judicial proceedings and in no other official proceedings."

Finally, Bratvold agreed with the district court's concern with "ensuring that media coverage of crimes does not taint the jury pool," but reasoned that fair and accurate reports "based on official statements at press conferences and news releases" serves the public interest and that *voir dire* serves to protect a defendant's right to an unbiased jury.

Bratvold concluded that the fair report privilege can be extended to news reports of official law enforcement statements, but noted that the privilege was qualified and could be defeated if the records did not fairly and accurately reflect official statements, or if they contained additional defamatory material not present in the official proceeding. She therefore turned to whether KARE 11 and the *St. Cloud Times* abused the privilege, concluding that there was a "genuine issue of material fact existed as to whether statements 1-8 accurately reported or fairly abridged law-enforcement statements from the November 30 press conference and news release." Bratvold held that this was a question for the jury to decide, and that the jury had already found the statements KARE 11 and the *St. Cloud Times* were sufficiently accurate to fall under the fair report privilege. Although Bratvold noted that some of the jury instructions were improperly given, she did not deem any of them prejudicial and believed the jury was reasonable in the conclusions it reached.

Because the statements fell under the fair report privilege, Bratvold held that the district court erred in granting a new trial, in setting aside the jury's verdict, and in vacating its initial judgment regarding statements 1-8. Bratvold's full ruling is available online at: https://caselaw.findlaw.com/mn-court-of-appeals/1895365.html.

In a May 7, 2018 interview with the *St. Cloud Times*, Mark Anfinson, an attorney for the Minnesota Newspaper Association, said the decision was one of the most important rulings in the field of libel and defamation in many years. "It makes pretty clear the scope or reach of the privilege is very broad, and that's what it should be," he said. "That's why this is a big deal.. . . This is for the benefit of the public, so it can know what law enforcement and court officials are saying."

Steven Wells of Dorsey & Whitney, lead counsel for the *St. Cloud Times* and KARE 11, agreed that the decision was important for the press and the public. "[Without the fair report privilege,] the press really wouldn't be able to do its job," he said in an interview with the *St. Cloud Times*. "The press really would have been chilled in its ability to report on that kind of press conference."

Lisa Schwarz, news director for the *St. Cloud Times*, agreed. "There's no common sense in law enforcement issuing news releases or calling press conferences to inform the public — through the press — if the press cannot report those official statements without fear."

Previously, in an April 29 post on his blog *NewsCut*, a Minnesota Public Radio (MPR) hosted opinion blog, Bob Collins wrote that Larson's case illustrates the problem with the media reporting on police statements without conducting any independent research. "There was never any real evidence against Larson . . . but that didn't stop reporters from racing to show his mug shot and name him as a suspect only on the strength of what police said." He added, "'We just reported what the cops said' is a solid First Amendment defense in cases like this. But cases like this should remind all of us that we should be better and more careful. Our job isn't to be stenographers. It's to get the story right."

Stephen C. Fiebiger, Larson's attorney, told the *St. Cloud Times* "We think the case should go back for a new trial.. . . We'll plan to ask the Supreme Court to review the decision." As the *Bulletin* went to press, the Minnesota Supreme Court had not announced whether it would hear the case.

BuzzFeed Allowed Fair Report Privilege in Trump Dossier Defamation Case

On June 4, 2018, a U.S. District Court for the Southern District of Florida judge ruled that *BuzzFeed* can claim New York's fair report privilege as a defense in a defamation lawsuit brought by Russian businessman Aleksej Gubarev regarding the "Steele Dossier," a 35-page memo compiled by former MI6 intelligence officer Christopher Steele detailing ties between the Russian government and then-Republican presidential candidate Donald Trump's campaign. *Gubarev v. BuzzFeed*, No. 1:17-cv-60426-UU (S.D. Fla. 2018). Federal Judge Ursula Ungaro ruled that the privilege, which is normally used to shield media outlets

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and journalists from defamation liability when they report on government investigations using official documents and statements by public officials, also extends to cover classified intelligence briefings.

During the 2016 U.S. presidential campaign, Steele compiled the dossier as part of opposition research against Trump, initially for Republicans during the primary process, and subsequently for Democrats after Trump won the Republican nomination. The dossier contained allegations of cooperation between Russia and the Trump campaign during the course of the general presidential election, among other claims. The dossier stated Gubarev was a "significant player" in an operation in which his companies, XBT Holdings S.A. and Webzilla, as well as their affiliates, "had been using botnets and porn traffic to transmit viruses, plant bugs, steal data and conduct 'altering operations' against the Democratic Party leadership."

On Jan. 10, 2017, *BuzzFeed* published the 35-page dossier in its entirety. Although it flagged the allegations contained within the documents as "unverified, and potentially unverifiable," *BuzzFeed* explained that it published the document in full "so that Americans can make up their own minds about allegations involving the president-elect that have circulated at the highest levels of the US government." The dossier and *BuzzFeed* article can be found online at: https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.darpRrV7#.vdxDJdZv.

CNN reported on Jan. 10, 2017 that four U.S. intelligence directors at the time — Director of National Intelligence James Clapper, Federal Bureau of Investigation (FBI) Director James Comey, CIA Director John Brennan, and National Security Agency (NSA) Director Admiral Mike Rogers — presented a two-page synopsis of the dossier to President Barack Obama and then President-elect Trump to brief them on the allegations in the Dossier. CNN also reported that the FBI was investigating the credibility and accuracy of the allegations. A hyperlink to the CNN story was included in *BuzzFeed*'s article.

On Feb. 28, 2017, Gubarev filed a defamation lawsuit against *BuzzFeed* and its editor-in-chief, Ben Smith, in the Southern District of Florida, contending that he and his companies had been severely damaged by the false accusations and "some clear errors" in the dossier. The complaint alleged that although *BuzzFeed* tasked its reporters with investigating the allegations, no one at the news outlet contacted Gubarev or his companies to determine whether the allegations had merit. (For more information about the dossier, the *BuzzFeed* publication, and Gubarev's defamation lawsuit, see *Florida Magistrate Judge Rules BuzzFeed Does Not Have to Reveal Trump Dossier Source* in "Canada Passes Federal Shield Law; Courts Deny Requests to Compel a Journalist and Internet Media Company to Disclose Sources and Information" in the Fall 2017 issue of the Silha *Bulletin* and "Ethical Questions Debated After BuzzFeed Publishes Dossier Containing Controversial Unverified Claims About President Trump" in the Winter/Spring 2017 issue.)

During discovery, Gubarev moved for a partial judgement on the pleadings in order to determine the validity of *BuzzFeed*'s asserted privileges and defenses, namely whether *BuzzFeed* could claim the fair report privilege and neutral report privilege under New York law.

Judge Ungaro first ruled that New York law applied in the case instead of Florida law because, among other factors, the decision to publish the dossier was made in New York. New York recognizes an absolute fair report privilege, codified in New York Civil Rights Law section 74, which provides, "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published." N.Y. Civ. Rights Law § 74. Ungaro noted that the fair report privilege exists to protect the press as it "provides the public with the information it needs to exercise oversight of the government, and with information concerning the public welfare."

However, Ungaro noted that there are two limitations on the New York privilege. First, in order to invoke the privilege, "the ordinary viewer or reader must be able to determine from the publication itself that the publication is reporting on a proceeding." Second, "a formal proceeding must be underway at the time of publication." Ungaro found that *BuzzFeed*'s article "accurately reproduces the Dossier, albeit with some names, including Plaintiffs' redacted," and thus turned to "whether an official proceeding concerning the Dossier was underway when BuzzFeed published it, and whether the Court can conclude as a matter of law that an ordinary reader would have understood that the Dossier was the subject of official action."

Applying the New York fair report privilege, Ungaro ruled that "official proceeding" should be interpreted broadly to provide protection even in cases when it is not open to the public and that is should apply "to any official action," including an FBI investigation into the truth of the Dossier's allegations. Furthermore, she concluded that although the article itself "[did] not permit an ordinary reader to understand that the Dossier was the subject of classified briefings or an FBI investigation," *BuzzFeed*'s hyperlink to the CNN article about the investigation was sufficient to inform an ordinary viewer of the investigation. She also found that the government interest in the dossier, while not as persuasive as the alleged FBI investigation into its contents, may also lend support to the idea that the dossier was under formal government investigation.

Although Ungaro allowed *BuzzFeed* to claim the fair report privilege, she noted that there were still factual questions pertinent to its application that must be answered through additional discovery. For example, if the FBI investigation and other official actions mentioned in the CNN article were not actually ongoing when *BuzzFeed* published the dossier, it would lose the right to assert the privilege.

Next, Ungaro turned to whether *BuzzFeed* could claim the neutral report privilege, a common law defense first announced by the U.S. Court of Appeals for the Second Circuit in 1977 that applies when the press "(1) publishes an accurate and disinterested report, (2) of serious charges against a public figure, (3) by a responsible, prominent organization, and (4) does not espouse or endorse the organization's statement." *Edwards v. National Audubon Society, Inc.* 556 F.2d 113 (2nd Cir. 1977). Because New York does not recognize a neutral report privilege, Ungaro ruled that *BuzzFeed* could not claim its protection under New York law.

Additionally, Ungaro declined to follow *Edwards*, contending that neither the U.S. Supreme Court, nor the Eleventh Circuit, have followed that precedent. Furthermore, she disagreed with the proposition in *Edwards* that "the press is free to publish defamatory statements provided the statements are

newsworthy and originate from a source which is — in some amorphous sense — 'trustworthy.'" Ungaro also declined to recognize the privilege under the First Amendment.

Ungaro's full ruling is available online at: https://www.politico.com/f/?id=00000163-cc95-d71a-ad7f-cdf7f16c0001. As the *Bulletin* went to press, discovery remained ongoing in the case.

In a statement, Matt Mittenthal, a spokesman for *BuzzFeed*, praised the ruling. "Today's ruling is a victory for the American free press and the First Amendment, which allows citizens to monitor the conduct of their leaders and elected representatives," he said. "As the judge writes, a document that was circulating at the highest levels of government, under active investigation by the FBI and briefed to two successive presidents, falls squarely into the category of 'official action' by our government. As we have argued from the start, the public's interest in understanding the investigation into whether the Russian government compromised and colluded with Donald Trump is, and has always been, quite clear."

Evan Fray-Witzer, one of Gubarev's attorneys, wrote in an email to *Politico*, "We're confident that, when discovery is complete there isn't going to be *any* evidence that the December Memo . . . was the subject of any 'investigation' at the time Buzzfeed [*sic*] published the dossier" (emphasis in original).

In a June 7, 2018 interview with the *Christian Science Monitor*, Robert Drechsel, an *emeritus* professor at the University of Wisconsin School of Journalism and Mass Communication, explained the importance of the fair report privilege, which does not just apply to reporters. "Witnesses wouldn't dare testify or people wouldn't appear before legislative committees in controversial matters if they had to worry that they might be sued later for remarks they made," he said. "Judges, attorneys, legislators — everybody would be vulnerable to an enormous range of libel suits.. . . The [freedom to engage] in public discussion of important issues could be badly damaged."

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley told the *Christian Science Monitor* that the principle behind the privilege was articulated by Supreme Court Justice William Brennan in the Court's 1964 decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964). "He talked about the notion that sometimes falsehoods are inevitable when the press is covering matters of legitimate public concern," she said. "If we are left with a situation where the press has to be the guarantor of the accuracy of everything they publish, that will act as a deterrent and cause them to self-censor." She added, "What I think Justice Brennan would have been saying in a situation like this is, are you giving the public enough information that they can independently decide for themselves whether they want to believe this or not. Or will they come away saying, I still don't know?"

However, Kirtley noted that the *BuzzFeed* case falls within a murky area of the law. "If it were introduced as evidence in a court case, then it would be covered by the fair report privilege," she said. "What makes it more complicated is whether, to the extent it is being scrutinized by the government, is that tantamount to saying it is now part of a formal government investigation?"

Kirtley also expressed concern that *BuzzFeed* published the dossier knowing that some portions were false. "To say we are knowingly publishing falsehoods, that's kind of the textbook definition of what actual malice is," Kirtley said. "Actual malice" requires that the journalist or news organization acted with knowledge of falsity or reckless disregard of the truth, as defined by the Supreme Court in *New York Times v. Sullivan*.

Nevertheless, in a June 4 interview with *Politico*, Kirtley called Ungaro's decision a "good ruling overall, recognizing the importance of the news media being able to report accurately on matters of public interest that are subject to government action, even if they cannot be independently verified, and even if they are defamatory."

Massachusetts Man, Sandy Hook Parents Sue Alex Jones for Defamation

In the spring and early summer of 2018, right-wing radio host Alex Jones and his conspiracy theory website "InfoWars" were the targets of several defamation lawsuits in connection with two school shootings. On April 2, Marcel Fontaine sued Jones for falsely claiming he was the attacker in the February 2018 shooting at Marjory Stoneman Douglas High School (Stoneman Douglas) in Florida. On April 17, three parents of children killed in the December 2012 shooting at Sandy Hook Elementary School (Sandy Hook) in Newton, Conn. sued Jones regarding his false claims that the shooting was a "hoax" and that the parents of victims were "liars," among other alleged defamatory statements. On May 23, six additional families of Sandy Hook victims, as well as a Federal Bureau of Investigation (FBI) agent, filed a separate lawsuit against Jones, "InfoWars," and others alleging five counts, including defamation, false light invasion of privacy, and other claims.

On April 3, 2018, *The New York Times* reported that Marcel Fontaine, a Massachusetts native, had filed a defamation lawsuit against Jones, "InfoWars," and one of its reporters after the website claimed Fontaine was the gunman who entered Stoneman Douglas in February 2018 and killed 17 people. The actual shooter was Nikolas Cruz, who was arrested two miles from the Parkland, Fla., school on February 14.

Shortly after the shooting at Stoneman Douglas, "InfoWars" claimed that it had a photograph of the shooter. According to the *Times*, the photo depicted a young man wearing a red shirt emblazoned with a hammer and sickle and images of Joseph Stalin, Vladimir Lenin, and Karl Marx. However, the photo was of Fontaine, not Cruz.

On April 2, Fontaine filed a defamation lawsuit in Travis County District Court in Austin, Texas against Jones, "InfoWars," and one of its reporters, Kit Daniels. Fontaine first asserted that the defendants had a "long history of reckless defamation [that] resulted in harassment against innocent parties. Among the examples provided in the complaint was Jones' 2016 "Pizzagate" story, which alleged that Democratic Party elites, including then-presidential candidate Hillary Clinton, oversaw a pedophile slave dungeon in Comet Ping Pong, a Washington, D.C. pizzeria. On Dec. 4, 2016, an armed man fired several shots inside the restaurant as part of a plan to uncover the conspiracy. Jones summarily walked back his claims, explaining that neither the restaurant, nor its owner were involved in human trafficking.

Second, the lawsuit alleged that "InfoWars" targeted Fontaine because of his novelty communist party t-shirt and that Jones and "InfoWars" "have long been consumed with paranoia over the prospect of communist infiltration and indoctrination." Third, the lawsuit alleged that the photograph of Fontaine was "spread across social media platforms with astonishing speed, resulting in its distribution to millions of additional

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people, typically accompanied by ridicule or malicious threats." The lawsuit further claimed that Fontaine suffered "general and special damages, including a severe degree of mental stress and anguish" because he "continues to suffer harassment and peril even from individuals aware of his identify [*sic*] as a Massachusetts resident . . . [and] from those who acknowledge that Plaintiff was not involved in the Florida shooting." Additionally, the lawsuit argued that Fontaine had suffered "damage to his reputation and image."

The complaint therefore contended that the defendants had defamed Fontaine and had acted with actual malice, the standard created in *New York Times v. Sullivan*, 376 U.S. 254 (1964) requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. Fontaine also argued that the defendants' conduct amounted to defamation *per se*, meaning he was entitled to an award of presumed damages. The lawsuit also brought claims of intentional infliction of emotional distress and conspiracy "to accomplish their campaign of defamation." The full complaint is available online at: https://www.documentcloud.org/documents/4429056-Fontaine-v-Infowars-POP.html.

Mark Bankston, Fontaine's attorney, told CBS News on April 2 that Fontaine tried to keep a positive attitude but has "grown increasingly disturbed by this incident" and that he "genuinely fears for his safety."

The New York Times reported on April 3 that after Fontaine filed his lawsuit on April 2, "InfoWars" had appended an editors' note to its February 14 story that said it had previously "showed a photograph of a young man that we had received and stated incorrectly that it was an alleged photo of the suspected shooter." It continued, "We regret that this error occurred."

The shooting at Stoneman Douglas led to numerous other conspiracy theories and fake news articles, many of which targeted student survivors who have become vocal advocates for gun-control measures. (For more information on the shooting and the proliferation of conspiracy theories and fake news, see "Parkland Shooting Raises Ethical Questions about Covering Mass Shootings, Sparks Proliferation of Fake News and Conspiracy Theories" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

On April 17, 2018, several news outlets reported that three parents of children who died in the 2012 Sandy Hook shooting had filed two separate defamation lawsuits in Travis County District Court in Austin, Texas against Jones, "InfoWars," and Free Speech Systems, LLC, under which "InfoWars" is registered. One lawsuit was filed by Leonard Pozner and his former wife, Veronique De La Rosa; the other was filed by Neil Heslin. Their sons, Noah Pozner and Jesse Lewis, both 6, were killed at Sandy Hook.

Jones previously asserted on multiple occasions that the Sandy Hook shooting was a hoax and entertained several conspiracy theories on his radio show, including that the reports of the shooting were a "cover up" or were "fabricated," according to *USA Today* on April 17.

In their complaint, Pozner and De La Rosa claimed that Jones, on "InfoWars" and his radio show, drew particular attention to an Anderson Cooper interview with De La Rosa in which a technical glitch made it appear as if the CNN anchor did not have a nose. Jones used the footage to argue that viewers should not "believe any of it." Pozner and De La Rosa stated that such claims were "manifestly false." The complaint also pointed to Jones calling the families of victims "Sandy Hook Vampires" and accusing them of engaging in a cover-up, as well as being "liars and frauds." Pozner and De La Rosa argued that such claims were part of Jones' and "InfoWars'" "years-long campaign to convince their audience that Sandy Hook was faked and that the parents are lying," citing several additional examples.

In his complaint, Heslin stated that on NBC's "Sunday Night with Megyn Kelly" in June 2017, when asked by Kelly about claims made by Jones that the shooting was "fake" and "a giant hoax," Heslin said, "I lost my son. I buried my son. I held my son with a bullet hole through his head." Heslin contended that Jones summarily dismissed his statements as false. He further alleged that "InfoWars" reporter Owen Shroyer, who was also named as a defendant in the lawsuit, claimed that it was impossible for Heslin to have held his son and seen the injury, citing evidence such as video footage of a local medical examiner informing reporters that slain students were identified by photographs rather than in person. Heslin argued that Shroyer's report "was manifestly false" and that "a minimal amount of research would have caused any competent journalist not to publish the defamatory accusation."

Pozner, De La Rosa, and Heslin alleged that Jones had committed defamation, defamation *per se*, and conspiracy, arguing that Jones', "InfoWars'", and Shroyer's claims amounted to actual malice. They further alleged that they had suffered "a severe degree of mental stress and anguish which have disrupted their daily routine and caused a high degree of psychological pain," seeking relief in excess of $1 million. Pozner's and De La Rosa's complaint is available online at: https://www.scribd.com/document/376707398/Pozner-v-Jones-Et-Al. Heslin's lawsuit is available online at: https://www.scribd.com/document/376707299/Heslin-v-Jones-Et-Al.

In a statement, Mark Bankston, who represented Pozner, De La Rosa, and Heslin, said, "Our clients have been tormented for five years by Mr. Jones' ghoulish accusations that they are actors who faked their children's deaths as part of a fraud on the American people. Enough is enough."

On May 23, 2018, six more families, as well as Federal Bureau of Investigation (FBI) agent William Aldenberg, who was among the first to respond to the shooting, filed a separate lawsuit in Superior Court in Bridgeport, Conn. against Jones, "InfoWars," Wolfgang Halbig, a frequent guest on Jones' show, and several other organizations that disseminated Jones' and "InfoWars'" material. According to the Associated Press (AP) on May 23, the plaintiffs included the parents of four children killed at Sandy Hook — Jacqueline and Mark Barden, parents of Daniel; Nicole and Ian Hockley, parents of Dylan; Francine and David Wheeler, parents of Ben; and Jennifer Hensel and Jeremy Richman, parents of Avielle — as well as Donna Soto, Carlee Soto-Parisi, Carlos Soto and Jillian Soto, the mother and siblings of first-grade teacher Victoria Leigh Soto, and Erica Lafferty-Garbatini, the daughter of Sandy Hook Elementary School Principal Dawn Hochsprung.

The lawsuit stated that despite "overwhelming — and indisputable — evidence . . . showing exactly what happened at [Sandy Hook], certain individuals have persistently perpetuated a monstrous, unspeakable lie: that the Sandy Hook shooting was staged, and that the families who lost loved ones that day are actors who faked their relatives' deaths." The complaint also stated that Jones "has accused Sandy Hook families . . . of faking their loved ones' deaths, and insisted that the children killed that day are actually alive," citing

numerous examples throughout the complaint. The plaintiffs argued that, as a result of Jones' claims, they "faced physical confrontation and harassment, death threats, and a sustained barrage of harassment and verbal assault on social media."

The complaint included five counts against the defendants. Count One alleged invasion of privacy by false light, specifically that the defendants, "as part of a campaign of harassment and abuse, broadcast numerous outrageous lies about the plaintiffs that represented such major misrepresentations of the plaintiffs' character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in their position." The complaint added that the defendants "acted with reckless disregard as to the falsity of their statements and the false light in which the plaintiffs would be placed," causing actual and substantial damages.

Count Two claimed that the defendants' statements constituted defamation and defamation *per se* and that they were made with actual malice. Count Three alleged intentional infliction of emotional distress, namely that the defendants' statements and conduct were "extreme and outrageous." Count Four alleged negligent infliction of emotional distress. Finally, Count Five claimed that the defendants violated Connecticut's Unfair Trade Practices Act by "unethically, oppressively, immorally, and unscrupulously develop[ing], propagat[ing], and disseminat[ing] outrageous and malicious lies about the plaintiffs and their family members, and [doing] so for profit." Conn. Gen. Stat. § 42-110a *et seq*.

Additionally, the plaintiffs argued that the lawsuit "was in defense of the values protected by the First Amendment, not in derogation of it." The lawsuit read, "The First Amendment has never protected demonstrably false, malicious statements like the defendants'. This is because 'there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust and wide-open debate on public issues,'" citing the U.S. Supreme Court's ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *New York Times v. Sullivan*.

The plaintiffs claimed damages in excess of $15,000 and also requested monetary and punitive damages. The full complaint is available online at: https://drive.google.com/file/d/12mHNXnFQo2nH555yJxC5JIEEeAoxi_Fj/view.

In a statement after filing the lawsuit, Josh Koskoff, a lawyer for the families, said, "[Jones] knew his claims were false but he made them anyway to further a simple but pathetic goal: to make money by tearing away at the families' pain." He continued, "This lawsuit seeks to hold Alex Jones and his financial network accountable for those disgraceful actions."

Jones addressed the lawsuits in a live video posted to his YouTube channel, The Alex Jones Channel, on May 23, 2018. Regarding the lawsuits, he said, "It's P.R., folks. It's a way to publish defamatory statements about somebody, and a way to bring a mass shooting back into the consciousness." Jones claimed the goal of the lawsuits was "to set the precedent to ban my free speech preemptively, where I am not even allowed to have speech, so that I can further be destroyed.. . . I don't know what the big master plan is here, I just know it is anti-free speech and anti-Second Amendment and it's going on in a big way."

The Associated Press (AP) reported on May 23, 2018 that Jones said he invited the parents on his show to have a "real discussion" about guns. He also said he believed the lawsuits would be dismissed. As the *Bulletin* went to press, the lawsuits against Jones remained pending in the Texas and Connecticut courts.

