THE SILHA Bulletin

A PUBLICATION OF THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW | SUMMER 2017

Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ

In the first half of 2017, President Donald Trump and the Department of Justice (DOJ) sought to address leaks tied to the Trump administration. In a Feb. 14, 2017 meeting with then-Federal Bureau of Investigation (FBI) director James Comey, President Trump suggested that the director consider jailing journalists who disseminate classified information, raising concerns from media law experts and advocates. In an August 4 news conference, Attorney General Jeff Sessions announced that the DOJ was considering subpoenaing members of the news media who publish leaked information. Sessions' comments further raised concerns from media experts and advocates about the Trump administration's attacks on freedom of the press. Meanwhile, on June 9, 2017, a National Security Agency (NSA) contractor who leaked a classified report regarding Russia's interference in the 2016 presidential election to *The Intercept* pled "not guilty" after being indicted by a federal grand jury on one count of "willful retention and transmission of national defense information." Reality Leigh Winner faces 10 years in prison if convicted under the Espionage Act, the first such prosecution under the Trump administration.

President Trump Suggests FBI Director Should Jail Reporters for Publishing Classified Information

On May 16, 2017, *The New York Times* reported that President Trump suggested to then-FBI director James Comey that he should consider putting reporters in prison for disseminating classified information. During the February 14 meeting, President Trump was "fixated on a series of damaging leaks during his presidency" and efforts to stop such leaks, according to the *Times*. Several media law experts and advocates expressed concern over President Trump's comments, noting that the idea of jailing journalists was not impossible.

Trump, throughout the 2016 campaign and the first several months of his presidency, was critical of the press, often speaking about his distaste for the media. In February 2016, Trump said that he believed news organizations often published false stories because they knew they would not be sued for libel. In May 2016, Trump called reporters "dishonest," "not good people," and among "the worst human beings" he had ever met, according to CNN on May 31, 2016. The day after Trump was inaugurated as the 45th president of the United States, he and then-White House Press Secretary Sean Spicer accused news organizations of deliberately reporting false information about the size of the crowds attending the inauguration. Additionally, at the May 17, 2017 commencement ceremonies at the Coast Guard Academy, President Trump told graduates that "no politician in history has been treated worse or more unfairly" by the media, according to *The New York Times*. (For more information on President Trump's relationship with the press as a presidential candidate and as president, see "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue of the Silha *Bulletin* and "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.)

Prior to President Trump's February 2017 meeting with Comey, there were multiple leaks apparently from or near his administration. In late January 2017, unauthorized transcripts of phone conversations between President Trump and the leaders of Mexico and Australia went public, *The Washington Post* reported on February 5. Drafts of executive orders, including one that would grant legal protection to people and businesses that discriminate against same-sex married couples, were also leaked in January. On February 9, *The Washington Post*, among other publications, reported on a leak that suggested former national security adviser Michael T. Flynn spoke privately with Russian Ambassador Sergey Kislyak and that the two discussed the U.S. sanctions on Russia for the country's interference with the 2016 presidential election. Following President Trump's meeting with Comey, additional leaks alleged that Comey was fired because the administration felt increasing pressure under the Russia investigation, according to *The Hill* on May 12.

On July 6, 2017, *Politico* reported that Senate Homeland Security and Governmental Affairs Committee Chairman Ron Johnson (R-Wis.) released a report and sent a letter to Attorney General Jeff Sessions claiming that an "avalanche" of media leaks under the Trump administration was harming national security. The report claimed that at least 125 stories containing leaked information potentially damaging to national security were published by national news organizations between January 20 and May 25, 2017. On July 10, Alexandra Ellerbeck, senior Americas and U.S. research associate for the Committee to Protect Journalists (CPJ), wrote that the Senate report was "deeply flawed," citing non-scientific methodology and political bias, among other concerns. "The naming of more than a hundred journalists

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accused of harming national security seems intended to have a chilling effect on the press and is the type of measure that we see more often in authoritarian countries," Ellerbeck wrote. "The free press and national security are not opposing interests: the American people are best served when a vigorous media holds the government to account." The full report is available online at: http://www.politico.com/f/?id=0000015d-174c-d1a7-a95d-5f4dd0350000.

Several right-wing media outlets took the opportunity to use President Trump's frustration with the leaks to condemn "left-leaning" media outlets for sabotaging the president, as reported by *The New York Times*. *Breitbart News* and Fox News criticized the *Times* and *The Washington Post* for relying on anonymous leakers, including those from or near the Trump administration.

As the *Bulletin* went to press, neither the Trump administration nor the Department of Justice (DOJ) had sought to jail a journalist. Nevertheless, President Trump's comments sparked criticism from media experts.

COVER STORY

In a May 17 story for *The New York Times*, correspondents Michael M. Grynbaum and Charlie Savage, together with reporter Sydney Ember, wrote that President Trump's proposal to Comey to jail journalists "breached new territory for political reporters who already consider their profession under siege." They quoted *The Washington Post* executive editor Martin Baron who said, "Suggesting that the government should prosecute journalists for the publication of classified information is very menacing, and I think that's exactly what they intend. It's an act of intimidation."

Joseph Kahn, the managing editor of the *Times*, defended the investigatory functions of the press. "We believe strongly that it is in the public interest to have a vigorous media committed to publishing truthful information about the government," said Kahn. "The First Amendment clearly protects the right of the press to publish such information, and [the *Times*] regards fair, unfettered coverage of those who hold power as a core part of its mission."

The Reporters Committee for Freedom of the Press (RCFP) released a statement also denouncing President Trump's suggestion to jail journalists. "The comments attributed to President Trump cross a dangerous line," the statement read. "But no president gets to jail journalists. Reporters are protected by judges and juries, by a congress that relies on them to stay informed, and by a Justice Department that for decades has honored the role of a free press by spurning prosecutions of journalists for publishing leaks of classified information.. . . Comments such as these, emerging in the way they did, only remind us that every day public servants are reaching out to reporters to ensure the public is aware of the risks today to rule of law in this country. The president's remarks should not intimidate the press but inspire it."

The White House did not respond when asked by *The New York Times* if President Trump supported imprisoning reporters who publish stories based on leaked material. Then-White House Press Secretary Sean Spicer did tell reporters that President Trump did not believe the *Times* article "was an accurate representation of that meeting," according to the *Times*.

Nevertheless, Joel Simon, executive director of CPJ, feared that President Trump may follow through on his comments. "We've been saying there's a big gap between the president's rhetoric and actions he can take to undermine the work of the media," said Simon to *The New York Times*. "That gap has now been closed."

Several media law experts indicated that it could be possible for the Trump administration to attempt to send journalists to prison. Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said it is "risky" to report on classified information under the Trump administration. "The law is untested, in terms of prosecuting journalists for reporting classified information, as distinguished from sources leaking it," Kirtley told *Paste* magazine. "This would make reporting legally risky."

University of Chicago law professor Geoffrey R. Stone told *The Washington Post* on May 17 that it may be possible for reporters to be jailed for doing their jobs, perhaps under the Espionage Act, 18 U.S.C. § 793 *et seq.* According to Stone, news organizations that publish leaked information seem to be safe, citing the *New York Times v. United States*, also known as "The Pentagon Papers Case," in which the U.S. Supreme Court held that the government could not issue a prior restraint against newspapers that sought to publish classified documents after they received the information from someone who illegally photocopied the documents. 403 U.S. 713 (1971). However, he also agreed with Kirtley that although the law is clear about the leakers as well, "[t]he law is not clearly resolved for the journalist who actively encourages the leak. That's a case the court has not addressed." (Stone was the 2006 Silha lecturer. For more information on the lecture titled "The Freedom of the Press v. The National Security," see "Geoffrey Stone Predicts First Amendment will Protect Journalists from Prosecution at 21st Annual Silha Lecture" in the Fall 2006 issue of the Silha *Bulletin*).

James Goodale, who represented *The New York Times* in the Pentagon Papers case, contended that a journalist could be charged under the Espionage Act. "I have thought from the moment [Trump] became president that the greatest threat to the free press is that he and his attorney general would try to jail reporters," Goodale told *The Washington Post*. "The president cannot jail journalists but the Attorney General is in a position to jail journalists, and I think we know a bit the general direction from which he's coming because he said his priority is to prosecute WikiLeaks.. . . . The greatest danger the press has is a successful prosecution of WikiLeaks in which the attorney general is able to prove that there is a conspiracy between WikiLeaks and its sources.. . . I don't get much pleasure defending [Assange] but functionally what he does is get information published." (Goodale was the 2013 Silha lecturer. For more information on the lecture tilted "The Lessons of the Pentagon Papers: Has Obama Learned Them?," see "Silha Lecturer Links Pentagon Papers and Obama Administration's Treatment of Linkers" in the Fall 2013 issue of the Silha *Bulletin*.)

In a May 16, 2017 interview with *Slate* magazine, Trevor Timm, executive director of the Freedom of the Press Foundation (FPF), agreed that although the DOJ may have a hard time prosecuting a journalist under the Espionage Act, they still may attempt to do so given the broad language of the Act. "Publishing classified information has generally been considered a bedrock right of journalists," Timm said. "I think there is at least a broad consensus among the legal community that bringing such a prosecution would violate the First Amendment. But when you look at how the Espionage Act is written, it's written so broadly that, just judging by the letter

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of the law, newspapers are violating it all the time." Timm added, "[T]here's nothing stopping the DOJ from trying to bring that case, and that's what's so disturbing. Even the specter of such a prosecution would certainly chill a lot of reporting."

President Trump's threat to jail journalists is not without precedent. In some cases, journalists have been caught up in the prosecution of leakers. One example is James Risen, a Pulitzer Prize winning journalist and author. In 2010, federal prosecutors indicted Jeffrey Sterling, a former Central Intelligence Agency (CIA) officer, alleging that Sterling provided classified information for Risen's book, *State of War*. In 2011, then-Attorney General Eric Holder authorized a subpoena ordering Risen to testify at Sterling's trial. Risen refused to testify, arguing that he had a First Amendment right to protect his source.

In 2013, a Fourth Circuit three-judge panel overturned a district court order, which had prevented prosecutors from asking Risen the name of his source. After the U.S. Supreme Court declined to hear Risen's case in June 2014, he faced potential jail time for contempt. However, the DOJ did not seek Risen's testimony during Sterling's actual trial, according to a Jan. 12, 2015 *New York Times* story. (Risen and his attorney Joel Kurtzberg were the 2015 Silha lecturers. For more information about the lecture, see "30th Annual Silha Lecture Addresses Challenges to Reporting on National Security Matters" in the Fall 2015 issue of the Silha *Bulletin* and "30th Annual Silha Lecture to Feature New York Times Investigative Reporter James Risen and Attorney Joel Kurtzberg" in the Summer 2015 issue. 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 of the Silha *Bulletin*, "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.)

However, Ellerbeck highlighted the difference between Risen's case and President Trump's comments to Comey in a May 20, 2017 CPJ story. "While journalists have been caught up inprosecutions of leakers, a move to directly target and jail them would be a marked change for the government," Ellerbeck wrote. "The likelihood of journalists in the U.S. being imprisoned for publishing classified information has not been legally tested, but lawyers point out that sections of U.S. law could expose them to prosecution."

U.S. Attorney General Announces New Efforts in Search for Leakers, Including Subpoenaing Reporters

On August 4, *The Hill* reported that during a news conference with Dan Coats, the director of national intelligence, Attorney General Jeff Sessions indicated that the Department of Justice (DOJ) was "reviewing its policies" regarding subpoenas for members of the news media who publish leaked information, further raising concerns about the Trump administration targeting journalists for leaks.

In the August 4 news conference, Sessions said, "I have listened to career investigators and prosecutors about how to most successfully investigate and prosecute these matters.. . .At their suggestion, one of the things we are doing is reviewing policies affecting media subpoenas." Sessions continued, "We respect the important role the press plays and we'll give them respect, but it's not unlimited.. . . They cannot place lives at risk with impunity. We must balance the press' role with protecting our national security and the lives of those who serve in the intelligence community, the Armed Forces and all law-abiding Americans."

According to *The Washington Post*, Sessions also said that the DOJ had "more than tripled the number of leak investigations compared to the number that were ongoing at the end of the last administration." Additionally, Sessions announced the creation of a new Federal Bureau of Investigation (FBI) counterintelligence unit for managing leak cases. "This culture of leaking must stop," Sessions said according to *The New York Times* on August 4. "I strongly agree with the president and condemn in the strongest terms the staggering number of leaks."

President Trump tweeted his approval of the efforts to find and prosecute leakers on August 5. "After many years of LEAKS going on in Washington, it is great to see the A.G. taking action!" Trump wrote.

Sessions' comments, however, did not receive approval from everyone, particularly media experts and advocates who viewed the potential subpoenas as threats against press freedom. In an interview with Yahoo News, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said that the targeting of journalists who publish sensitive information was "a reality that we have to prepare for." Kirtley continued, "We knew the Trump administration was going to take on the issue of leaking.. . . We've never had a prosecution of journalists for being the recipient of leaks. This could be the first time that happens."

In an August 4 statement, the American Society of News Editors (ASNE) and the Associated Press Media Editors (APME) expressed concern regarding Sessions' statements. "Attorney General Sessions' remarks minimize the care with which journalists treat their sources and their information," said ASNE President Mizell Stewart III in the press release. "The publication of information received from a confidential source, especially classified information or information relating to national security in any way, occurs only after significant vetting by several people at all levels of the newsroom. It is also well-documented that media outlets actively seek the input of the government before publishing any sensitive information."

APME First Amendment committee chairman Dennis Anderson agreed. "We are acutely concerned that the attorney general seeks to roll back protections for reporters that were strengthened only after it was revealed that the Department of Justice had clandestinely subpoenaed the communications records of 20 Associated Press reporters from various telephone providers. Reversion to these tactics threatens the award-winning, impactful reporting AP does in the United States and around the world. As our members publish those stories to readers in their local communities on a daily basis, this is not just a threat to reporters and sources; it is a threat to our readers."

In a separate statement, Alex Ellerbeck, senior Americas and U.S. research associate at the Committee to Protect Journalists (CPJ), discussed the implications of the Trump administration's pursuit of leakers on journalists. "Independent journalism in the public interest depends on reporters' being able to communicate privately with sources," Ellerbeck wrote on August 4. "Rolling back the limited protections on communication between

journalists and their sources would lessen the public's ability to hold their elected leaders to account and weaken hard-won standards of source protection around the world."

However, *The New York Times* reported on August 6 that deputy Attorney General Rod J. Rosenstein told "Fox News Sunday" that the DOJ would not be pursing reporters as part of its increasing leak investigations. "We don't prosecute journalists for doing their jobs," Rosenstein said. "That's not our goal here." Nevertheless, Rosenstein maintained that concerns about press freedom following Sessions' remarks were an "overreaction" and reiterated that reporters cannot expect "unlimited" freedom in handling leaked material, according to the *Times*.

"Generally speaking, reporters who publish information are not committing a crime. But there might be a circumstance where they do," Rosenstein said. "I haven't seen any of those today, but I wouldn't rule it out in the event that there were a case where a reporter was purposely violating the law."

As the *Bulletin* went to press, the Trump administration and the DOJ had not yet subpoenaed a member of the news media.

Department of Justice Arrest of NSA Leaker Marks First Such Prosecution under Trump Administration

On June 9, 2017, a National Security Agency (NSA) contractor who leaked a classified report regarding Russia's interference in the 2016 presidential election pled not guilty after being indicted by a federal grand jury on one count of "willful retention and transmission of national defense information." Reality Leigh Winner faces 10 years in prison and/or a $250,000 fine if convicted under the Espionage Act for leaking an NSA intelligence report to the news outlet *The Intercept* on May 5. Winner's arrest marks the first criminal leak case under President Donald Trump's administration.

In February 2017, Winner, a former U.S. Air Force linguist, was assigned to a government agency during her work for Pluribus International Corp. in Augusta, Ga. where she was given top-secret security clearance. Pluribus is a government contractor that "provides trained and experienced experts in intelligence, counterintelligence, and counterterrorism," according to its website. Although the government agency was not identified, *The New York Times* reported on June 5 that the NSA used Pluribus contractors and had opened a branch facility near Augusta in 2012.

On June 1, Pluribus notified the FBI that it had been contacted by reporters from *The Intercept* two days earlier, according to a June 5, 2017 *Bloomberg* story. *The New York Times* reported that *The Intercept* had approached the NSA with questions for their story and provided a copy of the document they had obtained from Winner. In an interview with CNN on June 6, *The Intercept*'s director of communications Vivian Siu said the document was provided anonymously and that the news agency had no knowledge of the identity of the source.

A June 5 affidavit in support of application for an arrest warrant against Winner alleged that the leaked material was marked with a warning that the release of the information "could reasonably result in exceptionally grave damage to the national security." According to *The New York Times*, the report described two cyberattacks by Russia's Main Intelligence Agency (GRU) on a U.S. voting software supplier during the 2016 presidential election. On June 6, *Ars Technica* reported that by handing over a copy of the document to the NSA to verify its authenticity, *The Intercept* exposed Winner as the source. The FBI was able to determine that Winner leaked the document because the NSA's auditing system showed that six people had printed the document, but only Winner had email contact with *The Intercept*. Additionally, the document had watermarks revealing when it was printed and on what printer.

Editor-in-chief of *The Intercept* Betsey Reed later released a statement on the news organization's website apologizing for not taking better precautions to protect their source. "At several points in the editorial process, our practices fell short of the standards to which we hold ourselves," Reed said. "We should have taken greater precautions to protect the identity of a source who was anonymous even to us." Reed also announced that *The Intercept* and its parent company, First Look, were donating money to help defend Winner.

On June 5, Winner was arrested on accusations of "removing classified material from a government facility and mailing it to a news outlet." In the affidavit, FBI Special Agent Justin C. Garrick contended that there was probable cause to believe Winner violated the Espionage Act, which provides: "whoever having unauthorized possession of, access to, or control over any document . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted . . . shall be fined or imprisoned not more than ten years, or both." 18 U.S.C. § 793(e).

Garrick contended that there was probable cause because Winner "admitted intentionally identifying and printing the classified intelligence reporting at issue despite not having a 'need to know,' and with knowledge that the intelligence reporting was classified." According to the affidavit, Winner also admitted to "removing the classified intelligence [report] from her office space, retaining it, and mailing it from Augusta, Georgia" to *The Intercept*, which she knew was not authorized to receive or possess the documents. Winner also said she knew "the contents of the reporting could be used to the injury of the United States and to the advantage of a foreign nation." The full affidavit is available online at: https://www.justice.gov/opa/press-release/file/971331/download.

According to a statement by Assistant U.S. Attorney Jennifer Solari, Winner told FBI agents she was "mad about what she had recently seen in the media" and "wanted to set the facts right." Solari also indicated that Winner used her work computer to search the question, "Do top secret computers detect when flash drives are inserted?" On June 10, the FBI searched Winner's home and seized notebooks, cellphones, computers, and Winner's passport. In one notebook, Winner had written the phrase "I want to burn the White House down" and move to Nepal or Kurdistan, Solari alleged. *The Atlantic* also reported on June 9 that Winner had often tweeted about government leaks and followed the Twitter accounts of Edward Snowden and WikiLeaks, as well as accounts tied to the hacking network Anonymous.

The Intercept published a story based on the leaked document about an hour after Winner's arrest. The article is available online at: https://theintercept.

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com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/. *Bloomberg* reported that government officials, including the Director of National Intelligence, asked the news outlet not to publish or report on the document. After declining the request, *The Intercept* agreed to withhold material that "clearly wasn't in the public interest."

On June 8, a federal grand jury in Savannah, Ga. indicted Winner on one count of "willful retention and transmission of national defense information," according to the indictment. The grand jury concluded that Winner's "unauthorized possession of, access to, and control over a document containing information related to the national defense" and her "willfully transmit[ing the document] to a person not entitled to receive it" were in violation of the Espionage Act. The indictment was filed in the U.S. District Court for the Southern District of Georgia Augusta Division. According to *The Guardian* on June 6, Winner faces up to 10 years in prison and/or a fine up to $250,000 for violating the Espionage Act.

On June 9, Winner pled not guilty to leaking the document. At the detention hearing, prosecutors argued that Winner may have additional stolen government secrets and that she may attempt to flee the country, according to a ABC News report. Additionally, Solari suggested that this "was not the first time [Winner] mishandled classified information," according to *The New York Times* on June 8, 2017. Solari also alleged that Winner's laptop contained software that could enable her to access online black-markets and purchase items, such as a fake ID or passport. "We don't know how much more she knows and how much more she remembers," Solari said. "But we do know she's very intelligent. So she's got a lot of valuable information in her head."

U.S. Magistrate Judge Brian Epps cited the "strong" weight of evidence against Winner and ordered that she remain in jail until her trial. As the *Bulletin* went to press, Winner remained in prison pending her trial, which was set for October 23.

Hina Shamsi, director of the ACLU's national security project, told *The Guardian* that leaks are a "vital source for information in our democracy" and that prosecuting leakers results in a "less informed public and less accountable government." Shamsi added, "It would be deeply problematic if this prosecution marks the beginning of a Trump administration crackdown on leaks to the press," Shamsi said.

Kathleen McClellan, who serves as national security and human rights deputy director for the Whistleblower and Source Protection Program, was also critical of charging Winner with violating the Espionage Act, calling it "wildly inappropriate." "There are plenty of regulations and other laws that you could use to punish someone for leaking," said McClellan to *The Guardian*. "It's clear that the Trump administration wants to punish leakers as severely, if not more severely, than Obama did."

The case against Winner marks the first such action by the Trump administration to crack down on government workers who illegally leak information to the press. On February 16, President Trump announced that he would be personally directing the DOJ to open a criminal investigation into the illegal leaks against his administration, according to a February 16 *New York Times* story. "I've actually called the Justice Department to look into the leaks," President Trump said during a news conference at the White House. "Those are criminal leaks." On May 16, President Trump tweeted that he had been "asking Director Comey & others, from the beginning of my administration, to find the LEAKERS in the intelligence community."

The Trump administration is not the first to prosecute leakers under the Espionage Act. In fact, President Barack Obama's administration was especially tough on leakers. *Politico* reported on May 12, 2016, that over the course of the eight-year term, the Obama administration prosecuted eight individuals under the Espionage Act for disclosing sensitive information to the public. Previous administrations combined had brought only three such prosecutions under the Espionage Act against government leakers since the law was adopted in 1917. (For more on the Obama administration's prosecution of individuals under the Espionage Act, see "President Barack Obama Leaves Mixed Legacy on Government Transparency" in the Fall 2016 issue of the Silha *Bulletin*, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror" in the Winter/Spring 2013 issue, "Leaks: New Policies Emerge; Congress Gets Involved" in the Summer 2012 issue, "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue, "Judge Rebukes Government on Leak Prosecutions" in the Summer 2011 issue, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, and "The Media and the Military: Guantanamo Access Rules Loosened; Other Guidelines Set to Limit Leaks" in the Fall 2010 issue.)

In the final days of his presidency, President Barack Obama commuted most of the remaining prison sentence of Chelsea Manning, a former intelligence analyst who was convicted of leaking details of American military and diplomatic activities to WikiLeaks in 2010. Manning was previously sentenced to 35 years in prison. At the same time that he commuted Manning's sentence, Obama pardoned James E. Cartwright, a retired Marine general who pled guilty to lying to FBI agents about conversations he had with reporters in relation to classified information regarding cyberattacks on Iran's nuclear program. (For more information on Obama commuting Manning's sentence and pardoning Cartwright, see "President Obama Commutes Chelsea Manning's Sentence, Pardons Gen. James E. Cartwright, Takes No Action on Edward Snowden" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

Nancy Hollander, Manning's attorney, emphasized that the Espionage Act prevented Winner from arguing the disclosures were in the public interest. "When people know something they seriously and genuinely believe the public has a right to know, and the government is keeping from the public, they have no recourse," she said in a statement. "It's very difficult for her to defend herself since she can't ever explain, until such time that she's sentenced, why she did what she did, what her motive was."

Scott Memmel
Silha *Bulletin* Editor

Journalists Face Physical Restraints and Arrests; Trump Video Raises Further Concerns about Violence Against the Media

During the summer of 2017, several journalists were physically restrained or arrested in the process of newsgathering duties. On May 9, 2017, a reporter for *Public News Service* in West Virginia was arrested and charged with a misdemeanor count of "willful disruption of governmental processes" after asking government officials a series of questions in the hallway of the West Virginia State Capitol in Charleston. On May 18, 2017, a reporter for Congressional Quarterly, Inc. (CQ) *Roll Call* alleged he was pushed against a wall by security and forced to leave a Federal Communications Commission (FCC) meeting after approaching an FCC commissioner with a question. On June 12, 2017, a congressman-elect for Montana's open seat in the U.S. House of Representatives pled guilty to misdemeanor assault after "body slamming" a *Guardian* reporter during a May 24 campaign event. And, on July 2, 2017, President Donald Trump tweeted a video that portrayed the president wrestling a man whose head was superimposed with the CNN logo, further raising concerns about violence against members of the media.

ENDANGERED JOURNALISTS

West Virginia Journalist Arrested

On May 9, 2017, a reporter for *Public News Service* in West Virginia was arrested after asking Secretary of the Department of Health and Human Services Tom Price and President Donald Trump's senior advisor Kellyanne Conway a series of questions in the hallway of the West Virginia State Capitol. Dan Heyman's arrest drew attention from fellow reporters and media advocates, including the American Civil Liberties Union (ACLU) and the Committee to Protect Journalists (CPJ).

The New York Times reported on May 10 that Heyman persistently shouted questions at Price and Conway as the two walked down a hallway in the capitol following a May 9 press conference. Heyman was attempting to question the two regarding whether domestic violence would be considered a preexisting condition under the American Health Care Act (ACHA) passed by the U.S. House of Representatives, according to the *Times*.

The criminal complaint alleged that Heyman was "aggressively [trying to] breach Secret Service security to the point that agents were forced to remove him a couple times from the area." The full complaint is available online at: https://www.documentcloud.org/documents/ 3711449-Daniel-Heyman-Criminal-Complaint.html. In a May 10 news conference, Heyman said he was only reaching over some of the staff and security personnel surrounding Price and Conway with his Android smartphone, according to the *Times*. In a May 16 editorial for *The Washington Post*, Heyman contended that he was wearing his press pass and identified himself as a reporter to the authorities present in the hallway.

Heyman was detained by West Virginia Capitol Police officers and charged with one misdemeanor count of "willful disruption of governmental processes," as reported by National Public Radio (NPR) on May 10. Kristen O'Sullivan, a protestor who saw the arrest and recorded it on her phone, told *Public News Service* that Capitol security officers "grabbed [Heyman] by the back of the neck and [pushed him] against a wall."

Heyman spent eight hours in the South Central Regional Jail before being released when his employer posted a $5,000 bond, according to a May 10 *Reuters* report. The maximum penalty under West Virginia law is a fine of up to $100 and up to six months in jail. As the *Bulletin* went to press, a court date had not been set.

In an interview with CNBC, Heyman criticized the actions of the capitol security. "I think it's a terrible example," Heyman said. "I think it's dreadful. I mean, well, this is my job. This is what I'm supposed do. I am supposed to go out and find out if somebody is going to be affected by this health-care law." At the May 10 press conference, Heyman's attorney Tim DiPiero called the arrest a "highly unusual case" and said he has never had a client arrested for "talking too loud," according to *The Washington Post* on May 10.

Price defended the police during a meeting in New Hampshire on May 10, contending that they "did what they felt was appropriate," according to the Associated Press (AP). Price also said the arrest was "not my decision to make" but added that "[Heyman] was not in a press conference." Lawrence Messina, a spokesman for the West Virginia Department of Military Affairs and Public Safety, which oversees the West Virginia Capitol Police, told CPJ that Heyman "wasn't arrested for asking a question. It is the actions of this individual that set him apart from the other reporters trying to cover the event."

In his editorial for *The Washington Post*, Heyman responded to Price's press conference comment. "I would have preferred to go to a news conference — ask my one question, sit down and shut up. But Price, like many of the other public officials supporting the AHCA, has been tightly restricting press and public access when he might be asked about health care." He added that he saw an outpouring of support on his Twitter account because his arrest "confirm[ed] people's worst fears about the erosion of a free press."

Heyman's arrest garnered attention from several fellow reporters and media advocates who considered it an affront to freedom of the press. In an interview with *Public News Service* on May 10, outreach coordinator for the West Virginia Citizen Action Group Valerie Woody, who was present during the arrest, defended the actions of Heyman. "I saw nothing in his behavior, I heard nothing that indicated any kind of aggressive behavior or anything like that," she said. "Just simple, you know, trying to get somebody's attention and ask them a question. It seems to me there was no violation of anyone's space, or physicality, other than the arrest itself."

In a May 10 commentary, CPJ senior U.S. and Americas research associate Alexandra Ellerbeck wrote, "The arrest of a journalist trying to ask a question in the public interest is a clear affront to press freedom," she said. "West Virginia authorities should drop all charges against Dan Heyman immediately and respect journalists' right to question government officials."

In a statement, the ACLU of West Virginia called the arrest "a blatant attempt to chill an independent, free press." The statement added, "This is a dangerous time in our country. Freedom of the press is being eroded every day."

ACLU legal director Jamie Lynn Crofts said the arrest falls under a pattern set during Donald Trump's presidency. "They have shown us every day since Donald Trump took office they don't care

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Violence, *continued from page 7*

about the First Amendment or the free press. Today was just another example of that. It's horrifying," Crofts said in a May 10 interview with CNBC. (For more information about President Trump's relationship with the media, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" on page 1 and "President Trump and his Administration Spark Debate Over Several Media Law Issues" on page 11 in this 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.)

FCC Commissioner Apologizes for Treatment of Reporter

On May 18, 2017, John M. Donnelly, a reporter for Congressional Quarterly, Inc. (CQ) *Roll Call*, said he was shoved against a wall by plainclothes security guards and forced to leave a Federal Communications Commission (FCC) meeting in Washington, D.C. after approaching FCC commissioner Mike O'Rielly to ask a question. The following day, O'Rielly apologized to the reporter. Media experts and advocates, among others, denounced the actions by FCC security, citing the current political climate and President Donald Trump's criticism of the press as contributing factors.

On May 18, the National Press Club (NPC) published a press release detailing how Donnelly was "manhandled" during the FCC meeting. According to the NPC, when Donnelly approached O'Rielly to ask a question, two security guards, which included Frederick Bucher, "pinned Donnelly against the wall with the backs of their bodies until O'Rielly had passed." Bucher asked Donnelly why he had not posed his question during the press conference, according to the release. Bucher then forced the journalist to leave the building under an "implied threat of force." The release also alleged that the security guards "had shadowed Donnelly as if he were a security threat" throughout the meeting.

In the release, Donnelly said, "I could not have been less threatening or more polite.. . . There is no justification for using force in such a situation." NPC President Jeff Ballou denounced the physical restraint of a reporter. "Donnelly was doing his job and doing it with his characteristic civility," Ballou said. "Reporters can ask questions in any area of a public building that is not marked off as restricted to them. Officials who are fielding the questions don't have to answer. But it is completely unacceptable to physically restrain a reporter who has done nothing wrong or force him or her to leave a public building as if a crime had been committed."

NPC Journalism Institute president Barbara Cochran also condemned the action of the FCC security guards. "The FCC and other government buildings are paid for by U.S. tax dollars, and officials who work there are accountable to the public through its representatives in the media," Cochran said in a statement. "The FCC should apologize for this incident and ensure that their guards are trained to respect the right of journalists to cover FCC public events. In other words: hands off reporters!" The release is available online at: http://www.press.org/news-multimedia/news/club-leaders-protest-report-reporter-manhandled-fcc-guards-because-he-asked-que.

Donnelly tweeted about the interaction, directing his commentary to O'Rielly's Twitter account @mikeofcc, as well as the @fcc account and FCC Chairman Ajit Pai's account @ajitpaifcc. O'Rielly initially responded to Donnelly by saying he had not witnessed any guards putting hands on the reporter and said he would be "happy to answer questions you may have."

O'Rielly later apologized to Donnelly in a May 19 tweet, claiming he did not recognize Donnelly in the hallway. "I saw security put themselves between you, me and my staff. I didn't see anyone put a hand on you. I'm sorry this occurred." In a May 19 email to *Politico*, an FCC spokesperson said, "We apologized to Mr. Donnelly more than once and let him know that the FCC was on heightened alert today based on several threats."

Donnelly responded in a tweet that he appreciated the apologies, but was critical of the FCC's statement about security threats. "There's no way I could have been mistaken for a threat," said Donnelly. "And if their guards are that bad at discriminating threats, then THAT is their biggest security problem."

On May 19, U.S. Sens. Tom Udall (D-N.M.) and Maggie Hassan (D-N.H.) sent a letter to Pai demanding an explanation for the events. "Given the FCC's role as the primary authority for communications law and its regulatory role with respect to the media, the FCC should set a sterling example when it comes to supporting the First Amendment and freedom of the press for other government entities here in the United States and around the world," the senators wrote.

Additionally, the senators included a list of incidents involving President Donald Trump's administration's mistreatment and negative comments toward journalists. The senators wrote, "Yesterday's incident at the FCC is not an isolated one and seems to be a part of a larger pattern of hostility towards the press characteristic of this Administration, which underscores our serious concern. Recent examples . . . make this most recent incident a new low point in a disturbing trend." The full letter is available online at: https://www.scribd.com/document/348869989/Sens-Udall-and-Hassan-Ltr-to-FCC-Re-Journalist-Incident-5-19-17.

Kathy Kiely, the 2017 Press Freedom Fellow at the NPC Journalism Institute, agreed that the events reflect the current political climate. "Incidents like these, occurring under a president who has openly threatened a free press, take on a greater and more ominous significance," Kiely said in a May 19 statement. "And they do not seem to be isolated." (For more information about President Trump's relationship with the media, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" on page 1 and "President Trump and his Administration Spark Debate Over Several Media Law Issues" on page 11 in this 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.)

Montana Politician "Body Slams" Journalist, Pleads Guilty to Misdemeanor Assault

On June 12, 2017, U.S. Representative Greg Gianforte (R-Mont.), then-congressman-elect, pled guilty to misdemeanor assault after "body slamming" *Guardian* political reporter Ben Jacobs during a May 24 campaign event. Gianforte later apologized for the incident and was sentenced to a 180-day deferred sentence, including community service and anger management. Several media organizations and advocates denounced the attack, calling it an "assault" on democracy, among other claims.

On May 24, 2017, Jacobs asked Gianforte about the Republican healthcare plan when the candidate allegedly "body slammed" Jacobs, according to *The Guardian* on May 24. In an interview with *The Guardian*, Fox News journalist Alicia Acuna, producer Faith Mangan, and photojournalist Keith Railey, who were present at the campaign event, described Gianforte as "slamming [Jacobs] to the ground while shouting 'Get the hell out of here.'" In a May 24 story for Fox News, Acuna wrote that Gianforte "grabbed Jacobs by the neck with both hands and

slammed him into the ground behind him.. . . Gianforte then began punching the reporter." According to Acuna, Jacobs did not "show any form of physical aggression toward Gianforte." Jacobs' glasses were broken in the assault and he was sent to the hospital for X-rays.

Jacobs reported the incident to the police, who charged Gianforte with misdemeanor assault later that night, as reported by *The Guardian.* Jacobs also posted a series of tweets recalling the incident.

Several media members and advocates were critical of Gianforte's actions. In a May 25 post on the Newseum Institute's website, Gene Policinski, the chief operating officer of the Institute, wrote, "Sadly, shamefully, disgustingly, it has come to this . . . Do not be fooled. It's democracy that got 'body slammed' Wednesday night. It's respect for the rule of law that was dealt a blow. It's the First Amendment that was insulted by Gianforte's attempt to justify what he did: attacking a reporter asking a reasonable question, on a matter of great public interest, to a political candidate on the eve of an important election." The Reporters Committee for Freedom of the Press (RCFP) called the incident "an assault on the very core of democratic life," in a May 25 statement.

