

## Open Government Advocates Criticize Obama's Prosecution of Leakers

### *Leaks of Information to News Media Raise Fundamental Legal Questions*

The federal government's prosecutions of leakers of government information have stirred advocates of free speech and open government to criticize the Obama administration for promising transparency while chilling freedom of speech.

In roughly 28 months since President Barack Obama took office Jan. 20, 2009, the federal government has filed criminal charges against five people for the unauthorized distribution of classified national security information. The five cases have involved leaks from the Central Intelligence Agency (CIA), U.S. military, U.S. State Department, and National Security Agency (NSA) to the media. In two of the cases, the government issued subpoenas to reporters or media companies as part of their investigations.

In a March 7, 2011 article, Politico.com reporter Josh Gerstein called the Obama administration's legal campaign against leakers "a sharp break from recent history," observing that the U.S. government brought only three such cases during the 40 years prior to the present administration. Gerstein reported that the administration has defended the prosecutions, insisting that they have arisen out of a duty to protect the nation's most sensitive secrets from reckless disclosure, and pointing out that other, more proper channels exist for government employees to report malfeasance. However, "legal experts and good-government advocates say the hard-line approach to leaks has a chilling effect on whistleblowers, who fear harsh legal reprisals if they dare to speak up," Gerstein wrote.

Jesselyn Radack, Homeland Security and Human Rights Director for the Government Accountability Project and a former Justice Department attorney, told Gerstein the Obama policy is "a disturbing one particularly from a president who

got elected pledging openness and transparency—and someone who also got elected thanks to a lot of [Bush-era] scandals that were revealed by whistleblowers."

On Jan. 21, 2009, his second day in office, Obama released a memo that said that under his administration there would be a "presumption of disclosure" for all federal Freedom of Information Act requests, reversing a Bush administration directive that called for withholding any requested documents if there was a "sound legal basis" for doing so. Obama said in a speech the same day that "starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known." (For more on the Obama open government promises, see "Obama Promises More Government

Openness; Skeptics Demand Immediate Results" in the Winter 2009 issue of the *Silha Bulletin*, and "Obama's Policies Promote Openness; Some Secrecy Persists" in the Spring 2009 issue.)

Salon.com blogger Glenn Greenwald contrasted the

administration's aggressive pursuit of leaks with Obama's promises to promote transparency. Greenwald observed that Obama's agenda as president-elect included plans to "protect whistleblowers," stating that "such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled." (Obama's Ethics Agenda is available online at [http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/)). Greenwald said "those pretty words have given way to the most aggressive crusade to expose, punish and silence 'courageous and patriotic' whistleblowers by any President in decades."

### *Risen Subpoenaed, Investigated in CIA Leak Case*

The investigation and indictment of former CIA officer Jeffrey Sterling has made *New York Times* reporter James Risen the subject of two subpoenas and a government

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"We've argued that I was a victim of harassment by the government. This seems to bolster that."

— James Risen  
*New York Times* Reporter



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# Director's Note: Outrageous Speech, 'Trash Torts' and the First Amendment

## Looking at the 'Johnny Northside' Case through the Prism of Snyder v. Phelps

**M**arch 2011 was an interesting month for freedom of expression. As you'll read elsewhere in this issue of the *Silha Bulletin*, the Supreme Court of the United States ruled, 8 to 1, that members of the Topeka, Kansas-based Westboro Baptist Church have a First Amendment right to picket at the periphery of a military funeral. The majority of the justices held that the protesters' signs, bearing messages such as "Thank God for Dead Soldiers" and "Fag Troops," constituted commentary on vital issues involving "the political and moral conduct of the United States and its citizens," including "homosexuality in the military." The court rejected claims that the surviving family of Lance Corporal Matthew Snyder should be able to recover damages for intentional infliction of emotional distress—essentially, hurt feelings—based on a peaceful protest on public property that involved "matters of public import."

### DIRECTOR'S NOTE

Justice Samuel Alito, the lone dissenter, argued that private individuals like the Snyders should not have to be subjected to what Alito considered to be outrageous and personal attacks. But the majority, extending its landmark 1988 decision in *Hustler Magazine, Inc. v. Falwell*, concluded that even "outrageous" speech targeted at private individuals must be protected as long as it involves matters of public concern.

But just a few days later, a jury in Hennepin County (Minn.) ruled that a public figure—ex-Jordan Area Community Council director Jerry Moore—could recover \$25,000 for emotional distress (as well as \$35,000 for lost wages) after he was fired by the University of Minnesota's Urban Research and Outreach/Engagement Center the day after John Hoff, a blogger known as "Johnny Northside," wrote a post accusing Moore of involvement in a "high-profile fraudulent mortgage" and asking "WHAT THE HELL was the U of M thinking by hiring him."

In the early stages of the case, the trial judge threw out some of Moore's claims, finding that parts of the blog post were pure opinion and therefore could not be the basis for a lawsuit. She rejected Moore's lawyer's argument that Hoff was not entitled to the First Amendment protection accorded to journalists because he is not objective and allows others to post online comments that turn his blog into a "defamation zone." But the jury nevertheless ruled against Hoff. Even though it found that what the blogger had posted was true, it concluded that the statement "tortiously interfered" with Moore's employment, resulting in lost wages and reputational damage.

This case is reminiscent of the so-called "trash torts" lawsuits brought in the 1990s. Plaintiffs who wanted to sue for libel, but could not meet the high standards of proof set by the Supreme Court in cases like *New York Times v. Sullivan* and its progeny, attempted to circumvent those requirements by claiming damages based on other legal theories such as trespass, breach of duty of loyalty, or fraud. In some instances, such as the infamous 1999 Food Lion suit brought against ABC's "Primetime Live" for deceptive undercover reporting techniques, they have won. But for the most part, courts have been unwilling to allow these kind of end-runs around the First Amendment. Plaintiffs whose damages are based on reputational harm must meet the standards of proof of falsity and actual malice that are necessary to prevail in a libel suit, even if they label the claim as some other tort.

The jury verdict in the "Johnny Northside" case is unlikely to withstand review by an appellate court. Holding a speaker liable for damage to reputation that results because he told the truth simply cannot be squared with the unbroken line of First Amendment precedent that protects robust, and even caustic, attacks on public figures. If the Supreme Court will not allow private figures like the Snyders to recover damages for emotional distress caused by the "outrageous" speech of the Westboro protesters, it will certainly reject a similar claim brought by a former government official who is offended by truthful criticism of his activities.