On July 31, 2018, *The New York Times* reported that YouTube had removed four of Jones' videos for violating its child endangerment and hate speech standards. YouTube also prohibited Jones from live-streaming for 90 days, though his channel remains a main source for his broadcasts. On August 6, CBS News reported that YouTube had taken down the Alex Jones Channel Page, the Alex Jones Page, the "InfoWars" Page, and the "InfoWars" Nightly News Page, citing repeated violations of its policies.

The New York Times also reported that Facebook had removed Jones' personal page on July 27 for 30 days, citing "hate speech" and "bullying." On Aug. 1, 2018, the *Huffington Post* reported that streaming service Spotify had pulled Jones' radio show after "widespread" complaints about hate speech. Apple also took action against Jones, banning all of his content from iTunes, according to *Vox* on August 6.

Several scholars noted that the removal of Jones' content was not a violation of his First Amendment rights. In an August 9 interview with *USA Today*, executive director of the First Amendment Center at the Freedom Forum Institute Lata Nott said, "As private companies, Apple, Facebook and Spotify can decide what content appears on their platforms, so I wouldn't call (the tech sites' actions) a violation of speech."

In an August 11 story for the *Huffington Post*, reporter Paul Blumenthal contended that "First Amendment judicial doctrine hardly has anything to say about the policing of speech on private digital platforms by the companies that own them." He continued, "In the 20th century, courts defined the right to freedom of speech as a protection against censorship by the government. Private actors like Google and Facebook are not governments (even if they act like them). They are private companies that are allowed to moderate content on their platforms as they please and remove users that are disruptive or screwing up the experience for everyone else." He added, "That's why others have tried to argue that online social media platforms are more like the modern-day public square, rather than the government."

Kirsten Nordstrom
Silha Research Assistant

U.S. Supreme Court Rules Law Enforcement Must Obtain Warrant to Access Individuals' Historical Cell Site Records

On June 22, 2018, the U.S. Supreme Court, in *Carpenter v. United States*, ruled in a 5-4 decision that government actors need a warrant to obtain historical data from cell phone carriers detailing the movements of a cellphone user, known as cell site location information (CSLI). *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206 (2018). Several observers praised the ruling as a victory for digital privacy, as well as First and Fourth Amendment rights.

SUPREME COURT NEWS

The case arose in April 2011 when Timothy Carpenter and Timothy Sanders were among four individuals arrested after allegedly committing a string of armed robberies at Radio Shack and T-Mobile stores in and around Detroit, Mich. between December 2010 and March 2011.

In May and June 2011, the Federal Bureau of Investigation (FBI) applied for three orders from magistrate judges to "obtain 'transactional records' from various wireless carriers for 16 different phone numbers." The records included "subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones." The FBI also requested CSLI, contending that after "the defendants made or received calls with their cellphones, the phones sent a signal to the nearest cell-tower for the duration of the call; the providers then made records, for billing and other business purposes, showing which towers each defendant's phone had signaled during each call." The data "took the form of business records created and maintained by the defendants' wireless carriers."

The FBI argued that the records, especially the CSLI, would "provide evidence that Sanders, Carpenter and other known and unknown individuals had violated the Hobbs Act," which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951. The magistrate judges granted the applications, citing the Stored Communications Act (SCA), which allows a court order for disclosure of certain telecommunications records when "the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703.

Using the records and data obtained from the wireless carriers, FBI agent Christopher Hess "[created] maps showing [their] phones were within a half-mile to two miles of the location of each of the robberies around the time the robberies happened." The government summarily charged Carpenter with six counts of aiding and abetting robbery that affected interstate commerce. Sanders was charged with two counts. Carpenter was also charged with aiding and abetting the use or carriage of a firearm during a federal crime of violence. 18 U.S.C. § 924(c).

Carpenter and Sanders filed motions to suppress the government's cell-site evidence on Fourth Amendment grounds, arguing that the government should have been required to obtain a warrant supported by probable cause in order to seize the records. However, the district court denied their motion. A jury convicted Carpenter and Sanders on all of the Hobbs Act counts and convicted Carpenter on all but one of the § 924(c) gun counts. Carpenter and Sanders summarily appealed the district court's decision to deny their motion to exclude the data from evidence at trial.

On April 13, 2016, the Sixth Circuit ruled that the government's collection of CSLI of Carpenter and Sanders without a warrant did not violate their Fourth Amendment rights. *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 85 USLW 3567 (U.S. June 5, 2017) (No. 16-402). The court cited Supreme Court precedent stating that "although the content of personal communications is private, the information necessary to get those communications from point A to point B is not." The court applied this distinction to the CSLI of Carpenter and Sanders, concluding that the business records "fall on the unprotected side of this line" because they "say nothing about the content of any calls. Instead the records include routing information, which the wireless providers gathered in the ordinary course of business."

Sixth Circuit Judge Raymond Kethledge, who wrote the majority opinion, distinguished *Carpenter* from the 2014 case *Riley v. California* in which the Supreme Court held that "the government may not access a smartphone's internal data — or, one might say, its contents — without a warrant." 134 S.Ct. 2473, 2485 (2014). Kethledge wrote that "the Court's rationale was that smartphones typically store vast amounts of information about their users," which Kethledge contended was "vastly more" than the information provided by CSLI. (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

On June 5, 2017, the Supreme Court granted *certiorari* to hear *Carpenter*. In an August 2017 *amici* brief, 14 large technology companies, including Apple, Facebook, Microsoft, Verizon, and Google, argued that the Court "should afford strong Fourth Amendment protection to digital data," including that coming from cell phones and computers, as well as products and applications in the Internet of Things (IoT), a network of "smart" devices that can connect to the internet. The brief contended that all of these devices transmit "metadata — i.e., data about data — generated by automated processes that are part of the background operation of digital devices and applications." The technology companies argued that such transmission are "inherent features of how the Internet and networked devices work" and, "[s]hort of forgoing all use of digital technologies, they are unavoidable," though users should still retain the right for their data to remain private.

The brief further argued that "Fourth Amendment doctrine must adapt to this new reality" and that the Court should "refine the application of certain Fourth Amendment doctrines to ensure that the law realistically engages with Internet-based technologies and with people's expectations of privacy in their digital data." The brief cited the Court's ruling in *Riley* as "signal[ing] that digital information deserves special consideration, largely because Internet-connected devices such as smartphones 'are not just another technological convenience,' but are necessary to participate in the modern world, and hold for many Americans 'the privacies of life.'"

Finally, the brief stated that technology companies "regularly turn digital information over to law enforcement in response to valid warrants," but also "voluntarily challenge overbroad or unsupported requests." The companies stated that they "support this approach" as an effective means of protecting consumers' privacy. The full brief is available online at: http://www.scotusblog.com/wp-content/uploads/2017/08/16-402-ac-technology-companies.pdf.

In an Aug. 14, 2017 *amici* brief urging the Supreme Court to reverse the Sixth Circuit's ruling, the Reporters Committee for Freedom of the Press (RCFP) and a coalition of 19 media organizations argued that "[b]ecause the Fourth Amendment's prohibition against 'unreasonable searches and seizures' plays a vital role in protecting First Amendment rights, the question presented is one of particular importance to journalists and news organizations."

The brief contended that "[a]bsent meaningful Fourth Amendment protection for records like those at issue in this case, activities protected by the First Amendment — including newsgathering, speech, expression, and association — will be chilled." RCFP and the coalition, which included the Society to Professional Journalists (SPJ) and Reporters Without Borders (RSF), among others, further asserted that the "Fourth Amendment's protection against unreasonable search and seizure is historically linked to the First Amendment's protection of the free press. As this Court has long recognized, the Fourth Amendment was ratified in response to the prerevolutionary practice of arresting publishers and confiscating papers to stifle dissenting viewpoints. The press's and the public's right to expressive and associational freedom therefore informs the scope of the Fourth Amendment's protection."

The brief cited *Zurcher v. Stanford Daily* in which the Court instructed lower courts to "apply the Fourth Amendment with rigor when a search or seizure might implicate First Amendment interests." 436 U.S. 547, 564 (1978). RCFP and the coalition argued that because "CSLI reveals an individual's First Amendment protected activities, it falls within the core category of information that the Fourth Amendment was designed to protect from warrantless surveillance."

Finally, the brief contended that the acquisition of CSLI without a warrant would allow law enforcement "to easily and routinely surveil both sources' and journalists' expressive, associational, and newsgathering activities, chilling individuals' willingness to engage in such activities." RCFP and the coalition therefore urged the Court to reverse the Sixth Circuit's ruling. The full brief is available online at: https://www.rcfp.org/sites/default/files/2017-08-14-carpenter-v-us.pdf.

In a Nov. 27, 2017 opinion piece for *The Guardian*, Alexander Abdo, a senior staff attorney at the Knight First Amendment Institute (Knight Institute) at Columbia University, and Jameel Jaffer, the director of the Knight Institute, also contended that *Carpenter* raised significant First Amendment considerations. They noted that "[t]o understand the Carpenter case's full significance . . . it's necessary to consider the implications the government's arguments have for first amendment rights.. . . Journalists and their sources might be at particular risk. Imagine parallel demands for the cell site location information of a journalist who exposed government misconduct and of all the government employees who had access to the information the journalist exposed."

On June 22, 2018, the U.S. Supreme Court reversed and remanded the Sixth Circuit's ruling, holding that the acquisition of historical cell site records by law enforcement constituted a Fourth Amendment search and that law enforcement must obtain a warrant to gain access to such records. Chief Justice John Roberts wrote the majority opinion, which began by describing the significant privacy concerns associated with cell phones. Roberts wrote that cell phones "continuously scan their environment looking for the best signal, which generally comes from the closest cell site.. . . Each time the phone connects to a cell site, it generates . . . CSLI," which wireless carriers collect and store for their own business purposes and sell in aggregated form to third parties.

Justice Roberts next cited *Katz v. United States* in which the Court established that "the Fourth Amendment protects people, not places," and that it protects "certain expectations of privacy." 389 U. S. 347, 351 (1967). Roberts noted that the Court has "kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools," citing *Kyllo v. United States* in which the Court rejected a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. 533 U.S. 27, 34 (2001). Thus, the government "absent a warrant . . . could not capitalize on such new sense-enhancing technology to explore what was happening within the home." Justice Roberts also cited *Riley* as support that the acquisition of CSLI by law enforcement constitutes a Fourth Amendment search, contrary to the holding of the Sixth Circuit.

Justice Roberts next held that the case before the Court, because it centered on "digital data — personal location information maintained by a third party," did "not fit neatly under existing precedents" and lied "at the intersection of two lines of cases."

The first line of cases related to "a person's expectation of privacy in his physical location and movements." Justice Roberts cited the Supreme Court's decision in *United States v. Jones*, in which five justices, though not all in the majority opinion, concluded that "longer term GPS monitoring in government investigations of most offenses impinges on expectations of privacy." 565 U.S. 400, 412 (2012). The Sixth Circuit had differentiated *Carpenter* from *Jones* because the government action was different in *Jones*, where government agents "secretly attached a GPS device to the underside of Jones's vehicle and then monitored his movements continuously for four weeks" and because *Carpenter* "is not a GPS-tracking case." (For more information on *United States v. Jones*, see "Warrantless GPS Tracking Violates Fourth Amendment; White House Defends Warrantless Surveillance,"

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in the Spring 2012 issue of the Silha *Bulletin*.)

Justice Roberts also cited the 1983 case *United States v. Knotts*, in which the Court was confronted with whether the "government's use of a 'beeper' to aid in tracking a vehicle through traffic" constituted a search. 460 U.S. 276 (1983). Law enforcement had planted the device in a container of chloroform purchased by one of Leroy Knott's co-conspirators. Officers then tracked the vehicle from Minneapolis to northern Wisconsin." Although the Court held that such use of the device did not constitute an illegal search, it "reserved the question whether 'different constitutional principles may be applicable' if 'twenty-four hour surveillance of any citizen of this country [were] possible.'"

The second line of cases concerned "what a person keeps to himself and what he shares with others." In *United States v. Miller*, the Court held that as a "general rule . . . the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant," which later became known as the "third-party doctrine." 425 U.S. 435, 444 (1976). In this case, the government subpoenaed banks at which Mitchell Miller had accounts, seeking several months of canceled checks, deposit slips, and monthly statements in a tax invasion investigation. The Court ruled that Miller could "assert neither ownership nor possession" of the documents because they were "business records of the banks." Additionally, the Court held that "the nature of those records confirmed Miller's limited expectation of privacy, because the checks were 'not confidential communications but negotiable instruments to be used in commercial transactions,' and the bank statements contained information 'exposed to [bank] employees in the ordinary course of business.'"

In *Smith v. Maryland*, the Court concluded that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," which became known as the third-party doctrine. 442 U.S. 735, 740 (1979). The Court found that petitioner Michael Lee Smith could "not claim that his 'property' was invaded or that police intruded into a 'constitutionally protected area'" after a telephone company, complying with a police request, "installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home." The Court ruled that an individual can claim "no legitimate expectation of privacy [in] . . . information that he has voluntarily turned over to a third party."

However, Justice Roberts "declined to extend *Smith* and *Miller* to cover [the] novel circumstances" in *Carpenter*, holding that "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." He reasoned that the government's argument that the third-party doctrine applies "fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years." He also argued that there is a "world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today."

Justice Roberts further found that the third-party doctrine did not apply because cell phone location information "is not truly 'shared' as one normally understands the term" in order to constitute "voluntary exposure" under the doctrine. He held that carrying a cell phone is "indispensable to participation in modern society" and that "a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up."

Instead, Justice Roberts relied on *Jones*, finding that a "majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements." Justice Roberts observed that law enforcement, both in the past and present, "would not — and indeed, in the main, simply could not — secretly monitor and catalogue every single movement of an individual's car for a very long period." Thus, he held that "[a]llowing government access to cell-site records contravenes that expectation . . . because [m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts," to which Carpenter has an "anticipation of privacy in his physical location."

Justice Roberts further argued that cell-site records "present even greater privacy concerns than the GPS monitoring of a vehicle we considered in Jones" because cell phones are "almost a 'feature of human anatomy'" that track "nearly exactly the movements of its owner." He therefore concluded, "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."

Justice Roberts added that the "retrospective quality of the data here gives police access to a category of information otherwise unknowable.. . . With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts." He continued, "Critically, because location information is continually logged for all of the 400 million devices in the United States — not just those belonging to persons who might happen to come under investigation — this newfound tracking capacity runs against everyone." Thus, Justice Roberts ruled that "when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements."

Finally, Justice Roberts concluded that the acquisition of Carpenter's CSLI constituted a search, meaning law enforcement "must generally obtain a warrant supported by probable cause before acquiring such records." He reasoned that the SCA's requirement that the government show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation" falls "well short of the probable cause required for a warrant." Justice Roberts wrote that requiring law enforcement to only show that the "cell-site evidence might be pertinent to an ongoing investigation" is not a "permissible mechanism for accessing historical cell-site records." Instead, the "Government's obligation is a familiar one — get a warrant."

However, Justice Roberts held that there are some "case-specific exceptions [that] may support a warrantless search of an individual's cell-site records under certain circumstances." He acknowledged some exigencies, including "the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence."

Before concluding, Justice Roberts emphasized that the majority decision "is a narrow one." He wrote that the majority opinion does "not disturb the application of *Smith* and *Miller* or call into question conventional

surveillance techniques and tools, such as security cameras." Justice Roberts continued, "Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security." Nevertheless, Justice Roberts "decline[d] to grant the state unrestricted access to a wireless carrier's database of physical location information."

In a dissenting opinion, Justice Anthony Kennedy, joined by Justices Clarence Thomas and Samuel Alito, wrote that the majority's "stark departure from relevant Fourth Amendment precedents and principles . . . puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation."

Justice Kennedy contended that the third-party doctrine should apply because "[c]ell-site records . . . are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process." He added that the majority would allow law enforcement to "acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy" but that the government would "[cross] a constitutional line" related to CSLI. Justice Kennedy called this distinction "illogical" and that it "will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations."

In a separate dissenting opinion, Justice Thomas wrote that the case "should not turn on 'whether' a search occurred" but "instead, on *whose* property was searched" (emphasis in original). Justice Thomas contended that by "obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property" because Carpenter "did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them." Instead, the records, according to Justice Thomas, "belong to MetroPCS and Sprint." He therefore concluded that the majority's erred in concluding that "although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable 'expectation of privacy' in the location information that they reveal."

Justice Thomas also raised a "more fundamental problem" with the majority opinion, namely its use of the "reasonable expectation of privacy test" in *Katz*, which "has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law." More specifically, Justice Thomas contended that the test "distorts the original meaning of "searc[h]" — the word in the Fourth Amendment that it purports to define.. . . Under the *Katz* test, the government conducts a search anytime it violates someone's 'reasonable expectation of privacy.' That is not a normal definition of the word 'search.'" Thus, Justice Thomas wrote that "[u]ntil we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence."

Justice Alito also filed a dissenting opinion, joined by Justice Thomas, in which he wrote that although he "shared the Court's concern about the effect of new technology on personal privacy," he feared that the ruling "will do far more harm than good" because it "fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely."

Justice Alito argued that the Court "ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents." Although the first search requires probable cause, the second does not, according to Justice Alito. He questioned whether "every grand jury subpoena [must] be supported by probable cause?" and, if so, "investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied."

Justice Alito further contended that the majority opinion "allows a defendant to object to the search of a third party's property," which he called "revolutionary." Justice Alito emphasized that the Fourth Amendment protects "'[t]he right of the people to be secure in *their* persons, houses, papers, and effects' not the persons, houses, papers, and effects of others" (emphasis in original).

Finally, Judge Neil Gorsuch wrote a dissenting opinion in which he disagreed with the majority's decision "to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared." Instead, he contended that the Court must more broadly revisit, or discard, the third-party doctrine and "look for answers elsewhere" beyond the doctrine, *Smith*, and *Miller* because, as a result of the rise of the internet, "[e]ven our most private documents — those that, in other eras, we would have locked safely in a desk drawer or destroyed — now reside on third party servers."

Justice Gorsuch argued that the "traditional approach" to the Fourth Amendment prior to the 1960s "asked if a house, paper or effect was yours under law" and that "[n]o more was needed to trigger the Fourth Amendment." He contended that there were several benefits to this property rights-based approach, including that "Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties," including in the case of digital records in which an individual may have no choice but to entrust a third party with their data.

Judge Gorsuch cited *Ex parte Jackson*, in which the Court held in 1878 that "sealed letters placed in the mail are 'as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.'" 96 U.S. 727, 24 L.Ed. 877 (1878). Justice Gorsuch therefore concluded that "[w]hatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted — as a bailment in which the owner retains a vital and protected legal interest." Thus, Justice Gorsuch concluded that it is "entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law" even though "the telephone carrier holds the information."

Following the ruling, several observers characterized the decision

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as a victory for privacy rights against law enforcement surveillance. In a June 22 statement, American Civil Liberties Union (ACLU) attorney Nathan Freed Wessler, who argued the case before the Supreme Court, praised the decision. "The government can no longer claim that the mere act of using technology eliminates the Fourth Amendment's protections," he wrote. "Today's decision rightly recognizes the need to protect the highly sensitive location data from our cell phones, but it also provides a path forward for safeguarding other sensitive digital information in future cases — from our emails, smart-home appliances, and technology that is yet to be invented."

Sarah St. Vincent, a national security and surveillance researcher at Human Rights Watch, also called the ruling a victory for digital privacy. "This is a huge victory not only for privacy, but also frankly for reality," she told *Wired* magazine in a June 22, 2018 interview. "When you share your location data via your cell phone, it's not really voluntary. What's critical is those exceptions — the lower courts are going to need to be vigilant about making sure they're not abused."

Cyrus Farivar, a reporter at *Ars Technica*, argued that the ruling shows that the Court views cell phones differently. "They're an entirely separate class of devices that provide a very intimate look into the most detailed elements of our life, not only where we go generally, but where we go extremely specifically," he told *Wired*. He added that the Court took "a long time for it to come to its decision," which was unusually released on a Friday. "That suggests that this is an issue that the court came to with a great deal of thought, discussion, and deliberation, he said. "This is not an easy decision to reach."

Ryan Radia, a Center for Technology and Innovation research fellow, contended that the ruling showed that the Supreme Court was willing to continue weighing privacy interests as surveillance techniques continue to proliferate and improve. "For people who are understandably worried about technological evolution enabling tools and mass surveillance, they can take solace in the fact that the court has willingness to limit the government's abilities to surveill [*sic*]," Radia told *Wired*.

In a June 22 interview with CNET, Computer and Communications Industry Association (CCIA) president Ed Black predicted that "[the] decision will provide users with the confidence that the sensitive location data they share with innovative digital devices and services will only be disclosed to law enforcement with a warrant based on probable cause."

> "[The Carpenter ruling is] not just a win for privacy — it's a victory for free speech and the First Amendment as well."
>
> **— Trevor Timm, Freedom of the Press Foundation co-founder and executive director**

Orin Kerr, a prominent Fourth Amendment scholar at George Washington University, wrote in a June 22 commentary for "The Volokh Conspiracy" that on one hand, someone could read Justice Robert's opinion and say that it is "a narrow opinion only about perfect location tracking by Big Brother." However, he contended that there is also "lots of language in the opinion that cuts the other way," including that it "casts a lot of doctrine in ways that could be used to argue for lots of other changes." He continued, "For example, what is the scope of this reasonable expectation of privacy in the 'whole' of physical movements?"

Kerr added that the decision makes it clear that the third-party doctrine "is less of the bright-line rule [than *Smith* and *Miller*] suggest and more of a fact-specific standard. At the very least that is going to invite a boatload of litigation on how far this new reasoning goes."

Other observers contended that the implications of the case go beyond privacy rights related to cell-cite location records. In a June 22 commentary for *Law360*, Allison Grande wrote that the ruling "could also jeopardize the way private companies such as Google and Facebook currently use and share sensitive information by giving ammunition to courtroom challenges and policy efforts to rein in these practices."

Abdo and Kate Klonick, an assistant professor of law at St. John's Law School, argued that the ruling had important First Amendment implications. "Imagine if the government had the power to force cellphone and internet providers to disclose the contact lists of journalists and their suspected sources, the names of protesters at a rally or the phone numbers and email addresses of everyone who contacted the author of a report critical of the government — all without a warrant," they wrote in a June 22 opinion piece for *The New York Times*. "The rights of free speech, assembly and association secured by the First Amendment would be hollowed out by authority that expansive." They added, "Those are the real stakes of the Carpenter decision. While the court didn't directly address these questions, it paved the way for their resolution, free from doctrinal anachronisms and sensitive to the threats to individual rights in the bold but scary world of modern technology."

Co-founder and executive director of the Freedom of the Press Foundation Trevor Timm argued in a June 22 tweet that the Supreme Court ruling is "not just a win for privacy – it's a victory for free speech and the First Amendment as well."

In a June 22 interview with the *Chicago Tribune*, Harold Gurewitz, Carpenter's lawyer in Detroit, Mich., emphasized that the case was not over for Carpenter. He noted that the Supreme Court remanded the case to the Sixth Circuit, which would have "to evaluate whether the cellphone tracking records can still be used against Carpenter under the 'good faith' exception for law enforcement — evidence should not necessarily be thrown out if authorities obtained it in a way they thought the law required." He added that there was also additional evidence implicating Carpenter that might be sufficient to sustain his conviction.

As the *Bulletin* went to press, the Sixth Circuit had not announced a ruling.

Scott Memmel
Silha *Bulletin* Editor

New York's Highest Court Rules *New York Times* Reporter Must Testify in Trial

REPORTER'S PRIVILEGE

On June 27, 2018, the New York Court of Appeals, the state's highest court, ruled in a 4-3 memorandum order that *New York Times* reporter Frances Robles did not have the right to appeal a trial judge's decision compelling her to testify about jailhouse interviews she had conducted with Conrado Juárez, who was accused of killing a toddler in 1991. The ruling meant Robles would be required to testify at Juárez's murder trial or face contempt of court charges, raising concerns from several media experts and advocates, as well as the judges dissenting in the ruling.