On June 2, PEN America, the Free Press Action Fund, Reporters Without Borders, and the Society of Professional Journalists (SPJ) filed a complaint with the Office of Congressional Ethics, an independent, nonpartisan agency within Congress that investigates ethics complaints. Among other claims, the complaint contended that Gianforte was in violation of House Rule 23, clause 1, which states, "A Member, Delegate, Resident Commissioner, officer, or employee of the House shall conduct himself at all times in a manner that shall reflect creditably on the House." The full complaint is available online at: https://pen.org/wp-content/uploads/2017/06/PEN-America-White-House-Letter-for-Submission.docx.pdf.

The organizations also sent a letter to the House ethics committee to remind the panel that it is required to open an investigation within 30 days. Additionally, the organizations sent a letter to President Donald Trump criticizing his rhetoric toward the media. (For more information about President Trump's relationship with the media, see "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" on page 1 and "President Trump and his Administration Spark Debate Over Several Media Law Issues" on page 11 in this 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.)

CNN reported on May 26 that despite the incident, Gianforte had won the special election for Montana's open U.S. House of Representatives seat. In his acceptance speech, Gianforte apologized to Jacobs. "When you make a mistake, you have to own up to it," Gianforte said. "That's the Montana way.. . . I should not have responded the way I did, for that I'm sorry. I should not have treated that reporter that way, and for that I'm sorry, Mr. Ben Jacobs." Additionally, Gianforte said, "If and when you're ready, I look forward to sitting down with you," referencing Jacobs' statement in June that he "hope[d] to finally interview [Gianforte] once he's arrived on Capitol Hill." However, as reported by *The Washington Post* on August 23, Gianforte had not done an interview with Jacobs, nor had he met with the journalist.

On June 21, Gianforte was sworn into the House by Speaker of the House Paul Ryan (R-WI), who had previously called for the politician to apologize, according to a June 21 CBS News report.

As part of a deal with Jacobs to avoid a civil lawsuit, Gianforte agreed to donate $50,000 to the Committee to Protect Journalists (CPJ) "in the hope that perhaps some good can come of these events," according to a June 8 ABC News report.

On June 12, National Public Radio (NPR) reported that Gianforte pled guilty to the charge of misdemeanor assault. In a tweet on the same day, *Bozeman Daily Chronicle* journalist Whitney Bermes reported that Gallatin County Judge Rick West had originally sentenced Gianforte to four days in jail. However, after speaking with prosecutors and defense lawyers, West changed the sentence to include a 180-day deferred sentence, 40 hours of community service, 20 hours of anger management and a $300 fine along with a $85 court fee, according to Bermes. Gianforte had faced a maximum penalty of a $500 fine and six months in jail under Montana law.

Jacobs responded in a statement that he hoped the sentencing would help demonstrate the important role of the press. "While I have no doubt that actions like these were an aberration for Congressman-elect Gianforte personally, I worry that, in the context of our political debate, they have become increasingly common," he wrote. "In recent years, our discourse has grown increasingly rancorous and increasingly vile. This needs to stop."

The Huffington Post reported on July 18 that Gianforte fought a court order requiring him to get fingerprinted and photographed following pleading guilty. His legal team filed a motion on June 15 arguing that Gallatin County's Justice Court does not have the authority to force Gianforte to provide be fingerprinted or photographed because he was not arrested or charged with a felony, according to *The Huffington Post*. Gallatin County Attorney Marty Lambert filed a response on July 20, contending "the legal arguments offered in support of defendant's motion lack merit and the motion should be denied." He added, "[Gianforte] should obey this court's order."

On August 23, West wrote in a one-page order that Gianforte has until September 15 to report to the Gallatin County Detention Center to provide the booking information, according to the *Bozeman Daily Chronicle*. As the *Bulletin* went to press, Gianforte had not been fingerprinted or photographed..

Nancy Keenan, executive director of the Montana Democratic Party, told *The Huffington Post* in an email that Gianforte's motion was at odds with his apology to Jacobs. "Greg Gianforte claims he has 'taken responsibility' for assaulting a reporter who asked him about health care, but he continues to do everything in his power to fight a routine criminal procedure resulting from his conviction," Keenan wrote. "No matter what he says, it's clear to Montanans that Congressman Gianforte has not taken responsibility at all. He's hidden from it."

Trump Tweets Video Depicting Himself Wrestling "CNN"; CNN's Decision to Withhold Reddit User's Name Prompts Ethical Concerns

On July 2, 2017, President Donald Trump tweeted a video in which he is portrayed wrestling and punching a man whose face was superimposed with the CNN logo. Media members and advocates denounced the video as promoting violence against journalists, while supporters of the president defended it as being satirical. Following President Trump's tweet, CNN discovered the identity of the Reddit user who had originally published the video to the message board site. However, CNN's decision to withhold the identity of the individual after he issued a public apology raised ethical questions about whether CNN committed "blackmail" or "extortion," among other claims.

The New York Times reported on July 2 that President Trump tweeted "#FraudNewsCNN #FNN," which was

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Violence, *continued from page 9*

accompanied by an edited clip from President Trump's appearance at WrestleMania, an annual professional wrestling event. At the event, Trump wrestled World Wrestling Entertainment (WWE) CEO Vince McMahon, whose head was replaced with the CNN logo in the 28-second clip. According to the *Times*, the video first appeared in June 2017 on a Trump-dedicated page on Reddit. The video became @realDonaldTrump's most-shared tweet, according to *The Hill* on July 5. The video was also shared from the @POTUS account, meaning it is archived as an official presidential statement by the National Archives under the Presidential Records Act.

Journalists and media advocates were quick to denounce the president's tweet as a threat to their safety and an unpresidential move. "I think it is unseemly that the president would attack journalists for doing their jobs, and encourage such anger at the media," *The New York Times* executive editor Dean Baquet said in a July 2 statement.

Courtney Radsch, advocacy director for the Committee to Protect Journalists (CPJ), told *The Guardian* on July 2 that "[s]ingling out individual journalists and news outlets creates a chilling effect and fosters an environment where further harassment and even physical attacks are seen to be acceptable." She continued, "We are already concerned about physical attacks on reporters.. . . And clearly the White House's charged rhetoric online undermines the media in the US and emboldens autocratic leaders around the world."

Radsch added that the video was especially alarming given recent assaults on working journalists. "We already saw that there has been at least one serious attack recently, on Ben Jacobs, a reporter for *The Guardian*, and this does not create a positive environment for the press online or offline," she said.

Three days prior to the president's tweet, Deputy White House Press Secretary Sarah Huckabee Sanders told the White House Press Corps, "The President in no way form or fashion has ever promoted or encouraged violence. If anything, quite the contrary." CNN's communications account @CNNPR tweeted the quote as a reply to the wrestling video.

In its official statement on the video, CNN again referenced Huckabee Sanders' statement saying, "It is a sad day when the President of the United States encourages violence against reporters. Clearly, Sarah Huckabee Sanders lied when she said the President had never done so. Instead of preparing for his overseas trip, his first meeting with Vladimir Putin, dealing with North Korea and working on his health care bill, he is instead involved in juvenile behavior far below the dignity of his office. We will keep doing our jobs. He should start doing his."

Conversely, many of President Trump's supporters and spokespersons endorsed his response to what they say is unfair treatment of the president by the mainstream media. Two *CNN* political commentators, Kayleigh McEnany and Sally Kohn, engaged in a heated exchange on July 2 over the tweet, with Kohn questioning how McEnany could defend the president's decision in tweeting the video. "I can't believe you can defend this," Kohn said. "I mean, really? Is there . . . is there no line? Like, if that had been a picture not of a CNN logo, but it had been Jake Tapper's head he was punching, would that cross a line for you? What if it was a picture of Donald Trump holding a bloodied CNN logo up? When does it cross the line?"

McEnany reiterated she would not have advised Trump to tweet the video, but she also said, "I think it was intended as a tongue-in-cheek, satirical video. Nothing serious." She continued that Trump has "a right to fight back" when he feels that he's unfairly attacked in the press.

President Trump's Homeland Security Adviser Thomas Bossert argued that "[n]o one would perceive that as a threat," in a July 2 interview with ABC News. *Reuters* reported on July 6 that during a news conference in Poland, Trump criticized CNN for taking the video "too seriously."

Following President Trump's tweet, CNN identified the Reddit user who originally published the video as "HanA------Solo [*sic*]" and reached out to him, according to a July 5 Associated Press (AP) story. The user issued a public apology on July 6 for the video, which he called a "prank" and "purely satire," according to the AP. The user also apologized for other racist and anti-Semitic postings.

The day after the public apology, CNN reporter Andrew Kaczynski posted an online story detailing how CNN found the Reddit user and that the news organization had decided not to publish the user's name "because he is a private citizen who has issued an extensive statement of apology, showed his remorse by saying he has taken down all his offending posts, and because he said he is not going to repeat this ugly behavior on social media again." Kaczynski added "CNN reserves the right to publish his identity should any of that change."

The final statement raised controversy over the ethical implications of CNN's actions. Conservative activist Ben Shapiro called it "essentially blackmail," according to the AP. He added, "That's CNN stating that it will out the guy if he dares to defy their political perspective or offends them sufficiently."

Senator Ted Cruz (R-Texas), contended that CNN violated Georgia state law's prohibition against "theft by extortion," which makes it a crime if CNN "threatened to '[d]isseminate any information tending to subject any person to hatred, contempt, or ridicule." Ga. Code Ann., § 16-8-16. WikiLeaks founder Julian Assange argued that CNN had violated New York's criminal code against "coercion," NY Penal Code § 135.60, and federal law regarding "conspiracy against rights." 18 U.S.C.A. § 241. Additionally, Donald Trump Jr., among others, falsely alleged that the Reddit user was a 15-year-old boy, according to a July 5 story by *Vox*.

CNN responded in a statement that "[a]ny assertion that the network blackmailed or coerced him is false." The statement continued, "The user, who is an adult male, not a 15-year-old boy, apologized and deleted his account before ever speaking with our reporter. CNN never made any deal, of any kind, with the user. In fact, CNN included its decision to withhold the user's identity in an effort to be completely transparent that there was no deal." CNN added that it opted to publish the user's name "out of concern for his safety."

In a July 6 interview, "AirTalk" host Larry Mantle asked Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley if it was ethical for CNN to put conditions on an individual as to whether they publicly name him or not. Kirtley responded, "In my opinion, news organizations exist for reporting the news. If they decided that the identity of this individual was newsworthy, then I think they should have reported it.. . . If it's not newsworthy and they choose not to publish it, then there's no need for this back and forth with this guy." Kirtley added, "People are tossing around words like 'blackmail' and 'extortion' and as a lawyer I find that troubling because I'm not at all sure that either word would apply in this set of circumstances. But from an ethical perspective, I think CNN did something pretty stupid which was to engage in a dialogue with this individual."

Kirtley contended that a news organization should consider any harm or retribution that may result from publishing the name of an individual. "I think anytime you're dealing with an individual who

Violence, *continued on page 11*

President Trump and His Administration Spark Debate Over Media Law Issues

In the summer of 2017, comments and actions by President Donald Trump and his administration raised First Amendment concerns, among other media law issues. On May 12, 2017, President Trump suggested that he would consider canceling all future White House press briefings. The comments came as the briefings were increasingly done off-camera and with less frequency than earlier in Trump's presidency. On June 6, 2017, the Knight First Amendment Institute asked President Trump to unblock Twitter users who had been critical of the president. If President Trump complied, the users would once again be able to see and respond to the president's tweets, as well as view his following and follower lists and his likes. On July 11, the Knight Institute filed a complaint for declaratory and injunctive relief in the United States District Court for the Southern District of New York, citing the First Amendment and public forum doctrine, among other arguments.

FIRST AMENDMENT

President Trump Considers Canceling White House Briefings

On May 12, 2017, President Donald Trump suggested he was considering canceling all future White House press briefings, ostensibly to ensure greater accuracy. In response to the president's comments, several journalists and media advocates expressed concern regarding eliminating press briefings, citing the importance of government accountability and transparency through the newsgathering process. In the weeks following President Trump's comments, although the briefings were not completely canceled, journalists covering the White House reported a decrease in their number and claimed that they were often restricted from recording video and audio.

On May 12, President Trump posted on Twitter, "As a very active President with lots of things happening, it is not possible for my surrogates to stand at podium with perfect accuracy!" Moments later, President Trump tweeted "Maybe the best thing to do would be to cancel all future 'press briefings' and hand out written responses for the sake of accuracy???"

Later the same day, President Trump reiterated his position in an interview with Fox News' Jeanine Pirro, who asked him what he felt could be done to rectify the inaccuracies presented by the media. Trump responded, "We don't have press conferences. We just don't have them. Unless I have them every two weeks and do it myself. We don't have them. I think it's a good idea."

Former White House correspondent for the *Houston Chronicle* Julie Mason expressed her concern with canceling press briefings. "At the White House, being able to see and question the president and his staff on a regular basis, without the formal constraints of a press conference, are important elements of newsgathering. Access gives reporting depth and context, and provides the White House with information and ready access to a massive international audience," she told the *Houston Chronicle*. "Daily briefings, beyond just the give-and-take with reporters, convey to the world what U.S. policies are, and what the president is prioritizing. The exercise helps the administration hone its messaging, and provides tips and information about what is happening and being said outside of the White House." She added, "Our leaders from both parties regularly lecture other nations about democracy, including press freedoms. What kind of example would it set to allow, as President Trump has proposed, only written questions from journalists? The idea is completely unacceptable, and letting it happen, just because his briefers are out of the loop, would be a dangerous failure of journalism."

Jeff Mason, a White House correspondent for *Reuters* and president of the White House Correspondents' Association, outlined potential consequences of canceling the briefings entirely. "Doing away with briefings would reduce accountability, transparency and the opportunity for Americans to see that, in the U.S. system, no political figure is above being questioned," he told *The New York Times*. He added, "We believe strongly that Americans should be able to watch and listen to senior government officials

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Violence, *continued from page 10*

might suffer adverse consequences if their identity is revealed and it is not already known, a news organization should be weighing that in the balance of making their determination of whether the publication is newsworthy," she said. However, in this case, Kirtley contended that the user was "likely mistaken" if he thought he would remain anonymous after posting the video and bragging that President Trump had retweeted his video. Kirtley added, "[T]here are consequences to actions like that."

Professor of communication at DePauw University Jeffrey McCall agreed with Kirtley and argued that CNN put themselves in a difficult position. "One thing I always think is best for news organizations is for them to try to stay out of making the news," he said in the same "AirTalk" program. "This is a case where CNN has clearly put themselves in the position of making the news and I don't know how that helps them in any way."

In August, Trump further raised concerns about potential violence against journalists after he retweeted a cartoon of a train, labeled "Trump" along its side, running over a man with the CNN logo superimposed on the top half of his body, as reported by *The Washington Post* on August 15. Trump quickly deleted the tweet after it sparked criticism as being inappropriate following an incident in which a counterprotester was killed in Charlottesville, Va. after a white supremacist drove vehicle into a crowd of counterprotesters.

Additionally, in a campaign-style rally on August 22, President Trump called journalists "sick people," accused the news media of "trying to take away our history and our heritage" and questioned their patriotism, according to the *Post* on August 23. He also said, "I really think they don't like our country." Following his comments, Margaret Sullivan, a media columnist for the *Post*, wrote in an August 23 commentary that his remarks were "the most sustained attack any president has ever made on the press."

Radsch told the *Post*, "To see this sort of attack coming yet again from the president is deeply disturbing.. . . It creates an environment in which attacks on the press, both verbal and potentially physical, could become common."

Brittany Robb
Silha Research Assistant

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face questions from an independent news media.. . . We are not satisfied with the current state of play, and we will work hard to change it."

In an opinion piece for *The New York Times*, former White House correspondent Jim Rutenberg questioned the point of the briefings if there was no concern for accuracy in the first place. "The daily White House briefings have always been used to put the president's decisions in the best light. But that's typically done with verifiable facts that stand no matter how hard every White House works to treat them like Silly Putty.. . . Once a president drops even the pretense of accuracy, what's the point?"

Former Speaker of the House Newt Gingrich welcomed President Trump's suggestion to eliminate press briefings. "Ignore all of these reporters," Gingrich told Fox News on May 13. "Close down the press room. Send the reporters off. They can go to Starbucks across the street. I don't care where they go. These people are not committed to the truth. They're not committed to being neutral. Why would you hang out with a bunch of people who despise you?"

Although the briefings were not canceled in the weeks following President Trump's comments, they were "downgraded," according to a June 20 story by *The Atlantic*. During the June 12 briefing, then-White House Press Secretary Sean Spicer took questions for only 15 minutes, signaling that "[b]revity has become perhaps the defining feature of the briefing these days," according to CNN. For four days following the June 12 briefing, representatives of President Trump took only off-camera questions in lieu of on-camera briefings. On June 19 and June 23, reporters were barred from recording audio or video footage of the briefing, according to *Nieman Lab*, a publication of the Nieman Journalism Lab at Harvard University. Additionally, *The Washington Post* reported on June 19 that the number of White House briefings had decreased significantly since March 2017, when there were 21 briefings. Comparatively, there were only 13 in May.

Senior White House Correspondent for CNN Jim Acosta was critical of the changes to the press briefings, including the use of "press gaggles" or informal briefings by the White House Press Secretary distinct from press conferences or briefings. "It feels like we're slowly but surely being dragged into what is a new normal in this country, where the president of the United States is allowed to insulate himself from answering hard questions," Acosta said on CNN. "I don't know why we covered that gaggle today, quite honestly Brooke, if they can't give us the answers to the questions on camera or where we can record the audio. They're basically pointless at this point."

> "The daily White House briefings have always been used to put the president's decisions in the best light. But that's typically done with verifiable facts that stand no matter how hard every White House works to treat them like Silly Putty.. . . Once a president drops even the pretense of accuracy, what's the point?"
>
> **— Jim Rutenberg, former *New York Times* White House correspondent**

In an opinion piece for *The New York Times*, Marc Dacosta called the decision to prevent recording press briefings "an affront to the spirit of an open and participatory government." He continued, "It's especially chilling in a country governed by a Constitution whose very First Amendment protects the freedom of the press.. . . Our government does millions of things each day.. . . Each of these actions creates a data record and, in aggregate, these records help us as citizens gain detailed information about the operations of government. Such data is a crucial tool for understanding and improving the way our government functions. However, under President Trump, the collection and publication of public data has been substantially undermined." Dacosta also cited the Trump administration's decision to stop publishing daily White House visitor records, as well as burying information about fines imposed by the Occupational Safety and Health Administration, as examples of departures from past administrations and from efforts for "a more transparent and open government."

The changing nature of the White House press briefings came after President Trump discussed "shaking up" the communications department, according to a May 18 report by *Politico*. According to *The Washington Post*, the communications operation had come under "sharp criticism from Trump and many senior officials in the West Wing, who believe the president has been poorly served by his staff."

Several officials close to the Trump administration suggested that the president was also considering scaling back Spicer's public role. Spicer's deputy, Sarah Huckabee Sanders, replaced him on several briefings in May and June, according to *Bloomberg* on June 18. On July 21, *The New York Times* reported that Spicer had resigned his position, which was filled by Huckabee Sanders. The *Times* reported that Spicer resigned because he "vehemently disagreed" with the appointment of New York financier Anthony Scaramucci as the administration's new communications director, following the departure of Mike Dubke in May 2017. *The New York Times* had called Dubke's resignation the beginning of "[a] long-promised shake up of the White House staff." On July 31, multiple news agencies reported that President Trump removed Scaramucci, another decision in the "shake up" of the communications department.

As the *Bulletin* went to press, the briefings had not been entirely canceled.

Twitter Users Critical of President Trump are Blocked by the President, Raising First Amendment Concerns

On June 6, 2017, First Amendment lawyers at the Knight First Amendment Institute, a non-profit organization under the Knight Foundation and Columbia University, sent President Donald Trump a letter asking him to unblock Twitter users who had previously criticized or disagreed with the president on the social media site. The users were blocked from accessing President Trump's personal account, @realDonaldTrump, which he uses more frequently than the official account of the president, @POTUS. The Knight Institute's letter led several First Amendment lawyers, advocates, and experts to comment on the applicability of the First Amendment, public forum doctrine, and other arguments to President Trump's personal Twitter account. On July 11, the Knight Institute

filed a complaint for declaratory and injunctive relief in the United States District Court for the Southern District of New York after President Trump or his aides failed to unblock several Twitter users. Meanwhile, on July 25, 2017, a federal district court ruled that the Chair of the Loudoun County (Va.) Board of Supervisors engaged in viewpoint discrimination by blocking a Facebook user from a public page, violating the plaintiff's right of free speech under the First Amendment and the Virginia Constitution.

According to the Twitter Help Center, blocking an account on the social media site "restrict[s] that account's ability to interact with your account." Users logged into Twitter that have been blocked cannot view the tweets, following or followers lists, likes, or lists of the account that blocked them.

According to a June 6, 2017 article by *Forbes*, one example of a Twitter user being blocked is Joseph M. Papp, @joepabike, who tweeted "Greetings from Pittsburgh, Sir" and "Why didn't you attend your #PittsburghNotParis rally in DC, Sir? #fakeleader" following a tweet by President Trump on June 3. The following day, Papp, one of the Knight Institute's clients, discovered that he was blocked.

Another example is Twitter user Holly O'Reilly, another client of the Knight Institute, who was blocked on May 28 after tweeting a Graphics Interchange Format (GIF), a moving image, of Pope Francis with an uncomfortable facial expression during a meeting with President Trump and the message, "This is how the whole world sees you," according to *Forbes*. These instances were part of a trend in which President Trump blocked a user after he or she said something with which he disagreed or that was critical of the president, according to a June 9 CNN story.

On June 6, 2017, NBC News reported that the Knight Institute sent a letter to President Trump urging him to unblock Twitter users, particularly Papp and O'Reilly who were their clients, claiming that blocking the users violated their First Amendment rights. The letter first argued that blocking particular Twitter accounts "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 said that the blocked Twitter users were "limited in their ability to participate in comment threads associated with [President Trump's] tweets."

Next, the letter contended that President Trump's Twitter account is a "public forum" in which he "share[s his] thoughts and decisions as President, and in which millions of people respond, ask questions, and sometimes have those questions answered." The letter explained that when a government official or body "makes a space available to the public at large for the purpose of expressive activity, it creates a public forum from which it may not constitutionally exclude individuals on the basis of viewpoint." The letter argued that a public forum can be a metaphysical space, like Twitter, rather than just a physical space, like a town hall meeting. Therefore, by blocking users from that "public forum," Trump violated the First Amendment, according to the Knight Institute.

Similarly, the letter discussed the First Amendment implications of President Trump blocking individuals based on their viewpoints. The letter pointed out that users were "blocked soon after having disagreed with or ridiculed you (Trump)." The Knight Institute contended that this is a violation of those users' First Amendment rights because even if their tweets were "scornful and acerbic," they are still protected by the First Amendment. Although the government may impose time, place, and manner restrictions on the forum, it cannot exclude individuals if they disagree with the government official or body. The letter emphasized that protecting free speech critical of government officials is "perhaps the core concern of the First Amendment, because the freedom of individuals to engage in this kind of speech is crucial to self-government."

The letter concluded by asking President Trump or his aides to immediately unblock Papp and O'Reilly's accounts in particular. The letter also included @POTUS, though that account had purportedly not blocked any Twitter users based on their viewpoints.

One point of contention for First Amendment lawyers, advocates, and experts was whether the First Amendment applied to President Trump's personal Twitter account. Katie Fallow, a senior attorney at the Knight Institute who co-authored the letter, argued the First Amendment should apply, citing then-White House Press Secretary Sean Spicer's statement on June 6 that President Trump's tweets on @realDonaldTrump constitute "official statements by the president of the United States." According to NBC News on June 6, this contradicted the views of other White House officials, including national security advisor Sebastian Gorka, who told CNN the day before, "It's not policy, it's not an executive order, it's social media. Please understand the difference," in reference to President Trump's tweets.

Additionally, as reported by *Slate* magazine on June 12, the United States Court of Appeals for the Ninth Circuit declared that President Trump's Twitter feed is a legally binding stream of consciousness. *State of Hawaii, et al. v. Trump* F.3d (9th Cir. 2017). In its ruling upholding the injunction blocking President Trump's travel ban against Muslim individuals from some Middle Eastern countries, the court cited President Trump's tweet on June 5 which read "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" The court noted, "We take judicial notice of President Trump's statement as the veracity of this statement 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2)."

In a June 10 interview with *ProPublica*, American Civil Liberties Union (ACLU) legal director Deborah Jeon argued that the First Amendment should apply to President Trump's tweets. "Where that's the situation and taxpayer resources are going to it, then the full power of the First Amendment applies," she said. "It doesn't matter if they're members of Congress or the governor or a local councilperson."

Another argument raised by media experts concerns the pattern cited by the Knight Institute that President Trump was blocking users who were critical of him or shared a different viewpoint. Clay Calvert, the Brechner Eminent Scholar in Mass Communication at the University of Florida, wrote an opinion piece for CBS News on June 9 in which he explained that the First Amendment prohibits viewpoint-based censorship of speech, meaning the government cannot suppress speech in light of someone's view of a topic or issue. Therefore, Calvert argued that President Trump's blocking of accounts that disagree with him "is engaging in viewpoint-based censorship."

Debate, *continued on page 14*

Debate, *continued from page 13*

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley agreed in an interview on WCCO News Radio. "I think what makes this makes this a little more complicated is the fact that he is issuing various kinds of pronouncements using this particular Twitter account and . . . he has blocked these people specifically because of the comments they have made to him through the Twitter account," Kirtley said. "And there is authority out there that's saying [that] public officials, while they do not have to take comments or questions from everybody, they can't not take those comments or questions [based on] ideological purposes."

In a statement, Jameel Jaffer, the Knight Institute executive director, said the First Amendment was created to ensure a president cannot censor certain viewpoints. "Though the architects of the Constitution surely didn't contemplate presidential Twitter accounts, they understood that the president must not be allowed to banish views from public discourse simply because he finds them objectionable," Jaffer said.

Calvert also discussed the Knight Institute's argument that President Trump's personal account creates a "designated public forum," a space created by the government for the purpose of speech, such as a bulletin board in a city hall where people can post fliers for events. President Trump blocking users from responding directly to him, according to Calvert, is the equivalent of a citizen not being allowed to use the bulletin board. Calvert contended that although the First Amendment does not address censorship imposed by private individuals or businesses, including Twitter, the First Amendment still applies to President Trump as a government official.

David Greene, an attorney and the civil liberties director of the Electronic Frontier Foundation (EFF), agreed that President Trump creates a public forum when he tweets. "[Blocking Twitter accounts is] not a problem for most people, because most people are not government actors," Greene said in an interview with *Forbes*. "But once you're a government actor, and you're using it as a public forum, the First Amendment is going to apply."

Eugene Volokh, a constitutional law professor at the University of California, Los Angeles School of Law contended that President Trump's @realDonaldTrump account was a personal one. In an interview with *ProPublica*, Volokh argued that members of Congress, for example, are entitled to private speech, even on official pages, because they are just one voice among many in the legislative branch. "It's clear that whatever my senator is, she's not *the government*. She is one person who is part of a legislative body," he wrote (emphasis in original). "She was elected because she has her own views and it makes sense that if she has a Twitter feed or a Facebook page, that may well be seen as not government speech but the voice of somebody who may be a government official."

> "Though the architects of the Constitution surely didn't contemplate presidential Twitter accounts, they understood that the president must not be allowed to banish views from public discourse simply because he finds them objectionable."
>
> **— Jameel Jaffer, Knight First Amendment Institute executive director**

Similarly, President Trump makes up one individual in the executive branch, according to Volokh. "You could imagine actually some other president running this kind of account in a way that's very public minded – 'I'm just going to express the views of the executive branch,'" Volokh said. "The @realDonaldTrump account is very much, 'I'm Donald Trump. I'm going to be expressing my views, and if you don't like it, too bad for you.' That sounds like private speech, even done by a government official on government property."

Michael W. McConnell, the director of Stanford's Constitutional Law Center and formerly a judge on the U.S. Court of Appeals for the Tenth Circuit, was also critical of the public forum doctrine being applied to Trump's tweets. "The president is entitled to communicate with whoever he wants to whenever he wants to," McConnell told *The Washington Post* on June 7. "No one has the right to compel someone else to communicate with them. If Trump or anyone else wants to limit his Twitter audience, he can do that. As can any other public official or any private person.. . . [Even presidents can] go to public arenas and meet with audiences of their choice. Public forum doctrine has to do with the right of people to speak, not the right of anyone being forced to communicate with them."

One final area of debate regarding the Knight Institute's letter was whether individuals blocked by President Trump have alternative ways to see his tweets and to express their views. Kirtley contended that these alternatives exist. "The reality is that a court would look at this and say there are alternative ways both for you to reach the president and get access to his tweets," she said. "This is not really blocking you from accessing this information or expressing your opinion." For example, a user could log out of their account and still see tweets by President Trump. Or, a user could create a new account. An individual could also use alternative methods to express their opinion besides using Twitter to attempt to communicate and follow President Trump.

However, Alex Abdo, one of the attorneys who signed the Knight Institute's letter, argued that there are two injuries resulting from being blocked by President Trump: not being able to tweet to the president and being excluded from directly responding to his tweets and replies from other users. "The significant harm, and one for which there aren't obvious workarounds, is that you're excluded from the comment threads discussing the president's tweets," Abdo said in an interview with *The Washington Post*. "That is the forum that is created by each of the tweets about his policies.. . . You could create another account and tweet anonymously to those threads, but what you're excluded from is contributing to those debates as yourself."

On July 11, the Knight Institute filed a 25-page complaint for declaratory and injunctive relief in the United States District Court for the Southern District of New York. The complaint named several additional plaintiffs who were Twitter users blocked by @realDonaldTrump for sharing viewpoints critical or in opposition to the president. President Trump, Spicer, and White House Social Media Director Daniel Scavino were named as defendants.

The complaint reiterated the arguments made in the letter to President Trump that blocking users violated their First Amendment rights. Specifically, the complaint contended that the defendants violated the First Amendment by imposing "a viewpoint-based restriction on the Individual Plaintiffs' participation in a public forum[,] . . . access to official statements the President otherwise makes available to the general public[,] . . . [and their] ability to petition the government for redress of grievances."

The complaint asked the court to declare the defendants' "viewpoint-based blocking of the Individual Plaintiffs from the @realDonaldTrump account to be unconstitutional." Additionally, the complaint requested that the court "enter an injunction requiring that the plaintiffs be unblocked" and prohibit the defendants from blocking the plaintiffs and other Twitter accounts based on viewpoint. "President Trump's Twitter account, @realDonaldTrump, has become an important source of news and information about the government, and an important public forum for speech by, to, and about the President," the complaint read. "In an effort to suppress dissent in this forum, Defendants have excluded – 'blocked' – Twitter users who have criticized the President or his policies. This practice is unconstitutional, and this suit seeks to end it."

As the *Bulletin* went to press, the U.S. District Court for the Southern District of New York had not held any official proceedings related to that complaint.

On July 25, 2017, United States District Court Judge James C. Cacheris ruled in a memorandum opinion that defendant Phyllis Randall, Chair of the Loudoun County (Virginia) Board of Supervisors, engaged in viewpoint discrimination by blocking plaintiff Brian Davison from a public Facebook page, violating his right of free speech under the First Amendment and the Virginia Constitution. *Davison v. Loudoun County Board of Supervisors et al.*, 2017 WL 3158389 (E.D. Va. 2017).

The case before the U.S. District Court for the Eastern District of Virginia arose on Feb. 3, 2016 when Randall posted comments about a town hall on her public Facebook page titled "Chair Phyllis J. Randall," which was created by Randall separate from her personal Facebook profile to "address County residents" and to "share information of interest with the County." Davison commented on Randall's post with allegations of corruption and conflicts of interest by Loudoun County's School Board members and their families. Randall summarily blocked Davison from the Facebook page because she took issue with him "mak[ing] comments about people's family members." Davison could still read and share content posted on the page, but could not comment on or send private messages on it. By the next morning, Randall had unblocked Davison.

Nevertheless, Davison brought claims against Randall and the Loudoun County Board of Supervisors under the First Amendment and Article I § 12 of the Virginia Constitution, the First Amendment's Virginia analogue, among other claims. Regarding the First Amendment question, Cacheris wrote that he first had to determine whether the case concerned protected speech. He concluded that Davison's criticism of Randall and the school board officials was "not just protected speech, but [lay] at the very 'heart' of the First Amendment." Cacheris wrote, "If the Supreme Court's First Amendment jurisprudence makes anything clear, it is that speech may not be disfavored by the government simply because it offends."

Second, the court addressed whether Randall "opened a forum for speech" through the "Chair Phyllis J. Randall" Facebook page. Cacheris cited a 2008 ruling by the U.S. Court of Appeals for the Fourth Circuit in which the court concluded that the government "may open a forum for speech by creating a website that includes a 'chat room' or 'bulletin board' [through] which private [users] could express opinions or post information." *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008). Cacheris also cited the 2017 U.S. Supreme Court decision *Packingham v. North Carolina*, in which the Court concluded that "social media . . . has become a vital platform for speech of all kinds." 137 S. Ct. 1737 (2017). For more information on *Packingham*, see "U.S. Supreme Court Rules in Two Significant First Amendment Cases" on page 16 of this issue of the Silha *Bulletin*.

Cacheris concluded Randall's page fell under the *Page* and *Packingham* definitions of a public forum. Consequently, he found that because Randall blocked Davison from her page after being "offended by his criticism of her colleagues in the County government," she "engaged in viewpoint discrimination by banning [Davison] from her Facebook page." Cacheris wrote, "Indeed, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards." Cacheris added that Randall "committed a cardinal sin under the First Amendment," despite the consequences being "fairly minor" because the ban lasted only a matter of hours.

In a July 29 commentary for *Slate* magazine, writer Mark Joseph Stern contended that Cacheris' decision could "be applied to [President] Trump's practice of blocking Twitter users with whom he disagrees." "When Trump blocks Twitter users, they can still see his tweets.. . . But they cannot engage directly with his tweets, at least not without resorting to an intricate and unreliable workaround," Stern wrote [emphasis in original]. "This inability to respond to Trump may seem to present only a minor burden on speech. But it poses a real First Amendment problem nonetheless, inflicting a potentially unconstitutional burden on protected political speech."

Venkat Balasubramani, a litigator of Focal PLLC, agreed in July 27 commentary for *Technology Marketing Law Blog*. "This is obviously a timely and relevant ruling, given the lawsuit against President Trump for blocking Twitter followers," he wrote. "What started off looking like a lark of a case could turn into consequential precedent for constraints on the ability of politicians, including President Trump, to block members of the public."

However, Stern also wrote that the cases may not be the same. "There's just one lingering issue with this comparison: It isn't clear whether Trump intends his personal Twitter page to function as a public forum the way Randall did.. . . Trump's lawyers will almost certainly argue that his personal Twitter feed is a private forum, not a government project." Nevertheless, Stern predicted that this argument would "likely fail," citing a series of @RealDonaldTrump tweets on July 26, 2017 in which President Trump banned transgender military service members, suggesting he had turned his feed "into a quintessential public forum."

Scott Memmel
Silha *Bulletin* Editor

U.S. Supreme Court Rules in Two Significant First Amendment Cases

On June 19, 2017, the U.S. Supreme Court issued two rulings concerning the First Amendment. First, the Court ruled in favor of a convicted sex offender who alleged that a North Carolina law banning such criminals from accessing a "commercial social networking website" violated his First Amendment rights. In the second case, the Court ruled in favor of the plaintiff, who sued after he was denied a federal trademark for his rock band because the name was "disparaging towards 'persons people of Asian descent.'" Following the Supreme Court's ruling, the Department of Justice (DOJ) and several Native American individuals dropped their legal challenge against the trademark of the Washington Redskins, a National Football League (NFL) team.