— PROF. JANE KIRTLEY

SILHA CENTER DIRECTOR AND SILHA PROFESSOR OF  
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investigation that swept up some of his personal financial and travel records without his knowledge or permission.

On Jan. 6, 2011, Sterling was arrested and charged with six counts of unauthorized disclosure of national defense information, and one count each of unlawful retention of national defense information, mail fraud, unauthorized conveyance of government property, and obstruction of justice. Sterling's indictment, which was filed under seal Dec. 22,

## COVER STORY

2010, did not specify the information he is alleged to have released, only saying that it related to his assignment to a "classified clandestine operational program designed to conduct intelligence activities related to the weapons capabilities of certain countries," and as an "operations officer assigned to handle a human asset associated with that program." According to the indictment, Sterling's unauthorized disclosure of national defense information violates the Espionage Act, 18 U.S.C. § 793, which criminalizes the unauthorized retention or disclosure of "national defense information" or "classified information."

The indictment alleges that Sterling "engaged in a scheme to disclose information ... first, in connection with a possible newspaper story to be written by an author employed by a national newspaper in early 2003 and, later, in connection with a book published by the author in January 2006." The indictment does not name the author, but its details make clear that it is Risen, who covers national security issues and whose 2006 book "State of War: The Secret History of the C.I.A. and the Bush Administration" described a CIA attempt to disrupt Iranian nuclear research as an "espionage disaster." The indictment alleges that Sterling released the information in retaliation for his 2002 firing.

Risen, who won a Pulitzer Prize in 2006 for his reporting on the Bush administration's warrantless wiretapping program, has been the subject of two federal subpoenas seeking his sources for the Iran chapter of "State of War." According to *The New York Times*, in January 2008 the Bush administration obtained a subpoena seeking his cooperation in the Sterling investigation, but Risen fought the government's efforts and the subpoena expired in summer 2009 without his having to testify. On April 28, 2010, *The New York Times* reported that a second subpoena had been issued by the Obama administration. At that time, Risen's attorney, Joel Kurtzberg, said Risen intended to fight the subpoena and "honor his commitment of confidentiality to his source or sources." A Jan. 6, 2011 *New York Times* story reported that a federal judge in the Eastern District of Virginia quashed the second subpoena in November 2010. (For more on the 2008 subpoena, see "Reporters Fight Federal Subpoenas" in the Winter 2008 *Silha Bulletin*.)

It is likely that both subpoenas were personally approved by U.S. attorney generals—Michael Mukasey under Bush in 2008 and Eric Holder under Obama in 2010—because of guidelines that require explicit permission from the Attorney General for the Justice Department to issue a subpoena to a member of the news media or to issue a subpoena for a reporter's "telephone toll records." The Attorney General guidelines are published at 28 C.F.R. § 50.10. Although not formally enforceable by a court, the guidelines have been seen as an important protection for

journalists because they require federal officials to negotiate with a reporter before a subpoena is requested, as well as to exhaust other sources of information and to provide "reasonable grounds" that the information is "essential" to resolve a disputed issue or solve a crime. The guidelines state that "the use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." But they also state that the policy "does not apply to demands for purely commercial or financial information unrelated to the news gathering function." (For more on the Attorney General Guidelines, see the "Silha *Bulletin* Guide to Journalist's Privilege" in the Spring 2008 issue of the *Silha Bulletin*.)

Court filings in the Sterling case show that although the subpoenas directly to Risen were unsuccessful, the government used other ways to compile information on the reporter. A motion Sterling filed with the Eastern District of Virginia on Feb. 24, 2011 stated that, as part of its evidence supporting the case against Sterling, the government "provided ... various telephone records showing calls made by ... Risen" as well as "credit card and bank records and certain records of his airline travel." In a footnote in a March 10 filing with the court, federal prosecutors wrote that they did not subpoena Risen's phone records, which would have required notification to Risen under the attorney general guidelines. The filing did not address the other records, which do not require notification under the guidelines. Moreover, they argued that questions about the acquisition of Risen's information was not "germane" to the issue before the court.

In an interview for a Feb. 24, 2011 story for Politico.com, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota told Gerstein that "third-party subpoenas" like the one issued for Risen's bank and credit card records "are really, really invidious." Kirtley explained that journalists often are not notified when the government asks telephone and Internet companies or banks for their records. "Even if it is targeted, even if they're trying to just look at the relevant stuff, they're inevitably going to get material that exposes other things," Kirtley said. (In 2007, St. Paul, Minn. police used a third-party subpoena to gather information on a local reporter without his knowledge. See "St. Paul Police Secretly Subpoena Reporter's Cell Phone Records" in the Winter 2008 issue of the *Bulletin*.)

In a Feb. 25, 2011 *New York Times* story, Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, expressed concern about the chilling effect the Sterling investigation could have on government workers who might criticize their bosses by speaking to the media. "The problem is that [Risen] and other reporters are going to have a much more difficult time in the future having government whistleblowers talk to them, and that's the reason [government officials] do this."

Risen's assessment, given to the Gerstein, was more direct: "We've argued that I was a victim of harassment by the government. This seems to bolster that."

## **Manning, WikiLeaks Case Leads to Prominent Resignation, Twitter Investigation**

The case brewing against Pfc. Bradley Manning, the military intelligence analyst charged with leaking thousands of military and diplomatic documents and other information to the website WikiLeaks, has also raised questions and criticism over discouraging whistleblowers while chilling freedom of speech.

On March 1, 2011 the Army announced the addition of 22 charges to those already pending against Manning, who

was first taken into custody in May 2010 in Kuwait over allegations that he had leaked classified video taken from a U.S. military helicopter as its guns shot and killed a Reuters photographer in Baghdad in July 2007. WikiLeaks titled the video “Collateral Murder” and released it online, including on YouTube, in April 2010. Manning has also been accused of providing WikiLeaks with

tens of thousands of classified field reports filed by American troops in Afghanistan, which WikiLeaks began publishing in July 2010, and hundreds of thousands of American diplomatic cables, which WikiLeaks began to release in November 2010. (For more on the initial round of WikiLeaks documents, see “WikiLeaks’ Document Dump Sparks Debate” in the Summer 2010 *Silha Bulletin*. Silha Center Director Jane Kirtley discussed “The WikiLeaks Quandary” in the Fall 2010 issue.) On April 25, WikiLeaks released a new round of documents focused on details surrounding detainees at the United States’ detention center in Guantanamo Bay, Cuba.