The case arose in October 2013 when New York police officials arrested Juárez after they determined the identity of a murdered four-year-old girl nicknamed "Baby Hope." The child's body had been found in July 1991, but remained unidentified for more than 20 years. After being interrogated, Juárez confessed on videotape to committing the murder and also told investigators that he and his sister had dumped the body in the woods near a highway. However, four days later, Juárez withdrew his confession, telling Robles during a jailhouse interview that he had helped dispose of the toddler's body, but denied killing the child. He further alleged that detectives had "browbeat him into a confession." *The New York Times* later published Juárez's account of the interrogation on Oct. 17, 2013.

Manhattan district attorney Cyrus R. Vance Jr. summarily filed a subpoena requiring Robles to testify about her interview with Juárez. On April 13, 2016, Justice Bonnie G. Wittner, a trial judge for the New York Supreme Court for New York County, a trial court, held that Robles would not be compelled to testify at a pretrial hearing about Juárez's confession. Wittner also quashed two subpoenas that would have required Robles to turn over her notes from her interview with Juárez.

Wittner relied upon New York's shield law, which states that journalists cannot be compelled to testify or provide information about news obtained from confidential sources. N.Y. Civ. Rights Law § 79-h. However, *The New York Times* reported on April 13, 2016 that when reporters have named their sources, such as when Robles identified that her information came from Juárez, journalists receive fewer safeguards. In such instances, a journalist can be forced to testify or turn over notes if prosecutors can show the information is "highly material and relevant" as well as "critical or necessary to the maintenance of a party's claim" to prove their case. Prosecutors must also show that the information cannot be obtained from another source.

However, *The New York Times* noted on April 13, 2016 that Wittner's decision "left the door open for prosecutors to argue again at trial that Ms. Robles's testimony was critical to their case." On Aug. 4, 2016, Wittner held that Robles was required to testify during the murder trial, ruling that Robles' notes and testimony were "material, relevant and critical to the people's case" against Juárez because the only other public statements he gave in addition to his confession were to the journalist during the jailhouse interview.

On Oct. 20, 2016, the New York Supreme Court, Appellate Division, First Department reversed Wittner's August 2016 ruling, holding that Robles could not be subpoenaed to testify about the jailhouse interview. *In re People of the State of New York v. Juárez*, 39 N.Y.S.3d 155 (1st Dept. 2016). In a unanimous decision, the court found that Robles' notes were not "critical or necessary," as required by the state shield law, to the prosecution of Juárez. (For more information on the background of the "Baby Hope" case and the rulings by Wittner and the New York Supreme Court, see New York Times *Reporter Wins Appeal after Judge Ordered Her to Testify*, in "State Courts Consider Reporter's Privilege Issues" in the Fall 2016 issue of the Silha *Bulletin*.)

On June 5, 2018, *The New York Times* reported that the Manhattan district attorney's office had brought the case to the Court of Appeals, arguing not only that Roble's testimony was critical to the case, but also that she could not appeal Wittner's August 2016 ruling because she was not a party to the case.

In an Oct. 10, 2017 *amici* brief, the Reporters Committee for Freedom of the Press (RCFP) and a coalition of 48 news media organizations, including the Society of Professional Journalists (SPJ), Reporters Without Borders (RSF), and the Committee to Protect Journalists (CPJ), called on the Court of Appeals to uphold the Appellate Division's ruling. The brief first argued that New York has "long protected journalists from compelled disclosure of confidential sources and nonconfidential unpublished information," including through the New York shield law and the New York Constitution, which states in art. I, § 8 that "[e]very citizen may freely speak, write and public . . . sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Second, the brief argued that the New York shield law's "qualified reporter's privilege against compelled disclosure of nonconfidential but unpublished information is critical to the news media's ability to inform the public" and the "free flow of information." The brief contended that the protection of "nonconfidential but unpublished materials protects journalists' ability to cultivate the trust of sources of newsworthy information." RCFP and the coalition continued, "Sources who believe that reporters are likely to be forced to testify against them in court, even on nonconfidential matters, or who believe that reporters are investigative agents of the government, may refuse to speak to reporters at all."

Additionally, the brief argued that such protections not only prevent from "overwhelming numbers of subpoenas," but also "safeguard[] the editorial discretion and independence of the news media . . . [and] ensure[] that journalists will confidently investigate and report on matters of public controversy and maintain records and files regarding prior reporting without fear that their work will favor or disfavor their sources in litigation."

Finally, the brief emphasized that to overcome the qualified reporter's privilege for nonconfidential, unpublished information under the New York shield law, "the party seeking the information must make a clear and specific showing that . . . the information is 'critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto.'" The brief argued that this requirement should be read narrowly and that "information is 'critical or necessary' only if a litigant's claim 'virtually rises or falls' with the admission or exclusion of the information sought." The full brief is available online

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at: https://www.rcfp.org/sites/default/files/2017-10-13-people-v-juarez-in-re-robles.pdf.

On June 27, the Court of Appeals ruled 4-3 in a memorandum order that Robles could not appeal Wittner's ruling, finding that article 450 of the New York Criminal Procedure Law, CPL § 450.90, "does not authorize a nonparty's appeal" in which the nonparty was "aggrieved by the denial of a motion to quash a subpoena in a criminal action." *In the Matter of the People v. Juarez*, 2018 NY Slip Op 04684 (2018). Chief Judge Janet DiFiore and Judges Leslie Stein, Michael J. Garcia, and Paul G. Feinman concurred with the memorandum opinion.

The four-judge majority first noted that the goal of CPL § 450.90 is to "limit appellate proliferation in criminal matters." Under the law, "an order resolving a motion to quash a subpoena that is issued *prior* to the filing of an accusatory instrument does not arise within the context of a 'criminal action'" (emphasis added) and would fall outside the CPL and "its concomitant limitations upon appellate review." However, the majority concluded that Robles' appeal "plainly arose *in* a 'criminal action' within the meaning of that term as prescribed by the CPL" (emphasis added).

The Court also cited its 1984 ruling in *People v. Santos* in which it held that "no appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization." *People v. Santos*, 64 N.Y.2d 702, 704 (1984). The Court further held in *Santos* that "an order determining a motion to quash a subpoena . . . issued in the course of prosecution of a criminal action, arises out of a criminal proceeding for which no direct appellate review is authorized." Thus, the majority held that a lower court's rulings on subpoenas cannot be appealed after a criminal proceeding has started if the nonparty does not have statutory authorization.

The majority concluded by stating it was "not unsympathetic to Robles's policy-driven arguments . . . concerning how best to balance the interests of the expedient resolution of criminal actions against the right of a nonparty . . . to seek appellate review . . . when the State's longstanding interests in protecting the newsgathering role of reporters." However, the majority wrote that the Court must follow CPL § 450.90 and that "[i]n the absence of statutory authorization, an order resolving a nonparty's motion to quash a subpoena issued after the filing of the accusatory instrument in a criminal proceeding . . . is simply not appealable."

The majority placed the blame on the New York legislature, stating that the Court had previously "repeated recommendations . . . that the CPL be amended to allow for an expedited appellate process for non-parties aggrieved by the denial of a motion to quash a subpoena in a criminal action," but that the legislature "has not adopted that approach." In a footnote, the majority wrote that the Court is "not authorized to write into the CPL a right that the legislature has yet to include, despite repeated urging."

In a dissenting opinion, Judge Jenny Rivera, joined by Judge Rowan Wilson, criticized the "superficial" and "ultimately irrelevant" reasoning of the majority that direct appellate review of orders in criminal proceedings require express authorization by the CPL. She argued that the Court of Appeals "[s]ince 1936 . . . has recognized that 'orders granting or denying motions to quash subpoenas in criminal investigations and actions' are not governed by the CPL because 'a motion to quash subpoenas, even those issued pursuant to a criminal investigation, is civil by nature and not subject to the rule restricting direct appellate review of orders in criminal proceedings.'" Rivera thus held that the "general rule" cited by the majority "is inapplicable here." She added, "The majority does not even clarify whether courts would have jurisdiction over her possible, future appeal from a contempt order."

Rivera also contended that New York's shield law provided "the statutory authority for a journalist's appeal from the denial of a motion to quash" and that even if it did not, the law "embodies a compelling policy justification for a direct appeal of the denial of a journalist's motion to quash a subpoena in a criminal proceeding, regardless of whether such orders would be in general appealable by nonparties if issued post-indictment."

Additionally, Rivera argued that the "result of the majority's decision will be that Robles, other journalists, and nonparties will have to risk contempt if they are unwilling to comply with a subpoena order." She continued, "In Robles' case, the choice is to testify and turn over her notes and breach her journalist's oath and ethics, or refuse to comply with Supreme Court's order and be held in contempt.. . . This choice places Robles and all other journalists in a terrible bind. It is a reversal of our settled law and against our State's strong historical protections of journalists and the newsgathering process."

Rivera further found that the prosecution "failed to establish that the unpublished materials obtained by the reporter in the course of her newsgathering [were] 'critical or necessary to the maintenance' of the[ir] case," as required by the New York shield law. She reasoned that the prosecution already had "a video of defendant's statement to the police, and nothing defendant said after the videotaping, during his pretrial incarceration interview, sheds light on whether his statements as recorded were voluntary or coerced." She added that the trial court had "already held that the video is admissible, and the jury can watch it and decide for itself what if any probative value to accord defendant's confession."

Finally, Rivera noted that there seemed to be "two avenues left open to a nonparty to contest a denial [of a] motion to quash" following the majority's holding. The first avenue would be a Civil Practice Law and Rules (CPLR) article 78 action, which allows a party, such as Robles, to bring a special proceeding raising questions such as "whether a determination was made in violation of lawful procedure." The second avenue, according to Rivera, would be "to simply fail to comply with the subpoena and seek appellate review of the subsequent order of contempt."

In separate dissenting opinion, Judge Eugene Fahey, who was also joined by Wilson, agreed with Rivera that in New York "there is no right to protection from government interference that has been held in higher esteem than freedom of speech and the press. We honor it highly because we value our liberty above all else," citing the New York Constitution and shield law. Fahey argued that these protections should not "be limited by the legislature's failure to provide a nonparty with the right to appeal." He further held that the state Constitution and shield law should "afford[] a journalist the right to directly appeal from an order denying a motion to quash a subpoena issued in a criminal action, 'irrespective of any privileges granted by the Legislature now or in the future' in the Criminal Procedure Law." Thus, Fahey wrote that he "would hold that [Robles] has the right to appeal, regardless of any provision in the Criminal Procedure Law to the contrary," citing Robles' "constitutional privileges," which must be "fully protected."

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Pittsburgh Post-Gazette Fires Longtime Editorial Cartoonist Rob Rogers

On June 14, 2018, several media outlets reported that the *Pittsburgh Post-Gazette* had fired its longtime editorial cartoonist, Rob Rogers. Several observers, as well as Rogers, contended that he was probably fired because of disagreements with management over cartoons criticizing President Donald Trump. Previously, in the first half of 2018, the *Post-Gazette* had refused to publish several of Rogers' cartoons, most of which criticized President Trump and his policies. Observers condemned the firing of Rogers, citing the importance of editorial cartoonists holding government officials accountable.

EDITORIAL CONTROL

Rogers began working as the editorial cartoonist at the *Post-Gazette* in 1993 and was named a Pulitzer Prize finalist in 1999. However, on June 8, *The Washington Post* reported that between March and May of 2018, Keith Burris, who was hired by the paper in March as the editorial director, and publisher John Robinson Block had killed "nine [of Rogers'] cartoon ideas . . . and 10 finished cartoons," all of which were critical of President Trump. According to Rogers, the paper had previously only rejected "a couple of his submissions" each year. In May 2018, the *Post-Gazette* announced that it would stop publishing Rogers' cartoons altogether, according to CNN on June 14. The last cartoon was published on June 5.

In an interview with CNN's Jake Tapper in early June, Rogers stated that he did not know why the paper "was killing his cartoons," but argued that it may be because management wanted him to be "less negative to Trump." He added, "I'm feeling, at least, that they want me to be a cartoonist that I'm not."

On June 14, the *Huffington Post* reported that a push by the *Post-Gazette* for less negative coverage of President Trump was linked to Block and Burris, who both identify as conservative. *The New York Times* noted on June 15 that the naming of Burris as editorial director was "part of a rightward shift by the once-liberal editorial page." Previously, in January 2018, the *Post-Gazette* drew criticism for defending President Trump's use of the phrase "shithole countries" regarding Haiti, El Salvador, and African nations. Block had asked that the phrase be removed from an Associated Press (AP) story that ran on the paper's front page. Burris wrote an editorial claiming that the comment was not racist. (For more information about the controversy around President Trump's comment, see "The Ethics of Covering President Donald Trump" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

However, in an interview with the *Times*, Burris stated, "I'm certainly not in Trump's base and I don't think our publisher is, we just don't think he's Satan.. . . This sort of portrayal of me as a right-wing yahoo riding in on a steed from Ohio with a red cap on is just silly and it's belied by — well, just read my stuff."

On June 14, several media outlets reported that Rogers had been fired. In a June 14 tweet, Rogers wrote, "Today, after 25 years as the editorial cartoonist for the *Pittsburgh Post-Gazette*, I was fired." In an interview on CNN's "Outfront," Rogers stated that he still did not know why the newspaper had stopped publishing his cartoons, but claimed that "the common theme in all the ones that have been rejected, I'd say 90% of them have something to do with Trump." He added, "I think that I've been pretty even handed in terms of presidents.. . . I've certainly hit both sides."

In a June 14 statement, Rogers further criticized the *Post-Gazette*'s management. "The Post-Gazette's leadership has veered away from core journalistic values that embrace diverse opinions and

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The full memorandum order and dissenting opinions are available online at: https://www.nycourts.gov/ctapps/Decisions/2018/Jun18/58mem18-Decision.pdf.

In a statement following the ruling, *New York Times* spokeswoman Danielle Rhoades Ha said, "[W]e are disappointed in the court's ruling, which is a setback for press freedom in New York. It is imperative that the Legislature act to correct the problem."

In a separate statement, RCFP executive director Bruce Brown also criticized the ruling. "The protections of a shield law are meaningless unless a reporter can appeal an erroneous trial court ruling," he said. "Today's decision leaves important substantive protections for journalists under New York law without the means to enforce them. A reporter should not have to risk going to jail for contempt in order to trigger appellate review of her rights." He added, "It's a journalist's job to report the news and inform the public. If reporters can't protect their sources, the public will miss out on important stories and valuable information."

In an interview with the New York *Daily News*, RCFP staff attorney Sarah Matthews argued that the decision undermined New York's shield law. "This could have broad and negative ramifications for members of the media in New York," she said.

In a June 28 interview with Silha *Bulletin* Editor Scott Memmel, George Freeman, the executive director of the Media Law Resource Center (MLRC) in New York and former assistant general counsel of the New York Times Company, contended that the "problem with the ruling is that it was entirely technical and procedural and did not get at the rights of the reporter." He added that as "a practical matter, [the ruling] makes it very difficult to appeal in these circumstances," therefore undermining the New York shield law and adding "needless hoops."

Robles' attorney, Katherine M. Bolger said in a statement, "Ms. Robles is deeply disappointed about the New York Court of Appeals decision and thinks it marks a retreat from their traditional role as protectors of the free press in New York." She added, "This is particularly so because it appears that at least some of the judges believe she is right on the merits."

In a June 27 interview with *The New York Times*, Bolger said that Robles "ha[d] not decided if she will testify." As the *Bulletin* went to press, Robles had not announced whether she would testify in the trial, file an CPLR article 78 appeal, or take a different action.

Scott Memmel
Silha *Bulletin* Editor

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public discourse on important issues," Rogers wrote. "I am especially troubled that management's decision to fire me discounts the thousands of readers who turn to the Post-Gazette for editorials, columns, and cartoons that, while not always reflecting their own positions, challenge preconceived notions and invite thought, conversation, and keep the civic conversation going. I fear that today's unjustified firing of a dissenting voice on the editorial pages will only serve to diminish an opinion section that was once one of America's best."

In an interview with the *Huffington Post* on June 14, Rogers said his cartoons would continue to be published by other publications through Andrews McMeel Syndication. He added in a June 15 opinion piece for *The New York Times*, "The paper may have taken an eraser to my cartoons. But I plan to be at my drawing table every day of this presidency."

In a June 14 story, the *Post-Gazette* claimed that Burris had offered Rogers "a deal in which he would be an independent contractor and produce two cartoons per week for the paper's op-ed page along with his weekly strip, 'Brewed on Grant.'" Burris was quoted in the story as saying, "We tried hard to find a middle way, an accommodation to keep him [at] the paper."

In a June 14 statement, Stephen Spolar, the *Post-Gazette*'s chief human resources officer, said, "The Post-Gazette does not provide details about employment matters, but in light of Mr. Rogers' public comments today, we do want to acknowledge his long service to the newspaper and our community. Any further discussions will be conducted with Mr. Rogers as a private matter."

Block stated in an interview with *Politico* on June 16 that Rogers had become "obsessed with Trump." He added, "He's just become too angry for his health or for his own good."

Several observers raised concerns about the firing of Rogers. Pittsburgh Mayor William Peduto criticized the *Post-Gazette* and explained the importance of editorial cartoonists. "This is precisely the time when the constitutionally-protected free press — including critics like Rob Rogers — should be celebrated and supported, and not fired for doing their jobs," Peduto said in a June 14 statement. "This decision, just one day after the President of the United States said the news media is 'Our Country's biggest enemy,' sets a low standard in the 232-year history of the newspaper."

In a June 15 statement, president of the Association of American Editorial Cartoonists (AAEC) Pat Bagley wrote, "It's as simple as this: Rogers was fired for refusing to do cartoons extolling Trump. Let that sink in." He continued, "The firing of Rogers and the absence of his cartoons from the editorial pages is a blow to free expression and to the existence of a free and open marketplace of ideas."

> "The firing of [Rob] Rogers and the absence of his cartoons from the editorial pages is a blow to free expression and to the existence of a free and open marketplace of ideas."
>
> **— Pat Bagley, Association of American Editorial Cartoonists president**

In a June 15 opinion piece for *The Washington Post*, Ann Telnaes, the *Post*'s editorial cartoonist, also explained the importance of satire and political cartoonists. "Through satire, humor and pointed caricatures, editorial cartoonists criticize leaders and governments that are behaving badly," she wrote. "The purpose of an editorial cartoonist is to hold politicians and powerful institutions accountable — and we all know how little President Trump thinks he, his family or his sycophants should be held accountable." She concluded, "Rogers was the first American editorial cartoonist to lose his job as a result, but he won't be the last." Telnaes also cited six cartoons that the *Post-Gazette* elected not to publish. They are available online at: https://www.washingtonpost.com/news/opinions/wp/2018/06/15/an-american-editorial-cartoonist-has-been-fired-for-skewering-trump-he-likely-wont-be-the-last/?noredirect=on&utm_term=.18921d68a0cf.

Telnaes and Bagley were among the panelists at "The State of Our Satirical Union: *Hustler Magazine, Inc. v. Falwell* at 30," a symposium held April 20-21, 2018, co-sponsored by the Silha Center for the Study of Media Ethics and Law, the AAEC, the Minnesota Journalism Center, and the Hubbard School of Journalism and Mass Communication. Among the topics discussed were the importance of political cartoons, especially in holding government officials accountable. (For more information on the symposium, see "Spring Symposium Marks the 30th Anniversary of *Hustler Magazine, Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

However, several observers emphasized that the firing of Rogers was not a violation of the First Amendment, noting that the *Post-Gazette* is a private company. In a June 14 story, the Poynter Institute (Poynter) stated that Rogers had acknowledged that he "[knew] the Post-Gazette is a privately owned newspaper, his position was not union protected and the owner, [Block], ultimately can do what he wishes." Previously, after actress and vocal supporter of President Trump Roseanne Barr was fired by ABC for a racist comment about former Obama adviser Valerie Jarrett, *National Review* reporter Katherine Timpf explained in a May 29, 2018 story that the First Amendment protects "consequences *from the government* over our speech [and press issues], not consequences from . . . [private] employers" (emphasis in original).

Additionally, Pennsylvania is an "at will" employment state, which the *Post-Gazette* explained on Oct. 17, 2011 means that an employer "can fire, suspend or fail to promote an employee for any reason or no reason at all, so long as it's not an illegal reason."

Scott Memmel
Silha *Bulletin* Editor

FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition

On June 11, 2018, the Federal Communication Commission's (FCC) repeal of net neutrality officially took effect, leading several observers to consider the possible implications of the repeal. However, actions taken by 100 U.S. mayors in April 2018 and by the U.S. Senate in May, among other previous actions taken by technology companies and open internet advocacy organizations, complicated the repeal and suggested that net neutrality practices may not disappear, at least in the short term.

NET NEUTRALITY

Net neutrality is the principle that Internet Service Providers (ISPs) should treat all data on the internet the same, regardless of the source. In February 2015, the FCC adopted the 2015 Open Internet Order, Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1), which implemented rules that reclassified broadband internet access as a "telecommunications service" under Title II of the Communications Act, providing the FCC the authority to regulate ISPs. The Open Internet Order also included three "bright-line" rules prohibiting ISPs from (1) blocking lawful internet content, (2) slowing down the speed of content delivery for specific applications or services, a practice known as throttling, and (3) paid prioritization, which would allow ISPs to favor some internet traffic over others.

On June 14, 2016, the U.S. Court of Appeals for the D.C. Circuit upheld the Open Internet Order in a 2-1 decision, ruling that the FCC had the authority to implement the Order and that ISPs should provide equal access to all users. *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F.3d 674 (D.C. Cir. 2016). As the *Bulletin* went to press, the U.S. Supreme Court had not announced whether it would grant *certiorari* in the *U.S. Telecom* case.

On Dec. 14, 2017, the FCC voted 3-2 to repeal its net neutrality rules in a Declaratory Ruling, a Report and Order, and an Order tilted "Restoring Internet Freedom" (collectively "Order"). WC Docket No. 17-108, FCC 17-166, 83 Fed, Reg, 7852 (Feb. 22, 2018). FCC Chairman Ajit Pai, Commissioner Brendan Carr, and Commissioner Mike O'Reilly voted in favor of repeal. Commissioners Mignon Clyburn and Jessica Rosenworcel were opposed. The Order first "[r]estor[ed] the classification of broadband Internet access service as an 'information service'" as it had been classified prior to the 2015 Open Internet Order. Second, the Order "[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission." Finally, the FCC eliminated the rules preventing blocking, throttling, and paid prioritization. On Feb. 22, 2018, the FCC published the new rules in the Federal Register, though the rules did not immediately take effect.

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

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

Additionally, governors in six states, including Hawaii, Rhode Island, New Jersey, New York, Montana, and Vermont, signed executive orders in the first half of 2018 prohibiting government agencies from contracting with Internet Service Providers (ISPs) who do not follow net neutrality principles.

(For more information about the background of net neutrality and efforts to reverse its repeal, see "FCC Repeals Net Neutrality, Prompts Legal Action and Legislation" in the Winter/Spring 2018 issue of the Silha *Bulletin*, "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation" in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.)

Net Neutrality Repeal Officially Takes Effect

On June 11, 2018, multiple news outlets reported that the Federal Communication Commission's (FCC) repeal of net neutrality rules had officially taken effect. Observers speculated that there could be several negative effects of the repeal, though FCC Chairman Ajit Pai countered that the new approach would have several benefits to consumers. Other observers noted that any changes were not likely in the short term in light of ongoing legal and legislative efforts to reinstate net neutrality principles.

On May 10, 2018, the FCC filed a notice "as an announcement of the effective date" of the net neutrality repeal. The notice stated that "the Office of Management and Budget (OMB) [had] approved, for a period of three years, the information collection requirements" associated with the FCC's December 2017 order. The notice was published in the Federal Register on May 11, meaning the repeal of the net neutrality

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protections was set to take place 30 days later, or on June 11. The full notice is available online at: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-10063.pdf.