SUPREME COURT NEWS

***Packingham v. North Carolina* Strikes Down Law Barring Sex Offenders from Social Media Websites**

In *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), plaintiff Lester Gerard Packingham challenged a North Carolina statute banning registered sex offenders from accessing a commercial social networking website that allows access to minor children. N.C. Gen. Stat. Ann. §14–202.5. On June 19, 2017, the U.S. Supreme Court reversed the North Carolina Supreme Court's ruling, concluding that §14–202.5 violated the First Amendment because it "bar[red] 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."

N.C. Gen. Stat. Ann. §14–202.5, titled "Ban use of commercial social networking Web sites by sex offenders," makes it "unlawful for a [registered] sex offender . . . to access a commercial social networking [website] where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." The statute also lists several requirements for what constitutes a "commercial social networking [website]," including that it "[p]rovides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." A violation of the statute constitutes a Class I felony under state law.

In 2002, Packingham pled guilty to "taking indecent liberties with a child" after admitting to having sex with a 13-year-old girl. Packingham, who was a 21-year-old college student at the time, was required to register as a sex offender for a minimum of 30 years. The case before the Supreme Court arose in 2010 when a state court dismissed a traffic ticket against Packingham, who summarily posted on his Facebook account, "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent.. . . Praise be to GOD, WOW! Thanks JESUS!"

> "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. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."
>
> **— U.S. Supreme Court Justice Anthony Kennedy**

At the time of Packingham's Facebook post, the Durham Police Department was conducting an investigation to identify registered sex offenders who were violating §14–202.5. An officer noticed that an account with the name "J.R. Gerrard" had posted the ticket status update. The officer determined through a search warrant and court records that J.R. Gerrard was in fact Packingham. On June 19, 2017, *Reuters* reported that at no time during the ensuing jury trial did the State accuse or provide evidence that Packingham had attempted to or successfully contacted a minor through the Facebook account.

Packingham was indicted by a grand jury for violating §14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that it violated his First Amendment rights. On appeal, the Court of Appeals of North Carolina struck down the statute on First Amendment grounds, concluding that it was not "narrowly tailored to serve North Carolina's legitimate interest of protecting minors from sexual abuse. *State v. Packingham*, 229 N.C.App. 293 (N.C. Ct. App. 2013). However, on Nov. 6, 2015, the North Carolina Supreme Court affirmed the trial court decision, finding §14–202.5 to be "constitutional in all respects." The court contended that "the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach." *State v. Packingham* 368 N.C. 380 (N.C. 2015). (For more information on the North Carolina Supreme Court ruling, see *North Carolina Sex Offender Case Muddles First Amendment Issues* in "Recent Cases and Pending Decisions Put Media Law Issues in Spotlight in Multiple States" in the Fall 2015 issue of the Silha *Bulletin*.)

In December 2015, the Electronic Frontier Foundation (EFF), Public Knowledge, and the Center for Democracy & Technology filed an *amicus* brief in support of Packingham. The brief contended that the "proscribed social networking services are central to enabling myriad First Amendment-protected speech, including political speech, religious speech, and employment-related speech." Thus, the brief argued that the North Carolina statute "cuts off a large class of people from an immense and important public dialogue," citing the U.S. Supreme Court's 1997 decision in *ACLU v. Reno* in which the Court "recognized the

profoundly important role of Internet communication in fostering the free speech values at the very heart of the First Amendment. 521 U.S. 844 (1997). The full *amicus* brief is available online at: http://www.scotusblog.com/wp-content/uploads/2016/12/15-1194_amicus-petitioner-EFF.pdf.

On June 19, 2017, the U.S. Supreme Court in the 8-0 decision – Justice Neil Gorsuch took no part in any portion of the case – concluded that §14–202.5 violated the First Amendment. Justice Anthony Kennedy, writing for the unanimous court, explained that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Justice Kennedy emphasized that social media users employ the websites "to engage in a wide array of protected First Amendment activity," but noted that "this case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet."

The Court concluded that the statute was content neutral and thus subject to intermediate scrutiny, meaning that a statute must be "narrowly tailored to serve a significant governmental interest" and "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley*, 573 S. Ct. (2014).

Justice Kennedy found that §14–202.5 failed to pass intermediate scrutiny because "the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens, [including] access to information and communicate with one another about it on any subject that might come to mind." He continued, "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. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Thus, the court concluded, a statute "foreclose[ing] access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."

Additionally, Justice Kennedy concluded that the State had failed to meet its burden to show "that this sweeping law is necessary or legitimate to serve that purpose." He wrote, "It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech,'" citing *Ashcroft v. Free Speech Coalition*. 535 U.S. 234, 255 (2002). Thus, the Court reversed the North Carolina Supreme Court ruling and remanded the case for further proceedings.

In a concurring opinion, Justice Samuel Alito wrote that he could not "join the opinion of the Court . . . because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks." Justice Alito concluded that "[b]ecause protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens." However, Justice Alito found that the "fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child." He provided several examples, including Amazon.com and WebMD, which allow minors to use their services. Therefore, he concluded that "[p]lacing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders."

In a July 20 commentary for *The Conversation*, University of Houston Senior Lecturer of Law & Criminology Melissa Hamilton discussed the significance of the ruling. "This ruling is of interest as the First Amendment's freedom of speech guarantee has typically been applied in the physical world," she wrote. "In *Packingham*, the court took a rather progressive stance that the internet in general – and social media sites in particular – are now the modern settings in which many Americans exchange ideas."

In a July 19 *MinnPost* "Community Voices" piece, Marshall H. Tanick, a constitutional law attorney at Hellmuth & Johnson, suggested that uncertainty remains after *Packingham*. "It remains to be seen how the ruling will affect conditions imposed on them or, for that matter, commonly accepted limitations on use of social media to engage in offensive or harassing communications," Tanick wrote. "These types of restrictions are frequently resorted to by judges . . . in sentencing of criminal wrongdoers, including sex offenders, as well as in marital disputes and other inter-personal spats."

> "This ruling is of interest as the First Amendment's freedom of speech guarantee has typically been applied in the physical world.. . . In *Packingham*, the court took a rather progressive stance that the internet in general — and social media sites in particular — are now the modern settings in which many Americans exchange ideas."
>
> **— Melissa Hamilton, University of Houston Senior Lecturer of Law & Criminology**

Individuals and Organizations Have The Right to Utilize Potentially Disparaging Terms as Trademarked Names

On June 19, the U.S. Supreme Court ruled that the provision of federal law prohibiting the registration of scandalous, immoral, or disparaging trademarks violated the Free Speech Clause of the First Amendment, affirming a ruling by the U.S. Circuit Court of Appeals for the Federal Circuit. *Matal v. Tam*, 137 S.Ct. 1744 (2017). Following the ruling, the Department of Justice (DOJ) and a Native American group dropped their disparaging trademark case against the Washington Redskins, which had remained in the U.S. Court of Appeals for the Fourth Circuit pending the Supreme Court's ruling in *Matal*.

The case before the Court was brought by Simon Shiao Tam, who named his all-Asian American dance rock band "The Slants" in order to "reclaim" and "take ownership" of Asian stereotypes. In 2010, Tam sought to register the band's name with the U.S. Patent and Trademark Office (PTO), but was denied

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a trademark because the PTO found that the name "would likely be disparaging towards 'persons of Asian descent,'" in violation of the Disparagement Clause of the Lanham Act of 1946. 15 U.S.C.A. § 1052(a). The "disparaging clause" 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."

Tam appealed the decision to the Trademark Trial and Appeal Board, which again denied the registration of the mark. Tam then appealed to the Federal Circuit, which found that the trademark officials correctly denied the trademark based on the language of the disparaging clause. *In re Tam*, 758 F.3d 567 (Fed. Cir. 2015). However, the full Federal Circuit voted to rehear the case *en banc*. On Dec. 22, 2015, the Federal Circuit came to a new conclusion, holding 9-to-3 that the exclusion of "disparaging" trademarks violated the First Amendment. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (*en banc*).

On Sept. 29, 2016, the Supreme Court granted *certiorari* in *Lee v. Tam*, which was changed to *Matal v. Tam* after Michelle Lee resigned her position as PTO Director. (For more information on the facts of the case, the Federal Circuit *en banc* decision, and the Supreme Court granting *certiorari*, see "United States Supreme Court Set to Hear Oral Arguments on Disparaging Trademarks" in the Fall 2016 issue of the Silha *Bulletin*.)

Justice Samuel Alito, writing for the 8-0 majority, concluded that the disparaging clause "violate[d] the Free Speech Clause of the First Amendment [because it] offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." The Court first considered whether "Tam's argument that the [disparaging] clause does not reach marks that disparage racial or ethnic groups." Tam contended that the clause prohibits the registration of marks that disparage "persons," meaning "only natural and juristic persons," and not "non-juristic entities such as racial and ethnic groups." Justice Alito concluded that Tam narrowly read the term "persons," which "applies to the members of any group whose members share particular 'beliefs,' such as political, ideological, and religious groups."

The Court next addressed whether the disparaging clause violated the Free Speech Clause of the First Amendment through viewpoint discrimination. The court considered three arguments by petitioner Joseph Matal, the interim director of the PTO ("the Government"), including "(1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new "government-program" doctrine."

Regarding the Government's argument that trademarks are government speech because they are issued by a federal office, Justice Alito concluded that this premise was invalid and that trademarks constitute private speech. "Because the 'Free Speech Clause . . . does not regulate government speech,' *Pleasant Grove City v. Summum*, 555 U.S. 460, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."

Justice Alito next addressed the Government's claim that "this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint." The Court concluded that the federal registration of a trademark is "nothing like the programs at issue in [other] cases" because those cases on which the Government relies "all involved cash subsidies or their equivalent."

Finally, Justice Alito addressed the Government's attempt to have the Court "sustain the disparagement clause under a new doctrine that would apply to 'government-program' cases." He concluded that "this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine." The only new elements, according to Justice Alito, were two cases that "occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks." In *Davenport v. Washington Ed. Assn.*, the Court upheld a Washington law that "permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining . . . [but] did not allow the employer to collect the portion of union dues that would be used in election activities." 551 U.S. 177–182 (2007). The Court determined that the law imposed "a "modest limitation" on an "extraordinary benefit," namely, taking money from the wages of non-union members and turning it over to the union. In *Ysursa v. Pocatello Ed. Assn.*, the Court considered the constitutionality of an Idaho law allowing public employees "to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union's political action committee." 555 U. S. 353, 355 (2009). The court ruled that "the government . . . [was] not required to assist others in funding the expression of particular ideas."

Based on its conclusions that the disparaging clause cannot be sustained under government speech or subsidy cases or the proposed "government-program" doctrine, the Court turned to whether trademarks constitute commercial speech and are thus subject to relaxed scrutiny under the 1980 case *Central Hudson. Central Hudson v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The Court did not need to determine whether trademarks constitute commercial speech because "the disparagement clause cannot withstand even *Central Hudson* review" – specifically that a restriction of speech "must serve 'a substantial interest,' and must be 'narrowly drawn.'" First, the Court concluded that the Government's interest in using the disparaging clause to prevent "'underrepresented groups'" from being "'bombarded with demeaning messages in commercial advertising'" demonstrated that the Government "ha[d] an interest in preventing speech expressing ideas that offend." Justice Alito wrote that "that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate,'" citing Justice Oliver Wendell Holmes' famous dissenting opinion in *United States v. Schwimmer*, 279 U. S. 644, 655 (1929). Second, the Court found that the "disparagement clause is not 'narrowly drawn' to drive out trademarks that support invidious discrimination" because it applies to any person, group,

or institution. Thus, the Court affirmed the judgment of Federal Circuit.

Justice Anthony Kennedy filed an opinion concurring in part and concurring in the judgment. He agreed with Justice Alito that the "[disparaging clause] constitutes viewpoint discrimination – a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny." However, Justice Kennedy elaborated on "why the First Amendment's protections against viewpoint discrimination apply to the trademark here." He wrote, "At its most basic, the test for viewpoint discrimination is whether – within the relevant subject category – the government has singled out a subset of messages for disfavor based on the views expressed.. . . [The disparaging clause allows] an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." 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."

Justice Clarence Thomas filed a short opinion also concurring in part and concurring in the judgment. Justice Thomas wrote, "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial,'" citing his opinion in *Lorillard Tobacco Co. v. Reilly*. 533 U.S. 525, 572, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

In a Facebook post following the decision, Tam wrote, "After an excruciating legal battle that has spanned nearly eight years, we're beyond humbled and thrilled to have won this case at the Supreme Court. This journey has always been much bigger than our band: it's been about the rights of all marginalized communities to determine what's best for ourselves."

In a June 19 statement, Notre Dame law professor Richard W. Garnett wrote that *Matal* bolsters the reputation of the Supreme Court as protector of First Amendment rights. "At a time when some have claimed that speech may and should be regulated or censored if it is offensive, hurtful, or dangerous, the justices' firm insistence that governments may not silence messages they dislike is noteworthy and important," he wrote.

Matal was also closely watched by DOJ attorneys and Native American individuals contesting the Washington Redskin trademark. In June 2014, the PTO initially ruled in favor of the DOJ and a Native American group led by Amanda Blackhorse, a Navajo from Arizona, scheduling the cancellation of the team's registrations. The team appealed, but on July 8, 2015, the U.S. District Court for the Eastern District of Virginia, Alexandria Division sided with Blackhorse, questioning why the team chose the name in the first place "when Webster's Collegiate Dictionary defined the word as 'often contemptuous' as early as 1898." *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. 2015).

> "After an excruciating legal battle that has spanned nearly eight years, we're beyond humbled and thrilled to have won this case at the Supreme Court. This journey has always been much bigger than our band: it's been about the rights of all marginalized communities to determine what's best for ourselves."
>
> **— Simon Shiao Tam, respondent**

However, the Associated Press (AP) reported on June 29 that the DOJ and Blackhorse had dropped their case, which had remained pending in the Fourth Circuit pending the *Matal* decision. In a letter to Patricia S. Connor, the Clerk of Court for the Fourth Circuit, the DOJ attorney Mark R. Freeman wrote, "[O]ral argument is unnecessary. The Supreme Court's decision in *Matal* . . . controls the disposition of this case. Consistent with Tam, the Court should reverse the judgment of the district court and remand the case with instructions to enter judgment in favor of Pro-Football." Freeman's full letter is available online at: http://www.politico.com/f/?id=0000015c-f0a0-d1e3-a97d-f9f436400001.

Jesse A. Witten, an attorney representing the Native American group, sent a similar letter to Connor on June 29. He wrote, "We agree that . . . . *Matal* . . . is controlling. As a result, there is no need for oral argument." Witten's full letter is available online at: https://localtvwtvr.files.wordpress.com/2017/06/ddgcarjwaam8e0o-large.jpg?quality=85&strip=all&w=254.

In a statement, Witten wrote, "There's no more challenge to make." He also pointed to the publicity his clients' campaign raised throughout the legal process. "There's the legal case and then there's the cause," he said. "It was a galvanizing force that caused people to pay attention to the cause."

Nevertheless, a June 21 Gibson, Dunn & Crutcher LLP commentary warned that the central holding in *Matal* was unlikely to affect trademark policy. "Tam's central holding—that the Lanham Act's [disparaging] clause is unconstitutional—is likely to have only a limited impact, as most trademarks are not accused of disparagement," the firm wrote. "More broadly, the Supreme Court's unanimous government-speech ruling suggests that it is poised to cabin what is considered to be government speech in the context of government registration and regulation. The Court explicitly warned that courts 'must exercise great caution before extending' government-speech rules to messages that originate from private parties. And the Justices' emphasis on viewpoint-neutrality as it relates to the government suggests that the Court is unlikely to extend the government speech doctrine any time in the near future."

Brittany Robb
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Vermont Governor Signs New Shield Law; U of M Board of Regents and a New York Appeals Court Address Reporter's Privilege Issues

In the summer of 2017, the reporter's privilege to protect confidential sources and information was the focus of a state legislature, a university's board of regents, and a state appellate court. On May 17, 2017, Vermont became the 41st jurisdiction, including Washington, D.C. to pass a shield law, providing statutory protection to journalists. On May 11, St. Paul, Minn.'s KSTP-TV became the target of a University of Minnesota Board of Regents investigation after an internal email was leaked to the television station under the condition of anonymity. Finally, on July 13, 2017, a New York appellate court ruled that a subscription financial industry newsletter was protected by the New York Shield Law.

REPORTER'S PRIVILEGE

Vermont Becomes 41st State to Adopt a Reporter's Shield Law

Vermont Public Radio (VPR) reported on May 17, 2017 that Gov. Phil Scott (R) had signed Senate Bill 96, "An act related to a news media privilege," into law, the state's first statute protecting journalists from subpoenas seeking to compel the disclosure of confidential sources and information. 12 V.S.A. § 1616. The bill passed the state Senate in March with no opposition and the House of Representatives in April, with only two opponents. Media experts and advocates praised the new shield law, while the representatives who voted against the bill cited concerns that it was not broad enough and imposed a definition of "journalist" and "journalism."

Prior to the passage of S.96, a reporter's privilege in Vermont consisted of a qualified privilege based on state and federal case law. In *State v. St. Peter*, the Vermont Supreme Court recognized a qualified reporter's privilege under the First Amendment to refuse to give testimony in a criminal case "absent a showing by the party seeking disclosure that there is no other adequately available source for the information and that the information sought is relevant and material on the issue of guilt or innocence." 132 Vt. 266, 315 A.2d 254 (1974).

The other source of a qualified privilege in Vermont was the state's constitution, which provided "[t]hat the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained." Vt. Const. ch. I, art. 13 (1793). According to the Reporter's Privilege Compendium compiled by the Reporters Committee for Freedom of the Press (RCFP), Article 13 of Vermont's state constitution "supports the recognition of a reporter's privilege, especially where the journalist is reporting on the activities of elected government officials." However, according to RCFP, Article 13 "has not been relied on by any court to provide a higher level of protection than is derived from the First Amendment." *Spooner v. Town of Topsham*, 2006 WL 4911248 (2006).

The Vermont Press Association and a coalition of journalists pushed for the legislation after two reporters and an editor at *Seven Days*, a Burlington newspaper, were subpoenaed to testify in a December 2015 sexual assault case filed against former Sen. Norm McAllister (R-Alburgh-Franklin). Prosecutors later withdrew the subpoena, as reported by VPR on June 14, 2016. Nevertheless, during the drafting of the Vermont Shield Law, journalists testified that S.96 was needed to protect sources and unpublished information.

Sponsored by Sens. Dick Sears (D-Bennington) and Jeanette K. White (D-Putney), S.96 passed both houses with overwhelming majority. The Senate vote passed 29-0 with one senator absent from the vote. The House vote passed 140-2. On May 17, 2017, Gov. Scott signed the bill into law.

The statute defines "journalist" as "(A) an individual or organization engaging in journalism or assisting an individual or organization engaging in journalism at the time the news or information sought to be compelled . . . or (B) any supervisor, employer, parent company, subsidiary, or affiliate of an individual or organization engaging in journalism at the time the news or information sought to be compelled pursuant to subsection (b) of this section was obtained." "Journalism" is defined as "(A) investigating issues or events of public interest for the primary purpose of reporting, publishing, or distributing news or information to the public, whether or not the news or information is ultimately published or distributed; or (B) preparing news or information concerning issues or events of public interest."

Under the statute, no "court or legislative, administrative, or other body with the power to issue a subpoena shall compel: (A) a journalist to disclose news or information obtained or received in confidence." This includes not only "the identity of the source of that news or information," but also "news or information that is not published or disseminated, including notes, outtakes, photographs, photographic negatives, video or audio recordings, film, or other data."

However, the statute does provide means for a court or legislative body to compel a journalist to "disclose news or information that was not obtained or received in confidence" if the government entity "establishes clear and convincing evidence that (i) the news or information is highly material or relevant to a significant legal issue before the court or other body; (ii) the news or information could not, with due diligence, be obtained by alternative means; and (iii) there is a compelling need for disclosure."

Moments before signing the bill, Gov. Scott praised the protection it provides Vermont journalists. "This protection enables sources, from whistleblowers to victims of a crime, to feel confident in their ability to speak freely with the press, ensuring accountability and giving the vulnerable a voice without fear," he said.

Paul Heintz, a political editor for *Seven Days* who lobbied for the new law, contended that the law is necessary given the current political climate in which journalists "are under attack." "Just yesterday, the *New York Times* reported that in an Oval Office meeting in February, [President Donald Trump] asked his FBI director to jail reporters who reported classified material," Heintz

told VTDigger.org, a project of The Vermont Journalism Trust, on May 17. "We don't hear such deeply un-American threats in Vermont, but that does not mean Vermont reporters and news organizations don't face grave threats." He added, "For too long, this state has allowed its judicial system to haul journalists up on the stand and compel them to testify with few limitations. For too long, the state has allowed overzealous attorneys to force reporters to disclose unpublished information and reveal the identities of confidential sources." (For more information on President Trump's comments about jailing reporters and attempts to stop leakers, see "President Trump and his Administration Spark Debate Over Several Media Law Issues" on page 11 of this issue of the Silha *Bulletin*. For more information on journalists facing physical threats, see "Journalists Face Physical Restraints & Arrests; Trump Video Further Raises Concerns about Violence Against the Media" on page 7 in this issue of the Silha *Bulletin*.)

Rep. Bob Frenier (R-Chelsea) was one of the two lawmakers who voted against the bill. Frenier, a former newspaper editor, supported the concept of a shield law, but worried Vermont's law was too narrow. "The definition of a free press is so broad now and this bill narrows it down, and that's not a good thing," Frenier said in an interview with the Associated Press (AP).

Rep. Anne Donahue (R-Northfield) was the other representative who voted against the bill and was also the only member to publicly speak against the bill during debate. Following the vote, she explained her opposition on her legislative blog "Representative Anne Donahue." "As a lifelong journalist and the daughter of a lifelong journalist, I probably surprised many with my opposition to the news media shield law that passed 140-2 on the House floor. I suppose my vote was partly in honor of my father, who imbued in me the principles of freedom of the press.," she wrote. "As he said, any time the government imposes a definition on who is a journalist and what content constitutes journalism, we are imposing government control on the press. A shield law that protects journalists from subpoenas carves out such definitions."

The shield law was one of two measures that passed the Vermont legislature in the summer of 2017 aiming to guarantee protections to journalists. Signed on May 23 by Gov. Scott, H.513 is an omnibus education bill, which provided, among other provisions, that public school and college administrators cannot censor material produced by school-affiliated media or retaliate against the students and their instructors for exercising their First Amendment freedoms. 16 V.S.A. § 180. The statute reads, "Absent a showing that a particular publication will cause direct, immediate, and irreparable harm that would warrant the issuance of a prior restraint order against the private media, school officials are not authorized to censor or subject to prior restraint the content of school-sponsored media. Content shall not be suppressed solely because it involves political or controversial subject matter, or is critical of the school or its administration."

KSTP Reports Internal Regents Email; Regents Launch Investigation to Find Source of the "Leak"

On May 11, 2017, Minnesota Public Radio (MPR) and the Minneapolis *Star Tribune* reported that the University of Minnesota Board of Regents ("regents") had launched an investigation to discover who provided information to KSTP-TV, the ABC affiliate in St. Paul, Minn., regarding a sexual harassment claim against Randy Handel, the University of Minnesota associate athletic director of development. Although the regents defended the probe seeking the anonymous leaker, media experts and advocates criticized the Board's attempts to reveal KSTP's confidential source, citing the Minnesota Shield Law.

The investigation by the regents arose following a May 10 KSTP report that Handel was being investigated by the EOAA. The full news report is available online at: http://kstp.com/news/randy-handel-university-of-minnesota-sexual-harrassment/4479772/. The source of KSTP's report was a May 10 email sent from the University's Equal Opportunity and Affirmative Action (EOAA) office to the Board of Regents explaining that Handel had sexually harassed an employee in the athletic department. The email read, "In a preliminary report issued on May 3, the EOAA found Handel's conduct towards (the victim) violated the University's sexual harassment policy," according to a May 11 KSTP story. The contents of that email were provided to the news station by a regent under the condition of anonymity, as reported by KSTP.

On May 11, the regents launched an investigation "to determine who provided the email to the TV station," according to the Minneapolis *Star Tribune* on May 12. The Board required all 12 of its members, as well as university employees who had access to the information, to sign affidavits swearing they were not the anonymous source. The affidavit required each one to assure that he or she did "not provide a physical or electronic copy of the memorandum," "read any portion of the Memorandum," describe the contents in any way, or disclose any contents to "any member of the media, including anyone from KSTP."

On June 22, the Associated Press (AP) reported that the University of Minnesota had hired the Minneapolis branch of the risk management firm Stroz Friedberg LLC to investigate the leak. University spokesman Evan Lapiska told the AP that the costs would be covered through a budget allocated for outside counsel. Lapiska added, "In order for all parties to trust that allegations of misconduct will be addressed firmly, honestly, and in a fair manner, there must be respect for confidentiality at all levels of the University, especially at the top." The *Star Tribune* had previously reported that the regents were planning to hire outside counsel and experts to conduct a forensic investigation of electronic communications of individuals who had access to the memorandum.

In a May 24 statement, the Minnesota chapter of the Society of Professional Journalists (SPJ) defended the KSTP reporters involved with the story. "The Minnesota Society of Professional Journalists defends the right of KSTP-TV and its journalists to pursue the truth and report it. In that pursuit, KSTP has relied on confidential sources to shine a light on sexual harassment allegations at the University of Minnesota." SPJ also cited the Minnesota Free Flow of Information Act, the state shield law which provides qualified protection to journalists. Minn. Stat. 595.021 *et seq.* "The university's investigation to seek the identity of the confidential source goes against the spirit of the Free Flow of Information Act and will have a chilling effect on those whistleblowers who seek to expose wrongdoing and those journalists who report it," the statement read.

Privilege, *continued on page 22*

Privilege, *continued from page 21*

SPJ added that the university should drop its investigation, "abide by the spirit of the Free Flow of Information Act[,] and concentrate on the serious problems of sexual harassment allegations at the University of Minnesota."

In an interview with Twin Cities PBS's "Almanac," University of Minnesota media ethics professor Chris Ison agreed that KSTP should not be compelled to provide their source and was not in legal jeopardy regarding the investigation. "I don't think there's any chance they'll give up a source" he said. "The state of Minnesota has a shield law that protects them from being compelled to give up a source, so there's no way we're going to see that."

In a May 11 statement, KSTP defended its reporting. "KSTP-TV regularly relies on sources, including confidential sources, in our newsgathering and reporting," KSTP reporter Theresa Malloy wrote. "Consistent with First Amendment principles and federal and state law, KSTP-TV protects the identity of its confidential sources to the fullest extent of the law."

Conversely, the board contended that its investigation was justified, citing university policies regarding private personnel information. In a May 11 news release, Dean Johnson, the Board of Regents chairman, argued that the regents' investigation was into the release of private information in violation of those involved in the original sexual harassment claim. "We strive to uphold tremendous fiduciary responsibilities that require us always to act professionally and ethically, and to maintain privacy and other legal expectations," Johnson said. "So it is greatly disappointing that we are faced with the potential that a member of the University community may have betrayed the public's trust. That's why members of the Board believe strongly that we need to investigate any potential leaks of private and confidential information." The release called on KSTP to violate the source's condition of anonymity with the justification that the investigation "signals to KSTP that the University is legally releasing KSTP from its apparent agreement of confidentiality with a Regent, and it encourages KSTP to reveal its Board source publicly."

As the *Bulletin* went to press, KSTP had not revealed its sources to the Board of Regents or any other University body.

New York Appeals Court Rules a Subscriber Newsletter is Protected by State Shield Law

On July 13, 2017, a five-judge panel for the New York Supreme Court Appellate Division, First Department unanimously ruled that a subscription financial industry newsletter was protected by the New York Shield Law, N.Y. Civ. Rights Law § 79-h, reversing a February 2017 decision in the New York Supreme Court for New York County. *Murray Energy Corp. v. Reorg Research, Inc.*, No. 157797/16 4464N 4463 (N.Y. App. Div. 2017). Several attorneys praised the ruling as demonstrating the strength of the New York Shield Law.

Reorg Research, Inc. ("Reorg"), the respondent in the case, sends email alerts to its subscribers regarding the financial industry and bankruptcy proceedings, among other topics. *Reuters* reported on Feb. 24, 2017 that a subscription costs between $30,000 to $120,000 a year, though it is often purchased by a corporation which then allows numerous people in the organization access to the content. According to court filings, Reorg has a "'dedicated editorial team of journalists, former lawyers, and investment bankers that . . . provide a comprehensive view' of debt-distressed companies in which the subscribers have an interest."

The case arose in August 2016 when thermal coal company Murray Energy Corporation ("Murray"), reached a collective bargaining agreement with its unionized mine workers and published press releases announcing the deal. Max Frumes, the senior editor at Reorg, followed up with four contacts who provided additional information about the agreement, which became the basis for an Aug. 15, 2016 alert titled "Murray Touts Successful Renegotiation With Union Amid Covenant Amendment Effort." Subsequently, two of the sources provided additional information concerning Murray's negotiations with its debt holders, among other information. On August 17, Frumes sent a second alert titled "Murray Finalizes Credit Agreement Amendment, Expects Annual Savings of $70M From Renegotiated Union Contract." Frumes promised to keep the names of his sources confidential.

On September 16, Murray filed a motion in the New York Supreme Court for New York County, a trial court, for pre-action discovery in order to learn the identity of Frumes' sources, which Reorg and Frumes refused to divulge. Murray believed the sources "must have been from a group of investors that were sent two power point presentations in advance of an investor teleconference on August 23, 2016." Specifically, Murray sought "the name(s) and contact information of John Does 1-10, and any and all documents, including electronically stored information, constituting or relating to communications between John Does 1-10 and Reorg."

Reorg contended that it was entitled to protection under the New York Shield Law, which provides that journalists cannot be "held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose news obtained or received in confidence or the identity of the source of such news coming into such person's possession in the course of gathering or obtaining news." In support of their argument, Reorg submitted an affidavit from Paul Steiger, former managing editor of *The Wall Street Journal* and founder of ProPublica. The affidavit contends that Reorg is a "journalism company" because of it employs an editorial staff and that the content it produces "serves the public interest." Additionally, Steiger argued that journalism can take a variety of forms. "Clearly, dissemination comes both in many different forms and at many different prices: video, audio, text; desktop, laptop, handheld; free, cheap, expensive, very expensive," Steiger wrote. "The variety is so great, it seems hard to swallow a contention to exclude Reorg Research based either on its price or on its effort to lengthen the time its scoops remain exclusive, which, as mentioned above, is hardly unique."

Nevertheless, on Feb. 24, 2017, Justice Carol R. Edmead granted Murray's application for pre-action disclosure. *Murray Energy Corp. v. Reorg Research, Inc.*, 47 N.Y.S.3d 871 (Sup. Ct. 2017). Edmead contended that Reorg did not fall under the New York Shield Law's definition of "professional reporter," "one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium which has as one of its regular functions the processing and researching of news intended for dissemination to the public . . ." Edmead found that the information gathered by Frumes "while it may have been news, was never intended for dissemination to the public."

Additionally, Edmead found that Reorg should be differentiated from traditional news organizations, even those like *The New York Times* and *The Wall Street Journal* which charge subscription fees. Edmead ruled that because Reorg "strictly keeps its stories away from the general public[,]. . . the conclusion that [Reorg] is not a news organization under the Shield Law is unavoidable."

In a Feb. 24, 2017 article for *Reuters*, news editor Alison Frankel criticized Edmead's conclusion that Reorg should be distinguished from traditional news organizations. "I'm not convinced Reorg is as different from traditional news companies as . . . Justice Edmead portray[s] it to be," she wrote. "Justice Edmead, for instance, mentioned several times that Reorg has only 347 subscribers. But the company's founder, Kent Collier, said in an affidavit in the Murray Energy litigation that many of the subscribers are institutions that allow lots of people access to Reorg reports. So those 347 subscriptions add up to about 9,000 readers. The Murray Energy story, for instance, went out to nearly 6,000 readers – more than the circulation of many local newspapers and niche publications."

Frankel added that Edmead's ruling could have implications for traditional journalism. "[E]very chip knocked out of the firmament of journalism matters. If Murray Energy . . . can squelch coverage by suing to expose confidential sources, what's to stop other companies from using the same strategy against subscriber-based news outlets? At the very least, corporations can scare confidential sources out of talking to reporters and can saddle publishers with legal costs, even if there's no doubt about the truth of the stories they put out."

Reorg filed an appeal in March 2017 and was joined by several media outlets, including *Reuters* and *Politico*, as *amici curiae*. The news organizations contended that the news business includes organizations that provide free or low-cost content to the public, but also organizations that provide content sold at a premium, according to *The New York Times* on June 21.

On July 13, a five-judge panel for the New York Supreme Court Appellate Division, First Department unanimously reversed Edmead's ruling, denying the petition for pre-action disclosure and dismissing the proceeding. The court concluded that Reorg was exempt from having to disclose the names of its confidential sources by New York's Shield Law because it is a "professional medium or agency which has as one of its main functions the dissemination of news to the public."

The court first concluded that even though Reorg's content is only available to a limited subscriber base, it is still entitled protections under the Shield Law because it is similar to "specialty or niche publications" targeting narrower audiences "not covered by the general news media." The court also agreed with Reorg's argument that the public "benefits secondarily from the information that [Reorg] provides to its limited audience, because that audience is comprised of the people who are most interested . . . and most able to use and benefit" from the information. The court added, "[G]iven the substantial investment required to unearth this information and the limited number of interested readers, the alternative is not broader coverage but no coverage at all."

Second, the panel contended that other state and federal courts have considered a publication's independence and editorial control as important factors for whether a shield law applies. The court determined that Reorg had "established that its editorial staff is solely responsible for deciding what to report on and that it does not accept compensation for writing about specific topics or permit its subscribers to dictate the content of its reporting." As a result, Reorg established a relationship typical of that "between a journalist and the activities upon which the journalist reports," citing *LaSalle Natl. Bank v Duff & Phelps Credit Rating Co.* 951 F. Supp. 1071, 1096 (S.D.N.Y. 1996).

Finally, the court ruled that extending protection to Reorg is "consistent with New York's 'long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press' – protection that has been recognized as 'the strongest in the nation.'" The court found that analyzing a publication's number of subscribers, subscription fees, and the extent to which it allows further dissemination of information" was not only "unworkable" and "creat[ing] prospective uncertainty," but could also lead to a "chilling effect," though the court did not elaborate on this claim.

Following the decision, Jude Gorman, the general counsel at Reorg, said the organization was pleased with the decision, according to *The New York Law Journal* on July 13. He noted, "the court made it clear that there are strong protections" for the type of reporting done by Reorg.

In an interview with *Law360* on July 13, Laura R. Handman, who also represented Reorg, called the decision a welcome relief for the organization. "We are grateful for the court's strong protection for this kind of in-depth reporting," she said. "The decision provides the certainty reporters need to do their job."

Kent Collier, founder and CEO of Reorg, also discussed the implications of the ruling on journalism. "In this evolving media landscape, it sends a powerful message that journalistic freedom is important and worth protecting," he said in an interview with *Business Insider* on July 14. "I could not be prouder of our entire team here at Reorg, and I look forward to continuing to provide our subscribers with the very best news and analysis in the industry."

In a July 13 statement, Murray's senior corporate counsel and director of investor and media relations Gary Broadbent expressed disappointment in the ruling, according to *The New York Law Journal*. "Reorg Research has repeatedly obtained and profited from the distribution of Murray Energy Corporation's confidential financial information, in breach of Murray Energy's legally enforceable confidentiality agreements," he said.

Broadbent added that Murray was planning to take further legal action. "We will continue to vigorously litigate this case and to ensure that all of Murray Energy's financial information remains strictly confidential," he wrote. "We are progressing in our identification of the party that violated our confidentiality agreement by disseminating this confidential financial information to the public. We will hold this party responsible for their actions." As the *Bulletin* went to press, no further legal motions or proceedings had been announced.