The original charges against Manning included violations of Article 92 of the Uniform Code of Military Justice (UCMJ) for “violating a lawful Army regulation by transferring classified data onto his personal computer and adding unauthorized software to a classified computer system” and Article 134 for general misconduct—breaking federal laws against disclosing classified information. According to Manning’s new “charge sheet,” the March 1 charges included violations of Article 104, “aiding the enemy;” charges stemming from violations of Article 92, “failure to obey order or regulation;” and Article 134, which extends generally to offenses not specifically listed in the UCMJ which “shall be punished at the discretion of [the] court.”

The *New York Times* reported March 2, 2011 that Manning’s lawyer, David E. Coombs, posted a comment on his Twitter feed saying that the Article 104 charge was the “most significant additional charge.” The *Times* reported that Coombs “has largely declined to talk to the news media.”

Article 104 of the UCMJ says: “Any person who (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may

direct.” The charge sheet did not identify an enemy that Manning was accused of aiding. According to the *Times*, a military statement said that “the prosecution team had decided against recommending the death penalty in [Manning’s] case.”

From July 2010 until April 2011, Manning was held at a Marine Corps brig in Quantico, Va. The conditions of Manning’s detention drew criticism from Coombs, commentators, and news media. Coombs wrote several posts on his blog, located at <http://www.armycourt martialdefense.info>, detailing

treatment of Manning that he called “degrading and humiliating.” After being transferred to Quantico, Manning was held under “maximum custody” with additional “suicide watch” and “prevention of injury watch” measures, according to a complaint he filed with the Quantico base commander on January 11. On April 19, The Associated Press (AP) reported

“In an intelligent system of government, [Crowley’s] views would be freely aired and honestly attended to. But it seems that there is not much place for such speech in the current Administration.”

– Steven Aftergood  
Secrecy News

that the Pentagon announced that Manning would be moved to the Fort Leavenworth Joint Regional Correctional Facility in Kansas.

According to the January 11 complaint, Manning was permitted to leave his cell for one hour out of every 24 for exercise, when he was allowed to walk in an empty room. He was forbidden to exercise in his cell, and was allowed no more than one book or magazine at a time, which was removed when he went to bed. His meals were served in his cell. The suicide and prevention of injury watch measures required Manning to respond affirmatively to guards asking whether he was “ok” every five minutes between 5 a.m. and 8 p.m., when he was prohibited from sleeping. He was not allowed a pillow or sheets, and if he covered his head or turned toward the wall while sleeping, he was awakened to ensure that he was “ok.” According to the complaint, two forensic psychiatrists at the brig who examined Manning consistently recommended that Manning be moved to “medium custody” and taken off of suicide and prevention of injury watch.

Coombs reported in a March 5 blog post that beginning March 2, Manning was required to sleep completely naked and report for morning roll call naked, after which his clothing was returned. The new treatment was a result of a remark that his treatment as a self-injury risk was “absurd” and, according to Coombs, he “sarcastically stated that if he wanted to harm himself, he could conceivably do so with the elastic waistband of his underwear or with his flip-flops.”

In his post, Coombs argued that “the decision to strip PFC Manning of his clothing ... is clearly punitive in nature. There is no mental health justification for the decision. There is no basis in logic for this decision. PFC Manning is under 24 hour surveillance, with guards never being more than a few feet away from his cell. PFC Manning is permitted to have his underwear and clothing during the day, with no apparent concern that he will harm himself during this time

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period. Moreover, if Brig officials were genuinely concerned about PFC Manning using either his underwear or flip-flops to harm himself (despite the recommendation of the Brig's psychiatrist) they could undoubtedly provide him with clothing that would not, in their view, present a risk of self-harm. Indeed, Brig officials have provided him other items such as tear-resistant blankets and a mattress with a built-in pillow due to their purported concerns." A March 13 post on the *Washington Post* World blog reported that beginning March 12, Manning was receiving sleeping garments.

March 14 editorials in the *Los Angeles Times* and *New York Times* decried Manning's treatment. *The New York Times* said that Manning's detention "conjures creepy memories of how the Bush administration used to treat terror suspects," while the *Los Angeles Times* observed, "it's hard to resist the conclusion that punishment, not protection, is the purpose of these degrading measures. Punishment may be in Manning's future ... [but his] treatment should reflect the fact that he remains innocent until proven guilty."

Outspoken criticism of the conditions of Manning's detention also forced the resignation of a top Obama administration spokesperson. According to a March 10 blog post by BBC news presenter and Nieman Journalism Fellow Phillippa Thomas, Chief State Department Spokesman P.J. Crowley told about 20 people gathered for an event organized by the Center for Future Civic Media at MIT that the treatment of Manning was "ridiculous and counterproductive and stupid," adding "none the less [he] is in the right place."

Obama was asked about Manning's detention in a press conference the following day. According to the March 13 *Washington Post* blog post, Obama said the Pentagon had assured him that the conditions of Manning's detention were "appropriate."

On March 13, Crowley resigned. CNN Senior White House Correspondent Ed Henry reported March 13 that "sources close to the matter said the resignation ... came under pressure from the White House, where officials were furious about his suggestion that the Obama administration is mistreating Manning." In an interview broadcast March 28 by the program "HARDtalk" on BBC World News, Crowley said "I don't regret saying what I said," although "quite honestly I didn't necessarily think the controversy would go as far as it did." Crowley declined to give details about "privileged conversations" he had with White House officials in the fallout from his remarks, saying that "I felt that my actions put the president in a difficult position. I felt that the only appropriate thing for me to do was resign."