On June 11, media outlets confirmed that the Open Internet rules had been repealed and speculated on the potential effects. National Public Radio (NPR) reported on June 11 that ISPs were now permitted "to throttle, block, or be paid to prioritize certain sites or content, as long as they disclose that they are doing so." *The Washington Post* stated on June 11 that the repeal "effectively narrow[ed] what the federal government would consider a net neutrality violation," providing more power to ISPs. The *Post* also pointed out that the new approach "hands much of the responsibility for enforcing violations" to the Federal Trade Commission (FTC).

In a June 11 statement, Democratic FCC Commissioner Jessica Rosenworcel, who voted in December 2017 against the repeal, also argued that "internet service providers now have the power to block websites, throttle services and censor online content." She added, "They will have the right to discriminate and favor the internet traffic of those companies with whom they have pay-for-play arrangements and the right to consign all others to a slow and bumpy road."

Multiple observers noted that the removal of rules against paid prioritization could allow ISPs to create "fast lanes" in which affluent individuals can pay to have faster internet speeds that other individuals may not be able to afford. *The Verge* on June 11 and the *New York Post* on June 12 added that companies could practice "zero rating" in which they provide exemptions to their own services, such as a particular platform for television or video streaming, while potentially making rival services more expensive, such as Netflix or Amazon. However, *The Verge* noted that this prompted much concern from observers because "[s]o far, [it] has mostly translated to free stuff." Additionally, Internet Service Providers (ISPs) could begin selling internet content or websites in bundles, therefore requiring individuals to pay extra for "premium content," such as social media, according to *The New York Times* on June 11.

The *Times* noted in November 2017 that small businesses would not have a "level digital playing field to compete against deep-pocketed industry giants that could pay to get an edge online." Finally, *The Verge* contended that internet companies would now be freer to collect and share users' data and to tailor ads based on users' web and purchase histories, though they would still be subject to FTC regulation.

In a June 10 commentary for CNET, Pai offered several arguments in support of the repeal of net neutrality, which was one of his main goals after being named FCC chairman by President Donald Trump in July 2017. First, Pai explained that the new rules "empower the [FTC] to police Internet service providers for anticompetitive acts and unfair or deceptive practices." He added that the new framework includes a strengthened transparency rule "so that internet service providers must make public more information about their network management practices."

Second, Pai compared the new approach to the "bipartisan success" when "President [Bill] Clinton and a Republican Congress agreed on a light-touch framework to regulating the internet." He continued "Under that approach, the internet was open and free. Network investment topped $1.5 trillion. Netflix, Facebook, Amazon, and Google went from small startups to global tech giants. America's internet economy became the envy in the world."

Third, Pai argued that the new approach "will be very positive for consumers," providing an example of Vermont broadband provider VTel, which had "just announced that it had committed $4 million to upgrade its 4G LTE service and to begin rolling out faster mobile broadband that will start its transition to 5G." VTel stated that the "the current FCC is a significant reason for [its] optimism" and investment, according to Pai.

Finally, Pai stated that the new approach "will both protect the free and open internet and deliver more digital opportunity to more Americans. It's worked before and it will work again. Our goal is simple: better, faster, cheaper internet access for American consumers who are in control of their own online experience. And that's what the FCC's Restoring Internet Freedom Order will deliver." The full commentary is available online at: https://www.cnet.com/news/fcc-chairman-our-job-is-to-protect-a-free-and-open-internet/.

Despite the concerns raised by the repeal of net neutrality, observers argued that internet users should not necessarily expect their coverage to slow down or change, at least not in the near future. Previously, in a March 5 story, *The Washington Post* argued that there was "scant evidence that Internet users should brace for a slowdown." According to *Bloomberg* on Dec. 12, 2017, several ISPs, in a December 2017 statement, made public pledges not to block or throttle content, and to avoid "unfair discrimination against lawful traffic online." The companies included Comcast and Broadband for American, which represents several ISPs, including Verizon, the largest U.S. wireless provider. However, *The Washington Post* noted on June 11 that ISPs are free to change their "commitments" and "promises" at any time. The *New York Post* on June 12 cited Marc Martin, a former FCC staffer, who argued that ISPs are "likely to drop these self-imposed restrictions; they will just wait until people aren't paying a lot of attention."

The *New York Post* also stated that the changes were "likely to happen slowly, as companies assess how much consumers will tolerate" and that they "don't want to add fuel to the fire." *The Verge* contended that "nothing on [a user's] phone or laptop will look drastically different in the immediate future" and that an individual's "webpages will continue to load at the same rate, and the content [users already] consume won't dramatically flash a giant 404-like error message anytime soon. Carriers aren't going to drop the throttle-hammer on day one."

On June 11, CNN argued that "not much is expected to change right away as the possibility of legislation and litigation looms," including by over 100 U.S. mayors and the U.S. Senate in April and May of 2018.

Over 100 Mayors Sign Pledge to Protect Net Neutrality

On April 27, 2018, *Gizmodo* reported that more than 100 mayors signed a pledge to uphold net neutrality principles in their jurisdictions. Among the Minnesota mayors who signed the pledge were Minneapolis Mayor Jacob Frey, St. Louis Park Mayor Jake Spano, Gaylord Mayor Don Boeder, Maplewood Mayor Nora Slawik, and Brooklyn Center Mayor Tim Willson. A full list is available online at: https://www.freepress.net/news/press-releases/more-100-mayors-sign-pledge-protect-open-internet-fccs-net-neutrality-repeal.

The pledge, created by a coalition of open internet advocates, including the Daily Kos, Free Press Action Fund, and Demand Progress, included six steps aimed to "ensure the internet remains open and to keep gatekeepers

from throttling, blocking or limiting government content on the internet." The mayors agreed to:

- "Procure applicable internet services from companies that do not block, throttle, or provide paid prioritization of content on sites that cities run to provide critical services and information to their residents."
- "Ensure an open internet connection with any free or subsidized service we offer to our residents."
- "Not block, throttle or engage in paid prioritization when providing internet service directly to our residents, such as through free public Wi-Fi or municipal broadband."
- "[R]equire clear and accessible notices of filtering, blocking and prioritization policies with enforceable penalties for violations to protect consumers from deceptive practices."
- "Monitor the practices of internet service providers so consumers and regulators can know when a company is violating open internet principles or commitments."
- "Encourage consumer use of ISPs, including municipal options, that abide by open internet policies."

The full pledge is available online at: https://docs.google.com/forms/d/e/1FAIpQLSctOwOuAZajo8BgYGzM4l0WemNeyBFnURoNWPg44971caMcuQ/viewform. More information about the pledge is also available online at the open internet coalition's website: MayorsForNetNeutrality.org.

In an April 26 statement, New York City Mayor Bill de Blasio said, "Today marks an important milestone in our fight against the Trump administration's attempt to strip away the right to access a fair and open internet. Since New York City helped launch the pledge, over 100 cities have signed on." He continued, "Cities must continue to join together to protect an open internet for all of our people in the face of reckless deregulation."

St. Louis Mayor Lyda Krewson said in a separate statement, "Net Neutrality is vitally important to ensure communications with our citizens, both daily and during emergencies.. . . Further, internet access is increasingly part of how we deliver services. A pay-to-play internet will increase our costs and make it harder for government to implement smarter ways of doing business."

Timothy Karr, the senior director of strategy and communications for Free Press Action Fund, agreed that local leaders were taking important steps to protect net neutrality. "Local leaders are forming a bulwark to defend our rights to connect and communicate against the real and present threat to Net Neutrality," he said. "On average, more than three city mayors are signing the Cities Open Internet Pledge each day, with more expected to join throughout the spring and summer. So many mayors are signing on because they understand that an open internet is vital to the livelihood of their communities. If bureaucrats in Washington, D.C., won't protect Net Neutrality against the FCC's wrongheaded decision, local leaders are ready to step up for the people they represent."

U.S. Senate Passes Resolution Aiming to Restore Net Neutrality

On May 16, 2018, several news outlets reported that the U.S. Senate had passed a resolution of disapproval aiming to block the Federal Communication Commission's (FCC) repeal of net neutrality. Observers noted that the resolution could also have significant political effects, namely shining a spotlight on lawmakers running for reelection in 2018.

Previously, on Feb. 27, 2018, Sen. Edward J. Markey (D-Mass.) formally introduced the resolution of disapproval in an attempt to overturn the FCC's repeal of net neutrality. The resolution was proposed under the Congressional Review Act (CRA), which allows Congress 60 days to challenge new rules passed by an independent agency, such as the FCC. The resolution required a simple majority vote, which requires 51 Senators. (For more information on the introduction of the resolution, see *U.S. Senate Introduces Resolution to Protect Net Neutrality* in "FCC Repeals Net Neutrality, Prompts Legal Action and Legislation" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

On May 16, the Senate voted 52-47 in favor of the resolution, with all 49 Democratic senators voting for the resolution, as well as three Republicans, including Sens. Susan Collins (R-Maine), John N. Kennedy (R-La.), and Lisa A. Murkowski (R-Alaska).

The vote came despite a May 15 letter sent to Congress by trade groups The Internet & Television Association (NCTA), CTIA, and the United States Telecom Association (USTelecom), who argued that internet companies and users "need a better solution than this [resolution]," namely "bipartisan legislation that provides 21st century rules for a 21st century internet." The full letter is available online at: https://twitter.com/b_fung/status/996411058456756224/photo/1.

Conversely, in a May 9 statement, The Internet Association (IA), a trade group backed by Facebook, Uber, and others, "urg[ed] Americans to contact their senators . . . to support the [Senate resolution] . . . that will restore strong, enforceable net neutrality protections." The statement continued, "Internet Association's position aligns with a bipartisan majority of Americans who support strong, enforceable net neutrality principles like a ban on blocking, throttling, and paid prioritization. Net neutrality is necessary in a world where half of all Americans — and 87 percent of rural Americans — have no choice for high speed broadband." IA president and CEO Michael Beckerman added, "It is essential that rules be reinstated through any means necessary, including the CRA, courts, or bipartisan legislation." The full statement is available online at: http://www.publicnow.com/view/0DD5F4F8643DDCFAE1C4AB91FEE4C6A8B36E7E3C.

Several news outlets have noted that even after passing in the Senate, the resolution of disapproval faced an uphill battle in the Republican-controlled U.S. House of Representatives, where passing the resolution required 150 out of 218 votes. *The Washington Post* reported on May 16 that House Majority Leader Kevin McCarthy (R-Calif.) had previously said lawmakers in the House were focused on passing their own legislation to "permanently address this issue," rather than addressing the Senate resolution. On June 11, *Bloomberg* reported that Democrats still needed about 48 signatures for a petition that would force a vote on the resolution. A list of representatives voting for and against the resolution is available online at: https://www.battleforthenet.com/scoreboard/all/.

Senate Minority Leader Chuck Schumer (D-N.Y.) maintained that the "House Republicans don't have to choose the same path that the vast majority of Senate Republicans in the Senate chose.. . . [House Speaker Paul Ryan (R-Wis.)] should bring this resolution up for a vote immediately because it's too important of an issue to shelf. The American people have spoken and the American people should listen."

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U.S. Customs and Border Protection Actions Continue to Raise First and Fourth Amendment Questions

On Jan. 4, 2018, U.S. Customs and Border Protection (CBP) issued a new directive revising its policies regarding searches of electronic devices and information at U.S. borders amidst growing criticism from observers that such searches without probable cause or a warrant constituted a violation of the First and Fourth Amendments.

SEARCHES AND SEIZURES

However, despite the new policy, the searches of electronic devices by CBP continued to be the center of several federal court rulings and lawsuits. On May 9, 2018, the U.S. Court of Appeals for the Fourth Circuit ruled that a forensic analysis of a Turkish citizen's iPhone by CBP agents constituted a "nonroutine border search," and therefore required the agents to have had "individualized" or "reasonable" suspicion to conduct the search. *United States v. Kolsuz*, No. 16-4687 (4th Cir. 2018). Conversely, on May 23, 2018, the Eleventh Circuit ruled that the Fourth Amendment does not require federal agents to have reasonable suspicion for a "forensic" search of electronic devices at U.S. borders. *United States v. Touset*, No. 17-11561 (11th Cir. 2018). Finally, on May 9, 2018, a federal judge denied a U.S. Department of Homeland Security (DHS), CBP, and U.S. Immigration and Customs Enforcement (ICE) motion to dismiss a case brought by 11 individuals, including two journalists and an editor of an online publication, who alleged that warrantless searches and seizures of their electronic devices at U.S. borders violated their First and Fourth Amendment rights.

Additionally, on June 12, 2018, *The Washington Post* reported that CBP faced additional criticism after the *Post* reported that CBP agent Jeffrey Rambo had questioned journalist Ali Watkins in June 2017 about her reporting methods and confidential sources, among other topics. CBP's Office of Professional Responsibility summarily launched an investigation into Rambo's actions.

CBP Adopts New Policy of Border Searches of Electronic Devices

On Jan. 4, 2018, National Public Radio (NPR) reported that U.S. Customs and Border Protection (CBP) had released Directive No. 3340-049A, titled "Border Searches of Electronic Devices," a new directive revising its 2009 policy on searches of electronic devices at U.S. borders. Among the changes was a requirement that CBP agents have "reasonable suspicion" in order to perform "advanced" or "forensic" searches. Observers noted that although the policy was an improvement, it did not go far enough to protect the Fourth Amendment and privacy rights of individuals crossing U.S. borders.

In August 2009, CBP released Directive No. 3340-049, titled "Border Search for Electronic Devices Containing Information," which remained the active policy until the passage of the January 2018 directive. The 2009 directive allowed "an Officer or other individual authorized to perform or assist in such searches . . . [to] examine electronic devices and may review and analyze the information encountered at the border." The individual could do so "with or without individualized suspicion," meaning a search warrant or probable cause were not required. One exception was for sensitive material "such as medical records and work-related information carried by journalists [which] shall be handled in accordance with any applicable federal law and CBP policy." However, several searches of journalists at U.S. borders raised concerns about whether the exceptions were followed. (For more information on the 2009 policy and criticism of CBP's searches of electronic devices and social media accounts at U.S. borders, see *2009 Policy Continues to Raise Legal Questions Amid Increase in*

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

Following the vote, Sen. Markey called it a victory for democracy and the economy. "When we talk about a free and open Internet, we mean it is free from corporate control," he said. In an interview with *The Washington Post* after the vote, Sen. Kennedy said, "It was a fairly close call, but I'll tell you what it comes down to: the extent to which you trust your cable company." He added, "If you trust your cable company, you're not going to like my vote today. If you don't trust your cable company, you will."

However, some observers and politicians contended that the resolution was for political purposes ahead of the 2018 midterm elections. A May 16 *Wired* magazine story explained that "[o]pposing net neutrality could be a liability in November's mid-term elections."

Sen. John Thune (R-S.D.), the chairman of the Senate committee that oversees the FCC, called the vote a "political stunt" in an interview with the *Post*. He added, "Despite this vote, I remain committed to finding a path to bipartisan protections for the Internet and stand ready to work with my colleagues on the other side of the aisle when they are ready as well."

On the Senate floor prior to the vote, Sen. Brian Schatz (D-Hawaii) asked, "Which side are you on?" He added, according to the *Los Angeles Times* on May 16, "There is no constituency on the other side of this other than telecommunications companies."

Marc Martin, a communications and technology law attorney at Perkins Coie LLP in Seattle, Wash. told the *Post*, "The Senate vote, on the eve of midterms, could have significant political effects." However, he cautioned that it remained unclear how many voters would be motivated by net neutrality to go to the polls.

FCC Chairman Ajit Pai said in a May 16 statement, "It's disappointing that Senate Democrats forced this resolution through by a narrow margin. But, ultimately, I'm confident that their effort to reinstate heavy-handed government regulation of the Internet will fail."

Scott Memmel
Silha *Bulletin* Editor

Warrantless Searches at U.S. Borders in "U.S. Customs and Border Protection Searches of Electronic Devices, Data at U.S. Borders Raise Privacy and Legal Concerns" in the Summer 2017 issue of the Silha *Bulletin* and "Civil Rights Organizations, Federal Agency, and House of Representatives Raise Different Issues Regarding Searches at U.S. Borders" in the Fall 2017 issue.)

According to National Public Radio (NPR) on Jan. 5, 2018, CBP agents inspected 30,200 phones and other devices in 2017, marking a 60 percent increase from 2016. Previously, in April 2017, CBP had released data indicating that searches of cellphones by border agents more than doubled from 8,503 arriving international travelers to 19,033 in 2016. In a January 2018 statement, CBP stressed that the searches affected only .007 percent of all travelers and that its "border searches of electronic devices have resulted in evidence helpful in combating terrorist activity, child pornography, violations of export controls, intellectual property rights violations, and visa fraud."

On Jan. 4, 2018, the U.S. Department of Homeland Security (DHS) and CBP released a new directive meant to "provide guidance and standard operating procedures for searching, reviewing, retaining, and sharing information" contained in travelers' electronic devices, including mobile phones, computers, and others. Titled "Border Search of Electronic Devices," the new policy allows CBP agents, when searching an electronic device, to only examine information "that is resident upon the device and accessible through the device's operating system or through other software, tools, or applications," meaning agents may not "intentionally use the device to access information that is solely stored remotely." Thus, agents are not authorized under the policy to search for information stored in the cloud.

Second, the policy differentiated a "basic search" from an "advanced search." An advanced or "forensic" search is that in which an agent "connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents." The policy now requires that there is "reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern" in order to conduct such searches. Although "reasonable suspicion" is not defined, the policy states that "[m]any factors may create reasonable suspicion or constitute a national security concern; examples include the existence of a relevant national security-related lookout in combination with other articulable factors as appropriate, or the presence of an individual on a government-operated and government-vetted terrorist watch list." Conversely, a basic or "manual" search is one in which an officer, "with or without suspicion, . . . examine[s] an electronic device" including reviewing and analyzing information.

Third, like the 2009 policy, the new directive includes some exceptions, such as when the device contains "possibly sensitive information, such as medical records and work-related information carried by journalists." The policy states that in such cases, the information "shall be handled in accordance with any applicable federal law and CBP policy," though no further specifics were provided. Additionally, the policy contains additional steps agents must take regarding information protected by attorney-client privilege.

Fourth, the policy states that CBP agents may request that an individual unlock portions of their device protected by "a passcode, encryption, or other security mechanism." If the agent is unable to access information due to such constraints, he or she may "detain the device." The policy states that an agent, with supervisory approval, "may detain electronic devices, or copies of information contained therein, for a brief, reasonable period of time to perform a thorough border search. The search may take place onsite or at an off-site location, and is to be completed as expeditiously as possible." The policy requires that the device be returned after a maximum of five days, unless "extenuating circumstances exist."

Finally, the policy allows agents to "seize and retain an electronic device, or copies of information from the device, when, based on a review of the electronic device encountered or on other facts and circumstances, they determine there is probable cause to believe that the device, or copy of the contents from the device, contains evidence of a violation of law that CBP is authorized to enforce or administer." CBP is authorized to share copies of any information collected with other domestic and foreign law enforcement agencies, though the information must be "safeguarded," including "keeping materials in locked cabinets or rooms, documenting and tracking copies to ensure appropriate disposition, and other safeguards during conveyance such as password protection or physical protections."

The directive is effective through January 2021 when a review will take place. The full policy is available online at: https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.

Following the release of the new directive, observers contended that although it was an improvement, several concerns still remained about the policy and CBP's practices. In a Jan. 8, 2018 statement, Electronic Frontier Foundation (EFF) senior staff attorney Sophia Cope and staff attorney Aaron Mackey wrote that "[a]lthough the new policy contains a few improvements over [the 2009] rules," including requiring reasonable suspicion for advanced searches, "overall it doesn't go nearly far enough to protect the privacy of innocent travelers or to recognize how exceptionally intrusive electronic device searches are. Nothing announced in the policy changes the fact that these device searches are unconstitutional."

EFF contended that there are "at least four problems with [the] new rule" related to advanced searches. The organization first asserted that it has "one huge loophole — border agents don't need to have reasonable suspicion to conduct an advanced device search when 'there is a national security concern.'" EFF argued that such an exception "can be construed exceedingly broadly and CBP has provided few standards for agents to follow."

Second, Cope and Mackey wrote that "the Constitution requires border agents to obtain a probable cause warrant before searching electronic devices given the unprecedented and significant privacy interests travelers have in their digital data." Thus, reasonable suspicion, while an improvement, is "insufficient under the Fourth Amendment to protect personal privacy."

Third, EFF argued that the distinction between basic and advanced searches is "flimsy" and that manual searches can be "just as intrusive as 'forensic' searches." Finally, Cope and Mackey contended that that agents should not simply have "reasonable suspicion of activity in violation of the laws enforced or administered by CBP," but also that they have a "basis to believe that the device

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itself contains evidence of a violation of an immigration or customs law."

Cope and Mackey also raised concerns about the new policy requiring travelers to unlock their devices at the border, which the organization called "simply wrong . . . travelers have a right to refuse to unlock, decrypt, or provide passwords to border agents." The full statement is available online at: https://www.eff.org/deeplinks/2018/01/new-cbp-border-device-search-policy-still-permits-unconstitutional-searches.

In a January 9 statement, American Civil Liberties Union (ACLU) Speech, Privacy, and Technology Project staff attorney Esha Bhandari wrote that the new directive "is a welcome development because it at least acknowledges the severe privacy invasions that occur when the government can search your device without any suspicion," but added that it "doesn't go nearly far enough."

Like EFF, the ACLU contended that "the Constitution requires the government to get a warrant before searching electronic devices at the border." Bhandari also found it problematic that the new directive "still requires no suspicion at all when an advanced search implicates a 'national security concern' — which is not clearly defined in the policy and is potentially vague enough to cover a wide array of scenarios — or when a search is not considered advanced." She added that basic searches can also "be incredibly invasive, exposing the intimate details of a person's life to government agents who never have to make a case for why they need to conduct the search."

Additionally, Bhandari noted that the new policy "does not apply to agencies outside of CBP that might conduct searches of devices taken at the border, and does not make clear that travelers should not be under an obligation to provide border officers with a password or other information to enable them to search their device." The ACLU's full statement is available online at: https://www.aclu.org/blog/privacy-technology/privacy-borders-and-checkpoints/governments-new-policy-device-searches.

Fourth Circuit Rules Certain Searches at U.S. Borders Requires "Individualized Suspicion"

On May 9, 2018, the U.S. Court of Appeals for the Fourth Circuit ruled that a months-long forensic analysis of Turkish citizen Hamza Kolsuz's smartphone by U.S. Customs and Border Protection (CBP) agents constituted a "nonroutine border search," which requires that the agents had "individualized" or "reasonable" suspicion to conduct the search. *United States v. Kolsuz*, No. 16-4687 (4th Cir. 2018). The decision, which was amended on May 18, affirmed a May 2016 ruling by the U.S. District Court for the Eastern District of Virginia denying Kolsuz's motion to suppress evidence gathered from a forensic analysis of his smartphone, finding that the CBP agents had had sufficient suspicion to conduct the search. *United States v. Kolsuz*, 185 F.Supp.3d 843, 846 (E.D. Va. 2016).

The case arose on Feb. 1, 2016 when Charles Reich, the CBP Special Agent assigned to the New York Homeland Security Investigations (HSI) Field Office, alerted CBP Supervisory Officer Mike Augustino and Special Agent Jay Culley that they should check Kolsuz's bags before he boarded a plane to Turkey the following day. Reich informed Augustino and Culley that Kolsuz had previously been stopped at John F. Kennedy International Airport in New York in December 2012 after allegedly attempting to export items to Turkey without a proper license.