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Rolling Stone, *Daily Mail*, and ABC Settle High-Profile Defamation Lawsuits

In the spring and early summer of 2017, *Rolling Stone* magazine, the British tabloid *Daily Mail*, and American Broadcasting Company (ABC) each reached settlements in prominent defamation lawsuits. *Rolling Stone* settled two defamation cases related to its retracted 2014 story "A Rape On Campus," one brought by University of Virginia (UVA) Associate Dean of Students Nicole Eramo, and the other by former members of the UVA Chapter of Phi Kappa Psi. On April 12, 2017, the *Daily Mail* reached a settlement with First Lady Melania Trump following a retracted August 2016 story alleging that she worked for a modeling agency that also offered escort services. On June 28, ABC and ABC News reporter Jim Avila reached a confidential settlement with Beef Products Inc. (BPI) in a case originating in 2012 when ABC News and Avila repeatedly referred to BPI's signature product as "pink slime."

DEFAMATION

Rolling Stone Reaches Settlements in Two Defamation Lawsuits related to 2014 Campus Rape Story

On April 11, 2017, *Rolling Stone* magazine announced it had reached a confidential settlement with former University of Virginia (UVA) Associate Dean of Students Nicole Eramo, six months after a jury had awarded Eramo $3 million in damages. On June 13, 2017, *Rolling Stone* magazine reached a $1.65 million settlement in the defamation lawsuit brought by three former members of the UVA Chapter of Phi Kappa Psi. The settlements marked the end of litigation following the controversial 2014 story "A Rape On Campus," which reported the alleged gang rape of a UVA student, but was later retracted due to inaccuracies and other journalistic ethical concerns. Although *Rolling Stone* declined to comment on either lawsuit, media experts argued that the suits took their toll on the magazine both financially and in terms of their reputation.

In November 2014, *Rolling Stone* published "A Rape On Campus," written by Sabrina Rubin Erdely, in which she reported on the alleged gang rape of UVA student "Jackie" during a Phi Kappa Psi fraternity party in 2012. The story criticized university officials, including Eramo, for being more concerned about the school's reputation than properly addressing sexual assaults on campus.

On April 5, 2015, the Columbia School of Journalism published a study conducted at the request of *Rolling Stone*. The study found that the magazine had failed to follow ethical and journalistic principles, including failing to corroborate derogatory information, using pseudonyms that unnecessarily obscured key information, ignoring the concerns of staff fact checkers, and providing inadequate information to the fraternities when asking for comment, among other problems. *Rolling Stone* retracted "A Rape on Campus" the same day the study was published. (For more information on "A Rape On Campus" and the Columbia School of Journalism's study, see *Legal Challenges*, *Ethical Questions Linger for Rolling Stone over Retracted Campus Rape Story* in "*Rolling Stone* Faces New Reporting Controversy, Continues to Face Questions over Retracted Story" in the Winter/Spring 2016 issue of the Silha *Bulletin* and "News Organizations Backpedal after Failures to Fact Check, Anchor's False Stories" in the Winter/Spring 2015 issue.)

On May 12, 2015, *The Washington Post* reported that Eramo filed a defamation lawsuit against *Rolling Stone*, the magazine's parent company Wenner Media, and Erdely in Virginia state court. Eramo alleged that *Rolling Stone* had harmed her reputation by casting her as "the chief villain of the story," according to her complaint. Eramo also claimed that *Rolling Stone*'s story and Erdely's subsequent press interviews falsely reported that she was "indifferent to Jackie's allegations" and misquoted her in saying that "UVA withholds rape statistics 'because nobody wants to send their daughter to the rape school,'" among other false statements. Finally, Eramo contended that *Rolling Stone* and Erdely had demonstrated actual malice, which requires the journalist acted with knowledge of falsity or reckless disregard of the truth, as defined by the 1964 Supreme Court case *New York Times v. Sullivan*. 376 U.S. 254 (1964). Eramo sought $7.5 million in compensatory damages for harm to her reputation.

On July 29, 2015, three former members of Phi Kappa Psi filed a separate defamation lawsuit against *Rolling Stone*, Wenner Media, and Erdely in the United States District Court for the Southern District of New York, as reported by *The Washington Post*. Although they were not named in the story, the plaintiffs, George Elias IV, Stephen Hadford, and Ross Fowler, still alleged that their reputations had been harmed because people had come to believe that the three were the perpetrators of the sexual assault. (For more information and commentary on both defamation lawsuits, see "Update: *Rolling Stone* Continues to Face Backlash for Campus Rape Story" in the Summer 2015 issue of the Silha *Bulletin* and *Legal Challenges*, *Ethical Questions Linger for Rolling Stone over Retracted Campus Rape Story* in "Rolling Stone Faces New Reporting Controversy, Continues to Face Questions over Retracted Story" in the Winter/Spring 2016 issue.)

On Nov. 7, 2016, the jury in Eramo's defamation case awarded the UVA administrator $3 million in damages. Earlier that day, Eramo had testified that her life unraveled after the *Rolling Stone* story was published, according to *The Washington Post* on November 7. The 10-person jury concluded that statements in "A Rape On Campus" and those made by Erdely following the publication of the story demonstrated actual malice, according to a November 7 *USA Today* story. The jury determined that Erdely was liable for $2 million of the total, and *Rolling Stone* and Wenner Media for $1 million.

Following the jury decision, Deborah J. Parmelee, the jury forewoman, read a brief statement, which said, in part: "With careful consideration of the facts in evidence for determining damages, the jury made its determination. We were proud to execute our civic duty." In a statement, Eramo's attorney, Libby Locke, called the jury's verdict "nothing short of a complete repudiation of *Rolling Stone* and Sabrina Rubin Erdely's flawed journalism."

On April 12, 2017, *Jezebel* reported that *Rolling Stone* and Eramo reached a confidential settlement after *Rolling Stone* had filed a motion to vacate the jury's judgment, the first step towards an appeal. In return for an undisclosed sum, Eramo agreed to drop the defamation suit. In a statement, Locke said, "We are delighted that this dispute is now

behind us, as it allows Nicole to move on and focus on doing what she does best, which is supporting victims of sexual assault." *Rolling Stone* called the settlement an "amicable resolution," according to *The Washington Post* on April 11.

On June 13, *The New York Times* reported that *Rolling Stone* reached a settlement with the former members of Phi Kappa Psi for $1.65 million, bringing an end to the litigation sparked by the "A Rape on Campus" article. No other terms of the agreement were released.

In a statement, Brian Ellis, a spokesman for Phi Kappa Psi, said his clients were pleased with the settlement, although they originally sought $25 million in damages. "It has been nearly three years since we and the entire University of Virginia community were shocked by the now infamous article, and we are pleased to be able to close the book on that trying ordeal and its aftermath," wrote Ellis. "The chapter looks forward to donating a significant portion of its settlement proceeds to organizations that provide sexual assault awareness education, prevention training and victim counseling services on college campuses."

Rolling Stone representatives declined comment. However, the litigation and the settlements to Eramo and the fraternity had taken their toll on the publication, according to Samir Husni, director of the Magazine Innovation Center at the University of Mississippi School of Journalism. "If you look at the magazine today, it's starting to look like a shadow of its past," Husni said in a June 13 interview with *The Washington Post*. "It is something you can't hide. The magazine is not in a healthy place."

On July 29, 2016, *The New York Times* reported that Managing Editor Will Dana, who had limited involvement with the reporting of "A Rape on Campus" but oversaw publication of the story, announced his resignation from the magazine. In September 2016, Wenner Media sold a 49 percent stake in *Rolling Stone* to BandLab Technologies, a Singapore-based music technology company. In March 2017, Wenner Media also sold the celebrity magazine *Us Weekly* to American Media Inc. for a reported price of $100 million, according to the *Times*.

However, Husni said that the biggest blow to the magazine was not the financial hardships, but the impact of "A Rape On Campus" on its reputation. "In addition to the music and the entertainment, investigative stories were a cornerstone of *Rolling Stone*," he said. "But where are they now? Magazines cannot survive on memory or on history. Magazines survive on the future."

First Lady Reaches Settlement in Libel Suit Against *Daily Mail*

On April 12, 2017, First Lady of the United States Melania Trump reached a settlement in two defamation lawsuits brought against the *Daily Mail*, a British tabloid that also publishes online content in the United States. The lawsuits first arose following an Aug. 19, 2016 *Daily Mail* article alleging that Trump had worked for a modeling agency in the 1990's that also provided escort services. Observers noted that Trump is the only first lady to file a lawsuit while in that position.

> "We accept that these allegations about Mrs. Trump are not true and we retract and withdraw them.. . . We apologise [*sic*] to Mrs. Trump for any distress that our publication caused her. To settle Mrs. Trump's two lawsuits against us, we have agreed to pay her damages and costs."
>
> **— *Daily Mail***

On Aug. 19, 2016, Mail Media, Inc., which operates the *Daily Mail*'s website "Media Online," published an article titled, "Naked photoshoots, and troubling questions about visas that won't go away: The VERY racy past of Donald Trump's Slovenian wife." The story cited a Slovenian magazine and alleged that the modeling agency for which Trump worked in the 1990 was also an escort service and that Trump had "provided services beyond simply modeling," according to *The New York Times* on April 12. A Maryland blogger, Webster Tarpley, published similar claims to those reported by the *Daily Mail*.

The New York Times reported on Sept. 1, 2016 that Trump sued Mail Media and Tarpley in the Circuit Court for Montgomery County in Maryland, alleging three counts, including libel against Tarpley, libel against *Daily Mail*, and "Tortious Interference With Actual and/or Prospective Business Advantage" against both defendants. Trump's full complaint is available online at: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_09_16_melaniatrump_complaint.pdf. On the same day, Trump filed a lawsuit in the Royal Courts of Justice in London, according to a September 2 BBC report. Tarpley and the *Daily Mail* both retracted their stories immediately after Trump filed the lawsuits.

The Guardian reported on Jan. 27, 2017 that Trump had reached a settlement with Tarpley for "a substantial sum." Tarpley also apologized to the first lady. "I posted an article . . . about Melania Trump that was replete with false and defamatory statements about her," he wrote in a statement after retracting his story. "I had no legitimate factual basis to make these false statements and I fully retract them. I acknowledge that these false statements were very harmful and hurtful to Mrs. Trump and her family, and therefore I sincerely apologize to Mrs. Trump, her son, her husband and her parents for making these false statements."

On Feb. 2, 2017, *The Washington Post* reported that Trump's defamation claim was dismissed by Maryland Circuit Court Judge Sharon V. Burrell. In a memorandum opinion, Burrell concluded that Mail Media was not subject to jurisdiction in Maryland because the article in question was "researched, written for and published in a United Kingdom newspaper and published on a general news website that did not focus on Maryland."

Consequently, on Feb. 6, 2017, Trump filed a new lawsuit in the New York Supreme Court for the County of New York, Commercial Division against the *Daily Mail*, according to National Public Radio (NPR) on the following day. In her complaint, Trump contended that the *Daily Mail*'s article negatively affected her ability "to launch a broad-based commercial brand in multiple product categories, each of which could have garnered multimillion dollar business relationships for a multiyear term during which plaintiff is one of the most photographed women in the world" and that her "brand ha[d] lost significant value." The complaint further alleged that the "defamatory statements in the [a]rticle . . . caused [Trump] damages, including to her reputation and to her business interests and prospective economic opportunities, as

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well as causing significant humiliation in the community and emotional distress." Trump sought $150 million in damages, according to the lawsuit. Her full complaint is available online at: https://www.documentcloud.org/documents/3455911-Melania-DailyMail.html.

On April 12, 2017, multiple news agencies reported that Trump had reached a settlement with the *Daily Mail* related to the lawsuits in London and New York. The terms of the settlement were not released in court, but the Associated Press (AP) reported that the total was $2.9 million (£2.4m), which included damages as well as legal costs. According to *The Guardian* on April 12, the settlement "is one of the highest ever to go through the British courts."

In an April 12 article, the *Daily Mail* apologized to Trump. "We accept that these allegations about Mrs. Trump are not true and we retract and withdraw them," the statement read. "We apologise [*sic*] to Mrs. Trump for any distress that our publication caused her. To settle Mrs. Trump's two lawsuits against us, we have agreed to pay her damages and costs."

Trump's attorney Charles J. Harder wrote in a statement, "The First Lady Melania Trump is very pleased that she has resolved this matter favorably with the Daily Mail, which has issued a full and complete retraction and apology for its false statements about her, and agreed to pay her million of dollars in damages and full reimbursement of her legal fees costs. Mrs. Trump will remain vigilant to protect her good name and reputation from those who make false and defamatory statements about her."

First lady historian Myra Gutin, a professor at Rider University in Lawrenceville, N.J., told the *USA Today* on February 7 that it was "a first" for a first lady to file a lawsuit, though Trump was not yet first lady when she filed her original complaint. Mark Feldstein, a former NBC reporter and a journalism professor at the University of Maryland, agreed. "It's unprecedented for a president (to file a libel suit), let alone a first lady," he said.

In order to prove in the U.S. that *Daily Mail* had defamed her as a public figure, Trump would have had to prove that the *Daily Mail* acted with actual malice, which requires showing that the journalist acted with knowledge of falsity or reckless disregard of the truth, as defined by the 1964 Supreme Court case *New York Times v. Sullivan*. 376 U.S. 254 (1964). Prior to the settlement, Feldstein said he was not convinced Trump would win her lawsuit in the United States. "I think this [lawsuit] will get tossed pretty quickly," Feldstein told the *USA Today*. "I don't see this as challenging *New York Times v. Sullivan*, which is the linchpin of (libel) law, that there is an extraordinarily high threshold to prove libel of a public figure."

However, according to the BBC on Sept. 2, 2016, it would not have been as difficult to succeed in a defamation action in the UK. "If [Trump] could prove that the published allegations were defamatory and that she had suffered serious harm as a result, it would be hard for the *Daily Mail* to defend an action," the BBC wrote. "Also, in light of its retraction it could not argue that it was justified in publishing."

ABC Reaches Settlement with Beef Products Inc. in "Pink Slime" Lawsuit

On June 28, 2017, the *Sioux City Journal* in South Dakota reported that American Broadcasting Company (ABC) had reached a settlement with Beef Products Inc. (BPI) in a case dating back to 2012 when ABC and ABC News reporter Jim Avila repeatedly referred to BPI's signature product as "pink slime" in a series of news reports, including ABC News' 2012 broadcast "Pink Slime and You," as well as several 2012 tweets by Avila. BPI claimed $1.9 billion in damages, though the total could have tripled to $5.7 billion under South Dakota's Agricultural Food Products Disparagement Act (AFPDA). SDCL § 20-10A. Media attorneys and experts expressed concern that the settlement may have negative consequences for future defamation litigation and for the newsgathering process.

In September 2012, BPI, as well as BPI Technology Inc. and Freezing Machines, Inc., brought a civil action in the Circuit Court of Union County in South Dakota against ABC, ABC News, Avila, anchor Diane Sawyer, correspondent David Kerley, USDA microbiologist Gerald Zirnstein, food scientist Carl Custer, and former BPI quality assurance manager Kit Foshee. The complaint followed a series of broadcast and online stories, as well as several tweets, in March 2012 about BPI's Lean Finely Textured Beef (LFTB) product, which ABC News repeatedly referred to as "pink slime." LFTP is "a low-fat product made from chunks of beef, including trimmings, and exposed to tiny bursts of ammonium hydroxide to kill E. coli and other dangerous contaminants," used in processed foods found in school cafeterias and fast food restaurants, according to a March 5, 2013 article by MSN News. ABC News' 2012 broadcast "Pink Slime and You" is available online at: http://abcnews.go.com/WNT/video/pink-slime-15873068.

In its complaint, BPI alleged that the reports by ABC News contained disparaging statements about LFTB and each plaintiff, citing the AFPDA. The statute defines disparagement as a false statement or implication "that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public."

According to Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley in a June 2017 interview on National Public Radio's (NPR) "All Things Considered," suing under the AFPDA meant that BPI would have to prove that ABC called LFTP unsafe to consume. ABC contended that it had never reported LFTB was unsafe, arguing the AFPDA would not apply.

BPI also claimed that ABC's reporting, as well as Avila's tweets related to LFTP, had defamed the company. The company drew attention to a March 7, 2012 tweet in which Avila wrote, "[pink slime]'s just not what it purports to be. Meat." In order for BPI to prove that ABC's reporting and Avila's tweets were actionable, according to Kirtley, the company's attorneys would have to show ABC reported false statements with actual malice. This standard requires a libel plaintiff to prove that defendants made defamatory statements with knowledge of their falsity or with reckless disregard of the truth, as established in *New York Times v. Sullivan*. 376 U.S. 254 (1964).

Lyrissa Lidsky, incoming dean at the University of Missouri School of Law, told *Vice* on June 7, 2017 that it would be an uphill battle for BPI. "I think they definitely suffered economic harm from the report, but the question is, to what extent was the report inaccurate, and if it was inaccurate, to what extent did they recklessly disregard the truth?" Lidsky said.

In 2013, ABC attempted to move the case to federal court on diversity grounds and to have the case heard by a federal jury. However, on June 12, 2013, U.S. District Judge Karen E. Schreier ordered that the case be

heard in South Dakota state court because BPI Technology, based in South Dakota, was a "real party in interest" in the case, among other reasons. (For more information on BPI's 2012 complaint, South Dakota's agriculture disparagement law, and the 2013 decision to have the case heard in state court, see *"Pink Slime" Case to Be Heard in South Dakota State Court* in "Defamation Round-up: Recent Decisions and Pending Cases Put Defamation in Spotlight, Have Potential to Reshape Media-Friendly Laws" in the Summer 2013 issue of the Silha *Bulletin*.)

The Christian Science Monitor reported in March 2014 that Judge Cheryle Gering ruled that the case would move forward following a motion to dismiss by ABC in which the organization argued that BPI had failed to meet the requirements to bring defamation and disparagement claims. Gering let stand 21 of BPI's 26 counts against ABC and the other defendants, as reported on April 29 by *Sioux City Journal*. According to the March 28, 2014 story by *Law360*, Gering did dismiss several of BPI's claims for disparagement, contending that they were preempted by other claims.

ABC appealed Gering's ruling on April 23, petitioning the South Dakota Supreme Court to reverse or clarify portions of her decision related to common law disparagement claims, and the AFPDA. In a May 22 two-page ruling, Chief Justice David Gilbertson denied ABC's appeal and lifted the stay on litigation he had granted while the high court had considered ABC's motion, according to the *Sioux City Journal*.

In an Aug. 2, 2016 ruling, Judge Gering scheduled the jury trial between BPI and ABC to begin in June 2017, according to a *Food Safety News* story. The jury trial was set to take place in Union County Circuit Court in Elk Point, with Gering presiding. On August 22, BPI lawyers voluntarily dismissed five defendants, including ABC News, Kerley, Zirnstein, Custer, and Foshee, according to an Oct. 7, 2016 Minnesota Public Radio (MPR) report.

The following February, Gering dismissed claims against Sawyer because "her actions as anchor . . . [limited] her involvement in doing research" and the claims against her were not sufficient to establish defamation, according to a March 2017 report by *Reuters*. However, Gering denied ABC's motion for summary judgement, retaining the claims against ABC and Avila. "A jury could determine that there is clear and convincing evidence that ABC Broadcasting and Mr. Avila were reckless, that defendants had obvious reason to doubt the veracity of informants, and that they engaged in purposeful avoidance of the truth," Gering said during the hearing. ABC filed a petition in the South Dakota Supreme Court in April 2017 appealing Gering's February ruling. On April 5, *Reuters* reported that Justice Gilbertson denied ABC's petition.

The trial began on June 5, 2017 and was not expected to conclude until the end of July. BPI claimed $1.9 billion in damages, including treble damages under South Dakota's AFPDA. In opening statements, attorney for BPI Dan Webb claimed that ABC used the term "pink slime" 350 times over the course of its reporting, according to *Reuters* on June 28. Webb also showed a picture of LFTB to demonstrate that it "physically doesn't look like slime." Additionally, Webb contended that calling a product "slime," instead of its proper name, would lead viewers or readers to "say they can't imagine anything worse. It connotes something disgusting, inedible."

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> **— Lyrissa Lidsky, University of Missouri School of Law dean**

In its opening statement, ABC countered that its coverage was accurate and deserved protection under the First Amendment. The network also contended that the term "pink slime" was used before its report and that BPI was already losing customers prior to ABC's online and broadcast stories. Additionally, ABC maintained that it used "knowledgeable sources on a matter of keen public interest," according to the Associated Press (AP) on May 30. Kevin Baine, an attorney representing ABC and Avila, previously said in a June 2017 statement that "people deserve to know what's in the food they eat" and that ABC's reporting would "be fully vindicated."

At the onset of the trial, Kirtley said that although the trial decision would have no precedential value, the case was still significant. "I do think it's a bellwether in the sense that it raises two very critical issues," Kirtley told *NPR*'s Robert Siegel. "One is that BPI claims that ABC News was basically on a disinformation campaign, which is another way of saying fake news. The other goes to the heart of what the media are supposed to be doing, which is informing the public about things that might be matters of interest to them but which corporate America might not be interested in sharing with them. And I think that was ABC's justification for doing this story – simply to let people know that this substance was in their ground beef."

On June 28, the *Sioux City Journal* reported that ABC had reached a confidential settlement with BPI. Gering filed the judgment of dismissal after telling those in attendance at the trial that "[n]either the court, nor the jury, nor the public will be told the terms of the settlement today."

In a statement outside the courthouse, Webb said, "We are extraordinarily pleased with this settlement.. . . . I believe we have totally vindicated the product." BPI issued a statement defending their product and their litigation against ABC. "While this was not an easy road to travel, it was necessary to begin rectifying the harm we suffered as a result of what we believed to be biased and baseless reporting in 2012," the statement read. "Through this process, we have again established what we all know to be true about Lean Finely Textured Beef: it is beef, and it is safe, wholesome and nutritious."

After Gering announced the settlement, Avila also spoke briefly outside the courthouse defending his reporting. "I wish [the jury] had had the chance to hear my side of the story," Avila said. "It's important to note we're not retracting anything. We're not apologizing for anything." Avila also said he understood the settlement was a business decision by ABC, a subsidiary of the Disney Media Network division of The Walt Disney Company.

In a written statement, ABC spokeswoman Julie Townsend said the settlement was an "amicable resolution"

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of the lawsuit and that it was in the network's best interests. "Throughout this case, we have maintained that our reports accurately presented the facts and views of knowledgeable people about this product," Townsend wrote. "Although we have concluded that continued litigation of this case in not in the company's interests, we remain committed to the vigorous pursuit of truth and the consumer's right to know about the products they purchase."

Kirtley called the settlement unfortunate because ABC would have had a strong defense had the case continued. "I always regret when a news organization, especially one who could mount a credible defense and has solid financial resources, elects to settle," Kirtley told *The Wrap* on June 28.

In a June 28 interview with the Associated Press (AP), Kirtley also explained how settlements can embolden potential plaintiffs to file a defamation lawsuit. "As a general proposition, I think settlements are bad because they send a message to other litigants that news organizations basically will buy their way out of lawsuits," Kirtley said. "This is a powerful corporation and it represents a powerful industry, and I think everyone should be concerned about the future of investigative reporting when powerful entities can bring an action like this and bring a settlement." She added in a June 28 interview with *Law360*, "I think the word has gotten out to the libel plaintiffs bar that if you're a public figure, you've got a big task ahead of you.. . . But now something like this could embolden them to say give it a try because they might give you some money."

First Amendment attorney Thomas Julin told *Law360* that he was "amazed" the case ever made it to trial because ABC's statements appeared to be either true or opinions, therefore protected under the law. "It's not like they did a report that simply said 'this is pink slime' full-stop and then left it to the imagination of viewers what that meant – ABC went the extra mile and said this is exactly how this product is manufactured," he said.

Because he believed ABC could have won the case, Julin agreed with Kirtley that it was problematic that ABC settled. "It's troubling whenever a case with such strong defenses settles," Julin said. He added that he was concerned the settlement could embolden people and companies to take legal action whenever they do not like how they were portrayed in the media. "[I]t is worrisome, whenever there's a confidential settlement of a billion-dollar case, you don't know what the terms are; that can be as encouraging to plaintiffs as anything else.. . . There will be many plaintiffs and many lawyers that will look at this as a case that will show you media will settle these claims."

> "I do think [the Pink Slime case is] a bellwether in the sense that it raises two very critical issues.. . . One is that BPI claims that ABC News was basically on a disinformation campaign, which is another way of saying fake news. The other goes to the heart of what the media are supposed to be doing, which is informing the public about things that might be matters of interest to them."
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> **— Jane Kirtley, Director of the Silha Center and Silha Professor of Media Ethics and Law**

Los Angeles media lawyer Ted Boutrous agreed with Kirtley and Julin, contending that the settlement could embolden people to attack the press. "It may well be a great settlement for ABC, but we just don't know and these days attackers of the press feel free to ignore the facts and will seize on and twist almost anything to undermine the legitimacy of the media," he said in an interview with *The Wrap*. "I am concerned about the outburst of recently filed defamation suits, and I think news organizations need to fight back hard and explain what they do and why they are doing it."

Enrique Armijo, associate professor at Elon University School of Law, told *Law360* that attacks against the press by politicians and other public figures can influence defamation suits such as this one. "From the president on down, it seems like we have reached a news environment where everything that the media does or doesn't do, intent is ascribed to it," Armijo said. "If the jury was predisposed to think that media, and especially big media, has an agenda, then that makes the plaintiffs' burden of proof easier to meet."

Lidsky contended that defamation cases often swing based on the credibility of the journalist, meaning skepticism about journalistic methods can affect a media defendant's case. "It matters if the media as a whole are really unpopular with the public, because juries are members of that public and they're less likely to find the media credible if they think the whole structure of the media isn't credible," she told *Law360*. "If the president is saying the media is the enemy of the people, that's something that filters down all the way to the trial judges in states where judges are elected."

Sonja West, a professor of First Amendment law at the University of Georgia School of Law, said the BPI's case against ABC could have the consequence of making the press more cautious in its reporting. "If that happens, it's the public who suffers by missing out on valuable information about important matters," West said in a June 28 interview with *Reuters*. "We don't want a press that is always playing it overly safe with their reporting."

Kirtley agreed, adding that the case "was a 'chilling' one from the beginning." "[The settlement] play[s] into the hands of those who want to undermine public confidence in the mainstream media," she said.

Scott Memmel
Silha *Bulletin* Editor

Media Groups and Transparency Advocates Challenge Family's Lawsuit, Judge's Ruling Halting the Release of "Personal" Information

On June 2, 2017, multiple news organizations reported that Patty and Jerry Wetterling had filed a lawsuit to block the release of certain documents from the now-closed investigation into the 1989 abduction and murder of their son, Jacob. The Wetterlings claimed that some of the documents produced by the investigation included personal and sensitive information about their family. The same day, a Stearns County (Minnesota) District Court judge granted a temporary restraining order (TRO), halting the release of over 10,000 documents collected during the 27-year investigation until she could review the documents the Wetterlings claimed contained private information. *Patty Wetterling and Jerry Wetterling v. Stearns County*, No. 73-CV-17-4904 (2017). On, June 27, the Silha Center for the Study of Media Ethics & Law, along with nine other several media organizations and transparency advocates, filed a "complaint in intervention," in addition to arguing for the release of the documents under the Minnesota Government Data Practices Act (MGDPA). Minn. Stat. § 13.01 *et seq.*

PRIVACY

Jacob was 11 years old when he was abducted at gunpoint on Oct. 22, 1989 near his home in St. Joseph, Minn. During the ensuing 27-year investigation after the disappearance of Jacob, local, state and national investigators, including the Federal Bureau of Investigation (FBI), compiled more than 56,000 pages of information and 10,000 documents containing interviews, tips, lead sheets, and investigative reports, according to a June 2 story by Minneapolis' KARE 11.

In October 2015, Danny Heinrich was officially named a person of interest in the Wetterling case after being jailed on federal child pornography charges. On Sept. 1, 2016, Heinrich confessed to kidnapping and killing Jacob in October 1989, according to the *Star Tribune*. On September 3, Stearns County officials announced they had found Jacob's remains after Heinrich led authorities to a farm near Paynesville, Minn. where he had reburied the remains after moving them a year after the murder. Heinrich gave a full, graphic account of the kidnapping, sexual assault, and murder of Jacob, and also confessed to sexually assaulting another boy, Jared Scheierl, nine months prior to the murder. Minnesota Public Radio (MPR) reported the confessions were part of a plea agreement that he would not face charges in either case, but instead provide closure and information for the families. In November, Heinrich was sentenced to 20 years in prison, the statutory maximum for the federal child pornography charge to which he pleaded guilty.

Jacob's disappearance and the ensuing investigation drew local and national attention, including an American Public Media podcast series "In The Dark," which received a Peabody Award in 2016. The case also led to the creation of the Jacob Wetterling Crimes Against Children and Sex Offender Registration Act, which requires states to register and track sex offenders. 42 U.S.C. § 14071. Congress amended the Wetterling Act in 1996 with the addition of Megan's Law, which requires law enforcement agencies to release information about registered sex offenders that is "relevant" and "necessary to protect the public." 42 U.S.C. § 14071(e).

In May 2017, Stearns County Attorney Janelle Kendall announced that the county sheriff would release the 10,000 documents from the Wetterling investigation, on June 5. In a June 2 statement, Stearns County Sheriff Don Gudmundson said, "The struggle here is balancing our need to protect the privacy of victims and state law that requires the release of a closed investigative file." The state law discussed by Gudmundson is the MGDPA, which classifies documents and information from closed or inactive investigations as "public data," "unless 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. Additionally, the MGDPA "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn. Stat. §13.01(3).

However, on June 2, the Wetterlings filed a lawsuit in the Minnesota District Court for the Seventh Judicial District, requesting a TRO that would halt the release of some information in the investigative file. The *Star Tribune* reported on June 3 that the Wetterlings had been allowed to review the file prior to its release and claimed that despite redactions, their privacy would still be violated if certain documents were made public. In the lawsuit, the Wetterlings alleged that the investigative documents include "personal information regarding [their] marriage and family relationship" and "highly personal details about the Plaintiffs, their minor children, and the inner working of the Wetterling family." Additionally, the lawsuit explains that law enforcement personnel were often "physically present in the Wetterling family home." The complaint alleged that the Wetterlings would "suffer irreparable harm if the redacted investigative file . . . is publicly released" and asked the court to grant injunctive relief preventing the release of the personal data.

The complaint contended that such information "is protected from disclosure by the state and federal constitutions" and that "[b]oth the United States Supreme Court and the Minnesota Supreme Court afford individuals a fundamental and personal right to informational privacy that prevents governmental intrusion into and public discourse about intimate details regarding personal and family matters." The full complaint is available online at: https://www.courthousenews.com/wp-content/uploads/2017/06/WetterlingComplaint.pdf.

On June 2, Judge Ann L. Carrott issued a TRO enjoining the Stearns County Sheriff's Office from "disseminating or disclosing the personal information contained in the Jacob Wetterling criminal investigative file to any person." Carrott

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cited the 1965 Minnesota Supreme Court case *Dahlberg Brothers, Inc. v. Ford Motor Co.*, which provided "five considerations . . . relevant in deciding whether to [issue a temporary restraint]." These considerations include, "(1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief. (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial. (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief. (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal. (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree." 137 N.W.2d 314 (Minn. 1965). Carrott concluded that "each of the five factors . . . weighs in favor of the issuance of a Temporary Restraining Order to maintain the status quo among the parties."

Carrott ordered that the plaintiffs "shall submit a copy of the Personal Information for the Court's *in camera* review," giving the family until June 30 to produce the documents they wanted to keep from public view.

On June 6, the *Star Tribune* reported that Carrott moved the deadline for producing the documents containing the personal information to July 31. Doug Kelley, the Wetterling's attorney, said the delay stemmed from a request by the FBI for Stearns County to return investigative documents shared by the agency to the county during the course of the investigation, according to the *Star Tribune*. According to the St. Paul *Pioneer Press* on June 2, Kendall and Gudmundson both announced that they would wait to release the documents until after Carrott privately reviewed them and ruled on what should be made public.

The Wetterlings' request to keep certain documents secret drew criticism from media members and transparency advocates. On June 27, ten media and transparency organizations, including The Silha Center for the Study of Media Ethics and Law, Minnesota Newspaper Association (MNA), and Minnesota Coalition on Government Information (MNCOGI), among others, filed a "complaint in intervention" in the Stearns County District Court in order to become a part of the legal proceedings regarding the investigative documents. The organizations sought to intervene "for the purpose of challenging plaintiffs' claim that there is a right of privacy arising under the state or federal constitutions that takes precedence over the public access requirements of the MGDPA." The complaint added, "Applicants are not aware of any legal authority suggesting that records subject to the MGDPA and classified as public can be withheld based on a purported constitutional privacy right.. . . Should this Court accept plaintiffs' argument . . . it would severely impair the ability of Applicants and their members to protect their interest in public access to government records, because it would create enormous uncertainty about when and under what specific circumstances public records could be withheld based on the constitutional privacy right."

> "While sincerely sympathetic to the Wetterlings, the Minnesota Newspaper Association believes the lawsuit poses a direct threat to the integrity of the [Minnesota Government Data Practices Act], the state law that governs the classification of government records and that requires most to be made public."
>
> **— Minnesota Newspaper Association**

Minnesota law requires that in order for an applicant "to be permitted to intervene in an action," the party must "claim an interest relating to the property or transaction which is the subject of the action." Minn. R. Civ. P. § 24.01 *et seq.* The applicant must also show that their interest is not adequately protected by the existing parties in the legal action. The news and transparency organizations alleged that they "have a strong and substantial interest in the subject matter of this action, which focuses on the issue of public access to records created, collected, and maintained by government agencies." They also contended that "no existing party is likely to challenge plaintiffs' claim that disclosure of the records in question is prohibited by a constitutional privacy right." The full complaint in intervention is available online at: https://www.scribd.com/document/352444051/Minnesota-Media-Organization-Intervention-in-Wetterling-Documents-Release.

In a statement after filing the complaint, the MNA wrote, "While sincerely sympathetic to the Wetterlings, [MNA] believes the lawsuit poses a direct threat to the integrity of the Data Practices Act, the state law that governs the classification of government records and that requires most to be made public."

Mark Anfinson, a Minneapolis media lawyer representing the MNA, explained the organizations' reason for filing the complaint in a June 27 interview with the *Pioneer Press*. "Once you recognize that the existence of a constitutional right of privacy can be used to override the Data Practices Act, you'll have an endless parade of celebrities, prominent officials and people who can afford attorneys threatening government agencies with lawsuits if they release records about them, even though classified as public under the Data Practices Act," he said. "That threat alone will have a paralyzing effect on public access."

In a June 27 interview with KSTP-TV, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley said the MGDPA should not be bent to satisfy the Wetterling's desire for privacy. "The statute is unequivocal," Kirtley said. "While I think no one has any interest in adding to the pain of the Wetterlings family, we have to think about this in the broader sense."

Kirtley further discussed the Wetterlings' legal arguments in an interview with MPR's Cathy Wurzer on June 7. "They are apparently relying on the federal Constitution, the Fourth Amendment and also the Minnesota Constitution, which does not have an explicit privacy provision," Kirtley said. "The argument that they're making to apply the Fourth Amendment here is somewhat novel because it normally wouldn't apply in a federal setting." She continued, "The Legislature doesn't provide an exemption for this and I

think that the court should follow the law."

The purpose of the MGDPA provision making inactive investigation records public, according to Kirtley, is to "give the public a chance to know what the government is up to." She added, "I understand that the Wetterlings think their family happenings do not reflect on that, but – with all due respect – I don't think that is their decision to make."