Commentators decried the fact that Crowley was apparently forced to resign for speaking his mind on Manning's detention. Steven Aftergood, an expert on government secrecy, intelligence, and national security policy, wrote in a post on his blog Secrecy News, "in an intelligent system of government, [Crowley's] views would be freely aired and honestly attended to. But it seems that there is not much place for such speech in the current Administration." Glenn Greenwald, in a March 13 blog post, said, "so, in Barack Obama's administration, it's perfectly acceptable to abuse an American citizen in detention who has been convicted of nothing ... but speaking out against

that abuse is a firing offense. Good to know."

Edward Wasserman, the Knight Professor of Journalism Ethics at Washington and Lee University and a columnist for *The Miami Herald*, criticized mainstream media more broadly for not speaking out against the detention of Manning, considering that Manning is accused of giving the media access to such a valuable trove of information. In a March 28 column, Wasserman asked, "don't journalists have some obligation to their sources? ... If these news media believe they were right to publish the material Manning gave them, how can they stand aside as he faces life in prison for giving it to them? If they did right and the world benefited, did he do wrong? On what grounds can they say—as [*New York Times* Executive Editor Bill] Keller and *Guardian* of London editor Alan Rusbridger have—that they would help defend Wikileaks boss Julian Assange if the U.S. charges him, while they won't lift a finger to protest Manning's incarceration?" (Wasserman was a featured speaker at the 2008 Silha Spring Ethics Forum. See "Forum Explores Journalistic Independence, War and Politics" in the Spring 2008 Silha *Bulletin*.)

The Pentagon said Manning's move to Fort Leavenworth was not a response to criticism of his treatment in Quantico, the AP reported April 19. Defense Department General Counsel Jeh Johnson said in a press conference that "the fact that we have made a decision to transfer this particular pretrial confine ... should not be interpreted as a criticism of the place he was before." Johnson and Army Undersecretary Joseph Westphal told reporters that Fort Leavenworth is more open, has more space, and will provide Manning with a greater opportunity to eat and interact with other prisoners, the AP reported. Johnson and Westphal said that the facility also has a broader array of facilities, including trained mental, emotional, and physical health staff. The AP reported that Pentagon officials said Manning's case is very complex and could drag on for months or years.

The federal government's investigation following WikiLeaks' publication of government secrets has not been limited to Manning, however. On March 11, a federal magistrate judge in the Eastern District of Virginia upheld an order demanding the disclosure of account information of three Twitter users with ties to WikiLeaks.

The Twitter users who filed a motion to dismiss the order as well as a motion to unseal the court records associated with it were Birgitta Jónsdóttir, a member of the Icelandic parliament who has been associated with WikiLeaks; Jacob Appelbaum, a WikiLeaks volunteer from Seattle; and Rop Gonggrijp, a Dutch computer security specialist and Internet entrepreneur. Lawyers from the American Civil Liberties Union (ACLU) and Electronic Frontier Foundation (EFF) represented the users. The order also sought records relating to WikiLeaks itself, its founder Julian Assange, and Manning. The Privacy Inc. blog on the website Cnet reported March 11 that prosecutors said no one "associated with" WikiLeaks has filed an objection to the order.

The order was filed under seal on Dec. 14, 2010. Citing the Stored Communications Act, 18 U.S.C. § 2703 *et seq.*, it required Twitter to turn over the users' "subscriber names, user names, screen names, or other identities;" contact information; records

of the users' "connection[s], ... session times and durations;" the "means and source of payment for such service (including any credit card or bank account number) and billing records; records of user activity for any connections made to or from the Account, including date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);" among other things.

The Stored Communications Act outlines the circumstances in which government entities may, via a warrant or subpoena, require the disclosure of the contents of a wire or electronic communication, or any records pertaining to that communication, by an electronic communication service provider. According to U.S. Magistrate Judge Theresa Carroll Buchanan's order, the law applies differently to "records" of communications, such as a name, address, connection records, or payment records; and communication "contents:" the actual messages communicated. If the government seeks communication contents, it must notify the subject of the warrant or subpoena, who can challenge the order. If the government seeks only records, however, notification is not required, and the user may not challenge the order.

*The New York Times* reported January 9 that such requests to Internet communications companies are somewhat routine, but are rarely disclosed to the public. The reason the Twitter order became public is because Twitter took the unusual step of challenging the secrecy of the government request in order to inform its targets. Twitter won that challenge, and the existence of the order, though not its contents, was made public.

Nevertheless, Buchanan's March 11 order ruled that Jónsdóttir, Appelbaum, and Gonggrijp lacked standing to challenge the order, since it requested only communication records, and not contents. Buchanan also addressed the three users' claims that the order was not properly issued because it was too broad and included information irrelevant to the investigation, it violated the Fourth Amendment prohibition of unreasonable searches and seizures, and violated the users' First Amendment rights to association. *In Re: §2703(d) Order; 10GJ3793* (E. Dist. Va., March 11, 2011)

Buchanan ruled that notwithstanding "the difficulty of challenging a document [the users] have not seen," the government had met its burden under 18 U.S.C. § 2703 (d) to show that its request for records "stated 'specific and articulable' facts sufficient to issue the Order ... [seeking] disclosures ... 'relevant and material' to a legitimate law enforcement inquiry." Moreover, Buchanan ruled that the order did not violate the Fourth Amendment because it did not infringe on "an expectation of privacy that society considers reasonable." She cited case law that has held that "no legitimate expectation of privacy exists in subscriber information voluntarily conveyed to phone and internet companies," and said the users "voluntarily conveyed their IP addresses to the Twitter website, thus exposing the information to a third party administrator, and thereby relinquishing any reasonable expectation of privacy."

Buchanan also found that the order did not violate the users' First Amendment rights. "Petitioners," she wrote, "who have already made their Twitter posts and associations publicly

available, fail to explain how the Twitter Order has a chilling effect" on their association, adding, "The Twitter Order does not seek to control or direct the content of petitioners' speech or association." She said that the order was "reasonable in scope," reflected a "legitimate" government interest, and was not requested in "bad faith."

"The freedom of association does not shield members from cooperating with legitimate government investigations," Buchanan wrote.