On Feb. 2, 2016, Kolsuz was detained at Washington Dulles International Airport while attempting to board his flight after CBP agents found firearms parts in his luggage. The agents took possession of Kolsuz's smartphone and subjected it to a "month-long, off-site forensic analysis, yielding a nearly 900-page report cataloguing the phone's data." On March 3, 2016, Kolsuz was indicted by a grand jury with "(i) attempting to export from the United States various firearms parts . . . without a license, in violation of 22 U.S.C. § 2778, (ii) attempting to smuggle goods from the United States, in violation of 18 U.S.C. § 554(a), and (iii) engaging in a conspiracy to commit those offenses, in violation of 18 U.S.C. § 371."

In a May 5, 2016 ruling, Federal Judge T.S. Ellis III of the Eastern District of Virginia denied a motion by Kolsuz to suppress the evidence gathered from his phone through "(i) the initial search of the iPhone's recent calls and text messages conducted at the airport, and (ii) the forensic search conducted at the HSI office in Sterling, Virginia." Ellis ruled that the searches of Kolsuz's phone, because they constituted a "border search," fell under "an exception to the Fourth Amendment requirement that a search be supported by a warrant and probable cause." Ellis' full ruling is available online at: https://scholar.google.com/scholar_case?case=31722144112140 1077&hl=en&as_sdt=6,24&as_vis=1.

On May 9, Judge Pamela Harris wrote the majority opinion for the Fourth Circuit, which addressed "whether the forensic search of Kolsuz's phone, and the associated invasion of Kolsuz's privacy, was justified under the border search exception." She noted that Kolsuz had not challenged the manual search, nor the seizure of his phone.

Harris first found that border searches constitute an exception to the Fourth Amendment's general requirement that law enforcement searches be accompanied by a warrant based on probable cause. She wrote that the exemption is intended to serve the government interest of "'prevent[ing] the introduction of contraband' into the country and bar entry by those who would bring harm across the border."

Harris added that an international airport is a "functional equivalent" to a U.S. border and that "government agents may conduct 'routine' searches and seizures of persons and property without a warrant or any individualized suspicion." She rejected Kolsuz's argument that because his phone was transported miles away from the airport for the forensics analysis, it no longer constituted a "border search" and, as a result, the border exception no longer applied. Harris wrote that the exception "is not rendered inapplicable because a search initiated at a border ultimately is conducted at some physical or temporal remove."

Harris also ruled that Kolsuz's arrest did not constitute a "search incident to arrest" which would have triggered the U.S. Supreme Court's 2014 ruling in *Riley v. California* in which the unanimous Court held that "what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant." 134 S.Ct. 2477 (2014). (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

Additionally, Harris ruled that the border exception applies even if the government's interest in preventing contraband is no longer at issue. She contended that the facts of the case demonstrated a "link between the search of Kolsuz's phone and the interest that justifies border searches," which "was sufficient to trigger the border

exception." She asserted that CBP agents searched Kolsuz's phone "because they had reason to believe — and good reason to believe, in the form of two suitcases filled with firearms parts — that Kolsuz was attempting to export firearms illegally and without a license," a "transnational offense that goes to the heart of the border search exception."

Second, Harris turned to Kolsuz's argument that the forensic search of his phone constituted a "nonroutine" border search "unsupported by the type of reasonable suspicion required to justify" such a search. She explained that the Supreme Court had recognized a category of nonroutine border searches that are constitutionally reasonable only if they are based on "individualized suspicion." Nonroutine border searches are those that "implicate especially significant 'dignity and privacy interests,' as well as destructive searches of property and searches carried out in 'particularly offensive' manners." In such cases, authorities must have "reasonable suspicion" to conduct the search.

Harris held that the forensic analysis of Kolsuz's phone constituted a nonroutine search because it was like other searches "that are most invasive of privacy," including "strip searches, alimentary-canal searches, x-rays, and the like." Harris emphasized the "sheer quantity of data stored on smartphones and other digital devices dwarfs the amount of personal information that can be carried over a border — and thus subjected to a routine border search — in luggage or a car." She further argued that smartphones contain "uniquely sensitive nature of that information matters," including "financial records, confidential business documents, medical records and private emails."

Harris also noted that CBP's new January 2018 policy required "reasonable suspicion of activity in violation of the laws enforced or administered by CBP, or in which there is a national security concern" for "advanced" or "forensic" searches, such as in the present case.

Finally, Harris addressed whether the search of Kolsuz's phone was "accompanied by the appropriate level of individualized suspicion." She held that "it was reasonable for the CBP officers who conducted the forensic analysis of Kolsuz's phone to rely on the established and uniform body of precedent allowing warrantless border searches of digital devices that are based on at least reasonable suspicion." As a result, Harris concluded that the court "need not — and will not — reach the issue of whether more than reasonable suspicion is required for a search of this nature," such as a search warrant or subpoena. The full ruling is available online at: https://scholar.google.com/scholar_case?case=9175057863427688107&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

In an opinion concurring in the judgment, Judge J. Harvie Wilkinson III wrote that although he agreed with "much of what [was] said," he contended that the majority "appear[ed] to leave the legislative and executive branches shivering in the cold." Wilkinson argued that the standard of reasonableness applied to nonroutine border searches "should be principally a legislative question, not a judicial one. Congress should decide that standard. Courts should apply it."

In a May 25, 2018 statement, the Brennan Center for Justice at the New York University School of Law noted that the ruling was consistent with the Ninth Circuit's approach in *United States v. Cotterman*, which arose in 2007 when border agents seized plaintiff Howard Cotterman's laptop at the U.S.-Mexico border after his name drew an alert that he was a registered sex offender. *United States v. Cotterman*, 709 F.3d 957 (9th Cir. 2013). Although the initial search of his device "turned up no incriminating material," a "comprehensive forensic examination" at a location 170 miles away uncovered images of child pornography on Cotterman's laptop. The court held that an "extended border search," such as the forensic analysis of Cotterman's laptop done at a separate geographical location, requires "reasonable suspicion[,] . . . 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" (For more information on *Cotterman*, see *2009 Policy Continues to Raise Legal Questions Amid Increase in Warrantless Searches at U.S. Borders* in "U.S. Customs and Border Protection Searches of Electronic Devices, Data at U.S. Borders Raise Privacy and Legal Concerns" in the Summer 2017 issue of the Silha *Bulletin*.)

A May 21, 2018 *Lawfare* commentary argued that it was "increasingly likely that the Supreme Court will need to resolve whether device searches at the border require suspicion or judicial process, and if so how much of each." The commentary added, "While *Kolsuz* clearly points these debates toward greater privacy protection, its practical impact is hard to judge."

Eleventh Circuit Rules that Searches of Electronic Devices at U.S. Borders Need Not be Supported by Reasonable Suspicion, Splitting with Other Circuits

On May 23, 2018, the U.S. Court of Appeals for the Eleventh Circuit ruled that the Fourth Amendment does not require federal agents to have "reasonable suspicion" for a forensic search of electronic devices at U.S. borders. *United States v. Touset*, No. 17-11561 (11th Cir. 2018). Observers noted that the ruling created a circuit split with the ruling by the Fourth Circuit in *United States v. Kolsuz*, 890 F.3d 150 (4th Cir. 2018), and the Ninth Circuit in *United States v. Cotterman*, 709 F.3d 957 (9th Cir. 2013) in which the courts held that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at a U.S. border.

The case arose in September 2014 when Xoom, a company that transfers money, identified several individuals it suspected were involved with child pornography based on a pattern of "frequent low money transfers to" individuals in "source countries for sex tourism and child pornography," including the Philippines. Xoom notified Yahoo! that some of the individuals may have used Yahoo! email and messenger accounts. Yahoo! subsequently found a file with child pornography in the account for the email address iloveyousomuch0820@yahoo.com, which was tied to a phone number based in the Philippines.

Yahoo! notified the National Center for Missing and Exploited Children and the Cyber Crime Center of the Department of Homeland Security (DHS), which discovered, through Western Union transactional records, that an account listing Touset's name and a post office box in Marietta, Ga., had sent three payments to an account associated with the Philippine phone number. The DHS placed a "look-out" on Touset so that his luggage and electronic devices would be searched when he returned to the United States.

On Dec. 21, 2014, Touset arrived on an international flight at Hartsfield-Jackson Atlanta International Airport where U.S. Customs and Border Protection (CBP) agent Derek Escobar inspected his luggage, including two iPhones, a camera, two laptops, two external hard drives, and two tablets. Escobar manually inspected the smartphones

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and camera, but finding no child pornography, returned them to Touset. However, Escobar "detained" the remaining devices in order to have them searched by DHS computer forensic analysts (forensic search). The searches, conducted at a different site, revealed child pornography on the laptops and external hard drives.

Using the evidence gathered in the forensic search, DHS special agent Dianna Ford obtained a warrant to search Touset's home, which was executed by her and 14 other agents in January 2015. The search produced additional evidence against Touset, including that he had purchased thousands of images of child pornography through accounts in the Philippines. Touset was summarily indicted by a grand jury on three counts, including "knowingly receiving child pornography, knowingly transporting and shipping child pornography, and knowingly possessing a computer and computer-storage device containing child pornography."

Touset filed motions to suppress the evidence obtained from his electronic devices, as well as the evidence obtained in the subsequent search of his home. On March 11, 2016, U.S. District Court for the Northern District of Georgia Judge Mark Cohen denied Touset's motions and sentenced him to 120 months of imprisonment and supervision for life on one count of transporting child pornography. Touset appealed the court's decision denying his motions. *United States v. Touset*, No. 1:15-CR-45-MHC (N.D. Ga. 2016).

On May 23, Judge William Pryor wrote the majority opinion of the Eleventh Circuit and ruled that the Fourth Amendment "does not require any suspicion for forensic searches of electronic devices at the border," splitting with the Fourth and Ninth Circuits.

Pryor first held that border searches "are reasonable without suspicion 'simply by virtue of the fact that they occur at the border,'" citing the 2009 Eleventh Circuit case *Denson v. United States*, 574 F.3d 1318, 1339 (11th Cir. 2009). Pryor also cited the March 2018 Eleventh Circuit ruling in *United States v. Vergara*, in which the court held that the Fourth Amendment "does not require a warrant or probable cause for a forensic search of a cell phone at the border." 884 F.3d 1309 (11th Cir. 2018). Pryor also cited the court's conclusion that the U.S. Supreme Court's ruling in *Riley v. California* did not apply to cases of border searches because it pertained to a different exception to the Fourth Amendment related to searches incident to arrests. 134 S.Ct. 2477 (2014). (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

Pryor further asserted that the Supreme Court and the Eleventh Circuit "never required reasonable suspicion for a search of property at the border, however non-routine and intrusive." Thus, the only searches requiring reasonable suspicion, according to Pryor, were for "highly intrusive searches of a person's body" in which there is "(1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force."

Second, Pryor found that electronic devices should not receive "special treatment [based on the argument that] so many people now own them or because they can store vast quantities of records or effects" because the same could be said "for a recreational vehicle filled with personal effects or a tractor-trailer loaded with boxes of documents." He wrote that he was "unpersuaded" by the Fourth and Ninth Circuits' rulings that searches of electronic devices constituted nonroutine searches and therefore required reasonable suspicion. Pryor stated that the court was "unpersuaded that a traveler's privacy interest should be given greater weight than the 'paramount interest [of the sovereign] in protecting . . . its territorial integrity.'" He added, "we fail to see how the personal nature of data stored on electronic devices could trigger ['personal] indignity[']' when our precedent establishes that a suspicionless search of a home at the border does not."

Third, Pryor contended that if the court "were to require reasonable suspicion for searches of electronic devices, we would create special protection for the property most often used to store and disseminate child pornography." He added, "We should not invent heightened constitutional protection for travelers who cross our borders with this contraband in tow." Instead, Pryor contended that Congress could enact laws to provide greater Fourth Amendment protections, citing Fourth Circuit Judge J. Harvie Wilkinson's concurring opinion in *United States v. Kolsuz*, 890 F.3d 150 (4th Cir. 2018).

Finally, Pryor ruled that even if reasonable suspicion were required for the forensic searches of Touset's devices, such suspicion existed because the DHS had a "particularized and objective basis for suspecting" that Touset possessed child pornography on his electronic devices. He also rejected Touset's claim that such evidence was "stale," citing the pervasive problems caused by child pornography. The court affirmed the district court's conviction and sentence. The full ruling is available online at: http://media.ca11.uscourts.gov/opinions/pub/files/201711561.pdf.

In an opinion concurring in part and concurring in the judgment, Middle District of Florida Judge Timothy J. Corrigan, sitting by designation, disagreed with the majority's finding that the search of electronic devices at the border does not require any suspicion, citing the rulings by the Fourth and Ninth Circuits. He concurred only with the court's holding that the district court correctly denied Touset's motions because the forensic searches were supported by reasonable suspicion, contending that the court could have ruled on that ground alone, rather than raising a constitutional question.

Corrigan also noted that the government, on appeal, went "beyond its position in the district court," by arguing that "border agents need no justification whatsoever to detain (in this case for seventeen days) and forensically search electronic devices of any American citizen returning from abroad." Corrigan wrote that "[t]his new-found government position presents a different and difficult question, one not addressed by the Supreme Court or (until today) any appellate court," though he concluded that the court "need not reach this issue to decide this case."

Following the ruling, a May 30, 2018 *Lawfare* commentary contended that the Eleventh Circuit's decision, and the resulting circuit court split, "makes clear that this issue isn't likely to resolve itself. The case for clarity from a higher court — or from Congress — is only getting stronger."

A May 25, 2018 Crowell Moring law firm commentary agreed. "The Eleventh Circuit's holding in Touset sets up a potential Supreme Court resolution on what standard of proof is necessary for a border search," the commentary read. "Until it does, the standard of proof the government must meet to conduct warrantless forensic searches at the

border will differ based on where a person crosses the border."

Federal Judge Allows Lawsuit to Continue Over First and Fourth Amendment Concerns of Warrantless Border Searches and Seizures of Electronic Devices

On May 9, 2018, U.S. District Court for the District of Massachusetts Judge Denise J. Casper denied a motion by the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) to dismiss a case brought by 11 individuals, including two journalists and an editor of an online publication, alleging that searches and seizures of their electronic devices at U.S. borders without probable cause or search warrants violated their First and Fourth Amendment rights. *Alasaad v. Nielsen*, No. 17-cv-11730-DJC, 2018 WL 2170323 (D. Mass. 2018).

On Sept. 13, 2017, the American Civil Liberties Union (ACLU), the Electronic Frontier Foundation (EFF), and the ACLU of Massachusetts filed a complaint in the District of Massachusetts on behalf of the 11 travelers. The plaintiffs were 10 U.S. citizens and one lawful permanent resident, and included "a military veteran, journalists, students, an artist, a NASA engineer, and a business owner. Several are Muslims or people of color. All were reentering the country from business or personal travel when border officers searched their devices," according to a Sept. 13, 2017 ACLU press release.

The journalists included Jeremy Dupin, "[a]n award-winning journalist and filmmaker who covers news coming out of South America and the Caribbean," and Isma'il Kushkush, a freelance journalist in Virginia. Additionally, the plaintiffs included Zainab Merchant, a Florida-based graduate student in international security and journalism at Harvard University, and Akram Shibly, a New York-based independent filmmaker who runs his own production company.

The complaint alleged that federal CBP agents "seized and searched Plaintiffs' electronic devices at U.S. ports of entry without probable cause to believe that the devices contained contraband or evidence of a violation of immigration or customs laws." The ACLU and EFF also alleged that officers had "confiscated and kept the devices of several plaintiffs for weeks or months," including one individual's device which had been held since January 2017.

The complaint argued that CBP and ICE had violated the travelers' Fourth Amendment rights "by searching the content that electronic devices contain, absent a warrant supported by probable cause that the devices contain contraband or evidence of a violation of immigration or customs laws, and without particularly describing the information to be searched." The complaint cited *Riley v. California*, 134 S.Ct. 2477 (2014), in which U.S. Supreme Court Chief Justice John Roberts, writing for the unanimous Court, ruled that "what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant." (For more information on the ACLU and EFF's complaint, see *ACLU and EFF Sue Government Agency Regarding Searches at U.S. Borders* in "Civil Rights Organizations, Federal Agency, and House of Representatives Raise Different Issues Regarding Searches at U.S. Borders" in the Fall 2017 issue of the Silha *Bulletin*. For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue.)

The complaint further argued that the searches and seizures had violated the 11 travelers' First Amendment rights, namely that they "[would] be chilled from exercising their First Amendment rights of free speech and association, in knowing that their personal, confidential and anonymous communications and expressive material may be viewed and retained by government agents without any wrongdoing on their part."

In a Feb. 2, 2018 *amici* brief, The Knight First Amendment Institute at Columbia University (Knight Institute) and the Reporters Committee for Freedom of the Press (RCFP) addressed the potential First Amendment implications of warrantless border searches of electronic devices, contending that such searches "burden travelers' freedoms of speech and association . . . [and] freedom of the press."

The brief alleged that travelers' "sensitive expressive and associational content" is scrutinized by border agents when they search their devices," implicating the right to free speech and the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." The Knight Institute and RCFP further contended that freedom of the press issues are implicated because "[j]ournalists are particularly vulnerable to the chilling effects of suspicionless searches, both because confidential or vulnerable sources may refuse to speak with reporters for fear that anything they say may end up in the government's hands, and because such searches can be used to retaliate against or deter reporting critical of the government."

Thus, the brief argued that such burdens on expression and freedom of the press "demand First Amendment [strict] scrutiny, namely that the "government must have a compelling interest in the information and use narrowly tailored means that do not seek more information than necessary." The brief further contended that the border search exception applies to the Fourth Amendment, but "says nothing at all about the First Amendment." Additionally, RCFP and the Knight Institute asserted that "the serious First Amendment implications of device searches . . . nevertheless require application of the Fourth Amendment's warrant and probable cause requirements with 'scrupulous exactitude,'" citing the Supreme Court's 1978 ruling in *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). The full brief is available online at: https://www.rcfp.org/sites/default/files/2018-02-02-Alasaad-v-Nielsen.pdf.

On May 9, 2018, Judge Casper denied a motion by the DHS, CBP, and ICE to dismiss the case. She first ruled that the plaintiffs had standing to bring the case, finding that they had "plausibly alleged that they face a substantial risk of future harm from Defendants' ongoing enforcement of their border electronics search policies."

Second, Casper addressed whether the plaintiffs had stated a plausible Fourth Amendment claim regarding manual searches of electronic devices at U.S. borders. She found that the Supreme Court's ruling in *Riley*, although it focused on a different exception to the Fourth Amendment for searches incident to arrests, was "not . . . irrelevant here" because the Court "has referenced search incident to arrest doctrine within its border search jurisprudence in the past, characterizing the two exceptions as 'similar.'" Casper also emphasized the Supreme Court's finding in *Riley* that "electronic devices implicate privacy interests in a fundamentally different manner than searches of typical containers or even searches of a person." She added that "the potential

CBP, *continued on page 52*

CBP, *continued from page 51*

intrusion into individuals' privacy is of 'particular concern' in the border search context because the permissible scope of customs officers' investigative search is so broad and need not 'be restrained by any limitations of exigency or relevance to a specific crime.'"

She noted that one of the two cases on appeal in *Riley* was *United States v. Wurie*, in which the First Circuit, which hears cases appealed from the District of Massachusetts, held "that cell phones are distinct from other physical possessions that may be searched incident to arrest without a warrant." 728 F.3d 1, 13-14 (1st Cir. 2013). The court found that cell phones store "much more personal information . . . than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers that the government has invoked."

Casper wrote that although the First Circuit "has not yet spoken on what level of suspicion is required to justify a cell phone or other electronic device search at the border," the court had previously "acknowledged the significant privacy interests implicated in a cell phone search." Thus, she held that "[i]n the absence of controlling precedent to the contrary, this Court cannot rule that this Fourth Amendment principle [of heightened privacy concerns for electronic devices] would not extend in some capacity to the border." She further concluded that searches of electronic devices at U.S. borders may require a heightened standard above "reasonable suspicion."

Furthermore, Casper wrote that although she agreed with the defendants "that digital contraband is not 'untethered' from the rationales supporting the border search exception," namely the prevention of the "introduction of contraband" into the United States, she contended that "it is unclear at this juncture the extent to which a warrant requirement would impede customs officers' ability to ferret out such contraband." Casper concluded that given the existing precedent in the First Circuit, she found that the plaintiffs had stated a plausible Fourth Amendment claim and denied the defendants' motion to dismiss.

Third, Casper denied the defendants' motion to dismiss the plaintiffs' claim that CBP and ICE "violate the Fourth Amendment by confiscating travelers' electronic devices, for the purpose of effectuating ['forensic'] searches of those devices after travelers leave the border, absent probable cause [as they are] unreasonable at their inception, and in scope and duration." She ruled that because the plaintiffs had alleged a plausible Fourth Amendment claim regarding "manual" searches, they had also done so for "forensic searches" when electronic devices are confiscated by CBP or ICE. However, she noted that confiscations raise an additional Fourth Amendment concern in that they must "be reasonable not only at their inception[,] but also for their duration."

Finally, Casper addressed the plaintiffs' First Amendment claims, namely that "warrantless digital device searches substantially burden travelers' protected rights of freedom of speech and association and chill the exercise of these rights." Casper found that "[f]reedom of the press is also implicated here," referencing plaintiffs Dupin and Kushkush.

Casper found that the defendants did not have to overcome strict scrutiny in the case, as RCFP and the Knight Institute had contended, because CBP's and ICE's policies are "content-neutral." However, she wrote that the court must still "determine whether the complaint adequately alleges an interference with First Amendment rights that is 'direct and substantial' or 'significant.'" Casper found that the defendants "[did] not argue that warrantless searches would not be a significant or substantial burden on travelers' First Amendment rights, nor do they explain their assertion that a heightened standard is not 'required by the First Amendment.'" She further found that CBP's and ICE's electronic device policies provide "no . . . First Amendment safeguards" and instead provide "limitless search authorization." Thus, Casper ruled that the plaintiffs had "plausibly alleged that the government's digital device search policies substantially burden travelers' First Amendment rights." She therefore denied the defendants' motion to dismiss the plaintiffs' First Amendment claims. Casper's full ruling is available online at: https://scholar.google.com/scholar_case?case=14924741304364995652&hl=en&as_sdt=6&as_vis=1&oi=scholarr. As the *Bulletin* went to press, no further announcements had been made in the case.

In a May 10, 2018 press release, EFF Staff Attorney Sophia Cope praised the ruling. "This is a big win for the digital rights of all international travelers," she wrote. "The court has rejected the government's motion to dismiss all claims in the case, so EFF and ACLU can move ahead to prove that our plaintiffs' Fourth and First Amendment rights were violated when their devices were seized and searched without a warrant."

ACLU attorney Esha Bhandari, who argued the case, wrote, "The court has rightly recognized the severity of the privacy violations that travelers face when the government conducts suspicionless border searches of electronics.. . . We look forward to arguing this case on the merits and showing that these searches are unconstitutional."

U.S. Customs and Border Protection Faces Criticism After a Border Agent Questioned a National Security Reporter

On June 12, 2018, *The Washington Post* reported that U.S. Customs and Border Protection's (CBP) Office of Professional Responsibility was opening an inquiry into CBP agent Jeffrey Rambo following a report that he had questioned journalist Ali Watkins in June 2017 about her confidential sources, among other topics. Rambo's actions prompted concerns from several observers, including two U.S. Representatives who sent a letter to members of President Donald Trump's administration inquiring about the questioning of Watkins and potential similar actions by other agents towards reporters.

On June 12, 2018, the *Post* reported that one year earlier, Rambo had met with Watkins at a Washington, D.C. restaurant. During the meeting, Rambo asked Watkins, who then worked for *Politico* but now works for *The New York Times*, about her reporting methods and her confidential sources, stating that the Trump administration was eager to investigate journalists and learn their confidential sources, according to several people familiar with the incident who spoke on the condition of anonymity with the *Post*.