Some experts were concerned that even if the court ultimately rejects the Wetterlings' arguments, a consequence of the ruling would be lawmakers seeking to amend the MGDPA. Don Gemberling, secretary of MNCOGI, a nonprofit group that works to educate the public on issues related to public records and government transparency, told *Minnesota Lawyer* on June 12 that "[i]f the Wetterlings win, the practical effect is that we return to 1981 and a situation where the Legislature spent a whole lot of time not being able to come up with a compromise on law enforcement data."

Gemberling also illustrated the importance of the MGDPA in a June 27 interview with the *Pioneer Press*. "A whole lot of information has made available to the public, which is helpful in understanding how investigations by law enforcement agencies are done, and whether or not sometimes they are screwed up," he said. "If we somehow stick limitations on those kinds of releases of information, then we start chipping away at government accountability and understanding how things work, and whether or not people are really doing their jobs."

Kirtley agreed with Gemberling's concerns about an amendment of the MGDPA. "I would predict that at the next chance the legislature had they would go in and amend this provision to specifically cover this kind of material," she said. "We have certainly seen in other cases around the country when you have a bad case or a case that upsets people, the legislature often will react by closing off public access. I don't think that's a good way to make public policy, but it is, unfortunately, somewhat inevitable."

In a June 27 statement, Kelley defended the Wetterlings' desire to withhold private information. "Patty and Jerry Wetterling firmly believe in transparency in government and recognize that law enforcement files should generally be made public once a criminal investigation ends," the statement read. "Our lawsuit seeks to preserve the Wetterling's constitutionally protected privacy interests. A very small part of the law enforcement file contains things which do not belong in a police file and misinformation of a character I've never before seen in my 42 years of practicing criminal law. We've asked the judge to review a very small set of documents (less than three one thousands of one percent) that is intensely personal and protected from disclosure by the state and federal constitutions and the Minnesota Government Data Practices Act. None of the documents in issue mention Danny Heinrich or shed any light on the performance of law enforcement investigating Jacob's disappearance."

> "[The Wetterlings] are apparently relying on the federal Constitution, the Fourth Amendment and also the Minnesota Constitution, which does not have an explicit privacy provision.. . . The argument that they're making to apply the Fourth Amendment here is somewhat novel because it normally wouldn't apply in a federal setting."
>
> **— Jane Kirtley, Director of the Silha Center and Silha Professor of Media Ethics and Law**

On July 27, WCCO, Minneapolis' CBS affiliate, reported that the Wetterlings filed a motion to prevent the media and transparency organizations from intervening in the legal proceedings. The Wetterlings asked Carrott to decide whether to release the documents before determining whether to let the media and transparency groups intervene in the case.

On August 11, a hearing on the motion to intervene was held in St. Cloud, Minn., with both sides given the opportunity to explain their positions. At the hearing, Kelly and co-counsel Adam Ballinger reiterated their desire for Carrott to look at the contested documents *in camera* before ruling on the motion to intervene, according to an email from Anfinson provided to the Silha Center. On August 23, the Wetterlings filed a memorandum responding to an August 9 memo submitted by Anfinson in support of intervention. Carrott also provided the news and transparency organizations an opportunity to respond to the plaintiffs' memo within seven days, if the organizations determine it is necessary.

Anfinson predicted that Carrott would make a decision on the intervention motion within two weeks of the Wetterling's attorneys filing the memo, though she would be allowed up to 90 days. As the *Bulletin* went to press, Carrott had not issued a decision regarding the contested information, nor had she ruled whether the media organizations were allowed to intervene.

Brittany Robb
Silha Research Assistant

U.S. Customs and Border Protection Searches of Electronic Devices, Data at U.S. Borders Raise Privacy and Legal Concerns

In April 2017, U.S. Customs and Border Protection (CBP) released data indicating a significant increase between 2015 and early 2017 of warrantless searches by CBP agents of travelers' personal and work electronic devices, as well as demands for their passwords and social media information. The data raised legal questions and privacy concerns stemming from CBP's 2009 policy directive allowing warrantless searches of electronic devices at U.S. borders. Also in the first half of 2017, President Donald Trump's administration, the U.S. Department of Homeland Security (DHS), and the U.S. State Department proposed or implemented "extreme vetting" measures of visa applicants and foreign visitors to the U.S., further raising concerns about the privacy of travelers' social media accounts and data. Finally, on June 20, 2017, Kevin McAleenan, CBP's acting commissioner, responded to a February 2017 letter from Sen. Ron Wyden (D-Ore.), citing several statutes defending the agency's warrantless searches, but also indicating that CBP agents do not search data stored on external servers. Nevertheless, on April 4, 2017, Sen. Wyden, along with Sen. Rand Paul (R-Ky.), introduced a bill aiming to prevent searches of American citizens' and permanent residents' electronic devices without a warrant, as well as prohibiting CBP's pressure on travelers to disclose passwords or social media accounts.

LAW ENFORCEMENT

2009 Policy Continues to Raise Legal Questions Amid Increase in Warrantless Searches at U.S. Borders

In August 2009, CBP released Directive No. 3340-049, titled "Border Search for Electronic Devices Containing Information," which remains an active policy. The purpose of the directive is to provide "guidance and standard operating procedures for searching, reviewing, retaining, and sharing information contained in computers, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players, and any other electronic or digital devices, encountered . . . at the border." The policy cites several reasons for searching these devices, including to "help detect evidence relating to terrorism and other national security matters, human and bulk cash smuggling, contraband, and child pornography."

Significantly, the directive allows "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 can do so "with or without individualized suspicion," meaning a search warrant or probable cause are not required, according to a March 13, 2017 ProPublica story. The policy cites several federal statutes related to imports and immigration, among other areas, justifying these warrantless searches.

If an officer determines that there is probable cause to believe "the device, or copy of the contents thereof, contains evidence of or is the fruit of a crime that CBP is authorized to enforce," the officer may "detain the [device], or copies of information contained therein, for a brief, reasonable period of time to perform a thorough border search," which should generally not exceed five days.

The policy includes several exceptions. First, if officers encounter material that appears "to be legal in nature, or an individual . . . assert[s] that certain information is protected by attorney-client or attorney work product privilege . . . the Officer must seek advice from the CBP Associate/ Assistant Chief Counsel before conducting a search." Second, sensitive material "such as medical records and work-related information carried by journalists . . . shall be handled in accordance with any applicable federal law and CBP policy." Finally, if an officer encounters "business or commercial information in electronic devices," the officer must "treat such information as business confidential information and shall protect that information from unauthorized disclosure." In all cases, information of a sensitive nature can only be shared with federal agencies that "have mechanisms in place to protect appropriately such information."

However, an incident in February 2017 indicates that the exceptions may not always be honored, or be completely clear. *The Atlantic* reported on Feb. 13, 2017 that Sidd Bikkannavar, a 35-year-old engineer working at the National Aeronautics and Space Administration (NASA) Jet Propulsion Laboratory in Pasadena, Calif., was told by a CBP agent to hand over his smartphone, despite being part of the CBP Global Entry program, which allows members to pass through customs lines after their fingerprints and passport are scanned. When Bikkannavar complied, the CBP agent requested Bikkannavar's passcode to gain access to his phone. Although Bikkannavar explained that the phone was property of the Jet Propulsion Lab and contained sensitive information, the border agent maintained that he had the authority to access the device. Eventually, Bikkannavar provided the passcode and waited 30 minutes as the agent "r[a]n 'algorithms' on the device . . . to search for threats." This incident suggests that CBP's directive is applicable to both personal electronic devices as well as those owned and provided by an employer, even if it contains sensitive information, according to *The Atlantic*.

Furthermore, journalists also face searches of their electronic devices, even if they are used for work purposes, according to the Reporters Committee for Freedom of the Press (RCFP). In an Oct. 28, 2014 commentary, the Committee to Protect Journalists (CPJ) contended that searches of journalists' personal devices used for work purposes can expose sensitive data, such as contact information of confidential sources, classified documents, or notes taken during investigative reporting, despite the CBP policy exception intended to be applied to journalists.

Consequently, the 2009 policy directive, and resulting actions by CBP agents, continue to raise legal questions, particularly that an agent can search an electronic device "with or without individualized suspicion" and that the federal government "has long claimed that Fourth Amendment protections prohibiting warrantless searches don't apply at the border," according to an American Civil Liberties Union (ACLU) release on March 14, 2017. Many privacy experts have pushed against these claims, often citing three court cases, including the 2014 U.S. Supreme Court

case *Riley v. California*, the 2013 U.S. Court of Appeals for the Ninth Circuit's decision in *United States v. Cotterman*, and the 2015 ruling by the U.S. District Court for the District of Columbia in *United States v. Kim*.

Riley arose out of two lower court cases in which the plaintiffs argued that searches of their smartphones constituted "warrantless search[es] in violation of the Fourth Amendment." *Riley v. California*, 134 S.Ct. 2477 (2014). 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." Chief Justice Roberts added, "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." (For more information on the *Riley* decision, see "Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection" in the Summer 2014 issue of the Silha *Bulletin*.)

A second case often cited is *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.

Writing for the majority, Judge M. Margaret McKeown determined that "the legitimacy of the initial search of Cotterman's electronic devices at the border is not in doubt" because "a suspicionless cursory scan of a package in international transit was not unreasonable." However, the majority concluded 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,'" which McKeown called "a modest requirement in light of the Fourth Amendment."

Although *Cotterman* perhaps provided some guidance for the potential limitations of CBP's authority, it is binding only in the nine Western states in the Ninth Circuit and it is "not clear whether CBP has taken the 2013 decision into account more broadly," according to ProPublica on March 13, 2017.

Finally, on May 8, 2015 District Court Judge Amy Berman Jackson, citing *Riley* and *Cotterman*, ruled that searches of computers at U.S. borders must be "reasonable," with the totality of circumstances taken into account, including the potential invasion of individuals' privacy. *United States v. Kim*, 103 F.Supp. 3d 32, 59 (D.D.C. 2015). The case arose in October 2012 when DHS officials obtained information that defendant Jae Shik Kim, a Korean businessman, was "involved in a previous shipment of controlled articles to a Chinese businessman in Korea, who then forwarded them to customers in Iran." In December, before being allowed to board his flight home, Kim's laptop was seized by a DHS agent and shipped to a forensic specialist in San Diego. Only after the specialist created an identical copy of the hard drive, which was searched using specialized software, did the DHS agent obtain a warrant to conduct the search of the hard drive.

> "[W]hile the Fourth Amendment's warrant requirement doesn't apply at the border, its 'general reasonableness' requirement still does, and is supposed to protect against unreasonable searches and seizures.. . . That may seem nuanced, but it's a critical distinction.. . . We don't surrender our constitutional rights at the border."
>
> **— Hugh Handeyside, ACLU National Security Project staff attorney**

Jackson ruled that the search of Kim's laptop was not "reasonable" given the totality of the circumstances surrounding the search. She wrote, "the Court is troubled by the lack of particularized grounds to believe that this defendant was engaged in criminal activity at the time he was exiting the United States" and that "the invasion of [Kim's] privacy was substantial." Jackson added that the court found the search of Kim's laptop using specialized forensic software "was supported by so little suspicion of ongoing or imminent criminal activity, and was so invasive of Kim's privacy and so disconnected from not only the considerations underlying the breadth of the government's authority to search at the border, but also the border itself, that it was unreasonable."

In addition to citing court precedent, privacy advocates have also cited arguments against warrantless searches at U.S. borders based on the Fourth and Fifth Amendments. Hugh Handeyside, a staff attorney with the ACLU's National Security Project contended in a March 13, 2017 interview with NBC News that "while the Fourth Amendment's warrant requirement doesn't apply at the border, its 'general reasonableness' requirement still does, and is supposed to protect against unreasonable searches and seizures." He added, "That may seem nuanced, but it's a critical distinction.. . . We don't surrender our constitutional rights at the border."

Additionally, in a March 13, 2017 commentary for ProPublica, reporting fellow Patrick G. Lee suggested that the individuals at the border may be able to invoke their Fifth Amendment right to avoid being "a witness against himself" in a criminal case. However, Lee conceded that lower courts "have produced differing decisions on how exactly the Fifth Amendment applies to the disclosure of passwords to electronic devices."

Despite these contentions, CBP agents and the federal government have maintained that the Fourth Amendment does not apply at the border, what NBC News calls a "legal loophole to collect intelligence." Nevertheless, Liza Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice, suggested to ProPublica that questions remain if an agent can compel an individual to disclose their passwords or to search their devices with a warrant. "That's still an unsettled question.. . . Until it becomes clear that it's illegal to do that, they're going to continue to ask," she said.

The ACLU agreed. "Until the Supreme Court weighs in on the constitutional limits of the government's powers at the border, questions about the government's authority to conduct these kinds of

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searches aren't likely to be settled.. . . Lower courts have issued conflicting rulings on whether individualized suspicion should be a condition for such a search."

Amidst the legal questions and uncertainty, the practice of searching electronic devices and requesting passwords by CBP agents at U.S. borders increased between October 2015 and March 2017. According to data published by CBP in an April 11, 2017 release, searches of cellphones by border agents more than doubled from 8,503 arriving international travelers to 19,033 in 2016. Searches rose from 857 in October 2015 to 2,560 one year later, rising to 2,595 in March 2017 before the data was released. The full press release is available online at: https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0.

In a March 13, 2017 interview with NBC News, Mary Ellen Callahan, former chief privacy officer at the Department of Homeland Security (DHS), called the increases "significant." She added, "That [increase] was clearly a conscious strategy, that's not happenstance."

In the release, the CBP contended that the increase in electronic device searches was "driven by CBP's mission to protect the American people and enforce the nation's laws in this digital age.. . . No court has concluded that the border search of electronic devices requires a warrant, and CBP's use of this authority has been repeatedly upheld." CBP Deputy Executive Assistant Commissioner John Wagner is quoted as saying, "Electronic device searches are integral in some cases to determining an individual's intentions upon entering the United States.. . . These searches, which affect fewer than one-hundredth of one percent of international travelers, have contributed to national security investigations, arrests for child pornography and evidence of human trafficking. CBP officers are well trained to judiciously conduct electronic device searches and to protect sensitive information that may be encountered."

Additionally, NBC News contended that the increase may have been "sparked by a string of domestic incidents in 2015 and 2016 in which the watch list system and the FBI failed to stop American citizens from conducting attacks. The searches also reflect new abilities to extract contact lists, travel patterns and other data from phones very quickly."

The Atlantic reported on April 12, 2017 that although the percentage of travelers being searched remained very low, with about eight in every 100,000 travelers being searched, there is a "steady rise [that] shows no signs of slowing."

Federal Agencies, Trump Administration Propose and Implement Measures for "Extreme Vetting"

Following President Donald Trump's January 2017 executive order banning Muslim individuals from several Middle Eastern countries, the Trump Administration, the U.S. Department of Homeland Security (DHS), and the U.S. State Department each proposed or implemented policy changes regarding the "extreme vetting" of visa applicants and foreign visitors to the United States. *The Washington Post* reported on April 4, 2017 that among the most significant changes were increased searches of individuals' electronic devices and mandatory checks of their social media history. Several former immigration officials, as well as privacy experts, criticized the proposed changes, calling them time consuming and ineffective, among other claims.

On Jan. 27, 2017, President Trump signed an executive order banning Muslim individuals from Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen from entering the United States, as reported by CNN. President Trump called for "far-reaching steps for 'extreme vetting'" of individuals looking to enter the U.S. in connection with the "travel ban." Just prior to the order, the Council on American-Islamic Relations (CAIR), the nation's largest Muslim civil rights and advocacy organization, had filed complaints with U.S. Customs and Border Protection (CBP), DHS, and the U.S. Department of Justice (DOJ) after reports indicated an "increased scrutiny of American Muslims' social media accounts and the contents of mobile phones, along with interrogations about constitutionally-protected beliefs," according to a Jan. 18, 2017 CAIR press release.

The Verge reported on January 30 that following President Trump's executive order, "border agents [increasingly] confronted targeted travelers with an unusual request: access to their social media accounts." According to *The Verge*, an immigration lawyer named Mana Yegani reported Border Patrol agents in Houston, Texas were "checking new arrival's Facebook pages, alongside questions about political views and associations."

The following week, then-U.S. Homeland Security Secretary John F. Kelly defended the practice. Kelly told the U.S. House of Representatives Homeland Security Committee that foreign visitors should have to provide their online passwords and submit to social-media searches in order to enter the United States, *The Atlantic* reported on Feb. 10, 2017. "If they don't want to cooperate then you don't come in," Kelly said in the February 8 meeting.

Joseph Lorenzo Hall, the chief technologist at the Center for Democracy and Technology, criticized Kelly's comments in a February 9 blog post. "Asking for passwords and other credentials is beyond the pale," he wrote. "With that kind of access, they can not only see what you've publicly posted, but things you haven't posted yet, private messages, private lists, they can impersonate you, even do these things on accident. This kind of access is profoundly invasive."

Sophia Cope, staff attorney at the Electronic Frontier Foundation (EFF), agreed in a February 8 interview with *The Guardian*. "Whether border agents demand usernames and passwords to social media accounts or access apps, such searches . . . violate human rights norms around free speech and privacy for foreigners and implicate the constitutional rights of Americans," she said.

On March 23, *The New York Times* reported that the Trump administration sent four cables between March 10 and March 17 to U.S. embassies, requesting that they conduct "extra scrutiny" of visa applicants. In the cables, Secretary of State Rex W. Tillerson called for embassy officials to "scrutinize a broader pool of visa applicants to determine if they pose security risks to the United States," including mandatory checks of social media history if the individual had ever been to a country or territory controlled by the Islamic State, according to the *Times*.

On April 4, 2017, *The Wall Street Journal* reported that DHS officials were also considering stricter policies for visa applicants and other foreign individuals seeking entry to the U.S. As part of a review of existing vetting procedures DHS officials planned to "significantly increase demands for information from all visa applicants, including visitors and others seeking to immigrate." *The Wall Street Journal* reported that there would be two changes to current U.S.

policy. First, CBP agents "would be asking applicants to hand over their telephones so officials could examine their stored contacts and perhaps other information." Visitors have previously had their phones examined at ports of entry, but a phone review "isn't routinely requested during the application stage." Second, CBP officials "would ask applicants for their social-media handles and passwords so that officials could see information posted privately in addition to public posts." According to a June 1 *Fortune* magazine story, the social media screening proposed by DHS officials could include citizens of close U.S. allies in the Visa Waiver Program, including the United Kingdom and Australia, in addition to other nations.

ABC News reported on May 4, 2017 that the U.S. State Department had also proposed changes to existing vetting practices, including proposed tougher questions for some visa applicants. Among the information requested in the new questionnaire would be "[s]ocial media platforms and identifiers, also known as handles, used during the last five years; and [p]hone numbers and email addresses used during the last five years," according to the State Department's proposal.

On May 31, *Reuters* reported that the Trump administration and the Office of Management and Budget had approved the State Department's new questionnaire for U.S. visa applicants, which required five years' worth of social media handles, among other information. Border agents would ask for social media details in the event "such information is required to confirm identity or conduct more rigorous national security vetting," according to an anonymous State Department official who spoke with *Reuters*. On June 29, *The Hill* reported that the State Department had begun instructing embassy and consular officials to institute social media checks, specifically of people coming from regions of Iraq and Iran under Islamic State control.

Privacy experts and former government officials expressed concern over the potential changes. Leon Rodriguez, who previously headed the U.S. Citizenship and Immigration Services, a DHS agency, told *The Wall Street Journal* that although information gleaned from phones and social media could help assess threats, it would also be a time-consuming process and that people with bad intentions would only need to change their practices. "The real bad guys will get rid of their phones," Rodriguez said. "They'll show up with a clean phone."

In a May 4 interview with *Reuters*, John Sandweg, a former senior official at the Department of Homeland Security, agreed that the process would be labor intensive and have little pay-off. "The more effective tactics are the methods that we currently use to monitor terrorist organizations, not just stumbling into the terrorist who is dumb enough to post on his Facebook page 'I am going to blow up something in the United States,'" Sandweg said. Greg Siskind, an immigration attorney in Memphis, agreed. "Somebody's got to do the work," he told *Reuters*. "It's going to cause operations at a lot of consulates [to] slow to a crawl."

Senator Receives Letter Clarifying CBP Policies; Introduces Bill Seeking to Eliminate Warrantless Searches of Americans at U.S. Borders

On Feb. 20, 2017, CNN reported that Sen. Ron Wyden (D-Ore.) wrote a letter to then-Secretary of Homeland Security John F. Kelly asking for clarification regarding U.S. Customs and Border Protection (CBP) agents' searches of travelers' electronic devices at U.S. borders, as well as their requests for travelers' passwords and social media account information. In a June 20 letter responding to Wyden, Kevin McAleenan, CBP's acting commissioner, cited several statutes defending the agency's practices, but also indicating that CBP agents do not search data stored on external servers or cloud storage, according to a July 12 NBC News story. Meanwhile, CNN reported on April 4, 2017 that Sens. Wyden and Rand Paul (R-Ky.) introduced a bill aiming to prevent searches at U.S. borders of American citizens' and permanent residents' electronic devices without a warrant. The bill would also allow Americans to cross the border without being forced to hand over account passwords and social media information.

Wyden sent his February 2017 letter to Kelly in response to "recent media reports of Americans being detained by [CBP] and pressured to give CBP agents access to their smartphone PIN numbers or otherwise provide access to locked mobile devices." Wyden called the reports "deeply troubling," especially following Kelly's comments that CBP should demand social media passwords from all visitors of the U.S. Wyden asked a series of questions in the letter, including "[w]hat legal authority permits CBP to ask for or demand, as a condition of entry, that a U.S. person disclose their social media or email account information . . . [and/or] turn over their device PIN or password to gain access to encrypted data?" Wyden's full letter is available online at: https://www.wyden.senate.gov/download/?id=B947731A-2394-484B-81E3-FDD49530EBF4&download=1.

In a letter dated June 20, 2017, Kevin McAleenan, then-nominee for CBP Commissioner, responded to several of Wyden's questions, as reported by NBC News. McAleenan cited several statutes defending the searches without probable cause by CBP, including 8 USC § 1357(c), which authorizes a search without a warrant of "the personal effects in the possession of any person seeking admission to the United States," if the CBP officer "may have reasonable cause to suspect that grounds exist for denial of admission to the United States . . . which would be disclosed by such search." McAleenan also maintained that CBP's inspection of electronic devices "does not require the consent of that traveler." Additionally, he wrote that if a traveler refuses to unlock their device or provide passwords, CBP officers can "detain the item." He added that smartphone searches are "exceedingly rare."

But perhaps most significantly, McAleenan wrote that searches by CBP apply only to content that is "physically resident on the device during CBP inspection," including call histories, text messages, contacts, and more. Consequently, according to McAleenan, "CBP does not access information found only on remote servers through an electronic device presented for examination, regardless of whether those serves are located abroad or domestically," therefore including cloud storage. According to McAleenan, CBP's Office of Field Operations issued "a nationwide muster in April 2017 reminding its officers of this precise aspect of the border search policy." McAleenan's full letter is available online at: http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/170712-cpb-wyden-letter.pdf.

Observers expressed mixed reactions to what McAleenan wrote. Drew Mitnick, policy counsel at the digital rights organization Access Now, told *The Washington Post* on July 14 that although he and other privacy advocates welcomed McAleenan's clarification, CBP rules could easily be changed to a

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more intrusive policy. "[T]his policy is at odds with recent broad expansions of CBP collection of social media information, which can enable the agency to access, store and analyze a significant amount of data on travelers and their connections, revealing highly personal information," Mitnick said. "Moreover, if CBP officers are not permitted to seek data stored in the cloud, it makes the case even weaker for them to seek travelers' passwords, as Secretary Kelly has proposed."

In a July 13 commentary for *The Verge*, writer Russell Brandom contended that the distinction between devices and cloud storage is not as clear as McAleenan makes it seem. "While McAleenan's testimony draws a sharp distinction between devices and the cloud, the division is often less sharp in practice," Brandom wrote. "The letter's phasing leaves room for border searches of recent email and social media messages, provided the information is accessible on a traveler's phone at the time of the search (that is, not "solely" on a remote server)."

In his February 2017 letter to Kelly, Wyden also indicated that he intended to introduce legislation to "guarantee that the Fourth Amendment is respected at the border by requiring law enforcement agencies to obtain a warrant before searching device, and prohibiting the practice of forcing travelers to reveal their online account passwords." Between sending his letter to Kelly and receiving the response back from CBP, Wyden, along with Sen. Rand Paul, introduced S.823, titled "Protecting Data at the Border Act," on April 4.

The bill first provided that individuals "have a reasonable expectation of privacy in the digital contents of their electronic equipment, the digital contents of their online accounts, and the nature of their online presence," including at U.S. borders. The bill alleged that "accessing the digital contents of an online account, or obtaining information regarding the nature of the online presence of a United States person entering or exiting the United States, without a lawful warrant based on probable cause, is unreasonable under the Fourth Amendment to the Constitution of the United States."

Under the legislation, a government body or official may not "access the digital contents of any electronic equipment belonging to or in the possession of a United States person at the border without a valid warrant supported by probable cause." Second, a government entity cannot "deny entry into or exit from the United States by a United States person" who refuses to disclose an access credential, provide access to digital contents of an electronic device, or provide online account information. Third, a government entity may not delay entry into or exit from the United States for longer than the period of time "necessary to determine whether the United States person will . . . consensually provide an access credential, access, or online account information," which is not to exceed four hours.

As *The Verge* journalist Adi Robertson noted in an April 4 commentary, the bill was only intended for "U.S. persons," meaning citizens or permanent residents. "Because it applies only to US persons — either citizens or permanent residents — it wouldn't address complaints from foreign travelers, nor stop the administration from asking visa applicants to turn over phones and social media details for 'extreme vetting.'" She added, "Though its chances of passing are likely slim, the bill is meant to address growing concern over invasive customs searches, especially as the Trump administration puts a greater focus on aggressive border security measures."

If a warrant was not obtained, "any copy of the digital contents in the custody or control of a Governmental entity shall immediately be destroyed . . . [and] the digital contents, and any information derived from the digital contents, may not be disclosed to any Governmental entity or a State or local government." However, the authors of the bill were careful to note that the bill does not "prohibit a Governmental entity from conducting an inspection of the external physical components of the electronic equipment to determine the presence or absence of weapons or contraband without a warrant."

The bill contains emergency exceptions, including if there is immediate danger of death or serious injury, "conspiratorial activities threatening the national security interest of the United States," or any activity "characteristic of organized crime." Additionally, a government entity does not have to obtain a warrant if an individual provides verbal consent and the entity subsequently "obtain[s] written consent" prior to searching an individual's electronic device.

The bill was sponsored by Reps. Jared Polis (D-Colo.) and Blake Farenhold (R-Texas) in the U.S. House of Representatives, and was referred to the Senate Committee on Homeland Security and Governmental Affairs on April 4, 2017. As the *Bulletin* went to press, the bill remained in the committee.

In a statement following the introduction of S.823, Wyden explained the purpose behind the legislation. "Americans' constitutional rights shouldn't disappear at the border," Wyden said. "By requiring a warrant to search Americans' devices and prohibiting unreasonable delay, this bill makes sure that border agents are focused on criminals and terrorists instead of wasting their time thumbing through innocent Americans' personal photos and other data." He added, "Folks are going to be less likely to travel freely to the US with the devices they need if they don't feel their sensitive business information is going to be safe at the border."

In a separate statement, Paul cited the 2004 U.S. Supreme Court case *Riley v. California*, in which the Court ruled a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." "As the Supreme Court unanimously recognized in 2014, innovation does not render the Fourth Amendment obsolete," Paul said. "It still stands today as a shield between the American people and a government all too eager to invade their digital lives. Americans should not be asked to surrender their rights or privacy at the border, and our bill will put an end to the government's intrusive practices."

Scott Memmel
Silha *Bulletin* Editor

Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Courts Split on Article III Standing Bar Following *Spokeo*

On Aug. 14, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled on remand that plaintiff Thomas Robins claimed a "sufficiently concrete" injury to establish Article III standing under the U.S. Constitution in order to bring a claim against Spokeo, Inc. the operator of an online "people search engine," for violating the Fair Credit Reporting Act (FCRA). *Robins v. Spokeo*, *Inc.*, No. 11-56843 (9th Cir. 2017). The ruling followed the U.S. Supreme Court's May 2016 decision in *Spokeo*, *Inc. v. Robins* in which the Court determined that the Ninth Circuit had failed to properly analyze the "concreteness" requirement for establishing standing, and remanded the case to the lower court to decide if Robins' claims met the "concreteness" standard. 136 S.Ct. 1540 (2017).

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Conversely, in May 2017, the Second and Fourth Circuits both ruled that plaintiffs did not have Article III standing to sue for violations of state or federal statutes because they had not incurred any concrete injuries. Although the Second and Fourth Circuit decisions both favored the defendants, other circuit courts, including the Ninth Circuit, have ruled in favor of plaintiffs having Article III standing in similar cases, following the Supreme Court's ruling in *Spokeo*. Court observers argued that the split would not be remedied until the Supreme Court weighed in on the issue once again.

On May 16, 2016, the Supreme Court decided *Spokeo*, vacating and remanding a Ninth Circuit decision because the lower court improperly analyzed the "concreteness" requirement for establishing an injury-in-fact. Spokeo was the operator of an online "people search engine," which gathered personal information about individuals for users, including employers evaluating prospective employees. The case arose when information pertaining to the plaintiff Thomas Robins contained inaccuracies, misrepresenting his marital and employment status and inflating his income and level of education. Robins filed a class action suit against Spokeo, alleging violations of the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681g(a)(2). The U.S. District Court for the Central District of California dismissed Robins' complaint for lack of Article III standing. The Ninth Circuit reversed, holding that Robins had "established a sufficient injury-in-fact . . . because [he] alleged that Spokeo violated specifically his statutory rights, which Congress established to protect against individual rather than collective harms." *Robins v. Spokeo*, *Inc.*, 742 F.3d 409, 414 (9th Cir. 2014).

Justice Samuel Alito, writing for a 6-2 majority, vacated and remanded the Ninth Circuit decision. The court determined that in order to have Article III standing, a plaintiff must demonstrate that he or she suffered an injury-in-fact, which consists of the invasion of a legally protected interest which is "concrete and particularized." Alito wrote that in determining whether an intangible harm is sufficient under Article III, courts must determine whether the injuries have "traditionally been regarded as providing a basis for a lawsuit in English or American courts." Additionally, Alito wrote that Congress's judgment is both "instructive and important." Therefore, the Court held that Robins could not satisfy the concreteness requirement with a "bare procedural violation" of the FCRA.

Ninth Circuit Rules *Spokeo* Plaintiff Claimed a Sufficiently Concrete Injury to Meet Article III Standing

On Aug. 15, 2017, the Ninth Circuit considered whether Robins had claimed a "sufficiently concrete injury" to meet Article III standing after the Supreme Court remanded the case in May 2016. The court reversed the district court's dismissal of Robins' action, instead ruling that "because the alleged injuries were also sufficiently particularized to Robins and caused by Spokeo's alleged FCRA violations that were redressable in court, Robins adequately alleged the elements necessary for Article III standing."

Writing for the unanimous three-judge panel, Judge Diarmuid F. O'Scannlain first addressed Robins' argument that "Spokeo's alleged violation of FCRA—specifically its failure reasonably to ensure the accuracy of his consumer report—is, alone, enough to establish a concrete injury." O'Scannlain explained that although the FCRA "purportedly allows [Robins] to sue for willful violations without showing that he suffered any additional harm . . . the mere fact that Congress said a consumer like Robins may bring such a suit does not mean that a federal court necessarily has the power to hear it." O'Scannlain cited the Supreme Court's conclusion in *Spokeo* that "a plaintiff does not 'automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" Instead, the plaintiff must allege a statutory violation "that caused him to suffer some harm that 'actually exist[s].'"

Nevertheless, O'Scannlain maintained that "congressional judgment still plays an important role in the concreteness inquiry, especially in cases—like this one—in which the plaintiff alleges that he suffered an *intangible* harm" [emphasis in original]. He wrote, "while Robins may not show an injury-in-fact merely by pointing to a statutory cause of action, the Supreme Court also recognized that *some* statutory violations, alone, do establish concrete harm" [emphasis in original].

Consequently, the Ninth Circuit posed two questions: "(1) whether the statutory provisions at issue were established to protect [Robins'] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."

Regarding the first question, O'Scannlain agreed with Robins "that Congress established the FCRA provisions at issue to protect consumers' concrete interests." The court ruled that the "interests protected by FCRA's procedural requirements are 'real,' . . . [and] the dissemination of false information in consumer reports can itself constitute a concrete harm." O'Scannlain added, "given the ubiquity and importance of consumer reports in modern life—in employment decisions, in loan applications, in home purchases,

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and much more— the real-world implications of material inaccuracies in those reports seem patent on their face."

The court also looked to "historical practice" to determine if "the statutory provisions at issue were established to protect [Robins'] concrete interests." The court cited several federal court opinions, including *In re Horizon Healthcare Servs. Inc. Data Breach Litig.* in which the Third Circuit compared the FCRA's privacy protections to common law protections. 846 F.3d 625, 638–40 (3rd Cir. 2017). O'Scannlain concluded that "guided by both Congress's judgment and historical practice . . . the FCRA procedures at issue in this case were crafted to protect consumers' (like Robins') concrete interest in accurate credit reporting about themselves."

The court next turned to "whether Robins has alleged FCRA violations that actually harm, or at least that actually create a 'material risk of harm' to, this concrete interest." O'Scannlain determined that Robins' claim "clearly implicates . . . [his] concrete interests in truthful credit reporting" because Spokeo "ensured the accuracy of his consumer report" and "published the report on the Internet." The court added, "It does not take much imagination to understand how inaccurate reports on such a broad range of material facts about [Robins'] life could be deemed a real harm . . . we agree with Robins that information of this sort (age, marital status, educational background, and employment history) is the type that may be important to employers or others making use of a consumer report. Ensuring the accuracy of this sort of information thus seems directly and substantially related to FCRA's goals."

Finally, the court rejected Spokeo's argument "that [Robins'] allegations of harm are too speculative to establish a concrete injury" and that Robins only "asserted that such inaccuracies *might* hurt his employment prospects, but not that they present a material or impending risk of doing so" [emphasis in original]. Thus, the court reversed the district court ruling and remanded.

Second & Fourth Circuits Rule on Article III Standing; Circuit Courts Split Following *Spokeo* Ruling

In May 2017, the Second and Fourth Circuits ruled in similar cases that plaintiffs had not sustained sufficiently concrete injuries in order to have Article III standing to sue for violations of state or federal statutes. The decisions fell on one side of a circuit court split following the Supreme Court's ruling in *Spokeo*, with some observers contending that the Court must weigh in on the issue once again in order for the split to be remedied.

Following *Spokeo*, several observers criticized the decision as lacking clear guidance for lower courts about how plaintiffs establish "concreteness" of injury. In a May 17, 2016 post on LinkedIn's "Pulse" blog, Daniel Solove, the John Marshall Harlan Research Professor of Law at George Washington University Law School, argued that while the Court sought to restrict Congress's ability to establish concrete harms via statutory violations, it failed to create a sufficient test for determining when Congress is not permitted to elevate such violations to that level.

In a June 22, 2016 commentary for *The Legal Intelligencer*, Reed Smith LLP attorney Richard L. Heppner Jr. wrote that merely citing procedural failures is no longer sufficient to establish standing. According to Heppner, plaintiffs now must show that the defendant's conduct caused or increased the risk of harm. However, he added that *Spokeo* provided "little guidance for other 'increased risk' cases."

On May 2, 2017, the Second Circuit affirmed in a summary order a district court's dismissal of a class action suit. *Whalen v. Michaels Stores, Inc.*, 2017 WL 1556116 (2nd Cir. 2017). The court concluded that plaintiff Mary Jane Whalen had failed to allege an actual injury in connection to a security breach at Michaels Stores, Inc. ("Michaels").