Buchanan also denied the users' request that all documents in the case be unsealed, particularly any documents that would identify other companies (such as Facebook or Google) that might have received orders like the one sent to Twitter. The users cited case law supporting both a common law and constitutional "presumption that public documents, including judicial records, are open and available for citizens to inspect." Buchanan rejected the request for openness, however, arguing that it was overcome by the government's need to prevent the destruction of evidence and "prevent[] unnecessary exposure of those who may be the subject of an investigation, but are later exonerated." Additionally, Buchanan ruled that there is "no First Amendment justification for unsealing the ... documents" because "there is no history of openness for documents related to an ongoing criminal investigation" and "there are legitimate concerns that publication of the documents at this juncture will hamper the investigatory process."

Buchanan agreed to release two redacted documents pertaining to the Twitter order, because they "do not reveal any sensitive investigatory facts which are not already revealed by the Twitter Order" and she agreed to "further review" and take "under consideration" the users' request that the case be placed on a public docket.

On March 25, Bloomberg news service reported that the Twitter users filed an appeal of Buchanan's order in federal district court in Alexandria, Va. Bloomberg reported that EFF legal director Cindy Cohn said "services like Twitter have information that can be used to track us and link our communications across multiple services including Twitter, Facebook and Gmail. The magistrate's ruling that users have no ability to protect that information from the U.S. government is especially troubling."

ACLU staff attorney Aden Fine, in a March 26 Agence France-Presse (AFP) story, said "if the ruling is allowed to stand, our client might never know how many other companies have been ordered to turn over information about her, and she may never be able to challenge the invasive requests." The ACLU is helping to represent Jónsdóttir.

The federal investigation into WikiLeaks remains largely secret. A March 14 AP story observed that "prosecutors have said little about their case, though Attorney General Eric Holder has said that the leaks jeopardized national security, and promised to prosecute anyone who violated U.S. law." The story quoted Aftergood, who speculated about the government's motives for seeking Twitter records: "Either the government is being extremely diligent in crossing every 't' and dotting every 'i.' Or the other possibility is that they have no case whatsoever and they're tallying up all conceivable leads,"

Aftergood said. “The information they’re going to get from Twitter is indirect evidence at best.”

### ***Three Other Cases in Various Stages***

Three other leak cases, none of which has included a request for source information or subpoena to a media organization, are in various stages of litigation. On May 24, 2010, former FBI linguist Shamai Leibowitz was sentenced to 20 months in prison after he pled guilty to leaking documents concerning “communication intelligence activities” to an unnamed blogger. According to *The Washington Post* on May 25, 2010, “federal prosecutors . . . remained mum about exactly what was contained in the classified papers” that Leibowitz leaked. The *Post* reported that during Leibowitz’s sentencing hearing, U.S. District Judge Alexander Williams Jr. said federal authorities convinced him that Leibowitz committed a “very, very serious offense,” but even the judge did not know what information Leibowitz disclosed. “I don’t know what was divulged, other than some documents, and I don’t know how it’s compromised things,” Williams said.

Aftergood said in a May 25 Secrecy News post that Leibowitz was the third government employee to ever be sentenced for leaking classified information to the press. Samuel Morison served eight months of a two-year sentence after being convicted in 1985 of disclosing spy satellite photos to *Jane’s Defence Weekly* and Larry Franklin served 10 months of house arrest after pleading guilty in 2005 to disclosing classified information in conversations with Pro-Israel lobbyists. The lobbyists, Steven Rosen and Keith Weissman, were also indicted in the investigation for taking the information Franklin had shared with them and sharing it with reporters, but the charges were dropped in May 2009. *The Washington Post* reported May 2, 2009 that U.S. attorney Dana Boente said the government requested dismissal because of “the diminished likelihood the government will prevail” in light of, among other things, a lower court ruling that the Espionage Act required the government to show that the men spread the information with the intent to hurt the United States. Media organizations and free press advocates criticized the prosecution of Rosen and Weissman, who were not government employees, arguing that it was one step away from prosecuting journalists under the Espionage Act for engaging in everyday Washington newsgathering practices—talking to sources and passing along information. (For more on the case, see “Judge Rules Classified Evidence in AIPAC trial Cannot be Kept Secret from Press and Public” in the Spring 2007 issue of the *Silha Bulletin*.)

On Aug. 27, 2010, Stephen Kim, a former foreign policy analyst contracted to the U.S. State Department, pled not guilty to charges that he had leaked classified information about North Korea to Fox News, according to *The New York Times*. The Reporters Committee for Freedom of the Press reported on Feb. 11, 2011 that Kim filed motions to dismiss the charges, arguing, among other things, that the prosecution violates the First Amendment because it does not show that Kim handed over documents, stole tangible reports, or received compensation or reward for “what would include oral conversations with a member of the press.” Kim’s attorney, Abbe Lowell, also led the defense of Rosen and Weissman. Lowell argued in a January 31 press release that in the Kim case “the government seeks to make illegal mere oral conversations between a government official and a member of the press.”

Former National Security Administration (NSA) official Thomas Drake was indicted on April 14, 2010, after leaking information about government wiretapping programs to *Baltimore Sun* reporter Siobhan Gorman. *The New York Times* reported June 11, 2010 that the Bush administration initially suspected that Drake was the source for the *Times*’ Pulitzer-winning reports on warrantless wiretaps. According to the *Times*, former officials said that five prosecutors and 25 FBI agents were assigned to that investigation, which included a raid of Drake’s house in November 2007, as well as searches of the homes of three other security agency employees and a Congressional aide.

On March 31, 2011, *The Baltimore Sun* reported that Judge Richard D. Bennett of the U.S. District Court for the District of Maryland said in a March 31 hearing that he would allow Gorman’s articles about NSA program and management problems to be admitted as evidence in Drake’s trial. However, the *Sun* reported that Bennett said he would not allow Gorman to be called as a witness at trial. According to the *Sun*, Bennett said forcing Gorman to testify could end in a “deep, dark hole,” and he is not inclined to jail reporters for refusing to reveal sources. Drake’s trial is scheduled to begin June 13, 2011.

Regardless of the ultimate outcome of the cases against Sterling, Manning, Kim, or Drake, the litigation is likely to continue to help expand an area of law that remained relatively untouched for decades. As the Obama administration moves forward with the prosecutions, questions about how World War I-era anti-spying laws apply to a variety of contemporary news media practices and technology are likely to arise, forcing lawmakers, judges, journalists, and citizens to contemplate the benefits of and challenges to access to information in a democracy.