Additionally, Rambo asked Watkins about her three-year relationship with former U.S. Senate Select Committee on Intelligence (SSCI) director James A. Wolfe, who was arrested and charged in June 2018 on three counts of lying to federal authorities. During an investigation into alleged classified leaks by Wolfe, federal investigators secretly seized several years' worth of phone and email records of Watkins. (For more information on Wolfe and the seizure of Watkins' phone and email records, see *Federal Prosecutors Seize Phone and Email Records of New York Times reporter in Leak Investigation* in "President Trump's Administration

Targets Journalist, Leaker of Government Information, and Three Former Government Employees Who Took Classified Documents" on page 9 of this issue of the Silha *Bulletin*.)

According to the *Post*, Rambo gave Watkins "accurate dates and destinations for trips [she] had taken overseas [with Wolfe] — a revelation that left Watkins rattled." However, in a June 14 interview with the *Huffington Post*, a U.S. Department of Justice (DOJ) official said that Rambo was not involved in the FBI's investigation into Wolfe.

In an interview with the *The Washington Post*, a spokesman for CBP said the agency "takes all allegations of employee misconduct seriously" and that the allegations against Rambo were referred to CBP's Office of Professional Responsibility. According to the officials who spoke with the *Post*, Rambo's search of travel records "could be a crime if he didn't have a legitimate reason to examine the information, which is protected by privacy laws and regulations that prevent unauthorized disclosures of personal information." DHS policies require that passenger records only be shared with personnel "who have a need to know the information as part of the performance of their official employment duties." *The Washington Post* also noted that ethics rules prohibit federal employees from improperly using "nonpublic information" to further their own or another individual's interests.

According to the *Huffington Post*, CBP agents often have access to databases like TECS and the Advance Passenger Information System (APIS), which contain sensitive information about travel to and from the United States. However, a CBP spokeswoman told the *Huffington Post* that with APIS "not all CBP officers can pull the same travel data; rather, it's based on the individual's need to know, official duties, agency of employment, and appropriate background investigation and training."

As the *Bulletin* went to press, CBP's Office of Professional Responsibility had not announced whether it would take any disciplinary measures against Rambo.

The Washington Post contended that meetings between journalists and potential sources are not unusual. However, in this case, the *Post* argued that "Rambo's behavior was unorthodox." The *Post* continued, "It's highly unusual for government investigators to question reporters about their sources, and national security leaks are generally investigated by the [Federal Bureau of Investigation (FBI), not CBP, [which is] part of the [U.S.] Department of Homeland Security [(DHS)]." The *Post* added that it was unusual for Rambo to contact Watkins using a personal email address.

In a June 13, 2018 letter to White House Chief of Staff John F. Kelly and Secretary of Homeland Security Kirstjen Nielsen, Reps. Jamie Raskin (D-N.Y) and Jerrold Nadler (D-Md.) inquired about Rambo's questioning of Watkins, including whether it had been authorized by a DHS or CBP official and whether Rambo, or other CBP agents, had approached other reporters with similar inquiries. The letter also stated, "Mr. Rambo's alleged misconduct is deeply troubling and may . . . constitute a criminal act if Mr. Rambo searched the reporter's travel records." The full letter is available online at: https://www.documentcloud.org/documents/4514783-Letter-to-Kelly-Nielsen-RE-CBP-Agent-6-13-18.html.

In a June 13 story for news and opinion website "Splinter," David Uberti, a contributor to "Splinter" who is also a *Columbia Journalism Review* (*CJR*) staff writer and senior Delacorte Fellow, wrote that it was alarming that "[a] government agent independently accessed a private citizen's personal information in order to identify the people with whom she corresponded." He continued, "Nothing about this story is good. But with the president referring to the press as "our country's biggest enemy" — as he did this morning on Twitter — the idea of vigilantes using federal power to harass and intimidate journalists isn't particularly surprising."

Uberti was referencing a June 13 tweet by President Trump, which read, "So funny to watch the Fake News, especially NBC and CNN. They are fighting hard to downplay the deal with North Korea. 500 days ago they would have "begged" for this deal-looked like war would break out. Our Country's biggest enemy is the Fake News so easily promulgated by fools!" (For more information on President Trump's relationship with the press, see "Journalists Face Physical Violence, Other Dangers in the United States and Abroad" on page 1 of this issue of the Silha *Bulletin*, "President Trump's Administration Targets Journalist, Leaker of Government Information, and Three Former Government Employees Who Took Classified Documents" on page 9 of this issue, "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" in the Summer 2017 issue, "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue, and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

Scott Memmel
Silha *Bulletin* Editor

Courts in the United Kingdom and United States Wrestle with the "Right to Be Forgotten"

In the first half of 2018, courts in the United Kingdom (UK) and the United States grappled with the "right to be forgotten," the right of individuals to have online search engine search results removed. On April 13, 2018, the England and Wales High Court of Justice ruled that Google must remove links related to news reports about a businessman who had previously been convicted of "criminal conspiracy," finding that some of the information was "inaccurate" and that it violated his privacy rights. NT 1 & NT 2 v. Google LLC [2018] EWHC 799 (QB). However, the court ruled against another businessman who also sought to have search results about a past criminal conviction "delisted," finding that the results "retain[] sufficient relevance today" because he "ha[d] not accepted his guilt," among other reasons.

PRIVACY

On July 6, 2018, a New Jersey judge issued a temporary restraining order (TRO) requiring Google to remove a photo published by the *Chicago Tribune* from its search results. *Malandrucco v. Google, Inc.* No. C-100-18 (July 6, 2018). The photo depicted injuries sustained by University of Chicago lecturer Gregory Malandrucco and management consultant Matthew Clark following a 2010 assault by two police officers. UCLA School of Law Gary T. Schwartz Professor Eugene Volokh criticized the order as an instance of the "right to be forgotten" entering the U.S. legal system.

Previously, in May 2014, the Court of Justice of the European Union (CJEU) ruled that European citizens retain a right to have online search engine search results deleted that link to "inaccurate, inadequate, irrelevant or excessive" information about themselves under the European Union's Data Protection Directive, Council Directive 95/46/EC, 1995 O.J. (L 281). Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (*Google Spain*). At the time of the decision, many legal observers suggested that this "right to be forgotten" could pose serious challenges for online search engines, Internet publishers, and news media organizations.

On Feb. 28, 2018, National Public Radio (NPR) reported that Google had received more than 650,000 requests from nearly 400,000 entities to remove content since the *Google Spain* ruling in May 2014. The requests totaled more than 2.43 million URLs, of which Google removed about 43 percent.

UK Court Rules Google Must Remove Search Results Related to Businessman's Past Criminal Conviction

On April 13, 2018, the England and Wales High Court of Justice, Queen's Bench Division ruled in favor of a businessman, referred to only as "NT2," who requested that Google remove search results about a previous criminal conviction. Justice Mark Warby found that some of the information available through the Google Search results was "inaccurate" and that the information regarding NT2's crime and conviction "ha[d] become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability." However, Warby ruled against claimant "NT1," finding that the information contained in the search results "retains sufficient relevance today" because NT1 "has not accepted his guilt, has misled the public and this Court, and shows no remorse over any of these matters" among other reasons.

Warby first provided the background of each businessman's claims, which were combined into one case. In the late 1980s and early 1990s, NT1 was involved in a controversial property business. In the late 1990s, he was convicted of a "criminal conspiracy" connected to the business' practices and was sentenced to a term of imprisonment. NT1 was also accused, but never tried for, a separate conspiracy connected with the same business, though other staff members were convicted. Links to media reports about NT1 and the illegal business practices were made available by Google.

On June 28, 2014, NT1 requested that Google "delist" six links to the media coverage. On Oct. 7, 2014, Google agreed to block one link, but refused to delist the other five. After Google refused to remove the links on at least two occasions in 2015, NT1 sought "orders for the blocking and/or erasure of links to the two media reports, an injunction to prevent Google from continuing to return such links, and financial compensation." In December 2017, NT1 expanded his claim to cover a third link, a book abstract about the controversial business practices.

According to Warby, NT2's case was connected to NT1's only in that they raised similar principles and that the two businessmen had the same representation. In the early 2000s, NT2 was involved in a separate business that was the subject of public opposition to its environmental practices. The company hired an investigations firm to find out who was behind protests and death threats directed at the company. NT2 authorized the firm to use illegal computer hacking and phone tapping. In the 2010s, NT2 pled guilty to two counts of conspiracy in connection with the investigations, and received a short custodial sentence, which is generally reserved for "the most serious offences and are imposed when the offence committed is 'so serious that neither a fine alone nor a community sentence can be justified for the offence.'"

NT2's conviction and sentence were the subject of news reports by local and national media outlets. After he was released, the original reports remained online, as well as new reports mentioning his conviction and sentence. NT2 initially asked Google to delist eight links in April 2015. Google summarily declined to delist the reports, contending that they "relate[d] to matters of substantial public interest to the public regarding [NT2's] professional life."

On Oct. 2, 2015, NT2 "claimed relief in respect to the eight links," later adding an additional three URLs. In total, the URLs in question included "five . . . contemporary reports in the national and local news media of the claimant's conviction and sentencing, "two interviews given by the claimant, over 7 years ago now, about his conviction and his business plans," and "various other articles, spanning a decade, which include reference to his offending, conviction, and sentence."

Warby identified the main issues of the case, including:

- whether the claimant is entitled to have the links in question excluded from Google Search results either (a) because one or more of them contain personal data relating to him which are inaccurate, or (b) because for that and/or other reasons the continued listing of those links by Google involves an unjustified

interference with the claimant's data protection and/or privacy rights; and
- if so, whether the claimant is also entitled to compensation for continued listing between the time of the delisting request and judgment.

Warby stated that these were "novel questions" that had "never yet been considered in this Court."

Warby also provided "ten key features" of the legal framework governing the case, including discussing the CJEU's decision in *Google Spain* in 2014. He discussed the General Data Protection Regulation (GDPR), the new set of rules governing how businesses handle European Union (EU) citizens' personal data, which took effect on May 25, 2018. In particular, Warby cited Article 17 of the GDPR which provides that a "data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay."

Next, Warby turned to NT1's case against Google. He rejected Google's contention that NT1 was attempting to "by-pass the protections which the law of defamation affords to the right of freedom of expression" by seeking to remove URLs, rather than file a defamation lawsuit. Warby wrote that he "[did] not find that NT1 [was] seeking to exploit data protection law or the tort of misuse of private information to 'avoid the rules' — to get round the obstacles that defamation law would place in his way." Thus, he held that NT1's claims were not "an abuse of the Court's process."

Warby also ruled against Google's claim that the links discussed by NT1 fell under the Data Protection Act of 1994's (DPA) "journalism exception," which provides that EU "Member States shall provide for exemptions or derogations . . . for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression." Warby found that "[t]here [was] no evidence that anyone at Google ever gave consideration to the public interest in continued publication of the URLs complained of, at any time before NT1 complained." He noted that Article 85 of the GDPR provides for exemptions from the rules on protecting personal data where that data is used solely for journalistic purposes or for artistic or literary expression, but that the GDPR was not yet in effect at the time the case was decided.

However, Warby refused to order the delisting of the three links. Regarding NT1's claim that the URLs conveyed information that was "inaccurate," Warby found that NT1 had failed to "provide . . . all the information needed to establish the data are evidently inaccurate." He held that although the headline of one article falsely suggested that NT1 had been convicted of the second conspiracy accusation, of which he was never tried, he would "not exercise [his] discretion to grant an order for the blocking or erasure of the URLs on this ground alone." He added that each of the news reports and the book extract "gave a clear enough account of what it was that the claimant was convicted of."

Warby also held that the information contained in the six links was "not intrinsically private in nature" and that NT1 did not have a "reasonable expectation of privacy" because the "information at issue is public not private in nature." He asserted that although the links included some information about NT1's health, which is "intrinsically private in nature," the information was "vague, and historic, and it was made public in the course of the proceedings." Warby added that the rest of the information regarding NT1's crime and punishment was "sensitive," but also not "intrinsically private in nature," especially because the "public prosecution, trial and sentence . . . all became essentially public."

Warby reasoned that the information contained in the six links "retains sufficient relevance today" because NT1 "has not accepted his guilt, has misled the public and this Court, and shows no remorse over any of these matters. He remains in business, and the information serves the purpose of minimising the risk that he will continue to mislead, as he has in the past." Warby added, "Delisting would not erase the information from the record altogether, but it would make it much harder to find. The case for delisting is not made out."

Finally, Warby turned to NT2's case against Google. Warby again concluded that the delisting claim was "not an abuse of the court's process," and that Google could not claim the "journalism exception" under the DPA. However, unlike in the case of NT1, Warby found that NT2 provided sufficient evidence to show that one article was inaccurate. The article in question, which "appeared in a national newspaper a few years ago, over eight years after the claimant was sentenced," was allegedly misleading "as to the nature and extent of the claimant's criminality" because it suggested that NT2 "made criminal proceeds from it with which . . . he dealt dishonestly and sought to shield from creditors."

Warby found NT's evidence persuasive, namely that he "made no profits or proceeds from his crime, and engaged in no such dishonest dealings as the item suggested." He further held that the "words complained of in the newspaper article refer[ed] or would be understood to refer to the claimant." He added, "Google accepts that the item did convey serious imputations against 'suspected criminals' but that these parts of the item would not have been taken to refer to NT2." Thus, Warby found that "the article complained of is inaccurate" because it gave "a misleading portrayal of the claimant's criminality and conveys imputations to the effect of which he complains."

Warby also held that the information regarding NT2's crime and conviction "has become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability." Warby reasoned that "NT2 has frankly acknowledged his guilt, and expressed genuine remorse. There is no evidence of any risk of repetition. His current business activities are in a field quite different from that in which he was operating at the time. His past offending is of little if any relevance to anybody's assessment of his suitability to engage in relevant business activity now, or in the future. There is no real need for anybody to be warned about that activity." Warby also reasoned that NT2 had a "reasonable expectation of privacy" because of the "presence of a young family in this claimant's life."

Warby therefore ruled that he would "make an appropriate delisting order, in respect of the URL for the national newspaper article, in its current form, on the grounds that the article is inaccurate." He further held that a "delisting order is appropriate" for the other information NT2 sought to have delisted. However, Warby held that Google had taken "reasonable care" and that NT2 was "not entitled to compensation or damages." Warby's full ruling is available online at: http://www.bailii.org/ew/cases/EWHC/QB/2018/799.html.

In April 13, 2018 statement, Google said, "We work hard to comply with the right to be forgotten, but we take great care not to remove search results

Forgotten, *continued on page 56*

Forgotten, *continued from page 55*

that are in the public interest and will defend the public's right to access lawful information. We are pleased that the court recognised our efforts in this area, and we will respect the judgments they have made in this case."

A spokesperson for Carter-Ruck, the firm representing both NT1 and NT2, told *The Guardian* on April 13, 2018, "The decision should cause Google to put in place improved reviewing processes of delisting requests."

In an April 23 story, *Engadget* associate editor Jon Fingas contended that the ruling "highlights the challenges Google has had obeying requests under the EU rules, which some complained are too nebulous." Fingas added, "At the same time, it could also establish precedent for future cases. Google and other internet companies might not have the option of dismissing conviction-related requests out of hand – they may have to weigh the seriousness of crimes and the convict's willingness to reform." He continued, "And that could be tricky. At what point does a crime become too serious to wipe from search results? How does Google know a convict's repentance is sincere? As much as this case might have done to explain Google's responsibility, it may have introduced more confusion."

In an April 13 interview with CNN, Meg Jones, an assistant professor at Georgetown's Communication, Culture & Technology program who researches data protection and privacy, said the court's ruling "sets something of a precedent." She continued, "Google has been making determinations about whether to remove criminal information, and this time they got it wrong."

However, an April 20 International Forum for Responsible Media (Inforrm) commentary argued that although the case "attracted press headlines because an English Court has told Google what to do (almost all the mainstream press headlines focused on NT2's success), it would probably be wrong to describe it as a landmark decision." The commentary concluded that Warby "simply applied existing data protection law in . . . line with what one would expect following the decision in *Google Spain*."

New Jersey Judge Orders Google to De-Index a Photo Published by the *Chicago Tribune*

On Aug. 3, 2018, UCLA School of Law Gary T. Schwartz Professor Eugene Volokh on his blog "The Volokh Conspiracy" reported that a New Jersey judge had issued a temporary restraining order (TRO) requiring Google to remove from its search results a photo published by the *Chicago Tribune*. The photo depicted injuries sustained by University of Chicago lecturer Gregory Malandrucco and management consultant Matthew Clark following an assault by two Chicago police officers. Volokh criticized the order and questioned whether the "right to be forgotten" was "sneaking into American courts." Volokh also reported on August 7 that the cases had been consolidated and removed to federal court.

> "At what point does a crime become too serious to wipe from search results? How does Google know a convict's repentance is sincere? As much as this case might have done to explain Google's responsibility, it may have introduced more confusion."
>
> **— Jon Fingas, *Engadget* associate editor**

According Volokh, the TRO largely targeted an April 16, 2010 *Chicago Tribune* blog post by columnist Eric Zorn regarding an assault of Malandrucco and Clark by two off-duty Chicago police officers. The *Chicago Tribune* story contained a side-by-side photo of the two men each with injuries to their faces. A similar photo appeared in a blog titled "Selena Gomez" on March 25, 2010.

According to Volokh, in 2016, Malandrucco began asking different news outlets to remove his name from a "vast range of items" related to the 2010 assault. For example, *Vice* replaced his name in its byline with "Anonymous." The University of Chicago's newspaper, the *Chicago Maroon*, removed his name from its article about the incident altogether. In court filings, Malandrucco claimed that over 130 publications had removed content about him, including the photos of his and Clark's injuries.

On July 6, 2018, Superior Court of New Jersey, Chancery Division Judge Jeffrey R. Jablonski issued a TRO requiring Google to "de-index [an] 'explicit' post-assault image from searches of 'Greg' and 'Gregory Malandrucco' and/or 'Malandrucco.'" The TRO also forbade Google from "continuing to permit the display of the subject image." The TRO is available online at: https://reason.com/assets/db/15332627875868.pdf.

In a separate July 2018 lawsuit against the *Chicago Tribune*, Malandrucco asked the court to order the newspaper to take down the blog post containing the photo. During the hearing, Jablonski agreed, stating "I am specifically ordering that the URL of the blog that is apparently owned or operated by Chicago Tribune, Incorporated that shows the explicit crime victim photo which is made reference in Dr. Malandrucco's papers be removed until further order of the court." However, the written order filed on July 24 did not include the command to remove the blog post, only that the *Chicago Tribune* must appear at a Sept. 10, 2018 hearing. *Malandrucco v. Chicago Tribune*, No. C-108-18 (July 24, 2018). The order is available online at: https://reason.com/assets/db/15332628056846.pdf..

In a statement sent to the *Chicago Tribune*, Google said, "We are aware of the recent complaints against Chicago Tribune and Google. We will be responding in court in due course and believe the allegations are wholly without merit." The statement continued, "This suit grew out of news coverage of a lawsuit alleging that off-duty Chicago police officers beat two men. It was unquestionably newsworthy at the time, and that coverage remains an important part of the public record and should not be erased from the internet."

In his blog post, Volokh argued that the TRO, as well as the lawsuit against the *Chicago Tribune* was "legally unjustified." He reasoned that "there was no evidence that the material is defamatory – the picture is apparently accurate" and that it is not actionable under the "disclosure of private facts" tort because the tort "does not apply to newsworthy material, and the picture of a victim of police brutality that illustrates a post about the brutality is newsworthy." Malandrucco also likely could not argue that the picture caused emotional distress because it constituted "speech on matters of public concern," according to Volokh.

Additionally, Volokh argued that the TRO was "procedurally defective" because a judge or court "can't just order Google to stop displaying certain material – even temporarily – based simply on the plaintiff's say-so, at least

absent some extraordinary urgency." As a result, Volokh questioned whether the "'right to be forgotten' [was] sneaking into American courts," which would be contrary to existing American law, which "generally does not let people use coercive government power to order search engines and publishers to hide such information."

According to Volokh, Google and the *Chicago Tribune* had not complied with the orders and that both would likely appear at the September 10 hearing. Additionally, Malandrucco requested that Google be held in contempt of court, prompting Jablonski to set a hearing for August 17.

However, on Aug. 7, 2018, Volokh reported that Malandrucco's cases against Google and the *Chicago Tribune* had been removed to the U.S. District Court for the District of New Jersey where they were "procedurally consolidated." The cases were moved for several reasons, including that the district court has "original jurisdiction . . . because Plaintiffs' claims arise under federal law" and because the parties are citizens of different states.

The notice of removal regarding Google noted that Jablonski had "entered [the] TRO [against Google] on an *ex parte* basis, without any notice to Google or any opportunity to be heard." *Malandrucco v. Google, Inc.*, No. 18-cv-12489 (D.N.J. Aug. 6, 2018). The full notice is available online at: https://reason.com/assets/db/15336197637836.pdf.

The notice regarding the *Chicago Tribune* stated that "[i]n support of the unconstitutional relief Plaintiff seeks, he purports to assert claims for violation of the Federal Copyright Act, 17 U.S.C. § 101, *et seq.* (alleging that he is the 'copyright holder of the photograph' . . . and Tribune was not 'authorized' to use it)[.]" *Malandrucco v. Chicago Tribune Company*, No. 18-cv-12480 (D.N.J. Aug. 6, 2018). Malandrucco also filed a claim under the Federal Crime Victims' Rights Act, 18 U.S.C. § 3771. The full notice is available online at: https://reason.com/assets/db/15336205681842.pdf.

Volokh wrote in his August 7 post, "Now that the cases are in federal court, I expect the order against Google to be promptly vacated, and the request for the order against the Chicago Tribune to be promptly dismissed."

On August 13, Volokh reported that Malandrucco was dropping the cases against Google and the *Chicago Tribune*. Volokh cited an official stipulation signed by all parties agreeing to the dismissal of both cases. In an update to the August 13 post, Volokh stated that the federal court had dismissed both lawsuits with prejudice and vacated the TROs.

Scott Memmel
Silha *Bulletin* Editor

Director's Note

The Summer 2018 issue of the Silha *Bulletin* includes several articles adapted from "Privacy and Data Protection," a chapter published in the course handbook for the Practising Law Institute's Communications Law in the Digital Age conference, which will take place in New York City in November 2018. Professor Kirtley gratefully acknowledges the contributions of Silha research assistants Casey Carmody, Scott Memmel, and Kirsten Nordstrom.

Jane E. Kirtley
Silha Center Director and
Silha Professor of Media Ethics and Law

Wetterling Family Decides Not to Appeal Judge's Order Requiring the Release of State Documents from Wetterling Investigation

On July 21, 2018, the Minneapolis *Star Tribune* reported that the family of Jacob Wetterling, whose 1989 abduction and murder prompted a 27-year investigation, had decided not to appeal a district judge's ruling requiring the release of state documents from the investigation case file.

PRIVACY

Previously, on April 19, 2018, Stearns County (Minnesota) District Court Judge Ann Carrott ordered the Stearns County Sheriff's Office (Stearns County) to release the state files. However, Carrott had also ruled on March 29 that documents created by the Federal Bureau of Investigation (FBI) during the investigation must be returned to the agency, comprising the majority of the case file.

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

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

On June 27, 2017, ten media organizations and transparency advocates, including the Silha Center for the Study of Media Ethics & Law (media-intervenors), filed a "complaint in intervention," arguing against the Wetterlings' claim that the information in the investigative file was "protected from disclosure by the state and federal constitutions," instead of the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.* The MGDPA classifies documents and information from closed or inactive investigations as "public data," except in circumstances in which "the release of the data would jeopardize another pending civil legal action, and except for those portions of a civil investigative file that are classified as not public data by this chapter or other law." Minn. Stat. § 13.39.

On Dec. 5, 2017, the federal government filed a motion to intervene in the case, arguing that the documents created by the FBI during the investigation needed to be returned to the agency under federal law. After Carrott approved the motion on Jan. 16, 2018, the federal government filed a motion for summary judgement the following day.