The case arose on Jan. 25, 2014, when Michaels notified customers of "possible fraudulent activity on some U.S. payment cards," which the store later confirmed was a security breach. Michaels reported that hackers had used a "highly sophisticated malware" to retrieve the credit and debit card information from the systems of Michaels stores and its subsidiary, Aaron Brothers, though there was no evidence that the hackers were able to retrieve any other customer information. Between May 8, 2013 and Jan. 27, 2014, approximately 2.6 million cards were affected.

Whalen, one of Michaels' customers during the security breach, filed a complaint in the United States District Court for the Eastern District of New York on Dec. 2, 2014, alleging that she had suffered actual damages and faced an increased risk of future harm. *Whalen v. Michael Stores Inc.*, 153 F.Supp.3d 577 (E.D.N.Y. 2015). Whalen alleged five different types of injuries, including "(1) 'actual damages including monetary losses arising from unauthorized bank account withdrawals, fraudulent card payments, and/or related bank fees charged to their accounts,' . . . (2) the loss of time and money associated with credit monitoring and obtaining replacement cards, . . . (3) overpayment for Michaels' services because Whalen would not have shopped at Michaels had she known that Michaels did not properly safeguard her personal identified information ("PII"), . . . (4) the lost value of Whalen's credit card information, . . . and (5) a statutory violation of GBL § 349," New York's general business law concerning deceptive acts and practices. N.Y. GBL § 349. In response, Michaels filed a motion to dismiss, arguing that Whalen lacked Article III standing and that she "failed to establish claims for breach of implied contract and for violation of GBL § 349."

On Jan. 8, 2016, District Court Judge Joanna Seybert dismissed Whalen's complaint, noting that "(i) no fraudulent charges were actually incurred; (ii) a plaintiff cannot use his/her own spending on credit monitoring to 'manufacture standing,' particularly if the compromised card is cancelled; (iii) Michaels did not charge a premium on its goods to reflect data security; (iv) Whalen did not explain how her personal information had lost value; and (v) the bare assertion of a violation of NY GBL § 349 does not create standing." Seybert also wrote that because Whalen cancelled the compromised credit card, she did not face a "substantial" risk of future harm.

On appeal, the Second Circuit affirmed the district court's judgement. Clerk of Court Catherine O'Hagan Wolfe wrote the summary order for the court, which first explained that Article III standing requires a plaintiff to "allege an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling,'" citing the 2013 U.S. Supreme Court case *Clapper v. Amnesty Int'l USA*. 133 S. Ct. 1138, 1147 (2013). *Clapper* also required the plaintiff to show that a future injury

is "certainly impending," rather than being "simply speculative."

The court next reviewed Whalen's theories of injury, including that "(1) her credit card information was stolen and used twice in attempted fraudulent purchases; (2) she face[d] a risk of future identity fraud; and (3) she ha[d] lost time and money resolving the attempted fraudulent charges and monitoring her credit." The court pointed out that Whalen did not allege "a particularized and concrete injury suffered from the attempted fraudulent purchases" because she never had to pay, or was asked to pay, any fraudulent charge. Whalen also did not allege "how she can plausibly face a threat of future fraud, because her stolen credit card was promptly canceled after the breach and no other personally identifying information . . . [was] alleged to have been stolen." Finally, the court noted that Whalen provided "no specifics about any time or effort that she herself has spent monitoring her credit." Based on these conclusions, the court ruled that Whalen "alleged no injury that would satisfy the constitutional standing requirements of Article III," affirming the judgment of the district court.

Following the ruling, Hanley Chew and Tyler G. Newby, attorneys at Fenwick & West LLP, explained in a May 4 blog post that the summary decision "heightened pleading requirements for standing in data breach cases" because plaintiffs "cannot rely on general allegations of increased risk of identity theft from stolen personal information coupled with mitigation costs to establish a concrete injury. Nor can they rely on an offer of free credit monitoring by a company to supplement those otherwise deficient factual allegations."

A May 19, 2017 Simpson Thacher & Bartlett LLP memorandum contended that the decision was "a welcome development for companies that experience data breaches" because plaintiffs no longer have standing to bring claims "if they do not incur fraudulent charges, reasonably expend resources to prevent fraudulent charges, or suffer some other actual injury or plausible risk of a future one."

In a similar case, on May 11, 2017, the Fourth Circuit vacated and remanded a district court decision that the plaintiff had demonstrated a concrete injury sufficient to satisfy Article III standing. *Dreher v. Experian Info. Solutions, Inc.*, No. 15-2119 (4th Cir. 2017). The case arose in 2010 when plaintiff Michael Dreher was undergoing a background check for a security clearance. During the process, the federal government discovered Dreher was associated with a delinquent credit card account. Dreher determined that his cousin had taken out a credit card in his name to cover expenses for a failing business. Subsequently, Dreher requested credit reports from three credit agencies, including Experian Information Solutions, Inc. ("Experian"), to clear up the delinquent account. The Experian reports listed a delinquent account under the names "Advanta Bank" or "Advanta Credit Cards" (Advanta).

In March and April 2011, Dreher sent two letters to Advanta requesting "some verification that [he] owed this debt." On April 18, 2011, he received a response on Advanta letterhead with a March 2011 statement showing an outstanding balance of $15,746.94. The following month, Dreher requested that Advanta delete the inaccurate information, which was not deleted until June 6, 2012. Dreher contended that the "process caused 'additional stress and wasted hours of [his] time,'" though his security clearance was approved by the federal government.

Dreher was unaware that in early 2010, the Utah Department of Financial Institutions had closed Advanta, which had failed to withstand the 2008 financial crisis. Deutsche Bank Trust Company received a security interest in Advanta receivables and appointed CardWorks, Inc., and CardWorks Servicing LLC ("CardWorks") as servicer of Advanta's portfolio. CardWorks decided to do business using the Advanta name, phone number, and website.

On September 21, 2011, Dreher individually sued Experian and CardWorks in the U.S. District Court for the Eastern District of Virginia, later amending the complaint to include three class claims and seven individual claims. *Dreher v. Experian Information Solutions, Inc.*, 71 F.Supp.3d 581 (E.D. Va. 2014). Dreher contended that Experian "willfully violated the FCRA by failing to include the name 'CardWorks' in the Advanta tradelines on its credit reports." On May 30, 2013, U.S. District Court Judge John A. Gibney denied Experian's motion for partial summary judgement in which the credit reporting agency contended that Dreher did not provide sufficient evidence of willfulness required under the Fair Credit Reporting Act (FCRA).

On Oct. 31, 2014, the parties filed cross-motions for partial summary judgment on October 31, 2014. Experian contended that "Dreher and the class members lacked Article III standing, and Dreher argued Experian willfully violated the FCRA." Gibney denied Experian's motion, concluding that Dreher had sufficient "injury-in[-]fact for constitutional standing" because Experian violated Dreher's right under the FCRA "to receive the 'sources of information' for one's credit report," which Experian failed to provide. Conversely, the district court granted Dreher's motion, concluding "as a matter of law that 'Experian committed a willful violation of the [FCRA].'" On Aug. 26, 2015, the district court entered final judgment on behalf of Dreher in the amount of $11.7 million. Experian appealed and the Fourth Circuit held the case in abeyance pending the decision in *Spokeo*.

On May 11, 2017, Judge Stephanie Thacker wrote the unanimous opinion for the Fourth Circuit addressing the Article III standing requirement. Thacker first explained *Spokeo*'s requirement that a plaintiff must show that the he or she "'suffered 'an invasion of a legally protected interest' that is 'concrete and particularized'" in order to establish injury-in-fact.

Thacker turned to Dreher's argument that Experian had violated the provision of the FCRA requiring that a consumer reporting agency "shall, upon request . . . clearly and accurately disclose to the consumer . . . [t]he sources of the information [in the consumer's file at the time of the request]." Dreher claimed he suffered "a cognizable 'informational injury'" because Experian failed to provide "specific information to which [he] w[as] entitled under the FCRA."

Thacker wrote that although "'informational injury' is a type of intangible injury that can constitute an Article III injury-in-fact . . . a statutory violation alone does not create a concrete informational injury sufficient to support standing," as outlined in *Spokeo*. Instead, a constitutionally cognizable informational injury requires that an individual "lack[ed] access to information to which he is legally entitled and that the denial of that information creates a 'real' harm with an adverse effect."

In order to determine whether a party suffered such a harm, the Court

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considered whether the injuries have "traditionally been regarded as providing a basis for a lawsuit in English or American courts," as outlined in *Spokeo*. The Fourth Circuit concluded that Dreher "[did] not propose a common law analogue for his alleged FCRA injury." Additionally, the court found "no traditional right of action that is comparable."

Next, the court turned to reasoning by the D.C. Circuit, which concluded that a plaintiff suffers a concrete informational injury if he or she "suffers . . . by being denied access to [information], the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). The Fourth Circuit agreed with this reasoning and concluded that Dreher "failed to show how the knowledge that he was corresponding with a CardWorks employee, rather than an Advanta employee, would have made any difference at all in the 'fair[ness] or accura[cy]' of his credit report, or that it would have made the credit resolution process more efficient," as required under the FCRA. Instead, he claimed there is "value in 'knowing who it is you're dealing with,'" among other claims, which the court called "chiefly customer service complaints" and not the type of harm Congress sought to prevent when it enacted the FCRA.

Finally, Dreher was left "with a statutory violation divorced from any real world effect." The court concluded that "receiving a creditor's name rather than a servicer's name – without hindering the accuracy of the report or efficiency of the credit report resolution process – worked no real world harm on Dreher." As a result, the court held that Dreher was not adversely affected by the alleged error on his credit report" and that he suffered "no real harm." The court vacated the district court's judgment and remanded it to the lower court "with instructions to dismiss the case."

A May 15, 2017 Troutman Sanders LLP blog entry contended that the *Dreher* decision was "one of the most significant post-*Spokeo* decisions to date." The post explained that the decision "is welcome and significant good news for defendants, and a warning to plaintiffs that hyper-technical claims premised on hypothetical harms may not be sufficient in the Fourth Circuit."

Robert D. Perrow & J.P. McGuire Boyd, Jr., partners at Williams Mullen, argued in a May 2016 post that the Fourth Circuit made the proper ruling based on the *Spokeo* decision. "In its decision, the Fourth Circuit has applied Spokeo as intended," they wrote. "To meet the standing test for federal jurisdiction for violation of a statute, a plaintiff must show an injury-in-fact from the violation of the statute that is concrete and particularized.. . . Here, if Experian had reported technically correct information, it would not have changed Dreher's credit report or made the dispute resolution process more efficient. In addition, reliance on mere frustration and inconvenience is not enough in the Fourth Circuit to show a concrete injury."

A May 17 Fenwick & West LLP commentary contended that *Dreher* "adopt[ed] a narrow interpretation of *Spokeo* in statutory injury cases and aligns with recent post-*Spokeo* decisions finding that purely procedural or technical violations of statutory rights are insufficient to establish Article III standing."

Circuit courts have split concerning how *Spokeo* is applied in statutory injury cases. In addition to *Whalen* and *Dreher*, other circuit courts, as well as district courts, have ruled in favor of the defendants and indicated a heightened pleading requirement for Article III standing, according to a Feb. 15, 2017 *Law360* story. For example, the Eighth Circuit ruled in *Braitberg v. Charter Communications, Inc.* that the plaintiffs lacked Article III standing and failed to state a claim alleging a violation of the Cable Communications Policy Act, 47 U.S.C. § 551(e). 836 F.3d 925 (8th Cir. 2016). (For more information on an additional case in which the court favored the plaintiff, see "Eleventh Circuit Affirms Dismissal of Video Privacy Class Action, Legal Questions Remain" on page 41 of this issue of the Silha *Bulletin*.)

Conversely, other circuit courts have ruled more favorably for plaintiffs, as reported by *Law360*. For example, the Eleventh Circuit ruled in *Church v. Accretive Health* that the plaintiff alleged a concrete injury sufficient to establish Article III standing in a Fair Debt Collection Practices Act (FDCPA) case. 654 Fed.Appx. 990 (11th Cir. 2016).

Marc Rotenberg, executive director of the Electronic Privacy Information Center (EPIC), a consumer advocacy organization, told *Legal Newsline* on July 12 that courts citing the *Spokeo* decision to reach different conclusions is a result of the decision itself. "Part of the confusion comes from the court's own decision," Rotenberg said. "The (Supreme Court's) decision hasn't helped lower courts clarify what's required to establish standing."

A Simpson Thacher & Bartlett LLP memorandum on May 19, 2017 attributed part of the problem that the Supreme Court "did not prescribe what types of data breach injuries (actual or potential) are sufficiently concrete to confer standing." The memorandum also contended that the mixed circuit court results will impact how plaintiffs bring their complaints. "Given that the standing issue has produced mixed results across U.S. courts in other circuits, however—and that data breaches often affect consumers in all 50 states—plaintiffs are likely to 'forum shop' to maximize the chances that their claim will survive a threshold standing challenge," the memorandum read. A Jan. 23, 2017 *Bloomberg BNA* story predicted that "depending on the context, various splits of authority concerning standing remain."

Some observers have argued that the only means to resolve the circuit court split is for the Supreme Court to weigh in once again. A May 4, 2017 Fenwick & West LLP commentary contended that the circuit split "is not likely to be resolved if and until the Supreme Court weighs in on the issue."

John Wester, an attorney at Robinson, Bradshaw & Hinson, wrote in a July 6 commentary, "With several circuits now reporting, when the Supreme Court will return to this field looms as a more urgent question."

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Silha *Bulletin* Editor

Eleventh Circuit Affirms Dismissal of Video Privacy Class Action; Legal Questions Remain

On April 27, 2017, the U.S. Court of Appeals for the Eleventh Circuit ruled that downloading a mobile software application ("app") and gaining access to "premium content" through a cable package did not make the plaintiff a "subscriber" allowing him to bring a claim under the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710 (2002). *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017). Plaintiff Ryan Perry alleged that Cable News Network, Inc. (CNN) had wrongfully disclosed his viewing records to a third-party analytics company without his consent. However, the court determined that although Perry had Article III standing under the U.S Constitution to bring a VPPA claim, he was not a "subscriber" under the statute and had not established an "ongoing commitment or relationship" with CNN, affirming a district court's dismissal of Perry's attempt to amend his complaint. Following the ruling, observers were divided on whether the decision provided clarity in VPPA class action cases.

DATA PRIVACY

The case arose in early 2013 when Perry downloaded the CNN app to his iPhone in order to receive breaking news alerts, stories, video clips, and coverage of live events. Perry alleged that the CNN app, without a user's knowledge, "tracks the user's views of news articles and videos and also collects a record of this viewing activity." According to Perry's complaint, when a user closes the app, CNN sends a "collected record of viewing activity" to Bango, a third-party data analytics company. Perry also contended that CNN sends Bango a media access control address ("MAC address"), a series of numbers tied to a particular user's mobile device. Bango then uses the MAC address to identify the user's other internet activity in order to track their online behavior, as well as to compile "personal information, including the user's name, location, phone number, email address, and payment information."

On February 18, 2014, Perry filed a proposed class action in the United States District Court for the Northern District of Georgia, Atlanta Division. *Perry v. Cable News Network*, 2016 WL 4373708 (N.D. Ga. 2016). In his first amended complaint, Perry set forth one cause of action for violation of the VPPA, seeking injunctive relief, as well as statutory and punitive damages, due to CNN's alleged unlawful disclosure of personally identifiable information.

The VPPA prohibits "[a] video tape service provider [from] knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." Additionally, the VPPA defines consumer as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." If a section of the statute is violated, "any person . . . may bring a civil action in a United States district court."

Meanwhile, in the fall of 2015, the Eleventh Circuit heard a similar case in which plaintiff Mark Ellis claimed that Cartoon Network's free "CN App" "kept records of the videos he watched and shared those records with Bango each time Mr. Ellis closed out of the CN app" in violation of the VPPA. *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1257 (11th Cir. 2015). However, the court ruled on Oct. 9, 2015 that an individual who "downloads and uses a free mobile application on his smartphone to view freely available content, without more, is not a 'subscriber' (and therefore not a 'consumer') under the VPPA." The court concluded that to be a "subscriber," the user must have an "ongoing commitment or relationship . . . [with] the entity which owns and operates the app." Because Ellis was not a subscriber or consumer under the VPPA, the Eleventh Circuit affirmed the dismissal of his case by the district court.

Subsequently, Perry, whose first amended complaint made similar allegations under the VPPA as Ellis', sought leave of the district court to amend his complaint. On April 20, 2016, the district court granted CNN's motion to dismiss the amended complaint and denied Perry's attempt to revise his complaint, reasoning that further amendment to the complaint would be futile.

On appeal, the Eleventh Circuit first considered whether Perry had Article III standing under the U.S. Constitution to bring an action over a violation of the VPPA. Judge Jane A. Restani wrote the unanimous opinion, which first reviewed the 2016 U.S. Supreme Court case *Spokeo, Inc. v. Robins* because Perry's "alleged violation of a statutory right is not on its own sufficiently concrete." 136 S. Ct. 1548 (2016). In *Spokeo*, the Supreme Court ruled that in addition to being "particularized," intangible injuries, including statutory violations, must be "concrete [because a] bare procedural violation" of a statute is not sufficient to establish injury-in-fact. Additionally, the Court ruled that it is necessary to determine "whether [the] alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." (For more information on the *Spokeo* decision, see "Ninth Circuit Addresses *Spokeo* after Supreme Court Remands Case; Circuit Courts Split on Article III Standing Bar Following *Spokeo*" on page 37 in this issue of the Silha *Bulletin* and "Supreme Court Issues Long-Awaited Spokeo Ruling" in the Summer 2016 issue.)

The Eleventh Circuit concluded that Perry had satisfied *Spokeo*'s concreteness requirement of Article III standing by alleging a violation of the VPPA. Restani wrote that violation of the VPPA constitutes a concrete harm because the statute "prohibits the wrongful disclosure by a video tape service provider of video tape rental or sale records" and "creates a cause of action for '[a]ny person aggrieved by any act of a person in violation of this section.'" The court concluded that VPPA's creation of a cause of action for this type of an invasion of privacy "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," as required by *Spokeo*. Consequently, the court dismissed CNN's motion to dismiss the appeal.

Next, the court reviewed the district court's decision to deny Perry's leave to amend his complaint. According to the opinion, Perry conceded that his initial complaint "fail[ed] to state a claim under the VPPA," but that the district court erred in denying leave to amend. Perry claimed he would amend his complaint first to "allege that in addition to downloading the CNN App and viewing CNN content on his iPhone, he also subscribed to CNN's television channel through his cable package." Second, he would contend that "CNN's transmission of his MAC address and video history is

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'personally identifiable information' as defined in the VPPA."

Nevertheless, the court concluded that the district court had properly held that Perry's attempt to amend his complaint was "futile." The court determined that Perry was not a subscriber to CNN because he has not demonstrated an ongoing commitment or relationship with CNN. Restani wrote that Perry "did not 'sign up for or establish an account with' CNN, 'provide any personal information to' CNN, 'make any payments' to CNN in using its app, 'become a registered user' of CNN or its app, 'receive a [CNN] ID,' 'establish a [CNN] profile,' 'sign up for any periodic services or transmissions,' nor 'make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content.'"

Additionally, Restani contended that Perry's proposed amendment would only show a commitment to his cable television provider, not to CNN. First, Perry contended that his television subscription provided him access to certain features on the CNN app that were not available to a typical user, including watching live CNN television on the app. However, Restani countered that Perry's choice to watch the same content on the app, rather than his television, which appeared to be the same content, "[did] not somehow convert him into a subscriber of CNN" because he did not demonstrate how he engaged CNN in any way beyond downloading the app. Furthermore, Perry used his credentials associated with his cable television provider's account, not a separate CNN account, meaning he could access the live television "solely because of his separate relationship with his cable television provider."

Second, Perry contended that CNN indirectly received monetary benefit through his direct payments to his cable television provider. However, Restani wrote that Perry's argument "misse[d] the mark" because "Perry's distinct financial relationship with his cable television provider does not shed light on his commitment to CNN."

Here, the court distinguished the case from a 2016 First Circuit ruling, *Yershov v. Gannett Satellite Information Network, Inc.*, in which the plaintiff provided his mobile device identification number and GPS location to Gannett, therefore "establish[ing] a relationship" with the proprietor of the app. 820 F.3d 482 (1st Cir. 2016). In this case, Perry conceded that he was "never required to register for the CNN App, even stating that the CNN App did not request his email address, his credit card number, or his GPS location."

Consequently, the court ruled that Perry's investment and commitment with downloading the CNN app, combined with his cable subscription, were not sufficient to be a "subscriber" and to state a claim under the VPPA. The court affirmed the district court's judgement and determined that CNN may not be held liable under the VPPA for providing "personally identifiable information" to a third party.

Following the ruling, some observers contended that the decision provided clarity for courts in cases in which a plaintiff brings VPPA claims related to app or online use. In a May 30, 2017 blogpost, Jeff Landis, an attorney at ZwillGen PLLC, wrote that *Perry* was another ruling in a trend of federal courts favoring defendants in VPPA cases. "The Eleventh Circuit's decision marks a continuation of the trend in VPPA cases," he wrote. "To date, no VPPA case brought against a media company based on videos offered via an App or online has resulted in liability to a defendant."

Ethan Forrest, an associate at Covington & Burling LLP, wrote an April 28 commentary in which he called *Perry* "another win for VPPA defendants." He continued, "[T]he narrowing of the 'subscriber' definition may make VPPA cases less palatable to the plaintiff's bar."

However, other observers contended that uncertainty remained in class action related to the VPPA. In a May 1, 2017 commentary for Fenwick & West LLP, attorneys Hanley Chew and Tyler G. Newby discussed the significance of the ruling in relation to the VPPA. "By holding that a user does not establish a commitment or relationship that rises to the level of being a 'subscriber' when an unregistered user downloads an app and watches content on his or her mobile device, the Eleventh Circuit narrows the reach of the VPPA to mobile apps that require users to sign up, register, establish a profile, or pay for the use of that app," they explained.

However, Chew and Newby still cautioned that companies should avoid disclosing personal information to third parties without users' consent. "Despite *Perry*, companies and organizations that offer free mobile apps should still act cautiously and obtain consent from their users for any collection and disclosure of their users' personal information," they wrote.

In an April 27, 2017 story for *Law360*, reporter Allison Grande wrote that "video service providers can't take total comfort in the Eleventh Circuit's ruling" given the "unsettled questions such as what constitutes 'subscriber' and whether information such as media access control addresses and video histories constitute 'personally identifiable information' under the statute (VPPA)."

Venkat Balasubramani of Focal PLLC wrote in a May 1, 2017 commentary that uncertainty remains even after *Perry*. "There's a tension there between reading the statute broadly to protect consumers on the one hand, and facilitating crushing privacy lawsuits on the other," he wrote. "There's also of course the difference between the state of affairs when the statute was passed (e.g., before Netflix) to the changing landscape of content consumption today. You can certainly argue that content nowadays often involves a non-monetary quid pro quo, so looking to whether the consumer pays money is a poor metric. But it's certainly a bright line. And as this case illustrates, the 'ongoing relationship' test spelled out by Ellis and applied here is vague at best." Consequently, Balasubramani predicted that "courts [will] continue to struggle with aspects of the [VPPA]."

Scott Memmel
Silha *Bulletin* Editor

Controversial Undercover Video Makers Face Legal Action and Ethical Concerns

DATA PRIVACY

During the summer of 2017, two undercover video makers faced legal action after recording individuals and organizations without consent, among other unethical and potentially unlawful methods. On July 11, 2017, a federal judge held pro-life activist David Daleiden and two of his attorneys in contempt after videos by the self-described journalist appeared on the attorneys' website, despite a preliminary injunction. The videos purported to show how abortion providers made fetal tissue available to researchers. On July 7, the California Attorney General's office refiled 14 felony counts brought against Daleiden and a co-conspirator after a San Francisco Superior Court judge had dismissed the charges on June 21. On June 1, Robert Creamer, the co-founder of Strategic Consulting Group, NA, Inc., a member organization of Democratic National Committee vendor Democracy Partners LLC, filed a civil complaint against James O'Keefe, a conservative political activist known for producing controversial hidden camera videos on his website, Project Veritas. O'Keefe posted a series of videos following a "sting operation" that infiltrated Democracy Partners' private offices. Subsequently, Creamer and Scott Foval, another Democratic political operative, left their jobs. In recent months, O'Keefe has also found himself embroiled in controversy after releasing a series of videos from CNN's offices in Atlanta, Ga.

Federal Judge Holds Daleiden and his Attorneys in Contempt; California Attorney General's Office Refiles Felony Charges Against the Video Maker

On July 11, 2017, U.S. District Judge for the Northern District of California William Orrick said he was holding video maker and pro-life activist David Daleiden and two of his attorneys in contempt of court after a series of links to videos appeared on their website in May, according to the Associated Press (AP) on July 17. In March 2017, the U.S. Court of Appeals for the Ninth Circuit had upheld Orrick's order for a preliminary injunction blocking the release of the videos produced by Center for Medical Progress (CMP), an anti-abortion group which Daleiden founded and heads. The videos primarily depicted two annual meetings of the National Abortion Federation (NAF), an association of abortion providers, and purported to show how abortion providers made fetal tissue available to researchers, sparking controversy and investigations into Planned Parenthood Federation of America, a nonprofit organization that provides sexual health care in the United States and globally. In March 2017, California prosecutors charged Daleiden and co-conspirator Sandra Merritt with 14 felony counts of unlawfully recording people without their consent, as well as one count of conspiracy to invade privacy. On July 7, the California Attorney General's office refiled the 14 felony counts of unlawful recording after a San Francisco Superior Court judge had dismissed them on June 21. The charges drew criticism from media advocates as setting a dangerous precedent against investigative reporting.

In March 2013, Daleiden, who describes himself as a "guerilla journalist," founded CMP to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue," according to CMP's website. In 2014 and 2015, Daleiden and other anti-abortion activists, including CMP board member Troy Newman, misrepresented themselves as representatives of BioMax Procurement Services LLC, a company purportedly engaging in fetal tissue research, in order to gain entrance to NAF's 2014 and 2015 annual meetings, according to the Ninth Circuit's memorandum affirming the preliminary injunction against Daleiden's videos. Daleiden went by the alias Robert Dauod Sarkis and signed "Exhibit Agreements" for both annual meetings in which he acknowledged, among other things, that all written, oral, or visual information disclosed at the meetings "is confidential and should not be disclosed to any other individual or third parties" without permission from NAF. Daleiden, other CMP activists, and investigators hired by CMP also signed "Confidentiality Agreements" that prohibited "video, audio, photographic, or other recordings of the meetings or discussions" at the NAF conferences without written consent by NAF. After gaining access to the meetings, Daleiden and his co-conspirators recorded several hundred hours of the conferences, including conversations with other attendees. During this period, Daleiden also used fake IDs to gain access to Planned Parenthood clinics across the U.S.

In July 2015, Daleiden made several recordings public, each alleging that Planned Parenthood employees sold fetal tissue for profit, which would be illegal, according to a July 26, 2016 story by *The New York Times*. Daleiden and CMP continued releasing recordings through the summer of 2017. According to a May 25, 2017 story by the *Los Angeles Times*, the videos "stoked the American abortion debate when they were released in 2015 and increased congressional heat against Planned Parenthood that has yet to subside." Planned Parenthood denied the claims and argued that the videos were deceptively edited. The *Los Angeles Times* reported on March 28, 2017 that the organization would later restrict affiliated clinics from accepting monetary reimbursement for making fetal tissue available to researchers.

On July 31, 2015, NAF filed a lawsuit in the U.S. District Court for the Northern District of California, requesting a temporary restraining order (TRO) prohibiting CMP, Daleiden, and Newman from releasing the recordings of the NAF annual meetings, the dates of future NAF meetings, and names and addresses of NAF members. The lawsuit also sought to bar the enjoined individuals from attending future NAF meetings. According to a July 31, 2015 press release by NAF, Orrick issued a TRO preventing Daleiden and co-conspirators from releasing any information or recordings from the NAF meetings. Orrick wrote that without the restraining order, "NAF would be likely to suffer irreparable injury . . . in the form of harassment, intimidation, violence, invasion of privacy, and injury to reputation, and the requested relief is in the public interest."

Politico reported on Sept. 23, 2015 that Daleiden and CMP were ordered by Orrick, as part of the discovery

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process tied to NAF's lawsuit, to turn over private documents and submit to questions regarding how they got access to the NAF meetings. Additionally, Daleiden was required to provide the full, raw footage he collected from some of the meetings he attended. The Ninth Circuit upheld the lower court's decision requiring CMP to participate in discovery. *Politico* also reported that Daleiden was ordered to turn over documents in a separate case brought by StemExpress, the tissue procurement company featured in some of Daleiden's videos.

Additionally, Orrick ruled on Oct. 6, 2015 that CMP must turn over all of its illegally recorded material to NAF before submitting it to Congress pursuant to a subpoena connected to a Congressional investigation into Planned Parenthood. Orrick wrote "I will not countenance a game of hide the ball with respect to these documents, video footage and communications, that interferes directly with these proceedings." Later that month, Daleiden and CMP turned over more than 500 hours of secretly recorded footage, according to a NAF press release.

In December 2015, James Bopp Jr., a free-speech and anti-abortion advocate, filed an emergency appeal on behalf of Daleiden, asking U.S. Supreme Court Justice Anthony Kennedy to block a November 20 order by Orrick requiring Daleiden to disclose the names of CMP's supporters and donors, citing the First Amendment right of association. Bopp also argued that Daleiden was a citizen journalist and was entitled to protect confidential information and sources under the California Shield Law, which provides that journalists "cannot be adjudged in contempt . . . for refusing to disclose . . . the source of any information procured . . . in gathering, receiving or processing of information for communication to the public." Cal. Evid. Code § 1070. The *Los Angeles Times* reported on Dec. 4, 2015 that Justice Kennedy, who oversees appeals from California, turned down the request, affirming the Ninth Circuit's ruling.

The following January, Orrick replaced the TRO with a preliminary injunction, according to a Jan. 29, 2016 story by *Rewire*, an online publication aiming "to foster public knowledge and enlightenment . . . on issues of sexual and reproductive health, rights, and justice." The difference between a TRO and a preliminary injunction is that TROs are meant to be a short-term measure, whereas preliminary injunctions remain in effect during the pending court case, unless otherwise modified or dissolved, according to the American Bar Association.

In the 42-page order, Orrick wrote that he did not find Daleiden's claims about being a journalist very convincing. "Defendants did not – as Daleiden repeatedly asserts – use widely accepted investigative journalism techniques," Orrick wrote. "The products of that Project – achieved in large part from the infiltration – thus far have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions (at least with respect to the NAF materials) of criminal conduct."

> "There is no question that serious investigative journalists provide an invaluable service to society by revealing truthful information otherwise hidden from the public and helping to hold institutions and individuals accountable. But individuals who masquerade as investigative journalists, whose actions show a gross disregard for basic principles of journalistic ethics such as telling the truth, serve no valid purpose."
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> **— Journalists and journalism scholars, June 2016 *amici curiae* brief**

Orrick was not alone in questioning Daleiden's claims of being a journalist. *Salon*'s Amanda Marcotte wrote in a January 28 article that Daleiden "has no right to call himself a journalist . . . because of his relationship to the truth." *Slate* magazine reporter Dahlia Lithwick agreed in a February 2 story. "The difference between journalism and what CMP did is that journalists seek truth, while Daleiden seeks to show that somewhere in between the edited seams and faked voiceovers of his films there lies a truth he cannot quite prove but wants us to believe anyhow," Lithwick wrote. "That can be called many things, but 'journalism' probably isn't one of them."

In a June 2016 *amici curiae* brief, 18 journalists and journalism scholars criticized Daleiden's claims that he was an "investigative journalist" and was entitled to journalist's protections. The brief highlighted the importance of investigative reporting, but also the dangers of an individual posing as a journalist: "There is no question that serious investigative journalists provide an invaluable service to society by revealing truthful information otherwise hidden from the public and helping to hold institutions and individuals accountable. But individuals who masquerade as investigative journalists, whose actions show a gross disregard for basic principles of journalistic ethics such as telling the truth, serve no valid purpose."

The brief argued, similar to Orrick, that Daleiden's actions did not fall under the ethical practices expected of journalists. "The deceptive techniques deployed by Mr. Daleiden and his associates in conducting their 'investigation' are a no less deplorable departure from standards of ethical journalism. Mr. Daleiden used deception as a first – not a last – resort, without exhausting alternative investigative methods or considering the many ethical and legal issues raised by his deceptive techniques," the brief reads. The full *amici curiae* brief is available online at: http://prochoice.org/wp-content/uploads/2016-06-07-87-Brief-of-Amici-Curiae-Journalism-Scholars-and-Journalist....pdf.

On Jan. 15, 2016, Planned Parenthood filed a lawsuit similar to NAF's against Daleiden and CMP in federal district court in San Francisco. Like the NAF lawsuit filed in July 2015, Planned Parenthood alleged that the defendants committed wire and mail fraud, invasion of privacy, trespassing, and illegal secret recording, according to CNN.

Later that month, a grand jury near Houston, Texas indicted Daleiden and one of his videographers, Sandra Merritt, on charges of tampering with government records, using fake identification, and offering to buy fetal tissue, according to a Jan. 26, 2016 *New York Times* story. After Daleiden and Merritt maintained that

they were journalists entitled to First Amendment protection and that their videos showed criminal wrongdoing by Planned Parenthood, a judge dismissed the charges against the pair, the *Times* reported on July 26, 2016. Nevertheless, the indictments raised concerns over the implications they could have for investigative journalism techniques. (For more information on the grand jury indictments and commentary regarding the First Amendment and journalist's privileges, see "Grand Jury Indicts Creators of Undercover Planned Parenthood Videos; Possible Implications for Undercover Newsgathering" in the Winter/Spring 2016 issue of the Silha *Bulletin*.)

On March 29, the Ninth Circuit affirmed Orrick's January 2017 preliminary injunction blocking the release of any recordings made by CMP at the NAF annual meetings. *National Abortion Federation v. Center for Medical Progress*, 2017 WL 1164450 (9th Cir. 2017). The court first explained that the defendants, Daleiden, CMP, and Newman, had not contested that they "engaged in misrepresentation and breached their contracts." Although the defendants claimed that the information they obtained was of public interest, making the preliminary injunction an unconstitutional prior restraint, the court ruled that the defendants waived their First Amendment rights to disclose that information by signing confidentiality agreements. Further, the court found that the district court was correct in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality agreements, because "one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest."

Next, the court addressed the defendants' arguments that they were released from the contractual obligations because they uncovered criminal wrongdoing. Once again, the court supported the findings of Orrick, who had reviewed the recordings and found that no criminal activity had been recorded. Additionally, the court ruled that although the preliminary injunction restricted CMP from disclosing information or recordings to anyone, including law enforcement, the injunction did not place a direct restriction on law enforcement authorities obtaining information or recordings through a subpoena. However, CMP agreed in a protective order that if law enforcement officials obtained a subpoena, the defendants would be required to first notify NAF, rather than law enforcement, so the organization could decide whether or not to oppose the subpoena. The court concluded that because the preliminary injunction and protective order both explicitly provided that NAF may not "disobey a lawful . . . subpoena," the injunction does not prevent law enforcement from conducting lawful investigations.

Judge María Callahan filed an opinion concurring in part and dissenting in part. Callahan agreed with the majority that the "[d]efendants have generally failed to carry their burden of showing that the District Court's grant of a preliminary injunction is an abuse of discretion." However, Callahan wrote that she disagreed with the portion of the injunction blocking the defendants from sharing information with law enforcement unless there was a subpoena. Furthermore, Callahan wrote that the requirement that the defendants notify NAF about a subpoena interferes with legitimate investigations, given the delay it causes. Additionally, Callahan wrote that disclosure to a law enforcement agency is different from disclosure to the public. Law enforcement regularly handles highly sensitive materials and should be trusted to do so, according to Callahan.