– PATRICK FILE  
SILHA FELLOW AND *BULLETIN* EDITOR



# Supreme Court Addresses FOIA Exemptions; Utah Legislators Pass, Repeal Law Limiting Openness

In March 2011, two U.S. Supreme Court rulings reaffirmed the presumptive disclosure of public information embodied in the federal Freedom of Information Act (FOIA) in cases that focused on the proper judicial interpretation of the terms “personal” and “personnel” in the statute’s exemptions. Meanwhile state legislators in Utah passed, then repealed, a public records law that many said decreased government openness.

## FREEDOM OF INFORMATION

### No ‘Personal Privacy’ Exemption for Corporations

On March 1, 2011, a unanimous U.S. Supreme Court ruled that corporations are not covered by FOIA’s “personal privacy” exemption, codified at 5 U.S.C. § 552 (b)7(C), holding that AT&T could not prevent a trade organization from acquiring internal company records that the Federal Communications Commission (FCC) gathered during an investigation of AT&T’s operations. *FCC v. AT&T*, 131 S. Ct. 1177 (March 1, 2011)

The facts giving rise to the case began in 2004, when AT&T voluntarily disclosed to the FCC that it might have overbilled a Connecticut school district for telecommunications services it provided as part of an FCC-administered program to enhance local schools’ and public libraries’ access to telecommunications services called E-Rate. The FCC launched an investigation after AT&T reported the possible error, during which the FCC collected invoices, emails containing information about AT&T’s pricing and billing structures, and memoranda about whether AT&T employees violated company policies. Ultimately, AT&T and the FCC settled the matter without AT&T conceding liability. The company agreed to pay the government \$500,000 and agreed to implement new procedures to ensure compliance with E-Rate’s billing requirements.

Several months after AT&T and the FCC reached their agreement, a trade organization, CompTel, submitted a request under FOIA to the FCC for “all

pleadings and correspondence” related to the FCC’s investigation. CompTel describes itself on its website as a trade organization representing and lobbying Congress on behalf of three of AT&T’s chief competitors: Verizon, Qwest, and Sprint. AT&T opposed CompTel’s FOIA request.

The FCC issued a letter-ruling in response to AT&T’s opposition to CompTel’s request. The ruling concluded that some information AT&T sought to keep from disclosure was protected by FOIA exemption 4, which covers “trade secrets and commercial or financial information,” and some information related to individual AT&T employees was covered by exemption 6, which covers “personnel and ... similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” However, the FCC ruled that AT&T as a corporation could not invoke exemption 7(C), which applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.” The FCC ruled that any information that AT&T sought to keep secret under exemption 7(C) must be disclosed to CompTel.

The FCC’s decision that the “personal privacy” exemption did not apply to corporate entities was based on a string of FCC administrative law precedents, as well as several U.S. circuit court and Supreme Court rulings. The FCC’s letter also said that exemption 7(C) was only intended to cover natural persons, not corporations. According to the 3rd Circuit U.S. Court of Appeals, which heard the case on appeal and reversed the FCC’s letter-ruling, the FCC asserted that the exemption’s purpose was to “protect key players in an investigation—targets, witnesses, and law enforcement officers—from the ‘literal embarrassment and danger’ that an individual might suffer, rather than from the ‘more abstract impact’ that a corporation might suffer.”

In ruling that 7(C) applied to AT&T as a corporation, the 3rd Circuit panel relied

principally on the meanings of “person” and “personal” in the statute. The court accepted AT&T’s argument that the plain text of “personal privacy” in exemption 7(C) applied to corporations. “[P]ersonal” is the adjectival form of ‘person,’” the court wrote, and explained that another provision of FOIA, 5 U.S.C. § 551(2), “defines ‘person’ to include a corporation.” The FCC had also argued that, based on previous Supreme Court precedent, “personal” in exemption 7(C) must be read in its “ordinary, everyday” sense; according to the FCC, the ordinary, everyday meaning of “personal” meant only natural persons. The appeals court rejected this argument, reasoning that the FCC “fail[ed] to take into account that ‘person’—the root from which the statutory word at issue is derived—is a defined term” in the statute, and cited the Supreme Court case *Stenberg v. Carhart*, 530 U.S. 914 (2000), for the proposition that “if ... a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.” *AT&T Inc. v. FCC*, 582 F.3d 490 (3rd Cir. 2009)

The 3rd Circuit panel also rejected the FCC’s argument that because exemption 6, which also contains the term “personal privacy,” has not been held by courts to apply to corporations, neither can “personal privacy,” as used in exemption 7(C), apply to corporations. The court reasoned that simply because exemption 6 as a whole has not been held to apply to corporations, “it does not follow that *each and every component phrase* in that exemption, taken on its own, limits Exemption 6 to individuals. It means only that *some* language in that exemption does so.”

The FCC appealed the 3rd Circuit’s ruling to the Supreme Court, which reversed, concluding that exemption 7(C)’s “personal privacy” language could not be applied to corporations.

Chief Justice John Roberts, writing for the unanimous court, explained that “adjectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own.” For

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example, “[t]he noun ‘crab’ refers variously to a crustacean and a type of apple, while the related adjective ‘crabbed’ can refer to handwriting that is difficult to read ... and while ‘crank’ is ‘a part of an axis bent at right angles,’ ‘cranky’ can mean ‘given to fretful fussiness.’” Roberts wrote that although “person” is defined in FOIA, “personal” is not, and those two words can have very different meanings. According to Roberts, “‘Personal’ ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities.”

Roberts also noted that when conducting statutory interpretation, courts “construe language in light of the terms surrounding it,” and explained that “Exemption 7(C) refers not just to the word ‘personal,’ but to the term ‘personal privacy,’” concluding that “AT&T’s effort to attribute a special legal meaning to the word ‘personal’” was “wholly unpersuasive.”

Roberts also addressed exemption 6 and its use of “personal privacy,” finding that, contrary to the 3rd Circuit’s finding, “the meaning of ‘personal privacy’ in Exemption 7(C) is further clarified by the rest of the statute.” Roberts wrote of exemption 6’s use of “personal privacy” that “not only did Congress choose the same term in drafting Exemption 7(C), it also used the term in a nearly identical manner.”

Roberts concluded his opinion with a tongue-in-cheek joke: “The protection in FOIA against disclosure ... on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.”