On March 29, 2018, Carrott granted the federal government's motion, ordering Stearns County to return the portion of the investigative files originating with the FBI to the agency, meaning the records would become subject to the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, rather than the MGDPA. *Patty Wetterling and Jerry Wetterling v. Stearns County*, No. 73-CV-17-4904 (March 29, 2018). However, on April 19, 2018, Carrott granted a November 10 motion for summary judgement by the media-intervenors' regarding the state documents in the Wetterling file not created by the FBI. *Wetterling v. Stearns County*, No. 73-CV-17-4904 (April 19, 2018). Carrott found that the MGDPA allowed for the release of "inactive law enforcement investigative file documents" and that "a constitutional right of informational privacy does not apply to prohibit the disclosure of government data classified as public by state statute." (For more information on the background of the Wetterling investigation and Carrott's rulings, see "Judge Orders Certain Files from Wetterling Investigation Be Returned to FBI, Allows Release of Remaining State Documents" in the Winter/Spring 2018 issue of the Silha *Bulletin*, "Media Groups Allowed to Join Lawsuit over Access to Documents in Wetterling Investigation; Dispute Expands to over Half the Case File" in the Fall 2017 issue, and "Media Groups and Transparency Advocates Challenge Family's Lawsuit, Judge's Ruling Halting the Release of 'Personal' Information" in the Summer 2017 issue.)

According to the *Star Tribune* on April 20, 2018, only six investigative documents belonged to the state, totaling 89 pages. Of those, the Wetterlings had objected to the release of 29 pages. The *Star Tribune* also noted that it had filed a FOIA request for the federal investigative documents. As the *Bulletin* went to press, the request remained pending.

In a July 21, 2018 interview with the *Star Tribune*, Patty Wetterling said that her family had decided not to appeal Carrott's order, calling it a "tough journey." In an interview with WCCO, Minneapolis' CBS affiliate, Doug Kelley, the Wetterlings' attorney, said that the family "just got tired" of fighting.

In a July 21 statement, Stearns County Attorney Janelle Kendall provided a timeline for when the files would be released. "We are in the process of complying with the court's order to return federal documents to the federal government," she wrote. "Once that process is completed, we anticipate releasing the nonfederal part of the investigation shortly thereafter." She added, "An appeal by any party would likely slow down or halt entirely any release until the appeal was resolved."

As the *Bulletin* went to press, the documents had not been released.

Scott Memmel
Silha *Bulletin* Editor

Federal Judge Imposes Prior Restraint on *Los Angeles Times*, Later Vacates Own Order

PRESS FREEDOM

On July 14, 2018, the *Los Angeles Times* reported that Judge John F. Walter of the U.S. District Court for the Central District of California had ordered the newspaper to remove information from an article concerning a plea agreement between prosecutors and a Glendale, Calif. police detective tied to organized crime. Walter had previously ordered that the plea agreement be filed under seal, but, due to an administrative mistake, the document was made available on a public online database. At a July 17 hearing, Walter vacated his initial order, which several media advocates and experts had called a "prior restraint" and a violation of the First Amendment.

In the morning of July 14, 2018, the *Los Angeles Times* published an article discussing a plea agreement between prosecutors and police narcotics detective John Saro Balian after he was accused of colluding with a Mexican crime syndicate. According to the article, Balian was charged with, and pled guilty to, one count each of soliciting a bribe, obstruction of justice, and making false statements to federal investigators. The full article is available online at: http://www.latimes.com/local/lanow/la-me-ln-glendale-detective-guilty-plea-20180714-story.html.

Walter ordered that the plea agreement be sealed, but a *Los Angeles Times* reporter found it posted on PACER, an online public database of federal court documents. According to the *Los Angeles Times* on July 17, the document was posted as the result of a "clerical error." Balian had alleged in court that the publication of the settlement would put his life in danger, according to *The New York Times* on July 15.

Within a few hours of the story being published, Walter enjoined "the *Los Angeles Times* and each of its parent companies, subsidiaries, or affiliates" from "[d]isclosing the under seal plea agreement in this case, in whole or in part, or publishing any article, piece, post, or other document whether in print or electronic format . . . [that] is derived in any way from the under seal plea agreement." Walter also ordered the newspaper to "return forthwith any and all copies of such plea agreement in its possession to the United States Attorney's Office for the Central District of California."

Walter concluded that Balian had shown" (1) a likelihood of success on the merits [of his *ex parte* application for temporary restraining order (TRO)]; (2) a likelihood of irreparable harm in the absence of preliminarily injunction relief; (3) that the balance of equities tips in his favor; and (4) that preliminary injunctive relief is in the public interest." Walter's full order is available online at: https://int.nyt.com/data/documenthelper/83-los-angeles-times-court-order/0d5392c30cf8bb98d924/optimized/full.pdf#page=1.

Several media law experts criticized Walter's order, contending that it violated the First Amendment. In a July 15 interview with *The New York Times*, Norman Pearlstine, the *Los Angeles Times*' executive editor, said, "There is sort of constant effort to nibble away at the First Amendment, and I think there is an obligation to respond to that and push back.. . . Once it's out in the public record, it is our decision to decide whether it is newsworthy and we should publish."

Kelli Sager, who represented the *Los Angeles Times*, contended that it was unusual that Walter did not notify the newspaper of any hearing before issuing his order. "It is very surprising that this kind of order would be issued without being heard," Sager told *The New York Times*. "We were never given notice. We don't know what was said. We hear speculative threats, we hear these safety allegations all the time. Courts have said that's not enough. There has to be a clear threat, and the example is troop movements during wartime — it has to rise to that level."

Theodore J. Boutrous, Jr., a First Amendment lawyer who previously represented the *Los Angeles Times*, told *The New York Times* on July 15 that "[t]he Supreme Court has ruled over and over again, the press can publish the information it has lawfully obtained if it is of public concern and interest." He added, "It's extraordinarily unusual for something to be de-published, and in some ways it is worse than prior restraint. It plainly violates the First Amendment." (Boutrous will present the 33rd annual Silha Lecture on Oct. 17, 2018. For more information on the lecture, see "Theodore J. Boutrous, Jr. to Deliver 33rd Annual Silha Lecture: 'The First Amendment and #MeToo'" on page 66 of this issue of the Silha *Bulletin*.)

Bruce Brown, the executive director of the Reporters Committee for Freedom of the Press (RCFP) agreed in a July 16 statement. "It is plainly unconstitutional for a court to order a news outlet to remove public information from an article it has published," he wrote. "It does not matter whether the information was placed in a court file by mistake, 90 years of legal precedent says that the court cannot prevent a news organization from doing its job and reporting the information to the public."

The New York Times reported that by the evening of July 14, the *Los Angeles Times* had removed any references to the settlement document, though it still indicated that a settlement had been reached between Balian and prosecutors.

On July 16, RCFP and 59 media organizations filed an *amici curiae* letter urging the U.S. Court of Appeals for the Ninth Circuit to "block [the] prior restraint on the *Los Angeles Times*." The letter called Walter's order an "extraordinary step" and an "unconstitutional prior restraint" because it required the *Los Angeles Times* to "remove any article about the plea agreement published prior to the issuance of its order."

The letter cited *N.Y. Times Co. v. United States*, known as the "Pentagon Papers" case, in which U.S. Supreme Court Justice Hugo Black wrote that under the First Amendment, "[t]he [g]overnment's power to censor the press was abolished so that the press would remain forever free to censure the [g]overnment." 403 U.S. 713, 714 (1971). The letter also cited *Nebraska Press Association v. Stuart*, in which the Court held that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they have "an immediate and irreversible sanction," not only "chilling" speech, but "freezing" it, at least for a time. 427 U.S. 539, 570 (1976). Additionally, RCFP and the media organizations cited *Near v. Minnesota*, another landmark case in which the Court recognized that "it is the chief purpose of the guaranty [of the

LA Times, *continued on page 60*

LA Times, *continued from page 59*

First Amendment] to prevent previous restraints upon publication." 283 U.S. 697, 713 (1931).

The letter contended that although the media organizations did not know Balian's argument seeking the temporary restraining order (TRO), he "[could not] possibly meet his burden to overcome the First Amendment presumption against prior restraints." They contended that the "district court's desire to correct this *administrative* error . . . cannot justify the imposition of a prior restraint, which has now created a constitutional harm" (emphasis in original). The letter further argued that "once information is made public, nearly 90 years of constitutional law stand in the way of using prior restraints to prevent a newspaper from communicating the information to its readers." The letter cited several additional Supreme Court rulings, including *Oklahoma Publishing Co. v. District Court* in which the Court "reversed an injunction preventing reporting on the name or likeness of a juvenile criminal defendant, after his name and picture were publicly revealed in connection with the prosecution of a crime, in spite of a state law that required juvenile proceedings to be held in private." 430 U.S. 308 (1977).

The letter concluded by stating, "[J]ust as the Constitution would protect the *Los Angeles Times* from punishment for publishing information about a plea agreement it found in court files, it surely protects the newspaper from being enjoined from publishing that information in the first place and forced to remove information it has already published." RCFP and the media organizations urged the Ninth Circuit to reverse the district court's entry of the TRO. The full letter is available online at: https://www.rcfp.org/sites/default/files/2018-07-16-LA-Times-v-USDC.pdf.

In a July 17 tweet, attorney Ken White reported that Walter had vacated the prior restraint order, but had also "blast[ed]" the press for printing "cooperation information." In a story on his blog, "Popehat," on the same day, White reported that Walter had explained that he was "'terribly concerned' that Mr. Balian or his family would be subjected to physical harm if the information became public." The *Los Angeles Times* reported on July 17 that Walter said, "I'm concerned about somebody's life. And if I err, I'm going to err on the side of protecting this defendant."

According to White and the *Los Angeles Times*, Walter also described himself as a "strong proponent of the First Amendment" and that he "believe[d] in public access to this courtroom." Walter vacated his initial order and denied a request for a longer-term order, a preliminary injunction, citing that he now knew how the plea agreement got out and that it was not through press misconduct. Walter also reasoned that the information was now public and that the government had the ability to protect Balian, according to White. However, Walter added that he hoped the *Los Angeles Times* would "use some restraint . . . in light of potential consequences."

> "[O]nce information is made public, nearly 90 years of constitutional law stand in the way of using prior restraints to prevent a newspaper from communicating the information to its readers."
>
> **— *Amici curiae* letter, Reporters Committee for Freedom of the Press with 59 media organizations**

The Hill reported on July 17 that the *Los Angeles Times* restored the details from the plea agreement into its original article.

In his blog post, White praised Walter's latest ruling, but criticized his original order. "It's good that Judge Walter vacated his order. But it's unacceptable that he issued it in the first place, and unbecoming and regrettable that he blasted the press for printing important information about a federal case." He added, "They were right to publish. He was wrong to issue the order, and wrong to try to justify it."

The Committee to Protect Journalists' (CPJ) North America program coordinator Alexandra Ellerbeck also praised Walter's decision to vacate his original order. "We are relieved that the District Court has reversed its decision and vacated the order," she wrote in a July 17 statement. "Censorship is the hallmark of authoritarianism and one of the most extreme measures governments use to control speech.. . . That is why U.S. courts have long determined that under the First Amendment the ability to impose prior restraint is extraordinary limited. We believe that the actions of the U.S. District Court in not only prohibiting publication but also ordering the *L.A. Times* to remove information already published violated constitutional protections."

Pearlstine agreed in a July 17 statement. "We are glad that the district court vacated the restraining order and denied John Balian's application for a preliminary injunction. The district court recognized that we acted lawfully in downloading a publicly available plea agreement from the PACER electronic retrieval system," he wrote. "We continue to believe that it was unconstitutional for The Times to be ordered to take down portions of the article on the plea agreement that we already had published."

RCFP legal director Katie Townsend added, "The Reporters Committee is very pleased that the district court reversed itself and vacated the unconstitutional prior restraint it had imposed on the LA Times.. . . It is the right outcome and we are glad that it happened quickly."

Scott Memmel
Silha *Bulletin* Editor

District Court Rules in Favor of CIA in Selective Disclosure FOIA Case

On March 29, 2018, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York granted the Central Intelligence Agency's (CIA) motion for summary judgment in a Freedom of Information Act (FOIA), 5 U.S.C. § 552, case brought by Adam Johnson, an independent journalist and contributing analyst for Fairness and Accuracy in Reporting (FAIR), a progressive media watchdog organization. *Johnson v. CIA*, No. 1:17-cv-01928-CM (S.D.N.Y. March 29, 2018). Johnson had sought classified information that had already been "selectively disclosed" via email by the CIA to three journalists at *The Wall Street Journal*, *The Washington Post*, and *The New York Times*. In an April 12 memorandum decision, McMahon concluded that although Johnson was seeking the exact information previously disclosed in the emails, the information was not in the "public domain" and, therefore, was exempt from disclosure. *Johnson v. CIA*, 309 F.Supp.3d 33 (S.D.N.Y. 2018).

FOIA

The case arose in 2012 when then-Gawker Media journalist John Cook filed a FOIA request for email correspondences between the CIA and several prominent journalists from *The New York Times*, *The Washington Post*, and *The Wall Street Journal*, among others, according to Daniel R. Novack, Johnson's attorney, in a March 16, 2017 post on his personal website. Two years later, when Cook was working as editor-in-chief of *The Intercept*, the CIA produced several hundred pages of documents. According to court documents, although the CIA released the journalists' inquiries and comments, the majority of the CIA's emails were redacted, despite being shared with the journalists. The documents obtained by Cook are available online at: https://www.documentcloud.org/documents/1283562-cia-public-affairs-emails.html.

In February 2017, Johnson filed a FOIA request for the same documents as Cook. Pursuant to Johnson's FOIA request, the CIA produced the journalists' responses, but heavily redacted the emails sent by the CIA. According to Novack, throughout the ensuing litigation, the agency removed the redactions from numerous emails. The case thus focused on five particular email chains sent by the CIA's Office of Public Affairs (OPA) to reporters Siobhan Gorman of *The Wall Street Journal*, David Ignatius of *The Washington Post*, and Scott Shane of *The New York Times*, who were "not cleared to receive [the information in the emails]," according to McMahon. According to a May 23, 2018 Ballard Spahr LLP commentary, the disclosure by the OPA went through and was approved under an agency-sanctioned "selective disclosure program." McMahon stated that the program, at the time of the ruling, was "no longer operative, or [w]as at the very least . . . modified." On his personal website on Feb. 1, 2018, Novack alleged that the emails were regarding surveillance activity in Syria and the CIA's fake vaccination programs in Pakistan around 2012-2013.

On March 16, 2017, Johnson filed a lawsuit against the CIA in the Southern District of New York, stating that the CIA had "fail[ed] to provide a response within twenty working days" and asking the court to order the CIA to "provide access to the requested documents in their entirety." Johnson contended that he was "entitled to this information as any other reporter now that it had been voluntarily disclosed by the CIA to certain members of the press — who are, in addition, members of the public." He further asserted that "the CIA ha[d], by disclosing to reporters not authorized to have access to [the] classified information, waived its right to rely on relevant exemptions," though he conceded that the withheld information would have otherwise been exempt under FOIA.

The CIA contended that the information was exempt under Exemptions 1 and 3 of FOIA. Exemption 1 protects information that is classified as being in the "interest of national defense or foreign policy." 5 U.S.C. 552 § (b)(1). Exemption 3 prevents disclosure of information that is prohibited from being disclosed by another federal law, such as the National Security Act, 50 U.S.C. 403-1(i)(1), which provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 5 U.S.C. 552 § (b)(3).

In a Jan. 19, 2018 memorandum order regarding the CIA's and Johnson's motions for summary judgment, McMahon ruled in favor of Johnson, ordering the CIA to file a "better reply" to Johnson's motion, finding that although the information contained in the emails would otherwise be subject to the FOIA exemptions, the agency had not provided sufficient reasons or evidence as to why the information should not be disclosed pursuant to Johnson's FOIA request. *Johnson v. CIA*, 2018 WL 833940 (S.D.N.Y. Jan. 19, 2018).

McMahon first found that the "applicability of the two [FOIA] exemptions to the withheld information cannot be doubted" and that they are "not even in dispute" because there was "ample evidence . . . that the information contained in the non-disclosed portions of the email chains [was] properly classified."

However, McMahon stated that the exemptions could be waived, citing a 1995 Southern District of New York case in which the court found that "[v]oluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption." *Dow Jones v. Dept. of Justice*, 880 F. Supp. 145, 150-5l (S.D.N.Y. 1995). McMahon added that although "[a]t first blush, it would seem that [the] CIA . . . waived its right to rely on the exemptions," Johnson's FOIA request had to meet three criteria, including that the request was for "(1) specific information, (2) that has already been disclosed to the public, and (3) by someone authorized to make such disclosure." She concluded that because Johnson had only requested the information that was contained in the emails, he had met these three requirements.

Second, McMahon found the CIA's reliance on the U.S. Court of Appeals for the D.C. Circuit's 1981 case *U.S. v. Phillips* "unconvincing" and "unpersuasive." 655 F.2d 1325 (D.C. Cir. 1981). In that case, the D.C. Circuit determined whether the CIA could suppress publicity about a project to raise a Soviet submarine from the ocean floor, known as the Glomar Explorer project. The court ruled that Exemption 3 barred disclosure of the records sought because such disclosure "[could] reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." In the present case, McMahon concluded that the CIA had "voluntarily disclosed to outsiders information that it had a perfect right to keep private" regardless of whether the three reporters had printed or published it. She further

CIA, *continued on page 62*

CIA, *continued from page 61*

held that there was "no possibility that one 'could not know for sure which information came from CIA sources'" because the disclosure "came in the form of an email sent by its in-house Office of Public relations."

Finally, McMahon criticized the CIA's argument that there was a "very real danger" to disclosing the information in the emails, arguing that it "only underscores the lack of wisdom of [the] CIA's risky (and apparently discontinued) selective disclosure program." Thus, McMahon concluded that because "[t]he issue here is a serious one, and so are the possible consequences if the court were to conclude that [the] CIA's limited disclosure to some members of the press operated as a waiver," she "suggest[ed] . . . that the [CIA] go back and treat the question of waiver with the seriousness it deserves" – namely, whether there is any precedent for Exemptions 1 or 3 to be waived. In a footnote, she stated "I suppose it is possible that the Government does not consider members of the press to be part of 'the public.' I do."

McMahon gave the CIA until Jan. 31, 2018 to provide the court with a "better reply to [Johnson's] brief in opposition to the [CIA's] motion [for summary judgment]." The full decision is available online at: https://fas.org/sgp/jud/johnson-order-013018.pdf.

In an April 30, 2018 commentary, Steven Aftergood, who directs the Federation of American Scientists' (FAS) Project on Government Secrecy, a project promoting public access to government information, wrote that McMahon "seemed to identify with the plaintiff's perspective" in her January 2018 ruling.

On Feb. 14, 2018, the CIA filed its revised reply brief, contending first that Exemptions 1 and 3 applied to the provisions of the five emails in question. Regarding Exemption 3 in particular, the CIA asserted that the U.S. Supreme Court in *CIA v. Sims* "recognized that the [National Security Act] authorizes the CIA to undertake limited and selective disclosure of information . . . including specifically when such disclosure is necessary in order not to compromise the agency's carrying out of its mission." 471 U.S. 159 (1985).

The CIA next claimed that sending classified information via email to the three reporters did not waive the protections of Exemptions 1 and 3 "because the full content of those emails has not been 'made public;' that is, the emails have not entered the 'public domain.'" The agency asserted that the reporters "[did] not seem to have disclosed the contents of the five emails to the general public" because if they had, Johnson would not have needed to file his FOIA request. The CIA's supplemental memorandum of law connected to its reply brief is available online at: https://fas.org/sgp/jud/johnson-cia-042618.pdf.

In response to the CIA's new brief, Johnson submitted a letter brief contending that the CIA's arguments "that it may selectively disclose without waiver, if it has the best of intentions, knows no logical limits and would render the FOIA waiver doctrine a nullity." The brief further argued that the CIA had offered "no persuasive grounds for the Court to revisit its common sense conclusion that journalists are members of the public and the CIA's documented disclosure here waived its right to invoke FOIA Exemption 3." The full letter brief is available online at: https://fas.org/sgp/jud/johnson-030218.pdf.

Additionally, on March 16, 2018, five FOIA advocacy organizations, including The Government Accountability Project, Government Information Watch, National Security Counselors, the New Venture Fund, and the Project on Government Oversight filed an *amici curiae* brief in support of Johnson. The brief first contended that exemptions do not apply in cases of prior official disclosure, arguing that "[i]f a document exists which is a highly classified . . . and an agency official releases it through an official and documented disclosure to a member of the public, that agency cannot withhold it from a FOIA requester, and a court cannot even entertain the argument that any of those exemptions apply because *no exemptions apply*" (emphasis in original).

Second, the brief asserted that by sending the information to the three reporters in an email, the CIA had caused the information to be "preserved in a permanent public record," meaning the dissemination was "truly public," contrary to what the agency claimed in its brief. The brief further argued that none of the cases cited by the CIA defined "truly public" as the agency had used the phrase.

Finally, the *amici* brief concluded that "one official's decision to disclose particular information in writing to a private non-government party most assuredly binds the same agency to disclose the same information to a FOIA requester." The full brief is available online at: https://fas.org/sgp/jud/johnson-amici.pdf.

However, in a March 29 order, McMahon granted the CIA's motion for summary judgment and stated her full opinion would be released after it was "appropriately redacted." The order is available online at: https://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2017cv01928/470916/38.

In her April 12 memorandum decision and order, McMahon ruled that Johnson had failed to demonstrate that the information he sought had made it into the "public domain." First, McMahon wrote that the CIA's new reply brief "should have filed in the first instance" and walked through the main arguments by the agency.

Second, McMahon considered the applicability of the "public disclosure doctrine," namely that courts "have long recognized that information could not remain classified after it had been 'specifically revealed to the public.'" McMahon provided three conclusions from several cases raised by the CIA in its reply brief. First, the "Director of Central Intelligence is free to disclose classified information about CIA sources and methods selectively, if he concludes that it is necessary to do so in order to protect those intelligence sources and methods, and no court can second guess his decision." Second, the CIA is not exempt from the public disclosure doctrine "if it does not handle such disclosures in a manner that prevents the information from becoming 'truly public.'"

McMahon's final conclusion was that courts have "not made it easy for a FOIA plaintiff to obtain selectively disclosed information on the ground that it has become 'truly public.'" She explained that, in order to compel disclosure of such information, the plaintiff must demonstrate that he or she "is seeking *exactly* the information that was previously disclosed to someone not ordinarily authorized to receive it" (emphasis in original). The plaintiff must also show that the "precise information he [or she] seeks is in the 'public domain.'"

Regarding the first requirement, McMahon found that "Johnson wants nothing more – and nothing less – than what is underneath th[e] redactions" in the emails strings between the OPA and the three journalists.

However, McMahon concluded that Johnson had not shown that there was a "permanent public record," even though the reporters had copies of the information in their email inboxes. McMahon asserted that Johnson had

CIA, *continued on page 63*

Minnesota Supreme Court Allows Audio and Video Recordings in Some Portions of Criminal Cases

On July 2, 2018, the Minnesota Supreme Court issued an order allowing audio and video recording in most criminal proceedings "after a guilty plea has been accepted or a guilty verdict has been returned." However, the order, which made permanent a three-year pilot project, did not permit "coverage of cases involving charges of domestic violence in which the victim is deceased" and also limited coverage in some domestic violence and criminal sexual conduct cases, among other limitations. Several observers praised the order, but also contended that it did not go far enough providing access and transparency to Minnesota courtrooms.

CAMERAS IN COURTROOM

Previously, in 2011, Minnesota launched a two-year pilot project permitting cameras in most civil proceedings. However, the project prohibited cameras in criminal proceedings, child custody, family law and juvenile proceedings, and petitions for protective orders.