Following the ruling, CMP released a statement that the organization "will continue to fight this unconstitutional abuse of power and vindicate our First Amendment rights and those of all citizen journalists to speak and publish on matters of urgent public concern." On August 3, the Life Legal Defense Foundation filed a petition for *certiorari* seeking review by the U.S. Supreme Court of the Ninth Circuit decision. Petition for writ of *certiorari*, *National Abortion Federation v. Center for Medical Progress*, 2017 WL 1164450 (9th Cir. 2017). The petition contended that the Ninth Circuit was "the first federal circuit to uphold an injunction against the publication of information of legitimate public interest, based solely on the private agreement of parties." The petition also contended that the Ninth Circuit decision conflicted with the Supreme Court's "many decisions requiring *de novo* review of constitutionally decisive facts and an 'independent examination of the whole record' in First Amendment cases." The full petition for *certioarai* is available online at: https://lifelegaldefense.files.wordpress.com/2017/08/daleiden-v-naf-cert-petition-7-31-2017-final.pdf. As the *Bulletin* went to press, the Supreme Court had not issued an order on whether it would hear the case.

Despite the preliminary injunction being upheld by the Ninth Circuit, links to the videos covered by the order were posted on the website of Daleiden's attorneys Steve Cooley and Brentford J. Ferreira in May 2017. On May 25, Orrick said that he would consider holding Daleiden and his attorneys in contempt, according to the *Los Angeles Times*. Orrick initially ordered the three to appear at a June 14 hearing to consider contempt sanctions, but later canceled the hearing after Daleiden sought to disqualify Orrick from the lawsuits brought by NAF and Planned Parenthood. According to a June 22 ABC News story, CMP claimed that Orrick was biased against Daleiden because of the judge's affiliation with Good Samaritan Family Resource Center, a partner of Planned Parenthood, and that his wife had "liked" Facebook posts critical of Daleiden. The AP reported on June 26 that U.S. District Court Judge James Donato rejected the attempt to disqualify Orrick, citing a lack of evidence calling the judge's impartiality into question.

On July 11, Orrick announced he was holding Daleiden and his lawyers in contempt of court for publishing the videos in violation of the preliminary injunction, as reported by the AP on July 17. Orrick determined that "CMP, Daleiden, Cooley, and Ferreira willfully disobeyed a court order." He told the attorneys in court, "Criminal defense counsel . . . do not get to decide whether they can violate the preliminary injunction." Matthew Geragos, an attorney for Cooley and Ferreira, contended that the attorneys were attempting to draw out witnesses and other information by posting the videos, according to the AP. As the *Bulletin* went to press, Orrick was considering a request from attorney Matthew Geragos, who represented Cooley and Ferreira, asking that the judge stay his ruling for 30 days while defense attorneys filed an appeal.

In the midst of NAF and Planned Parenthood's legal action against Daleiden and CMP, Daleiden also faced felony charges in California. On April

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5, 2016, *The Washington Post* reported that investigators with the California Department of Justice raided Daleiden's home, seizing a laptop and multiple hard drives. The search suggested that states were looking into possible criminal activity by Daleiden, according to the *Post*. In a statement, Daleiden said, "We will pursue all remedies to vindicate our First Amendment rights."

On March 28, 2017, nearly a year after California authorities entered Daleiden's apartment, California prosecutors charged Daleiden and Merritt with 14 felony counts of unlawfully recording people without their permission and one count of conspiracy to invade privacy, according to a March 28, 2017 *Los Angeles Times* story. California Attorney General Xavier Becerra said his office "will not tolerate the criminal recording of confidential conversations" and that the "right to privacy is a cornerstone of California's Constitution, and a right that is foundational in a free democratic society."

In a March 30, 2017 story, the *Los Angeles Times* editorial board argued that the charges brought by Becerra were a "disturbing overreach" and carried implications for the press. "It's disturbingly aggressive for Becerra to apply this criminal statute to people who were trying to influence a contested issue of public policy, regardless of how sound or popular that policy may be," the *Los Angeles Times* editorial board wrote. "In similar cases, we have denounced moves to criminalize such behavior, especially in the case of animal welfare investigators who have gone undercover at slaughterhouses and other agricultural businesses to secretly record horrific and illegal abuses of animals. That work, too, is aimed at revealing wrongdoing and changing public policy."

The *Los Angeles Times* editorial board also contended that legal remedies existed for Planned Parenthood and StemExpress, making California's action against Daleiden unnecessary. "[The companies] have another remedy for the harm that was done to them: They can sue Daleiden and Merritt for damages," the board wrote. "The state doesn't need to threaten the pair with prison time."

In a March 29 opinion piece for *The Week*, writer and fellow at the Ethics and Public Policy Center Pascal-Emmanuel Gobry wrote that the charges against Daleiden and Merritt set "a dangerous precedent." "Undercover journalism is in the best journalistic tradition," Gobry wrote. "Embarking on serious undercover journalism will, by definition, almost always involve doing things that can be technically classified as illegal. To prosecute such behavior is a textbook case of 'chilling effect,' the legal and ethical concept that safeguards the First Amendment's protection of the natural right of free speech. This precedent is disastrous."

In a March 29, 2017 story, *Slate* magazine writer Mark Joseph Stern discussed the implications of California being a "two-party consent" state. Cal. Penal Code § 632. The state's wiretapping law provides that an individual cannot record "confidential communication" without the consent of all parties being recorded. Communication qualifies as confidential if it is made with the reasonable expectation "that it would not be overheard or recorded." The *Los Angeles Times* Editorial Board argued the two-party consent law "should be applied narrowly" and should only be applied "to clear and egregious violations of privacy where the motive is personal gain."

Daleiden criticized the felony charges in a statement released through CMP. "The bogus charges from Planned Parenthood's political cronies are fake news," the March 28 statement said. "We look forward to showing the entire world what is on our yet-unreleased video tapes of Planned Parenthood's criminal baby body parts enterprise, in vindication of the First Amendment rights of all." In an interview with *The Washington Post*, Cooley also invoked the First Amendment. "It was nothing more than a First Amendment journalist pursuing a good cause and fighting a battle, now a martyr who's being crushed by the power of the State of California."

On June 21, the Superior Court of California for San Francisco County dismissed the 14 felony counts of unlawfully recording individuals without their permission, finding the charges to be "legally insufficient," according to a June 22 Fox News story. The charge of conspiracy to invade privacy was not dismissed. *Reuters* reported on June 21 that Superior Court Judge Christopher Hite ruled that the criminal complaint was "too vague." Rather than dismiss the case, Hite gave Becerra's office until mid-July to file a revised complaint that provides greater detail, including specific dates, alleged victims, among other information. Hite also ruled that identities of the alleged victims would remain under court seal, according to *Reuters*.

In a statement, attorney Mat Staver who represented Merritt, called the dismissal of the counts a "huge victory." "We will now turn our attention to dismissing the final count," Staver said. "The complaint by the California attorney general is unprecedented and frankly will threaten every journalist who provides valuable information to the public."

On July 7, the *San Francisco Chronicle* reported that prosecutors refiled the charges against Daleiden and Merritt. The new charges included numerical identifications for each video and other details that were absent from the original charges. Staver said he would challenge the refiled charges because they are still not specific enough. "[The new set of charges] lists videos generally but doesn't list specific conversations on those videos, so it's hard to know what conversations they're referring to," Staver said. As the *Bulletin* went to press, no announcement had been made regarding the charges against Daleiden and Merritt.

Political Operatives Target Hidden Camera Videographer in Civil Lawsuit

On June 1, 2017, Robert Creamer, co-founder of Strategic Consulting Group, NA, Inc., a member organization of Democratic National Committee vendor Democracy Partners LLC, filed a civil complaint against political activist James O'Keefe, who is known for producing controversial hidden camera videos on his website, Project Veritas. In the fall of 2016, O'Keefe posted a series of videos following a "sting operation" that infiltrated Democracy Partners' private offices, leading to Creamer and Scott Foval, another Democratic political operative, to leave their jobs. In the summer of 2017, O'Keefe was embroiled in more controversy after he released over 119 hours of audio and video footage of his "sting operation" into CNN.

O'Keefe first gained notoriety in 2009, when a series of undercover videos were posted to Project Veritas depicting a community organizing group known as Association of Community Organizations for Reform Now (ACORN) advising a couple posing as a pimp and a prostitute on how to make it a legal business. The couple was later revealed to be O'Keefe and

co-conspirator Hannah Giles. *The New Yorker* magazine reported on May 20, 2016 that the videos "raised serious questions about [O'Keefe's] methods and ethics — questions that have trailed him ever since." The videos also appeared to be heavily edited, according to the *Columbia Journalism Review* (*CJR*) on March 15, 2011. The resulting court case concluded with O'Keefe and his accomplice settling with ACORN for $100,000 after losing on summary judgment on a wire-tap claim. (For more information on the ACORN Videos and the resulting lawsuit, see "ACORN Videos Provoke Media Debate, Trigger Lawsuit" in the Fall 2009 issue of the Silha *Bulletin*).

In 2010, O'Keefe and three accomplices were criminally charged when two of the accomplices disguised themselves as telephone repairmen in an attempt to enter the offices of then-U.S. Senator Mary Landrieu (D-La.) and tampered with the office's phone system, as reported by *The Washington Post* on Jan. 27, 2010. O'Keefe and the others pled guilty to one count each of entering federal property under false pretenses. O'Keefe was sentenced to three years of probation, 100 hours of community service, and a $1,500 fine. In 2011, O'Keefe released a video on Project Veritas depicting senior vice president of National Public Radio (NPR) Ron Schiller making negative comments about the Republican party and the "Tea Party" political movement. Schiller was also shown saying that NPR would be "better off in the long run without federal funding." The video ultimately led to the resignation of Schiller and NPR Chief Executive Officer Vivian Schiller. (For more information on O'Keefe's stings in 2010 and 2011, see *NPR Executives Resign after Hidden Camera Sting* in "Prank Phone Call, Hidden Camera Spur Ethical Controversies for News Media" in the Winter/Spring 2011 issue of the Silha *Bulletin*.)

According to *Time* magazine on Oct. 18, 2016, O'Keefe's investigation into Democracy Partners began in April 2016 when a staffer for Project Veritas, who went by the alias "Steve Packard," met with Foval, who became a contractor for Democracy Partners soon afterward. Packard recorded conversations with Foval, who discussed his role with Democracy Partners and how the organization might cover up voter fraud in the 2016 Presidential Election, according to *The Washington Post* on October 19. In a series of videos posted over the course of the fall of 2016, Foval is shown bragging about "a litany of political dirty tricks."

The next step of Project Veritas' infiltration into Democracy Partners began during the spring of 2016 and sparked the June 2017 complaint by Creamer, Democracy Partners, and Strategic Consulting Group. On June 24, 2016, Creamer met a man who introduced himself as "Charles Roth," claiming he was a potential donor to Americans United for Change (AUFC), a non-profit organization for which Creamer worked. Roth's real name was Daniel Sandini, an employee of the Project Vertias Action Fund ("Project Veritas Action"), which was created to "[i]nvestigate and expose corruption, dishonesty, self-dealing, waste, fraud and other misconduct." According to the complaint, on July 15, 2016, Roth/Sandini told Creamer that his niece, "Angela Brandt," was interested in volunteering for Democratic candidates or organizations. It was later revealed that "Angela Brandt" was a fictitious name and that she was really Allison Maass, another Project Veritas employee. Creamer interviewed Brandt/Maass for an internship in the Democracy Partners office. The complaint alleges that during the interview, Brandt/Maass gave the fictitious name and false background information, including her identity, being the niece of Roth/Sandini, and her interest in gaining experience with Democracy Partners.

Brandt/Maass began her internship in Washington, D.C. on Sept. 21, 2016, where she carried a concealed camera and audio recording device. The complaint claims that no one in the Democracy Partners office knew she was wearing or using the device. According to the complaint, much of the information Creamer disclosed to Brandt/Maass was "confidential and sensitive business information including the identity of clients, client information and programmatic details, and the identity of partners." Creamer alleged that he told Brandt/Maass "that based on the confidential and sensitive nature of the mission and programming of . . . Democracy Partners, the information, and any additional information she was given over the course of her internship, was confidential and not to be shared with anyone other than persons with whom she had specifically been instructed to share that information." It was later revealed that Brandt/Maass had recorded the conversations, both in person and during conference calls.

The complaint emphasized that the recording took place in Democracy Partners' private offices that are "not accessible to the general public, have 24-hour security, and are only accessible if one signs into the building at the lobby security desk, if one is provided entrance by Plaintiffs' receptionist, and/or if one has an electronic pass card." It also said she did not have consent from the plaintiffs or clients to record them in meetings or conversations. According to the complaint, Brandt/Maass was also included among the recipients of highly confidential emails and documents, which she collected and provided to Project Veritas. Democracy Partners never authorized Maass to transfer or deliver any of the documents.

The private conversations, messages, and documents recovered by Brandt/Maass were later used by Project Veritas in four separate videos posted on their website between October 17 and October 24. Project Veritas Action also published the videos on its website under the heading "VeritasLeaks" on Oct. 26, 2016. *The Washington Post* reported on October 19 that the videos appeared to be heavily edited, often combining statements in a way that did not make sense or suggested that something was missing from the video. This style of production was consistent with past videos by Project Veritas, according to the *Post*. Additionally, *Time* magazine reported that many of the claims made by O'Keefe regarding the videos "did not hold up to scrutiny and the videos were more of a footnote during a fall campaign."

Nevertheless, following release of the videos, Foval and Creamer both left their jobs, as reported by *The Washington Post*. Foval was laid off on October 18 by AUFC, where he had been national field director. The following day, Creamer announced he was "stepping back" from the work he was doing for the unified Democratic campaign for Hillary Clinton, according to the *Post*.

In a statement that night, Democracy Partners denounced not only Project Veritas, but also the comments made by Foval and Creamer on camera. "Our firm has recently been the victim of a well-funded, systematic spy operation that is the modern day equivalent of

Video, *continued on page 48*

Video, *continued from page 47*

the Watergate burglars," the firm said. "The plot involved the use of trained operatives using false identifications, disguises and elaborate false covers to infiltrate our firm and others, to steal campaign plans, and goad unsuspecting individuals into making careless statements on hidden cameras. One of those individuals was a temporary regional subcontractor who was goaded into statements that do not reflect our values."

In an interview with *Time* magazine on Oct. 18, 2016, Creamer criticized Project Vertias' methods. "James O'Keefe, the discredited individual behind this well-orchestrated spying scheme directed at our firm, uses methods that would make Richard Nixon and the Watergate burglars proud," Creamer said. "O'Keefe executed a plot that involved the use of trained operatives using false identifications, disguises and elaborate false covers to infiltrate our firm and other consulting firms in order to steal campaign plans and goad unsuspecting individuals into making careless statements on hidden cameras."

Steve Gordon, a spokesman for the Project Veritas Action, defended the organization's actions to *The Washington Post* the following day. "The reporting process and methods of Project Veritas Action are proven successful and effective and are the protected intellectual property and trade secrets of Project Veritas Action," said Gordon. "This policy is in accordance with the practices of news organizations globally and is generally accepted as the professional norm."

On June 1, 2017, *Time* magazine reported that Democracy Partners, Strategic Consulting Group, and Creamer filed a 27-page complaint against O'Keefe, Maass, Sandini, Project Veritas, and Project Veritas Action, which included six counts against the defendants. The first count alleged that Maass committed a breach of fiduciary duty. The complaint contended that a fiduciary relationship existed between Maass and Democracy Partners because Maass had access to confidential information at the firm during her internship. Maass allegedly breached her fiduciary duties to Democracy Partners by "surreptitiously recording meetings and conversations held in non-public spaces with Democracy Partners members, employees and clients without consent or authorization," as well as "[r]emoving documents or copies of documents from the premises without consent or authorization" and providing those materials to Project Veritas.

Count Two claimed that all the defendants participated in "unlawful interception of oral communications." 18 U.S.C. § 2511 *et seq.* The complaint alleged that Maass "willfully intercepted the oral communications of Plaintiffs and their employees by using an electronic device concealed on her person . . . in violation of the Constitution and the laws of the United States." Count Three made the same claims, but applied to the "unlawful interception of oral communications" under Washington D.C. code. D.C. Code § 23-542(a)(1).

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> **— David Heller, Media Law Resource Center deputy director**

Count Four alleged that Maass trespassed at the Democracy Partners office, contending that it was not open to the public and was accessible by third parties only upon invitation and authorization. Count Five of the complaint accused each defendant of fraudulent misrepresentation. The complaint alleged that both Sandini and Maass made false representations regarding their names and backgrounds. Maass also misrepresented her intent in securing and maintaining the internship, her education, and work history, among other claims. Finally, Count Six alleged that each defendant "combined and conspired for an unlawful purpose . . . including to commit trespass, fraudulent misrepresentation, unlawful wiretap, and to breach fiduciary duties."

At the end of the complaint, the plaintiffs requested relief, including first "enjoin[ing the] Defendants . . . from posting, publishing, disclosing, or in any way using any documents, recordings, or other information obtained." Second, the complaint requested an order that the defendants "return any documents, recordings, or other information obtained." Finally, the plaintiffs sought actual damages of $1,034,000 for "actual loss of amounts that would have been received under contracts," "diminishment of the economic value of the space leased . . . and of confidential and proprietary information," "loss of future contracts," and "damage to reputation of the Plaintiffs." They also sought additional statutory damages, punitive damages, costs of litigation, and more. The complaint indicated that the plaintiffs requested a jury trial. The full complaint is available online at: http://www.politico.com/f/?id=0000015c-64bc-d355-a3fc-66fd15dc0000.

In an email acquired by *Time* magazine, O'Keefe said he was prepared to fight. "Robert Creamer believes that by suing us, he can intimidate us," he wrote. "I will not be silenced – only over my dead body!" O'Keefe also promised more sting operations. "We will be deploying a new batch of freshly trained journalists next week to shine additional light on the cockroaches of the corrupt D.C. establishment," O'Keefe wrote.

Project Veritas attorney Benjamin Barr added: "The First Amendment protects the rights of undercover journalists to expose exactly the sort of corruption captured in these videos. Veritas will assert its full First Amendment rights to defend itself in these proceedings."

David Heller, deputy director of the Media Law Resource Center, said Creamer's lawsuit would face significant challenges, especially because O'Keefe identifies himself as a journalist. Heller told *The Washington Post* on June 8 that "pretending to be someone else to expose something that might be of public interest is hardly new." "In the current environment of 'fake news' and hyper partisanship, it won't be surprising if judges struggle over what is or isn't for the good of the public," Heller said. He added that courts have generally protected constitutional rights to gather and publish news, whether by the institutional press or the average citizen.

The Washington Post also reported that because Washington, D.C.'s wiretapping law is a "one-party consent" law, O'Keefe and other members of Project Veritas did not need to get permission to tape conversations to which the video makers were a party. D.C. Code § 23-542. Accordingly, Mason Kortz, an instructional fellow at Harvard University's Cyberlaw Clinic, said an issue for Democracy Partners will be if Maass was a bystander to other people's conversations or if she was a part of them, in which case she would not be in violation of the wiretap law. However, Kortz also said that Washington, D.C.'s one-party consent law includes an exception that secret recordings are illegal if they are done with the purpose of "committing any criminal or tortious act." Thus, according to Kortz, the wiretapping law prevents secret recordings done to purposely damage a person or organization.

In an interview with *The Washington Post*, Yael Bromberg, a supervising attorney for the Institute for Public Representation at Georgetown Law representing Creamer and Democracy Partners, said O'Keefe's methods of obtaining the video had been widely criticized. "We're in an era of unprecedented hyper partisanship and fake news, and the integrity of the public domain is critical to the practice of democracy," said Bromberg. "What's more is [O'Keefe and Project Veritas] degrade public discourse during a time of heightened importance, which is when the public is most in tuned into politics just before the election."

As the *Bulletin* went to press, no further action had been announced on the civil complaint.

In recent months, O'Keefe has found himself embroiled in further controversy after releasing undercover videos from CNN's offices in Atlanta, Ga, which he called "CNN Leaks." In February 2017, O'Keefe posted 119 hours of secretly taped conversations among CNN employees to Project Veritas, according to *The Washington Post* on Feb. 23, 2017. However, the *Post* and *Politico* both reported that when the audio recordings were posted, technical difficulties with the website prevented many users from hearing any of the audio. Additionally, the recordings largely only featured lower-levels staffers at the network. In response to the recordings, a CNN spokesperson told *Politico*, "I don't think there's anything to comment on." O'Keefe later called on volunteers to comb through the 119 hours of raw tape, offering a $10,000 reward of "content that exposes media malfeasance."

On June 27, *The Hill* reported that O'Keefe released another undercover video that depicted a CNN producer saying the coverage of President Donald Trump's possible collusion with Russia during the 2016 presidential election was "mostly bullshit" and all about "ratings." CNN producer John Bonifield is seen speaking to an off-screen questioner in a number of settings, including in an elevator and outside the Atlanta office. Bonifield can be heard and seen saying "I haven't seen any good enough evidence to show that the president committed a crime." Bonifield, who appears not to realize he is being recorded, also mocked "cutesy little [journalism] ethics."

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> **— Gabriel Kahn, University of Southern California journalism professor**

In a statement, CNN said their organization "stands by our medical producer John Bonifield. Diversity of personal opinion is what makes CNN strong, we welcome it and embrace it." Steve Gordon, communications director at Project Veritas, defended the use of undercover video in an interview with *USA Today*. "That's what Project Veritas does," he said. "We go undercover. Undercover video has been widely respected."

On June 28, O'Keefe posted another video on Project Veritas. CNN contributor and host of "Messy Truth" Van Jones is heard calling the possible collusion of the Trump administration with Russia during the 2016 presidential campaign "a nothingburger," according to *The Hill* on June 30. Jones wrote an opinion piece for CNN on June 29 calling the recording "a hoax." Also on June 29, O'Keefe released a video depicting a Project Veritas reporter asking CNN associate producer Jimmy Carr if it "would be fair to question the intellect of the American voter," according to *The Hill*. Carr is shown in the video responding "Oh, no. They're stupid as s--- [*sic*]." Carr also said President Trump is "just f---ing [*sic*] crazy" and that he is "not actually a Republican." CNN declined to comment on the footage.

Gabriel Kahn, a journalism professor at the University of Southern California, told *USA Today* that surreptitiously recording a source "is slimy." "If they are knocking CNN for bad practices, they need to look at their own, first," Kahn said. "More broadly, we are suddenly operating in an environment where all reporting is perceived as partisan. This becomes a self-fulfilling prophesy. When the holder of the highest office in the land lambastes coverage he doesn't like as biased or fake, then, almost by definition, that coverage is seen as partisan by some."

In a series of tweets following the release of the video, *New York Times* reporter Sopan Deb also criticized the videos, saying "there is a better than 90% chance they were edited deceptively." She also tweeted "CNN has probably 1,000 producers, not including APs, PAs, etc. But sure, let's use 1 guy's private comments to represent the whole network."

President Trump also took to Twitter, saying "Fake News CNN is looking at big management changes now that they got caught falsely pushing their phony Russian stories. Ratings way down!" He also tweeted "So they caught Fake News CNN cold, but what about NBC, CBS & ABC? What about the failing @nytimes & @washingtonpost? They are all Fake News!"

Scott Memmel
Silha *Bulletin* Editor

Third Circuit Declares a First Amendment Right to Record On-Duty Police Officers

On July 7, 2017, the United States Court of Appeals for the Third Circuit ruled that bystanders have a First Amendment right to record on-duty police officers in public places. *Fields v. Philadelphia*, No. 16-1650, No. 16-1651 (3rd Cir. 2017). The Third Circuit joined a growing consensus of five other federal circuit courts that issued similar rulings. Several attorneys and media experts praised the decision and explained the significance of the ruling, including on the newsgathering process.

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Previously, the United States Court of Appeals for the First, Fifth, Seventh, Ninth, and Eleventh Circuits had ruled that bystanders' right to record law enforcement officers in public places is protected by the First Amendment. The Eleventh Circuit ruled in 2000 that the "First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

In August 2011, the First Circuit ruled that recording or filming government officials engaged in their duties in a public space "is a basic and well-established liberty safeguarded by the First Amendment." *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). However, the court found that the First Amendment does not apply if the bystander directly interferes with law enforcement activity. (For more information on the *Glik* decision, see "Cops and Citizens Clash over Recordings of Law Enforcement Activity" in the Fall 2011 issue of the Silha *Bulletin*.)

In a May 2012 ruling, the Seventh Circuit held that the act of making an audio or audiovisual recording falls under the First Amendment. *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). The court enjoined an Illinois eavesdropping law because it "likely violate[d] the First Amendment" by prohibiting people from making audio recordings of the police in public. (For more information on the Seventh Circuit's decision, see *7th Circuit Holds Recording is Protected by First Amendment* in "Courts, Federal Government Clarify First Amendment Protection for Recording in Public" in the Summer 2012 issue of the Silha *Bulletin*.)

The following year, the Ninth Circuit recognized a First Amendment right to photograph police. *Adkins v. Limtiaco*, 537 Fed.Appx. 721 (9th Cir. 2013). The court cited their 1995 case *Fordyce v. Seattle*, which found that "a genuine issue of material fact exists concerning whether [a police officer] interfered with [an amateur journalist's] First Amendment right to gather news." 55 F.3d 436 (9th Cir. 1995).

Finally, in February 2017, the Fifth Circuit ruled in a 2-1 decision that the First Amendment provides the right for citizens to film the police, though the right is not absolute. *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017). Writing for the majority, Judge Jacques L. Wiener concluded that "the principles underlying the First Amendment support the particular right to film the police." Additionally, he wrote that gathering information about government officials that can be disseminated to the public "serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" Judge Edith "Joy" Brown Clement wrote a dissenting opinion regarding the liability of the officers in the case, but agreed that "a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."

The case before the Third Circuit began as two separate lawsuits following events occurring in September 2012 and September 2013. Amanda Geraci, a member of the police watchdog group "Up Against the Law," attended a September 2012 protest in Philadelphia. When Geraci saw several police officers acting to arrest a protestor, she moved to a better vantage point, without interfering with the police activity, in order to record the encounter. According to the Third Circuit's majority opinion, an officer "abruptly pushed Geraci and pinned her against a pillar for one to three minutes," prevented her from observing or recording the arrest. Geraci was not arrested or cited.

In September 2013, Temple University student Richard Fields was on a public sidewalk when he observed a number of police officers breaking up a house party across the street. Fields took a photograph of the scene with his iPhone. A police officer noticed Fields take the picture and ordered him to leave. When Fields refused, he was detained by the officer who confiscated and subsequently searched through Fields' phone, opening several videos and photos. Fields was issued a citation for "Obstructing Highway and Other Public Passages," though the charges were later withdrawn.

Geraci and Fields brought claims in the United States District Court for the Eastern District of Pennsylvania against the City of Philadelphia and certain police officers, citing 42 U.S.C. § 1983, a federal statute allowing individuals or groups to bring lawsuits for violation of constitutional rights. Geraci and Fields' suits were consolidated by the district court at their request.

Both claimed that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity. They also alleged that the officers violated their Fourth Amendment right to be free from an unreasonable search or seizure. Additionally, the plaintiffs pointed out that Philadelphia Police Department's official policies recognized their First Amendment right, including a 2011 memorandum advising officers not to interfere with a private citizen's recording of police activity because it was protected by the First Amendment. A 2012 official department directive reiterating that the First Amendment right existed.

On February 19, 2016, U.S. District Court Judge Mark A. Kearney concluded that Geraci's and Fields' actions were not protected by the First Amendment because they presented no evidence that their "conduct may be construed as expression of a belief or criticism of police activity." *Fields v. Philadelphia*, 166 F. Supp. 3d 528 (E.D. Pa. 2016). Kearney also wrote that "[a]bsent any authority from the Supreme Court or our Court of Appeals, we decline to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions."

On Oct. 31, 2016, the Reporters Committee for Freedom of the Press (RCFP) and 31 media organizations, including *The New York Times* and *The Washington Post*, filed an *amici curiae* brief in support of Geraci and Fields. The brief argued that bystander video benefits the newsgathering process,

and thus the public, in two ways. First, bystander video provides the news media and the public with important, newsworthy material. "Today, the first source of information from the scene of a newsworthy event is frequently an ordinary citizen with a smart phone," the brief read. "These witnesses often play a meaningful role in monitoring the functioning of government, particularly when they work with the news media to distribute the information."

The brief detailed the media coverage of several police shootings that had "benefitted from eyewitness video." "Video evidence is useful whether it comes from a bystander or another source, like a patrol car dashcam, an officer's body-worn camera, or other surveillance video," wrote the RCFP and media organizations. "Its release serves the public interest in understanding what actually happened in a disputed event, regardless of which side it favors, if any."

Second, the brief contended that upholding the district court's decision would "hinder the ability of the news media to gather the news and provide the public with information of significant public interest." According to the brief, the lower court's decision could have a chilling effect on citizens and the press. "By finding that ordinary citizens observing police activity in public have no constitutional protections when they try to record the event, the district court interferes with the general public's right to learn about critically important public controversies," the brief read. "After all, if it becomes even more common for officers to arrest citizens who peacefully record their activities, it is reasonable to conclude that fewer citizens will engage in such conduct." The full *amici curiae* brief can be viewed online at: https://www.eff.org/files/2017/06/13/10.31.16_amicus_brief_reporters_committee_for_freedom_of_the_press.pdf

On July 7, 2017, multiple news publications reported that the Third Circuit reversed and remanded the district court decision. Judge Thomas L. Ambro wrote the opinion of the court, which first addressed Kearney's conclusion that the plaintiffs "engaged in conduct only (the act of making a recording) as opposed to expressive conduct (using the recording to criticize the police or otherwise comment on officers' actions)," which would have meant their recording activities were protected by the First Amendment. Ambro countered that the value or the purpose of the recordings "may not be immediately obvious and only after review of them does their worth become apparent." Ambro contended that because the officers stopped Geraci from recording, she never had the opportunity to decide to put any recording to expressive use.

Next, the court addressed whether bystanders have a First Amendment right to record law enforcement officers acting in the course of their duties in a public space. Ambro wrote that because "recording of police activity is a widespread, common practice" and the First Amendment issue is "of great importance," it is necessary to "deal with it before addressing . . . defenses to liability." Ambro wrote that the First Amendment "protects the public's right of access to information about their officials' public activities.. . . Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'"

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> **— Third Circuit Judge Thomas L. Ambro**

Ambro added that because recording "corroborates or lays aside subjective impressions for objective facts" and "facilitate[s] discussion because of the ease in which they can be widely distributed via different forms of media," recording police activity "falls squarely within the First Amendment right of access to information." The court contended that because the press "no doubt . . . has this right," the public does as well.

Additionally, the court discussed the significance and value of bystander videos. Ambro contended that bystander video can "provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public." Furthermore, bystander video "complements the role of the news media," as well as serving as a "common component of news programming," Ambro wrote.

The court also contended that video recorded by the public can benefit the police as well. Ambro noted that bystander video may "improve policing," "help [law enforcement] carry out their work," and "exonerate an officer charged with wrongdoing." Video taken of police officers who committed wrongdoing has "spurred action at all levels of government to address police misconduct and to protect civil rights," Ambro wrote. He continued, "We ask much of our police. They can be our shelter from the storm. Yet officers are public officials carrying out public functions, and the First Amendment requires them to bear bystanders recording their actions. This is vital to promote the access that fosters free discussion of governmental actions, especially when that discussion benefits not only citizens but the officers themselves."

However, the court cautioned that all recording is not necessarily protected or desirable. The right to record police is not absolute and is instead "subject to 'reasonable time, place, and manner restrictions,'" such as if a bystander interferes with police activity while recording. The court concluded that the cases before them provided "no countervailing concerns" and that they did not have to "address at length the limits of this constitutional right."

After addressing whether Geraci's and Fields' actions were protected by the First Amendment, the court next considered whether the six defendant police officers were entitled to qualified immunity. According to Ambro, government actors, including police officers, are entitled to protection from lawsuits under qualified immunity unless they violated a constitutional right "so clearly established that 'every reasonable

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official would have understood that what [the officer] is doing violates that right.'"

In order to determine whether the plaintiffs' constitutional right to record the police carrying out official duties in public was "clearly established," the court "look[ed] at the state of the law when the retaliation occurred" against Geraci and Fields in September 2012 and 2013. Ambro wrote that the court could not definitively say that the state of law at the time of the events "gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected." As a result, the court concluded that the Geraci's and Fields' right to record police activities in public places was not "clearly established," meaning the officers were entitled to qualified immunity.

The court remanded the case to the district court to determine if the City of Philadelphia could be held liable for its officers' conduct, an issue that the district court had not considered because of its First Amendment ruling. As the *Bulletin* went to press, the district court had not held any further proceedings related to the case.

Judge Richard Lowell Nygaard filed an opinion concurring in part and dissenting in part. He wrote that he agreed with the "majority's analysis and conclusions regarding the existence of a First Amendment right to record, and agree[d] that the case against the City of Philadelphia should be remanded for further proceedings." However, he disagreed with his colleagues' conclusion that the officers should be granted a qualified immunity.

Nygaard wrote that the question of whether a constitutional right is clearly established has to be considered in a "real-world context," and should be "conducted from the perspective of a 'reasonable official.'" For two reasons, Nygaard felt Geraci's and Fields' constitutional right was clearly established under this standard. First, Nygaard explained that "every Circuit Court of Appeals that has considered the issue ruled that there is a First Amendment right to record police activity in public." Because four of the decisions were published before the conduct related to this case, Nygaard reasoned that the constitutional right to record the police during their duties in a public place was clearly established. Second, Nygaard contended that the Philadelphia Police Department's official policies, including the 2011 memorandum, "explicitly recognized this First Amendment right well before the incidents under review here took place." Consequently, Nygaard contended that "it is indisputable that all officers in the Philadelphia Police Department were put on actual notice that they were required to uphold the First Amendment right to make recordings of police activity."

Following the ruling, several members of the media and media experts commented on the significance of the ruling. In a July 7 statement, executive director of the American Civil Liberties Union (ACLU) of Pennsylvania Reggie Shuford praised the decision. "Government operates best in sunlight, and the police are not an exception," he said. "The First Amendment right to document the police at work is critical to promote transparency. We are grateful that the appeals court agrees."

Molly Tack-Hooper, the ACLU attorney who argued the case before the appeals court, discussed the value of holding government officials accountable. "The police cannot operate in a shroud of secrecy," said Tack-Hooper in a statement following the ruling. "The fundamental right to document police activity is crucial to deter misconduct and gather information about how police use their power. Today's ruling strengthens that important concept."

In a July 7 story for *The Atlantic*, associate editor Matt Ford called the ruling a "significant milestone" because "[h]alf of U.S. states are now covered by [circuit court] rulings protecting the videotaping of law enforcement." Ford estimated that roughly 60 percent of the American population falls under the constitutional protection.

According to Mickey Osterreicher, counsel for the National Press Photographers Association (NPPA), the six circuit court decisions not only establish a right to record on-duty police, but also have implications for qualified immunity for officers in those jurisdictions. "In order to overcome that 'qualified immunity' defense, plaintiffs must show that they were engaged in a constitutionally protected activity that was 'clearly established' at the time of the incident," Osterreicher told the Poynter Institute on July 10. "The only way for that to be substantiated is for the U.S. Supreme Court, a U.S. Court of Appeals or a federal district court having jurisdiction over the area where the incident took place to have previously articulated that right as being clearly established beforehand so that any reasonable police officer would know that what they were doing was unconstitutional. The Supreme Court has so far declined to hear such a case but every Circuit Court of Appeals to address this issue . . . has held that such a clearly established right exists. By those courts doing so, police in those jurisdictions may not successfully use qualified immunity in their defense."