In a March 3 press release posted on its website, the FCC said that the ruling “supports the Commission’s commitment to increased transparency and openness in government by giving this FOIA exemption its natural and more limited reading, hence refusing to expand the universe of records that may be withheld from the public.”

However, in 2004, the court had interpreted the personal privacy exemption expansively to cover the autopsy photos of Vincent Foster. The

court based its ruling on a theory that Foster’s family members had a privacy right in the government withholding the photos that outweighed the public interest in their being released. *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004)

The Silha Center filed an *amicus* brief in support of the records requestor, attorney Allan Favish. See “Citing Family Members’ Privacy, Supreme Court Allows Government to Withhold Foster Photos,” in the Spring 2004 issue of the *Silha Bulletin* and “The Silha Center Files *Amicus Brief* With the United

“The protection in FOIA against disclosure ... on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.”

— Chief Justice John Roberts  
U.S. Supreme Court

States Supreme Court, Comments with the Council of Europe, And Department of Homeland Security,” in the Summer 2003 issue of the *Silha Bulletin*. Brief for Respondent Allan J. Favish as Amici Curiae Supporting Respondent, *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (No. 02-954)

### ***Military Maps are not ‘Internal Personnel Rules and Practices of an Agency’ under FOIA***

On March 7, 2011, less than a week after handing down its decision in *AT&T v. FCC*, the Supreme Court decided *Milner v. Department of the Navy*, in which it held that FOIA’s exemption 2, which prohibits disclosure of documents “related solely to the internal personnel rules and practices of an agency,” did not apply to naval maps that showed what might happen if a weapons cache, located near a populated area, exploded.

Justice Elena Kagan, writing for the eight-member majority, said that the court took the case to resolve a split in authority among the federal appeals courts regarding the proper interpretation of the language of exemption 2. The circuit split, Kagan wrote, arose from case law that began with the Supreme Court case

*Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In *Rose*, the court held that exemption 2 targets records about employee relations or human resources matters, such as “the use of parking facilities or regulations of lunch hours, statements of policy as to sick leave and the like.” In *Rose*, the court found that “the general thrust” of exemption 2 “is simply to relieve agencies of the burden of assembling and maintaining [such information] for public inspection.” However, as Kagan wrote in *Milner*, the court also noted a potential “caveat”: its limited interpretation of exemption

2 may apply only to the extent that “the situation is not one where disclosure may risk circumvention of agency regulation.”

*Milner v. Department of the Navy*, 131 S.Ct. 1259 (March 7, 2011)

Kagan wrote that “[i]n *Crooker*

*v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981), the D.C. Circuit converted this caveat into a new definition of Exemption 2’s scope.” In *Crooker*, the D.C. Circuit Court found that exemption 2 covered any “predominantly internal” materials whose disclosure would “significantly risk circumvention of agency regulations or statutes.” Kagan explained that, over the years, a new lexicon developed: some courts following the *Crooker* reasoning referred to records about human resources as “Low 2” exemptions to FOIA and referred to records the disclosure of which would risk evasion of laws as “High 2” exemptions.

*Milner* directly addressed the distinction lower courts had developed between “High 2” and “Low 2” exemptions. The case concerned the Navy’s Indian Island Naval Magazine, located at Puget Sound, Wash., which stored heavy munitions and explosives. The Navy used data, called Explosive Safety Quantity Distance (ESQD), to estimate the potential effects of an accidental explosion of weaponry at Indian Island. The ESQD data was translated onto topographical maps, showing the degree of damage to surrounding areas that might result from

a hypothetical explosion. The lawsuit arose out of 2003 and 2004 FOIA requests to the Navy by Glen Milner, a resident of Puget Sound, for the ESQD maps. The Navy denied Milner's request, citing exemption 2, and Milner sued to compel the maps' disclosure.

The district court and the 9th Circuit U.S. Court of Appeals held that the Navy could withhold the ESQD maps under a "High 2" interpretation of exemption 2. Disclosing the maps, the 9th Circuit wrote, "would risk circumvention of the law" because if a terrorist group were to obtain the ESQD maps through a FOIA request, it could use the information to attack the "most damaging target." *Milner v. Department of the Navy*, 575 F.3d 959 (2009)

The Supreme Court reversed, finding that "Exemption 2, as we have construed it, does not reach the ESQD information at issue here. ... By no stretch of imagination do [the ESQD maps] relate to 'personnel rules and practices,' as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees. The Navy therefore may not use Exemption 2, interpreted in accord with its plain meaning to cover human resources matters, to prevent disclosure of the requested maps and data."

Kagan's two-pronged rationale was based both on a statutory interpretation of the meaning of "personnel" that did not encompass as much information as the government argued it should, as well as an interpretation of the intent of FOIA and exemption 2 that undermined any justification for recognizing "High 2" exemptions. "When used as an adjective," Kagan wrote, "[personnel] refers to human resource matters ... in its common parlance, [it] means 'the selection, placement and training of employees and ... the formulation of policies, procedures, and relations with employees or their representatives.'" Kagan explained that "Exemption 2 uses 'personnel' in the exact same way," and that therefore "the records that qualify for withholding [under exemption 2] ... are what now commonly fall within the Low 2 exemption." Kagan argued that "the *Crooker* interpretation ... suffers from a patent flaw: It is disconnected

from Exemption 2's text." Kagan wrote that the "High 2" test articulated in *Crooker* "ignores the plain meaning of the adjective 'personnel,' and adopts a circumvention requirement with no basis or referent in Exemption 2's language. Indeed, the only way to arrive at High 2 is by taking a red pen to the statute ... Because this is so, High 2 is better labeled 'Non 2' (and Low 2 ... just 2)."

Kagan also wrote that FOIA's legislative purpose does not support lower courts' recognition of the "High 2" interpretation. Kagan wrote that

"By no stretch of imagination do [the ESQD maps] relate to 'personnel rules and practices,' as that term is most naturally understood."

— Justice Elena Kagan  
U.S. Supreme Court

the court has repeatedly held that FOIA's goal is "broad disclosure," and that FOIA exemptions are to be construed narrowly. Congress' purpose in enacting FOIA, she wrote, was to encourage disclosure of information, and that purpose would be ill-served by "construing Exemption 2 to authorize expansive withholding."