In 2015, the Minnesota Supreme Court issued an order authorizing a two-year pilot project relaxing restrictions on camera usage in courtrooms during limited portions of criminal proceedings – specifically, after a guilty plea or verdict. The order provided that the media need only a judge's approval to broadcast or take pictures in certain limited circumstances, whereas the previous rule required all parties in a case to consent prior to recording. Exceptions included cases involving charges of criminal sexual conduct and domestic violence, as well as the testimony of victims or hearings outside the presence of the presiding judge. (For more information about the evolution of cameras in Minnesota courtrooms, see "Court Access: Federal Law Would Allow Cameras in U.S. Courts," in the Fall 2007 issue of the Silha *Bulletin*, "Minnesota Supreme Court Holds Hearing on Cameras in Courts: Minnesota Supreme Court Holds Hearing on Cameras in Courts in the Summer 2008 issue; "Minnesota Advisory Committee Resists Cameras in Courts" in the Winter 2008 issue, "Minnesota High Court Approves Cameras in-Court Pilot Program" in the Winter 2009 issue, "Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings" in the Fall 2010 issue, "Battles to Gain Camera/Audio Access to State and Federal Courtrooms Continue" in the Fall 2011 issue, "Minnesota Senate Expands Floor Access; State Supreme Court Approves Cameras" in the Winter/Spring 2011 issue, "Silha Spring Ethics Forum Focuses on Cameras in the Courtroom, Status of Minnesota Pilot Project" in the Spring 2012 issue, "Minnesota Supreme Court Approves Use of Cameras in Civil Cases, Considers Expansion to Criminal Cases" in the Fall 2013 issue, and Minnesota Supreme Court Eases Restrictions on Courtroom Cameras in Criminal Cases in "Updates to State Laws Create Challenges, New Benefits for News Organizations" in the Summer 2015 issue.)

In January 2018, the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure (committee), which was tasked by the Court with providing "recommendations for continuation, abandonment, or modification of the [2015] pilot project," filed a report recommending that the procedures for audio or video coverage of criminal proceedings be permanently codified under Rule 4 of the Minnesota General Rules of Practice (Rule 4). Minn. Gen. R. Prac. 4.01 *et seq.* The report also recommended several amendments in order to address issues raised during the pilot, such as clarifying when coverage is allowed in domestic violence cases.

On April 25, the Minnesota Supreme Court held an hour-long hearing concerning whether to extend the pilot program. Some justices seemed opposed to extending it, including Justice Natalie Hudson, who said that she shared former "Justice [Alan] Page's concern that . . . it would over-represent

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CIA, *continued from page 62*

provided "no proof that the emails 'remain[ed]' in the public domain." She stated that "[e]ven though the emails . . . will reside for all eternity on the servers . . . of the three receiving newspapers, I do not believe that the CIA has created a permanent public record of its authorized disclosure."

McMahon wrote that for something to be "public," it must be accessible to members of the general public. In this case, a member of the public, according to McMahon, "would have to steal a copy [of the emails] from the newspapers by breaking into servers" or hack into the newspapers' or CIA's servers in order to obtain the emails. She added, "If the only way that information can be seen by the general public is by stealing it from an authorized recipient, logic dictates that the information is not available to the general public — it is not 'in the public domain.'"

McMahon further contended that even if a member of the public went to the newspapers to demand a copy of the emails, it is likely that the journalists or news organizations would "fight tooth and nail against any effort to make them public." If that were not the case, according to McMahon, Johnson would not have needed to file the FOIA request. She added, "I cannot deny the allure of Johnson's argument. I do think the CIA was careless in this instance – especially given the generosity of courts in making sure that the Agency had a safe harbor within which it could do what the Director deemed needful without jeopardizing its right to rely on the relevant FOIA exemptions." McMahon's full memorandum decision and order is available online at: https://fas.org/sgp/jud/johnson-cia-042618.pdf. As the *Bulletin* went to press, Johnson had not announced whether he would appeal the ruling.

In its May 23 commentary, Ballard Spahr LLP's Media and Entertainment Law Group predicted that McMahon's ruling would have the negative effect of "bolster[ing] the government's ability to deny FOIA requests." The group wrote, "Despite what the judge called 'CIA's carelessness' that 'appears to have ignored every safe harbor the courts have afforded it,' the CIA now has a judicially sanctioned justification to selectively disclose classified information to certain members of the public without waiving any FOIA exemptions." However, the group also argued that McMahon's order "gives the CIA and other intelligence agencies a legal authorization to share classified information with members of the press," therefore potentially "encouraging the agency to share more information with the press."

Scott Memmel
Silha *Bulletin* Editor

Recording, *continued from page 63*

particularly young African American men as violent." Conversely, Judge Michelle Larkin, who had served as the chairwoman of the committee that studied the pilot project, asserted that allowing the use of cameras has not led to negative consequences as opponents of the program contended. "People said this is what is going to happen, this is why we shouldn't do this . . . and it didn't happen," Larkin said. "The sky has not fallen.. . . We simply did not see anything inflammatory. It was pretty dry actually." (For more information on the committee's report and the April 2018 hearing, see "Minnesota Legislature Seeks to End Use of Cameras in Courtrooms" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

In a July 2, 2018 order signed by Chief Justice Lorie S. Gildea, the Minnesota Supreme Court held that "the rules that govern the pilot project . . . be permanently codified" into Rule 4. The Court concluded that based on the results of the pilot project, "the conditions that govern the coverage of these public proceedings provide the appropriate balance between the fundamental right of a defendant to a fair trial and the judicial branch's commitment to the fair, open, and impartial administration of justice."

In a connected unanimous *per curiam* memorandum decision, the Court first rejected some committee members' argument that the pilot program be extended, finding that there would be "no benefit to extending the pilot project in its current form because we do not see that a longer pilot will result in a significantly increased number of coverage requests."

Second, the Court approved the committee's recommendation that coverage be prohibited in domestic violence proceedings only when "the victim is defined as a family or household member" under Minnesota law. The Court also approved the recommendation that the category of prohibited coverage include "cases with charges of murder committed while committing or attempting to commit criminal sexual conduct in the first or second degree." The Court reasoned that "[t]hese refinements to the language of the rule are consistent with the interests of privacy and safety that led to the exclusion of similar cases from the scope of permitted coverage." Additionally, the Court approved recommendations regarding when a coverage request by the media can be denied by a judge, as well as several amendments "promot[ing] consistency in the permitted coverage between civil and criminal proceedings."

However, the Court did not accept the committee's recommendation that coverage be permitted in cases involving domestic violence in which the victim is deceased. The Court held that "[v]ictim concerns may be different in these cases . . . but this difference does not change the fact that, as with other domestic violence and sexual misconduct cases, these cases often involve egregious and salacious facts."

Finally, the Court shortened "the time for notice of intent to cover proceedings" by media representatives from 10 days to seven days.

Under the new and amended rules, in criminal proceedings occurring before a guilty plea has been accepted or a guilty verdict has been returned, a judge "may authorize, with the consent of all parties in writing or made on the record prior to the commencement of the trial, the visual or audio recording and reproduction of appropriate court proceedings." Such coverage is subject to several limitations, including prohibiting the recording of jurors at all times and of witnesses who object to being recorded. Coverage is also prohibited for hearings that take place "outside the presence of the jury," including those determining the admissibility of evidence or considering various motions. Additionally, coverage is prohibited during hearings when the presiding judge is not present and when proceedings take place outside the courtroom, such as in other areas of the court building.

In criminal proceedings after a guilty plea or verdict, the consent of all parties "is not required for coverage . . . and lack of consent is not good cause to deny coverage." Instead, to determine "whether there is a good cause to prohibit coverage of a proceeding," a judge must consider "(1) the privacy, safety, and well-being of the participants or other interested persons; (2) the likelihood that coverage will detract from the dignity of the proceeding; (3) the physical facilities of the court; and (4) the fair administration of justice." As recommended by the committee, coverage is prohibited when a victim of domestic violence is "a family or household member." Additional limitations include the prohibition of coverage when a jury is present and in proceedings in drug, mental health, veterans, and DWI courts. Victims or "a person giving a statement on behalf of the victim as the victim's proxy" also cannot be recorded unless he or she "affirmatively acknowledges and agrees in writing before testifying to the proposed coverage." Coverage is also prohibited during hearings outside the presence of the presiding judge or those conducted outside the courtroom.

In civil proceedings, a judge may authorize, "without the consent of all parties," recordings of court proceedings so long as there is "no visual or audio coverage" of jurors and witnesses. Recordings are also prohibited during hearings that take place "outside the presence of the jury," as well as in cases involving "child custody, marriage dissolution, juvenile proceedings, child protection proceedings, paternity proceedings, civil commitment proceedings, [and] petitions for orders of protection," in addition to all other proceedings "not accessible to the public."

If a party opposes audio or video coverage, they must "provide written notice of [their] objections to the presiding judge, the other parties, and the media requesting coverage." The judge then rules "on any objections and make[s] a decision . . . before the commencement of the hearing or trial." A judge also "has the discretion to limit, terminate, or temporarily suspend [audio and video recording] of an entire case or portions of a case at any time."

The full ruling and Rule 4 are available online at: http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/Administrative-Order-GRP2.pdf.

In a July 2 interview with the Minneapolis *Star Tribune*, Mark Anfinson, an attorney for the Minnesota Newspaper Association, praised the ruling, but said it did not go far enough. "This is progress," he said. "Not with a capital P, but it's progress. I think the court ultimately will have to go much further, along the lines of what Wisconsin, Iowa and North Dakota do. All have allowed routine coverage of court cases for more than 30 years. And more than 30 other states do as well." He added, "The advantage the media and the public have as time goes by is we acquire evidence as we do these things.. . . We gain experience, we gain knowledge. So far the evidence is very one-sided. There's nothing that supports the alarms and fears of the opponents."

In a July 6, 2018 editorial, *The Mankato Free Press* wrote, "Making the cameras in court rules permanent is a small victory for transparency, but Minnesota must do much more to provide taxpayers the same level of transparency as those citizens in our neighboring states."

Scott Memmel
Silha *Bulletin* Editor

U.S. Court of Appeals Calls PETA Bananas in Monkey Selfie Case

On April 24, 2018, the U.S. Court of Appeals for the Ninth Circuit ruled that an Indonesian monkey named Naruto could not sue for copyright infringement over the publication of selfies he took using photographer David John Slater's unattended camera in 2011. The court held that Naruto had standing under Article III of the U.S. Constitution to bring a case to federal court alleging that he was the author and owner of the photographs and suffered economic harm as a result of Slater's alleged copyright infringement. However, the court ruled that he did not have statutory standing under the Copyright Act, 17 U.S.C. §§ 101 *et seq*. The Ninth Circuit ruling came despite a September 2017 settlement between Slater and the People for the Ethical Treatment of Animals (PETA), which brought the case on behalf of Naruto.

COPYRIGHT

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

In a tentative opinion filed on Jan. 8, 2016, Judge William Orrick of the U.S. District Court for the Northern District of California held that the Act did not apply to animals. "While Congress and the president can extend the protection of law to animals as well as humans," he wrote, "there is no indication that they did so in the copyright act." *Naruto v. Slater*, 15-cv-04324-WHO (N.D. Cal. 2016).

On Sept. 11, 2017, the parties reached a settlement in which Slater agreed to donate 25 percent of future revenue from the photograph to charitable organizations that protect crested macaques, like Naruto. (For more information on Naruto's selfie, Orrick's ruling, and the settlement, see "No More Monkey Business: Settlement Ends 'Monkey Selfie' Copyright Lawsuit" in the Fall 2017 issue of the Silha *Bulletin*.)

Despite the settlement, several news outlets reported on April 13 that the Ninth Circuit had refused to dismiss the case. On April 23, 2018, the Ninth Circuit affirmed Orrick's ruling that Naruto had Article III standing to bring a case based on economic harms as a result of alleged copyright infringement, but lacked statutory standing to claim copyright infringement under the Copyright Act.

Judge Carlos Bea, writing for the majority, first determined whether PETA had "next friend standing" to bring the lawsuit, an argument normally used when a party seeks to appear in court on behalf of an individual who is not competent to do so, such a minor or someone with cognitive disabilities. Bea ruled that PETA did not have next friend standing because it "failed to allege any facts to establish the required significant relationship between a next friend and a real party in interest" and that an animal "cannot be represented, under our laws, by a 'next friend.'" However, Bea held that the court "must proceed . . . because Naruto's lack of a next friend does not destroy his standing to sue" and because "Naruto's Article III standing . . . is not dependent on PETA's sufficiency as a guardian or a 'next friend.'"

Second, Bea explained that PETA was alleging that Naruto was not only the author and owner of the selfies but that he "suffered concrete and particularized economic harms as a result of the infringing conduct by the Appellees." Bea ruled that Naruto had Article III standing under the U.S. Constitution to bring a federal lawsuit, citing the Ninth Circuit's ruling in *Cetacean Community v. Bush* in which the court held that all of the world's whales, dolphins, and porpoises (collectively "cetaceans"), through their self-appointed lawyer, had alleged facts sufficient to establish Article III standing. 386 F.3d 1169, 1175 (9th Cir. 2004). Bea held that Naruto had standing to bring the case in federal court because he was, according to the complaint, the author and owner of the photographs he had taken using Slater's camera, and had perhaps suffered "concrete or particularized harms," as required by the U.S. Supreme Court in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). (For more information on *Spokeo, Inc. v. Robins*, see "Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Court Splits on Article III Standing Bar Following Spokeo in the Summer 2017 issue of the Silha *Bulletin*, "Supreme Court Issues Long-Awaited *Spokeo* Ruling" in the Summer 2016 issue, and "U.S. Supreme Court Accepts Review of *Robins v. Spokeo, Inc*." in the Summer 2015 issue.)

However, Bea ruled that Naruto did not have statutory standing under the Copyright Act, citing again *Cetacean Community v. Bush* in which the Ninth Circuit stated that "if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standings. If the statute does not so plainly state, then animals do not have statutory standing." Bea held that the Copyright Act "does not expressly authorize animals to follow copyright infringement suits under the statute." Bea added that several provisions of the Act also demonstrated that animals do not have standing under the statute, which includ terms such as "children," "grandchildren," "widow," and "widower," which "all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law."

Thus, the court concluded that *if* Naruto had a valid federal claim, he would have Article III standing to sue (emphasis added). However, because Naruto did not have standing under the Copyright Act, he did not have a valid federal claim.

In a footnote, the court further stated, "Mindful that the term 'standing' carries with it jurisdictional connotations, we clarify that our use of the term 'statutory standing' refers to Naruto's ability to sue under the Copyright Act, not his ability to sue generally." The footnote further explains that the lack of statutory standing "requires dismissal for failure to state a claim;" lack of Article III standing requires dismissal for lack of subject matter jurisdiction."

Finally, the court granted Slater and Wildlife Personalities, Ltd.'s request for attorney's fees, with the appropriate amount to be determined by the district court.

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

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Theodore J. Boutrous, Jr. to Deliver 33rd Annual Silha Lecture: "The First Amendment and #MeToo"

SILHA CENTER EVENTS

On Dec. 18, 2017, *Time* magazine named "The Silence Breakers" as 2017 "Person of the Year," recognizing the #MeToo movement, an international campaign against sexual harassment and assault. Numerous individuals have accused powerful people of sexual misconduct, among them film producer Harvey Weinstein; former co-host of NBC's "Today Show" Matt Lauer; author and radio personality Garrison Keillor; and former U.S. Sen. Al Franken.

The #MeToo movement raises many First Amendment issues, including how to protect the free speech rights of women who allege sexual harassment, as well as the use of defamation lawsuits by accusers and those accused of misconduct. Attorney Theodore J. Boutrous, Jr., who recently filed a defamation lawsuit on behalf of actor Ashley Judd against Weinstein, will deliver the Silha Center's 33rd Annual Lecture, "The First Amendment and #MeToo," on Wednesday, Oct. 17, 2018. Boutrous will consider these issues in light of how social media platforms disrupt traditional First Amendment doctrine.

Boutrous is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP, and is also global co-chair of the firm's Litigation Group. Boutrous has extensive experience handling high-profile litigation, media relations, and media law issues. Boutrous received his law degree, *summa cum laude*, from the University of San Diego School of Law in 1987, where he was Valedictorian and editor-in-chief of the *San Diego Law Review*.

According to *The National Law Journal*, which named him one of the "100 Most Influential Lawyers in America" in 2013, Boutrous "is known for his wise, strategic advice to clients in crisis and is a media law star." In February 2016, *The New York Time*s credited Boutrous with "a long history of pushing the courts and the public to see the bigger picture on heated issues." Boutrous has argued complex civil, constitutional, and criminal matters in more than 100 appeals, including before the U.S. Supreme Court, 12 federal circuit courts of appeals, 10 state supreme courts, and many other appellate and trial courts.

Boutrous has successfully persuaded courts to overturn some of the largest jury verdicts and class actions in history, including the largest defamation verdict of all time involving *The Wall Street Journal*. He also assisted the Reporters Committee for Freedom of the Press (RCFP) in a case involving blogger Joshua Wolf, who had posted video of the 2005 G-8 protests and was subpoenaed by government officials for unaired portions of the video. (For more information about the case against Wolf, see "Wolf Sets Jail Time Record for Refusing to Comply with Grand Jury Subpoena in the Winter 2007 issue of the Silha *Bulletin*; "Reporters Privilege News: Blogger Ordered Back to Jail for Refusal to Disclose Videotapes" in the Fall 2006 issue; and "Reporters Privilege News: Court of Appeals Orders Freelance Journalist To Hand Over Videotape" in the Summer 2006 issue.)

In 2014, Boutrous urged the Supreme Court to grant *certiorari* in the case of journalist James Risen, who challenged a U.S. Department of Justice (DOJ) subpoena ordering him to testify and reveal his confidential sources the prosecution of Jeffrey Sterling, a former Central Intelligence Agency (CIA) officer charged under the Espionage Act, who federal prosecutors said had provided classified information to Risen for his 2006 book *State of War*. (James Risen, with his attorney Joel Kurtzberg, delivered the 2015 Silha Lecture. For more information about that lecture and the case against Risen, see "30th Annual Silha Lecture Addresses Challenges to Reporting on National Security Matters" in the Fall 2015 issue of the Silha *Bulletin*. For more information on the background to Risen's case, see "Espionage Conviction Ends Lengthy Struggle to Compel Journalist's Testimony" in the Winter/Spring 2015 issue, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, "Update: Supreme Court Declines to Hear Reporter's Privilege Cases" in the Summer 2014 issue, "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources" in the Fall 2013 issue, and "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue.)

Boutrous is also a frequent commentator on legal issues. His many articles include "Why I'll Defend Anyone Trump Sues for Speaking Freely," in *Politico* on Oct. 31, 2016, as well as others in *The Wall Street Journal* and *The New York Times*.

Boutrous is a member of the Advisory Board of the International Women's Media Foundation and was its 2015 Leadership Honoree. He also serves on the Business Advisory Council of ProPublica, a nonprofit investigative newsroom.

The 33rd Annual Silha Lecture begins at 7:30 pm on Oct. 17, 2018 at Cowles Auditorium in the Hubert H. Humphrey Center on the West Bank of the University of Minnesota, Twin Cities campus. The Silha Lecture is free and open to the public. No reservations or tickets are required. Parking is available in the 19th and 21st Avenue ramps. Additional information about directions and parking can be found at www.umn.edu/pts.

The Silha Center for the Study of Media Ethics and Law is based at the Hubbard School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities, including the annual Lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

Silha Center Staff

Selfie, *continued from page 65*

allowed PETA "to sue on Naruto's behalf" even "with no injury or relationship to the real party of interest." In a footnote, Smith added, "PETA's real motivation in this case was to advance its own interests, not Naruto's.. . . Unfortunately, PETA's actions could be the new normal under today's holding." The Ninth Circuit's full ruling is available online at: https://www.documentcloud.org/documents/4444209-Naruto-Monkey-PETA-v-Slater-CA9-Opinion-04-23-18.html.

In an April 24 story for *The Verge*, senior writer Sarah Jeong wrote that the Ninth Circuit appeared to be unhappy with PETA's lawsuit. "A scourge of monkey copyright lawsuits isn't the worst kind of future to live in," she wrote. "Regardless, the Ninth Circuit appears to be very, very mad at PETA." Jeong also added that "the court went after PETA with a vengeance" in several footnotes, such as one which read, "Puzzlingly, while representing to the world that 'animals are not ours to eat, wear, experiment on, use for entertainment, or abuse in any other way,' PETA seems to employ Naruto as an unwitting pawn in its ideological goals."

Scott Memmel
Silha *Bulletin* Editor

Dr. Hazel Dicken-Garcia, Former Interim Director of the Silha Center, Passes Away in May 2018

On May 30, 2018, Hubbard School of Journalism and Mass Communication Emerita Professor Hazel Dicken-Garcia passed away at the age of 79. During her 30 years of service to the school, Dicken-Garcia was the interim director of the Silha Center for the Study of Media Ethics and Law from December 1989 to June 1990 while founding director Donald Gillmor was a senior fellow at the Freedom Forum Media Studies Center at Columbia University.

Dicken-Garcia was born in rural Clinton County, Ky. on March 4, 1939. She attended Berea College, which was founded in 1855 to provide a free education to poor students regardless of race or gender. After graduating in 1961, Dicken-Garcia worked for the American Friends Service Committee (AFSC) before earning her master's degree from the University of Michigan in Ann Arbor, where she also worked as a reporter. She earned her PhD in mass communication history from the University of Wisconsin in 1977.

After teaching at several other universities, Dicken-Garcia settled at the University of Minnesota where she taught from 1979 to 2008. She published several books, including *Journalistic Standards in Nineteenth-Century America* in 1989 and *To Western Woods: The Breckinridge Family Moves to Kentucky in 1793* in 2008. She also coauthored *Communication History* in 1980 with John D. Stevens, a professor at the University of Michigan, and *Hated Ideas and the American Civil War Press* in 2007 with Giovanna Dell'Orto, one of Dicken-Garcia's many graduate student advisees and current Hubbard School of Journalism and Mass Communication associate professor. Dicken-Garcia also received numerous awards, including the Association for Education in Journalism and Mass Communication (AEJMC) Distinguished Service Award in 2001.

A memorial for Dicken-Garcia was held on June 22 at Unity Church-Unitarian in St. Paul. A fund in her honor is the Hazel Dicken-Garcia Graduate Fellowship, which supports graduate students in the Hubbard School of Journalism and Mass Communication. Contributions can be sent to University of Minnesota Foundation; P.O. Box 860266; Minneapolis, MN 55486-0266 or online at: https://makingagift.umn.edu/give/fund.html?id=5003.

Scott Memmel
Silha *Bulletin* Editor

In Memory of Helen Fitch Silha

The Silha Center gratefully acknowledges the generosity of the following who made donations in memory of Helen Fitch Silha.

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Susan F. Willis

Silha Center for the Study of Media Ethics and Law
Hubbard School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612) 625-3421

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The First Amendment and #MeToo

The #MeToo movement focuses on accusations of sexual harassment and assault. But it also raises free speech issues. As both accusers and accused level charges and counter-charges, does traditional First Amendment doctrine governing libel still make sense?

THEODORE J. BOUTROUS, JR.
PARTNER, GIBSON, DUNN & CRUTCHER LLC (LOS ANGELES)

Attorney Theodore J. Boutrous, Jr., a long-time advocate for the news media, represents actor Ashley Judd in her defamation lawsuit against Harvey Weinstein. Judd claims that the producer made false and malicious statements about her professionalism after she rebuffed his advances—charges Weinstein denies. As the lawyer who successfully overturned the largest defamation verdict of all time against *The Wall Street Journal*, and who offered to defend "anyone who Donald Trump sues for speaking freely," Boutrous will discuss why he represents a libel plaintiff in this case, and why he believes the rise of social media platforms has disrupted constitutional norms.

Global co-chair of Gibson, Dunn & Crutcher's Litigation Group, Boutrous received his law degree *summa cum laude* from the University of San Diego's School of Law in 1987, where he was editor-in-chief of the *Law Review*. He is a member of the Advisory Board of the International Women's Media Foundation, and was its 2015 Leadership Honoree.

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