In a story for *Slate* magazine, writer Mark Joseph Stern agreed. "Fortunately, Friday's ruling establishes the right to record within the 3rd Circuit beyond any doubt, meaning officers who violate that right in Delaware, New Jersey, or Pennsylvania may be sued," he wrote. "The Philadelphia police are now on notice: An individual who films law enforcement activity isn't breaking the law; she's exercising her constitutional rights." Stern added, "Bystander videos may not eliminate police misconduct. But they play a vital role in our national debate about the lawlessness of law enforcement. And the Constitution does not allow police to muffle that debate by denying citizens the right to document their misconduct with a camera."

The Electronic Frontier Foundation (EFF) contended that despite the important victory, the right of technology users to record on-duty police officers was far from resolved. "[T]he struggle continues," EFF Senior Staff Attorney Adam Schwartz and Staff Attorney Sophia Cope wrote in a July 7 article. "Across the country, many government officials continue to block members of the public from using their electronic devices to record newsworthy events. EFF will continue to fight for this vital right."

Osterreicher cautioned that police may still attempt to stop photojournalists from recording. "A police officer may not tell you to stop photographing or recording if you are in a public place where you have a legal right to be present but that does not mean that they will not still do so," he said. "That is because the right to photograph and record is a First Amendment protected activity which may only be limited by reasonable time, place and manner restrictions. The most common of those restrictions are location."

Scott Memmel
Silha *Bulletin* Editor

Several State Courts and Legislatures Grapple with Anti-SLAPP Laws

During the summer of 2017, several states grappled with anti-SLAPP (strategic lawsuit against public participation) laws meant to provide a remedy for defendants against meritless claims brought by plaintiffs involving publications regarding matters of public concern or the defendant's right to free speech, right to petition the government, or right of association. On May 24, 2017, the Minnesota Supreme Court ruled that the state's anti-SLAPP law was unconstitutional because it deprived claimants the right to a jury trial. On May 23, 2017, the Massachusetts Supreme Judicial Court (SJC) provided a new way for parties to dismiss special motions under the state's anti-SLAPP law. In addition to the existing procedures, the SJC ruled that a judge can dismiss an anti-SLAPP special motion if the nonmoving party shows that their lawsuit was not brought "primarily to chill" a defendant's ability to petition the government. Conversely, the New Jersey and Connecticut legislatures each considered an anti-SLAPP lawsuit in their respective states.

ANTI-SLAPP

Minnesota Supreme Court Strikes Down State's Anti-SLAPP Law

On May 24, 2017, the Minnesota Supreme Court struck down the state's anti-SLAPP law, Minn. Stat. § 554.01 *et seq.* in *Leiendecker v. Asian Women United of Minnesota*, A16-0360 (Minn. 2017). The majority ruled that the statute was unconstitutional as applied because it deprived claimants their right to a jury trial under the Sixth Amendment to the U.S. Constitution and Article 1, Section 4 of the Minnesota Constitution. Chief Justice Lorie Skjerven Gildea filed a dissenting opinion, arguing that the law did not violate claimants' right to a jury trial because a judge can issue summary judgment without violating that right. Although some constitutional law attorneys, among others, contended that the loss of the anti-SLAPP statute would have a small impact, others expressed concern following the Minnesota Supreme Court's decision.

Passed in 1994, Minnesota's anti-SLAPP statute requires that a party filing a motion to dismiss an alleged SLAPP lawsuit ("moving party") must make a threshold showing that "the [lawsuit] materially relates to an act of the moving party that involves public participation." "Public participation" is defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." The Minnesota statute provides immunity against lawsuits targeting "lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action." According to *MinnPost* on June 7, 2017, this could include a number of activities, from contacting an elected official to making a report to law enforcement. This conduct or speech is immune from liability, unless it "constitutes a tort or a violation of a person's constitutional rights."

If the moving party meets its threshold showing, the burden moves to the party who brought the lawsuit ("responding party") to produce "clear and convincing evidence that the acts of the moving party are not immunized from liability." This is an elevated standard from "preponderance of evidence" followed in most civil cases. If the responding party fails to meet this burden, its lawsuit is dismissed and the court awards reasonable attorney fees and costs to the moving party.

The case before the Minnesota Supreme Court arose as part of a decade-long dispute between Sinuon and Lawrence Leiendecker and Asian Women United of Minnesota (AWUM), a non-profit organization addressing domestic violence against women. Sinuon Leiendecker was AWUM's executive director from 1999 to 2004 while her husband provided *pro bono* legal services to AWUM. In 2003, the Leiendeckers attempted to oust AWUM's board of directors by forming a new board and filing a declaratory-judgment action to have the new board declared legitimate. AWUM contended that the organization had previously fired Sinuon and that she received wages and benefits to which she was not entitled. The dispute led to five lawsuits between the Leiendeckers and AWUM.

The first began in late 2003 and resulted in a district court rejecting the Leiendeckers' efforts to install the new board of directors. Although the district court also rejected the old board's allegation that it had fired Sinuon, it did permit the board's claims that Sinuon had received wages and benefits to which she was not entitled. Consequently, the old board fired Sinuon. After AWUM declined to take further legal action against Sinuon, the district court ultimately dismissed the case.

In August 2005, Sinuon sued AWUM for wrongful termination. The district court dismissed the action, but the Minnesota Court of Appeals reversed. *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 838 (Minn. App. 2007). The parties ultimately settled the second lawsuit in 2008.

In the third lawsuit, AWUM sued Lawrence for legal malpractice in February 2007. The district court eventually dismissed AWUM's complaint at the organization's request, granted summary judgment to Lawrence on his counterclaim for indemnification, and entered judgment for over $41,000 in favor of Lawrence.

One year later, AWUM sued Sinuon, alleging that she had received wages and other payments to which she was not entitled while AWUM's executive director. After Sinuon moved for indemnification, the district court denied her motion. However, the court of appeals reversed and remanded the case to the district court, which dismissed AWUM's lawsuit when the organization declined to tender advance indemnification to Sinuon.

The fifth lawsuit between the parties is the case considered by the Minnesota Supreme Court in regards to the state's anti-SLAPP statute. The Leiendeckers brought the lawsuit seeking to recover for the injuries allegedly inflicted by AWUM in the four previous lawsuits. The Leiendeckers argued that two of AWUM's previous lawsuits against them constituted malicious prosecution, a tort action in which a plaintiff sues another party for using the legal system in a manner for which the system was not intended. Subsequently, AWUM sought immunity under Minnesota's anti-SLAPP law, attempting to dismiss the Leiendeckers' lawsuit.

In 2013, the district court dismissed most of the Leiendeckers' claims, but also denied AWUM's anti-SLAPP motion on the grounds that the organization did not meet its initial burden of showing that the Leiendeckers' lawsuit related

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to an act by AWUM involving public participation. On June 3, 2013, the court of appeals affirmed the lower court's decision. However, on June 25, 2014, the Minnesota Supreme Court granted AWUM's petition for review to determine if the district court properly denied AWUM's anti-SLAPP motion. The court reversed the decision of the court of appeals and remanded the case to the lower courts. On Dec. 15, 2014, the court of appeals ruled that AWUM had met the threshold showing that the "lawsuit filed by the Leiendeckers materially related to an act by AWUM involving public participation." The court of appeals then remanded the case to the district court, where AWUM renewed its motion to dismiss the Leiendeckers' lawsuit under the anti-SLAPP law. In response, the Leiendeckers moved for an order declaring the anti-SLAPP law unconstitutional. Although the district court found that the Leiendeckers fell short of proving by clear and convincing evidence that AWUM's acts were not immunized from liability under the anti-SLAPP statute, the court concluded that the law violated the Leiendeckers' constitutional right to a jury trial. AWUM appealed and sought accelerated review, which was granted by the Minnesota Supreme Court.

In a 6-1 decision, the Minnesota high court ruled on May 24, 2017 that two clauses in the Minnesota anti-SLAPP law were unconstitutional. First, the court considered "whether the Leiendeckers waived their argument that the law is unconstitutional." Justice Anne K. McKeig wrote in the majority opinion that because the Leiendeckers had no prior opportunity to make their constitutional challenge at the district court, they had not waived their challenge.

Second, the court had to determine whether the district court violated the court of appeals' remand instructions by analyzing the constitutionality of the statute. McKeig wrote that because the appellate court did not provide a specific statement to the district court saying it was not permitted to determine the constitutionality of the statute, the district court did not violate the instructions on remand.

The court next addressed the constitutionality of the anti-SLAPP law. McKeig provided context for determining the constitutionality of a statute, writing that the court must "[exercise] extreme caution" when determining whether a statute is unconstitutional. However, McKeig wrote that the court must also exhibit a "watchful jealousy" of any "impairment of the right of a free and inviolate jury trial," citing the 1921 case *Flour City Fuel & Transfer Co. v. Young*. 150 Minn. 452, 458, 185 N.W. 934, 937 (1921). The case requires that a law be unconstitutional "if it renders the jury-trial right 'so burdened with conditions that it is not a jury trial, such as the Constitution guarantees.'" Article I, Section 4 of the Minnesota Constitution establishes that the "right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Furthermore, the Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

McKeig wrote that the right to a jury trial is relevant because the Leiendeckers claimed malicious prosecution, which contains three elements: "(1) the action [must be] brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of the defendant." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997). According to the majority, two of the three elements of malicious prosecution, the probable cause and malice elements, are factual questions for a jury.

Next, McKeig turned to the language of the statute, specifically clause 2 of section 554.02, which specifies that "the responding party has the burden of proof," and clause 3 which requires the responding party to produce "clear and convincing evidence" to dismiss the anti-SLAPP motion. McKeig wrote that these clauses violated the responding party's right to a jury trial in two ways. First, they transfer the jury's fact-finding role to the district court. McKeig cited *Gabrielson v. Warnemunde* which held that the role of resolving disputed facts belongs to a jury, not the court. 443 N.W.2d 540, 543 n.1 (Minn. 1989). Thus, the majority ruled that these clauses "unconstitutionally instructs district courts to usurp the role of the jury by making pretrial factual findings that can, depending on the findings, result in the complete dismissal of the underlying action." Accordingly, if a district court decided that "the responding party failed to show by clear and convincing evidence that the moving party engaged in tortious conduct," it would preclude a jury trial. Furthermore, the court contended that even if a district court decided that the responding party did show clear and convincing evidence, it "would also arguably preclude a jury trial." Second, the majority concluded that the clauses "require the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence)."

The majority opinion drew a parallel to a similar case decided by the Washington Supreme Court in 2015, which determined that Washington's anti-SLAPP law violated the state's constitutional jury-trial guarantee. (For more information on Washington Supreme Court Striking Down the state's anti-SLAPP law, see *Washington Supreme Court Strikes Down Anti-SLAPP Law* in "Updates to State Laws Create Challenges, New Benefits for News Organizations" in the Summer 2015 issue of the Silha *Bulletin*.)

Finally, having determined that clauses 2 and 3 of section 554.02 were unconstitutional, the court next considered whether they were severable from the reminder of the section. McKeig wrote that the clauses were inseparable because the remaining provisions "provide no procedure for courts to determine whether a lawsuit violates the substantive prohibition of Minn. Stat. § 554.03." Therefore, the court ruled that "Minn. Stat. § 554.02 is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. § 554.03 . . . Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts."

Chief Justice Gildea filed a dissenting opinion in which she wrote that she "would resolve this case on . . . more narrow ground and not reach the constitutional question the majority decides," especially because "precedent recognizes that we resolve cases without reaching constitutional issues whenever possible."

Gildea contended that the majority's resolution "may undermine the summary judgment remedy" afforded to district courts by Rule 56 of Minnesota's Rules of Civil Procedure. Additionally, Gildea contended that because the district court in this case did not find facts and "did not need to make any credibility determinations on the probable cause element" regarding

malicious prosecution, the district court's conclusion that the Leiendeckers failed to show a lack of probable cause was "a ruling as a matter of law." Thus, according to Gildea, "the district court's resolution of the legal question of probable cause did not violate the Leiendeckers' right to a jury trial."

Following the Minnesota Supreme Court's ruling, Robert Hill, one of the Leiendeckers' attorneys, said he was not surprised by the ruling. "Once the judge is forced to become a fact finder on a motion, the toothpaste is out of the tube," said Hill according to a May 30, 2017 *Minnesota Lawyer* story. "What the Supreme Court did today is to reaffirm that our rules of civil procedure are the only mechanism that ensures due process and fundamental fairness. And if you deviate from that, you do it at your own peril."

Hill added that his clients were relieved by the decision not only because they could pursue their claim of malicious prosecution, but also that the anti-SLAPP statute's attorney fee provision would have applied had they lost. Section 4 of the anti-SLAPP law requires that "[t]he court shall award a moving party who prevails in a motion under this chapter reasonable attorney fees and costs associated with the bringing of the motion." According to *Minnesota Lawyer*, Hill estimated his clients would have been required to pay over $500,000.

Eric Magnuson, another attorney for the Leiendeckers, called the ruling an important victory for constitutional principles. "It's a strong vindication of the right to a jury trial, which is one of our most precious and fundamental rights," said Magnuson. Attorney for AWUM Phillip Cole said that although his clients were disappointed in the decision. However, he told *Minnesota Lawyer* that the larger ramifications are limited because the anti-SLAPP statute "is simply not invoked very often."

Mark Anfinson, a lawyer and lobbyist for the Minnesota Newspaper Association, agreed that the loss of the anti-SLAPP law was "not a big deal," according to *Minnesota Lawyer*. "I've used it to threaten people who said they were going to sue my clients: You better watch out, Jack, there's this statute you should be aware of," said Anfinson. "But when push came to shove and litigation occurred, it hardly ever worked. Trial judges saw the flaw in it and said, 'I can't make this kind of factual decision. That's not how the law works.'" He added, "It's been a sitting duck for a long time but of a species that most people weren't all that interested in hunting."

Marshall H. Tanick, a Twin Cities employment and constitutional law attorney, wrote in his June 7 story for *MinnPost* that members of the media and free-speech advocates may not be pleased with the decision. "For progressives, liberals, and free-speech enthusiasts of whatever political ideology, the decision is one of mixed blessings," he wrote. "There are others, however, including some in the media, who view it less charitably. They regard the dismantling of the SLAPP shield as unfavorably removing barriers to lawsuits for defamation and similar claims by powerful entities and affluent individuals, which may have the effect of silencing critics or those opposing their practices for fear of being slapped around in costly litigation. The chilling effect of exposure to such lawsuits may, they fear, impede freedom of expression and impair the free flow of information to the public."

Ultimately, Tanick contended that the decision was likely to have a "profound and long-lasting impact." He wrote, "Not only is the Minnesota law now invalid, but the ruling is likely to have a domino effect, cited as precedent for striking down similar laws in many other jurisdictions. It also could scuttle a SLAPP measure at the federal level, which has been stalled in Congress since 2009 and is not likely to be enacted anytime soon, if ever."

Massachusetts Supreme Judicial Court Changes Legal Framework of the State's Anti-SLAPP Statute

In a May 23, 2017 ruling, the Massachusetts Supreme Judicial Court (SJC) provided a new way in which a party can have an anti-SLAPP motion dismissed by a district court judge. *Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141 (Mass. 2017). The SJC ruled that a judge can dismiss an anti-SLAPP special motion if the nonmoving party who brought the alleged SLAPP lawsuit can show that the suit was not brought "primarily to chill" a defendant's ability to petition the government, an activity protected by the Massachusetts Constitution. Following the ruling, attorneys had mixed reactions to the change in the anti-SLAPP law, with some arguing it significantly weakened the statute.

Passed in 1991, the Massachusetts anti-SLAPP law allows a party to bring a special motion to dismiss "[i]n any case in which [that] party asserts that the civil claims, counterclaims, or cross claims against said party are based on [their] exercise of its right of petition [governmental bodies] under the constitution of the United States or of the commonwealth." A special movant "must make a threshold showing . . . that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities,'" according to the SJC decision. *Law360* reported on May 23, 2017 that Massachusetts' anti-SLAPP law is narrower than other states' because it specifically "protects speech and petitioning that relates to governmental and regulatory functions, instead of just matters of broader public importance."

The anti-SLAPP statute provides that the special motion can be dismissed if the party against whom the motion is made shows that: "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." Thus, the burden shifts to the plaintiff to establish "by a preponderance of the evidence that the [defendants] lacked any reasonable factual support or any arguable basis in law for its petitioning activity." *Baker v. Parsons*, 434 Mass. 543, 553-554 (2001).

Blanchard arose in April 2011 following four incidents involving alleged patient abuse and neglect at the adolescent psychiatric unit of Steward Carney Hospital, according to the SJC decision. The hospital immediately reported these incidents to the Department of Mental Health (DMH), the Department of Public Health (DPH), and the Department of Children and Families. DMH commenced an investigation into the incidents and considered revoking the hospital's license to operate the unit, pending the hospital's response to the reports of abuse. Additionally, Scott Harshbarger, then-senior counsel at the law firm Proskauer Rose LLP, was hired to conduct an investigation into the incidents, to recommend remedial actions, and to represent the hospital's interests in its dealings with the State agencies. During the investigations, the hospital placed most employees of the unit, including managers, nurses, and mental health counsellors, on paid administrative leave. After completing his investigation, Harshbarger recommended to then-president of

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the hospital, William Walczak, that "it would be prudent to replace the current personnel in order to ensure quality care for these vulnerable patients." Subsequently, Walczak informed each of the nine plaintiff nurses that he was terminating their employment.

Walczak issued statements about the investigations and the firing of the nurses through an internal email to the hospital's employees and to the *Boston Globe*. In a *Boston Globe* article published two days later, Walczak was quoted as saying that he "decided to replace the nurses and other staff on the unit" after seeing the reports of the abuse. Walczak said that the report recommended that he "start over on the unit" and that his "goal [was] to make it the best unit in the state." About one month later, the *Boston Globe* published another article on the incidents at the hospital, quoting Walczak as saying "[t]he Harshbarger report indicated it wasn't a safe situation" and that the report "underscored his decision to fire the entire staff of the unit."

In May 2013, the nurses who had been fired by Walczak filed a lawsuit suit against the hospital, as well as Proskauer Rose LLP and Harshbarger, for defamation, among other claims. The nurses alleged that they were defamed both by the email sent to hospital employees announcing their terminations, as well as by communications made to and published by the *Boston Globe*. The hospital defendants, including Walczak, as well as Proskauer Rose LLP and Harshbarger, filed special motions to dismiss the defamation counts under the anti-SLAPP statute, claiming the defamation suit filed by the nurses was a SLAPP suit. A Superior Court judge allowed the Proskauer defendants' special motion to dismiss, but denied the hospital defendants' motion. The motion judge concluded that Walczak's communications to the *Boston Globe* did not fall under the anti-SLAPP law. In 2016, the Massachusetts Appeals Court reversed the motion judge's decision to deny the hospital defendants' anti-SLAPP motion." *Blanchard v. Steward Carney Hosp., Inc.*, 89 Mass. App. Ct. 97, 98 (2016). The SJC granted the parties' applications for further appellate review.

Writing for the unanimous court, Justice Barbara A. Lenk first addressed whether the defendants met the threshold burden that the conduct complained of, Walczak's email and his statements to the *Boston Globe*, constituted the exercise of the defendants' right to petition. Accordingly, the initial question before the court was whether Walczak's communications to the *Boston Globe* and to the hospital employees were each made "in connection with" DMH's investigation of the incidents and its decision regarding the hospital's license to operate the unit. If so, these communications would constitute petitioning activity under the anti-SLAPP statute, according to the opinion.

The court concluded that the statements to the *Boston Globe* were petitioning activity under the anti-SLAPP statute for two reasons. First, Lenk wrote that "it can be reasonably inferred that Walczak's statements to the *Boston Globe* were intended to demonstrate to DMH the hospital's public commitment to address the underlying problems at the unit," during the same period when DMH was considering whether to revoke the hospital's license to operate the unit. Second, the court contended that Walczak's statements were issued in a manner that was likely to influence or, at the very least, reach DMH because the *Boston Globe* is a newspaper "widely circulated in Boston and throughout the Commonwealth." Conversely, the internal email did not represent petitioning activity because the audience was exclusively hospital employees, not the DMH or any other government body or official.

Although the SJC determined that "the *Boston Globe* based portion of the nurses' defamation claim arises from and is, in that limited sense, solely based on their hospital employer's quite legitimate petitioning activity," the court was not satisfied that the plaintiff nurses' defamation claim was "a 'SLAPP' suit at all."

Accordingly, the court concluded that in order to ensure that only SLAPP suits are subject to early dismissal and financial penalties under the anti-SLAPP law, the statutory term "based on" must be "accorded broader meaning." Consequently, the court added an additional opportunity for a party to defeat a special motion to dismiss by demonstrating that the challenged claim is not a SLAPP suit.

Previously, if the moving party met the initial burden of showing the claims are solely based on petitioning activities, the burden shifted to the nonmoving party to demonstrate that the special movant's petitioning activities lack a reasonable basis in fact or law, such as sham petitioning, or if the petitioning caused injury. If the party did not meet this burden, the special motion would be granted, ending the lawsuit and resulting in financial penalties, including attorney's fees.

However, the court ruled that the nonmoving party could now meet a "second-stage" burden and defeat the special motion "by demonstrating that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities." Thus, the nonmoving party can escape an anti-SLAPP motion if it convinces the judge that it did not bring the defamation suit or other claims to chill the other party's petitioning rights, according to *Law360*. Lenk added that to make this showing "the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden defendants' . . . petition rights, but to seek damages for the personal harm to [it] from [the] defendants' alleged . . . [legally transgressive] acts.'"

The SJC remanded the case back to lower courts to sort through the new procedure. As the *Bulletin* went to press, the lower courts had not ruled on whether the nurses had met their second-stage burden to dismiss the special motion, nor had they ruled whether the nurses met their first-stage burden of showing the hospital defendants' petitioning activities lacked a reasonable basis in fact or law.

Following the ruling, attorney Dahlia C. Rudavsky, who represented the nurses, praised the decision. "I think it's great that the court has seen what was a difficulty with the statute," Rudavsky told *Law360*. "Defendants have been misusing and overusing anti-SLAPP statute to get rid of legitimate claims. The court has finally taken action to remedy that."

Jeffrey J. Pyle, a First Amendment lawyer at Prince Lobel Tye LLP, said in an email to the Silha Center for the Study of Media Ethics & Law that he agreed with the SJC that calling the nurses' defamation suit a SLAPP was problematic. "The court's reluctance to dismiss the claims of the nurses in *Blanchard* was understandable. The legislature passed the statute to provide for quick resolution of suits brought 'to intimidate opponents' exercise of rights of petitioning and speech,' . . . and there

is no indication the nurses brought suit to discourage the hospital from continuing to speak out in support of its license."

However, Pyle remained concerned about the ramifications of the decision. "In resolving this difficult case, however, the Court has made the path to dismissal under the anti-SLAPP law more circuitous and doubtful, to the detriment of the First Amendment values it seeks to protect," he wrote. "The new standard weakens the anti-SLAPP law and will likely result in more defamation claims against citizens groups, bloggers, opinion writers, and the press. In practice, a defamation plaintiff will always insist that its 'primary' motivation in bringing suit was to recover damages, not to suppress petitioning. Defendants seeking to rebut such claims will now have the unenviable task of trying to show their opponents' bad motive – without the benefit of discovery.. . . [A]nti-SLAPP motions are likely to become increasingly burdensome and expensive – the very outcome the statute was intended to avoid in the first place." Pyle continued, "By placing so much emphasis on the plaintiff's subjective motivation, the ruling threatens to vest more discretion in the hands of trial judges to deny anti-SLAPP motions.. . . However, judges who simply don't like the anti-SLAPP law, or who don't think the plaintiff should have to pay the defendant's attorneys' fees, will now have greater leeway to deny a special motion to dismiss simply by finding a proper subjective motive."

Connecticut and New Jersey Legislatures Consider Anti-SLAPP Legislation

On March 16, 2017, the New Jersey Assembly passed A603, a bill allowing a party to file an application seeking dismissal of a civil action on the basis that it is a SLAPP lawsuit. Similarly, on June 5, 2017, the Connecticut House of Representatives unanimously passed Public Act 17-71, an anti-SLAPP bill meant to enable defendants to seek dismissal of SLAPP lawsuits related to the rights of free speech, assembly, and petitioning the government.

According to the *New Jersey Law Journal* on March 16, 2017, the New Jersey anti-SLAPP bill had previously been approved in a 68-4 vote in February 2016, but the state Senate took no action before the legislative session ended. Sponsored by Assemblyman Joseph Lagana (D-Bergen), the bill re-passed the Assembly 69-3 on March 16, 2017. As the *Bulletin* went to press, A603 remained in the Senate Judiciary Committee.

Under the proposed law, the moving party, the defendant in a civil action alleged to be a SLAPP lawsuit, may file an application seeking the dismissal of the suit. The burden first falls on the moving party to present "*prima facie* evidence showing that the cause of action at issue arises from an act in furtherance of the right of advocacy on an issue of public interest." The bill defines "right of advocacy on an issue of public interest" as a "statement made in connection with an issue of public interest . . . that is reasonably likely to encourage or to enlist public participation," "an expression . . . that involves petitioning State or local government," "any written or oral statement made or submitted in a place open to the public or a public forum," or "any other conduct in furtherance of the exercise of the constitutional right of free speech or right of petition." The bill defines "issue of public interest" as any issue related to "health or safety; environmental, economic, or community well-being; the government; a public figure; or a good, product, or service in the marketplace."

If the moving party meets this initial burden, the burden shifts to the responding party who brought the initial lawsuit to provide "*prima facie* evidence that demonstrates the probability of prevailing on the cause of action." The includes: "evidence to support each essential element of the cause of action, evidence showing that the moving party's application for dismissal . . . is devoid of any reasonable factual support or any arguable basis of law, and evidence showing that the moving party's acts caused actual compensable harm to the responding party."

If the responding party meets this burden, the civil action proceeds to trial and the court awards the responding party reasonable costs of litigation and attorney's fees. Conversely, if the responding party fails to meet the burden, the civil action is dismissed. Additionally, the court awards the moving party reasonable costs of litigation and any attorney's fees incurred. A603 also allows a judge to "order additional relief including sanctions against the responding party as the court deems necessary to deter repetition of comparable conduct by the responding party or others similarly situated."

Following the Assembly passing A603, Lagana said in a statement, "SLAPP suits are nothing more than thinly veiled attempts to silence defendants by putting them through a costly and complicated legal process. This goes against our democratic ideals and is an abuse of our judicial system."

During hearings on the bill in the Assembly Judiciary Committee in March 2016, Lagana said the current process in which defendants can ask for sanctions to be imposed after motions to dismiss based on grounds of frivolousness are granted, is insufficient, as reported by the *New Jersey Law Journal* on March 8, 2016.

On June 5, 2017, the Connecticut House of Representatives unanimously passed Public Act 17-71, previously SB-981, titled "An Act Concerning Strategic Litigation Against Public Participation And A Special Motion To Dismiss." The proposed anti-SLAPP statute is meant to enable defendants who are exercising First Amendment rights to more easily seek dismissal of some lawsuits intended to silence them, according to the *Connecticut Law Tribune* on May 10. As the *Bulletin* went to press, the bill remained on Gov. Dannel Malloy's desk for his consideration.

Under the proposed law, "[i]n any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern" the opposing party may file a special motion seeking dismiss the complaint. "Right to petition the government" is defined as "communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body," as well as communication that "is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a . . . governmental body." The bill defines "matter of public concern" as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work."

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Google Hands Over Only One Record Following Expansive Search Warrant

On Feb. 1, 2017, Hennepin County Judge Gary Larson approved a search warrant request by the Edina Police Department seeking to force Google to reveal the name(s) and personal information of suspect(s) in a local identity fraud case. On May 3, Detective Dave Lindman of the Edina police filed an update with the district court indicating that Google had complied with the warrant, despite the search engine's previous objections. On May 12, the Minneapolis *Star Tribune* reported that Google had turned over only one record.

UPDATE

On Jan. 7, 2017, two individuals reported to Edina police that $28,500 had been stolen from their Spire Credit Union savings account through a fraudulent transfer. According to Lindman's application for the search warrant, an unknown number of suspects transferred the funds from the victim, who was only identified as Douglas in the search warrant application, into a Bank of America account that did not belong to Douglas. The suspect(s) authorized the transfer by providing the credit union with Douglas's name, date of birth, social security number, and a fake passport in Douglas's name. Lindman wrote in the application that the photo used in the passport was not Douglas, but resembled him and was the first image displayed under a Google Image search of Douglas's first and last name. The full search warrant application is available online at https://www.documentcloud.org/documents/3519211-Edina-Police-GoogleSearch-Warrant-Redacted.html.

Lindman filed the application for the search warrant on February 1 and Larson approved it the same day. The warrant asked Google to reveal the "name(s), address(es), telephone number(s), dates of birth, social security numbers, email addresses, payment information, account information, IP addresses, and MAC [media access control] addresses of the person(s) who requested/completed the search" of Douglas' first and last name. In a March 17 story about the warrant, *Ars Technica* senior editor David Kravets wrote that the warrant was "perhaps the most expansive one we've seen unconnected to the US national security apparatus."

On March 17, a spokesperson for Google told the *Star Tribune* that "[Google] will continue to object to this overreaching request for user data, and if needed, will fight it in court. We always push back when we receive excessively broad requests for data about our users." (For more information on the search warrant and commentary from observers, see *Minnesota Judge Signs Search Warrant Covering Individuals Who Searched a Victim's Name on Google* in "Minnesota and New York Consider Media Law Questions Involving the Internet and Privacy" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

Nevertheless, in a May 3 court filing, Lindman wrote that Google had complied with the warrant, according to *City Pages* on May 12. "On April 27, [I] was notified by Google Inc. that the results from this search warrant were available via their law enforcement portal," Lindman wrote in the update.

On May 12, Google issued a statement saying that it had turned over only one record. "We objected to the warrant and significantly narrowed its scope to the point that only one record was produced," the statement read. "We were pleased to resolve this in a way that preserves our users' privacy." Neither Edina officials nor Google disclosed what information was turned over to the police, according to the *Star Tribune* on May 12.

In an interview with the *Star Tribune*, University of Minnesota law professor William McGeveran said Google's resistance to the warrant led to a positive result. "Google, by working to narrow it down and focus it, was responding to what was really objectionable," he said. "[The warrant] was asking for a broad swath of people's searches that was overly inclusive."

However, McGeveran expressed concern about similar warrants being issued in the future and that other search engines may not fight as hard to prevent the disclosure of personal information. "I'm still worried about what would happen next time," he said. "Will another judge do this in the future?"

Scott Memmel
Silha *Bulletin* Editor

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In order for a court to grant the special motion to dismiss, the party filing the motion must "[make] an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association."

However, the court can deny the special motion if the party that brought the alleged SLAPP lawsuit "sets forth with particularity the circumstances giving rise to the complaint . . . and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the [lawsuit]." Like the New Jersey bill, the court awards costs and reasonable attorney's fees to the party filing the special motion if it is granted. Conversely, if the special motion is denied and is found to be "frivolous and solely intended to cause unnecessary delay," the court awards costs and reasonable attorney's fees to the party opposing the motion.

Following its passage in the Connecticut House of Representatives, Rep. William Tong (D-Stamford) called Public Act 17-71 "a bill to protect people against 'libel bullies.'"

Scott Memmel
Silha *Bulletin* Editor

New York Times Deputy General Counsel to Deliver 2017 Silha Lecture, "Making Media Law Great Again: The First Amendment in the Time of Trump"

When the President of the United States has declared the news media "the enemy of the American people" and has threatened to "open up our libel laws" to make it easier for the powerful to sue, will the Constitution continue to protect freedom of the press? Join us on Monday, October 2, 2017 at 7:30 p.m. for the 32nd Annual Silha Lecture, "Making Media Law Great Again: The First Amendment in the Time of Trump," featuring David McCraw, Deputy General Counsel of *The New York Times*. This event is sponsored by the Silha Center for the Study of Media Ethics and Law at the Hubbard School of Journalism and Mass Communication at the University of Minnesota.

SILHA CENTER EVENTS

McCraw's October 2016 letter to Donald Trump's attorney, defending the *Times*' right to publish an article entitled, "Two Women Say Donald Trump Touched Them Inappropriately," put *The Times*' lawyer in the national spotlight. The letter is available online at: https://www.nytimes.com/interactive/2016/10/13/us/politics/david-mccraw-trump-letter.html

Trump's attorneys accused the *Times* of libeling the then-Republican presidential candidate, and demanded that the newspaper retract the article from its website. But McCraw refused, saying, "Nothing in our article has had the slightest effect on the reputation that Mr. Trump, through his own words and actions, has already created for himself." He defended *Times* reporters' efforts to confirm the women's statement and to give Trump an opportunity to respond, and concluded, "We did what the law allows. We published newsworthy information about a subject of deep public concern." McCraw invited Trump's attorneys to present his case in a court of law, assuring them that a judge would "set him straight." To date, neither Trump nor his administration has sued the newspaper, but the President continues to threaten and deride what he calls "Fake News" organizations, including CNN, NBC, CBS, and ABC, along with the "failing" *New York Times* and *The Washington Post*.

McCraw is among the nation's most prolific advocates for open government. He has litigated more than 35 Freedom of Information Act (FOIA) suits, 31 of them during the Obama administration, winning the disclosure of secret records on topics ranging from drone strikes in Yemen to the government's ever-growing surveillance program. Pursuing information about government activity through FOIA requests is essential to providing the public with the information it needs to know, McCraw wrote in a June 13, 2017 *Times* essay. Unless news organizations are willing to sue when requests are denied, "FOIA bureaucrats [are permitted] to decide just how secret our government is going to be. That was never part of democracy's plan." McCraw's essay is available online at: https://www.nytimes.com/2017/06/13/insider/foia-freedom-of-information-act-new-york-times.html

McCraw has worked for the *Times* for 15 years, where he has provided legal support for many of the newspaper's major investigative stories, including its Pulitzer Prize-winning stories on workers' deaths at a Texas foundry, the lethal aftermath of Hurricane Katrina at a New Orleans hospital, and the secret fortunes of China's political elite. McCraw also leads the *Times*'s crisis management team coordinating the newspaper's response when journalists are kidnapped or detained overseas. In January 2017, the *Times* promoted McCraw to its Deputy General Counsel. He is a graduate of the University of Illinois, Cornell University, and Albany Law School. He is also an adjunct professor at the NYU Law School. In 2010, the New York City Bar awarded McCraw its Cyrus Vance Award for his international *pro bono* work on behalf of free expression.

The 32nd Annual Silha Lecture begins at 7:30 pm at Cowles Auditorium in the Hubert H. Humphrey Center on the West Bank of the University of Minnesota Twin Cities campus in Minneapolis. No reservations or tickets are required. Parking is available in the 19th and 21st Avenue ramps. Additional information about directions and parking can be found at www.umn.edu/pts.

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

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& MASS COMMUNICATION

Making Media Law Great Again: The First Amendment in the Time of Trump

**DAVID McCRAW,
DEPUTY GENERAL
COUNSEL OF
*THE NEW YORK TIMES***

In October 2016 David McCraw wrote a letter to Donald Trump's attorney defending the right of *The New York Times* to publish a news story over which Trump had threatened a lawsuit. The letter went viral, with more than two million people reading it on the *Times* website alone.

Despite his apparent overnight rise to fame, McCraw already ranked as one of the nation's most prolific litigators of freedom-of-information cases. The 15-year *Times* veteran has provided legal support for every major investigative story the paper has published in recent years, including three that won Pulitzer Prizes. The 35 FOIA suits he has litigated have pried loose secret documents on topics ranging from drone strikes in Yemen to the U.S. government's burgeoning surveillance program.

A graduate of the University of Illinois, Cornell University, and Albany Law School, McCraw is an adjunct professor at NYU Law School. In 2010, the New York City Bar honored him with its Cyrus Vance Award for his international *pro bono* work on behalf of free expression.

32ND ANNUAL SILHA LECTURE

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