In support of a "High 2" interpretation, the Navy also offered a House report, issued in 1966 when FOIA was being drafted, and a 1986 FOIA amendment that included "circumvention of the law" language in exemption 7, but Kagan rebuffed these. Kagan wrote that in *Rose*, the high court had adopted a competing 1966 Senate report that favored the narrower interpretation of "personnel," saying that the 1986 amendment to exemption 7 did not support a broad interpretation of exemption 2. If Congress supported the broad *Crooker* interpretation of exemption 2, Kagan wrote, it would have either amended exemption 2 "specifically to ratify *Crooker*" or "left the statute alone (on the theory that *Crooker* would do the necessary work)."

"The decision instead to amend Exemption 7(E) suggests that Congress approved the circumvention standard only as to law enforcement materials, and not as to the wider set of records High 2 covers," Kagan wrote, concluding,

"one thing is clear: The 1986 amendment does not ratify, approve, or otherwise signal agreement with *Crooker*'s interpretation of Exemption 2."

Although the court struck down the broad "High 2" interpretation of exemption 2, Kagan wrote that the court "recognize[d] the strength of the Navy's interest in protecting the ESQD data and maps and other similar information," echoing the 9th Circuit's concerns that "disclosure of this information could be used to 'wrea[k] havoc' and 'make catastrophe more likely.'" The court

observed that other means exist to protect sensitive information under FOIA, including exemption 1, which applies to "properly classified" information, and exemption 3, which applies to "matters

that are ... specifically exempted from disclosure by statute (other than section 552b of this title)." The Navy can seek to withhold the ESQD data and maps under those exemptions, or seek help from Congress to do so in the interest of national security, Kagan concluded.

Justice Stephen Breyer dissented, writing that although he "recognize[d] that there is reasonable ground for disagreement" over whether "High 2" should continue to exist as a way to interpret exemption 2, in reality, the majority of federal courts over the years since *Crooker* had embraced and relied on the "High 2/Low 2" distinction. Breyer wrote that the Supreme Court's own precedents held that when lower courts rely on a commonly accepted interpretation of statutory language, the court should be cautious before reversing that trend.

Justice Kagan and the majority found Breyer's argument unpersuasive. Breyer's concern, Kagan wrote, "would be immaterial even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so. And in any event, it is not true." Kagan wrote that, prior to *Crooker*, three circuits adopted the narrow reading of exemption 2 that the Court favored in *Milner*, "and they have not changed their minds." Kagan wrote

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# Supreme Court Ruling Protects Funeral Picketers

Quoting from many of the U.S. Supreme Court's most important decisions protecting freedom of speech, Chief Justice John Roberts wrote in a March 2, 2011 ruling that the First Amendment protects the "hurtful" picketing of military funerals by the Westboro (Kan.) Baptist Church.

"As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate," Roberts wrote, on behalf of an 8 to 1 majority. "That choice requires that we shield Westboro from

## FREEDOM OF SPEECH

tort liability for its picketing in this case." Justice Stephen Breyer wrote a concurrence and Justice Samuel Alito dissented. *Snyder v. Phelps*, 131 S. Ct. 1207 (March 2, 2011)

The case arose in 2006 after the church picketed the Westminster, Md. funeral of Marine Lance Cpl. Matthew Snyder, who was killed in action in Iraq. The church, which was founded by the Rev. Fred Phelps in 1955, believes that God hates the United States for its tolerance of homosexuality, particularly in America's military, and the death of soldiers is punishment for that tolerance. Roberts wrote that members of the church have publicized their message by picketing nearly 600 funerals over the past 20 years, many of which have been military funerals. Westboro picketers commonly carry signs with messages like "Thank God for Dead Soldiers," "America is Doomed," and "God Hates Fags."

Snyder's father, Albert Snyder, sued the church after seven of its members—Fred Phelps, two of his daughters, and four of his grandchildren—picketed near Matthew Snyder's funeral and posted an Internet message disparaging Albert and Julie Snyder as parents and Catholics. The original suit, filed in federal district court in Maryland, included five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The district court granted summary judgment to the church on the defamation and publicity claims, but a jury awarded Snyder \$10.9 million in damages on

the other three claims. A federal judge reduced those damages to \$5 million in October 2007. (For more on the district court case, see "U.S. District Court Rules against Funeral Protesters" in the Winter 2008 issue of the *Silha Bulletin*.) In 2009 the 4th Circuit U.S. Court of Appeals reversed the lower court, holding that the church's "distasteful" picket signs were protected by the First Amendment because they involved matters of public concern and could not be read as "asserting actual and objectively verifiable facts about the father or his son." *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009)

The U.S. Supreme Court affirmed the 4th Circuit ruling for two central reasons: the church's speech addressed matters of public concern, and it occurred in a public place. Although the church's messages "may fall short of refined social or political commentary," Roberts wrote, "the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." Quoting Justice William Brennan's famous majority opinion in the landmark 1964 case *New York Times Co. v. Sullivan*, as well as the 1964 case *Garrison v. Louisiana* and 1983 case *Connick v. Myers*, Roberts wrote that "The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open ... because speech concerning public affairs is more than self-expression; it is the essence of self-government." Therefore, Roberts said, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."

Roberts observed that the court has defined speech addressing matters of public concern as that which "can be fairly considered as relating to any matter of political, social, or other concern to the community ... or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Moreover, Roberts wrote, in the 1987 case *Rankin v. McPherson*, the

court ruled that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Roberts concluded that "the content of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of purely private concern."

Snyder argued that even if the picketers' speech addressed issues of public concern, they should be subject to a lower First Amendment standard because they sought to exploit his son's funeral "as a platform to bring their message to a broader audience," intentionally inflicting emotional distress on the family, and because they aimed their message at a "captive audience"—funeral attendees—intruding on Snyder's right to expect seclusion in burying his son.

Roberts observed that "Westboro conducted its picketing peacefully ... at a public place adjacent to a public street," a space which "occupies a special position in terms of First Amendment protection," according to the 1983 case *United States v. Grace*. Furthermore, Roberts wrote, "Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged," 1,000 feet from the church and out of the sight of funeral attendees. "The protest was not unruly; there was no shouting, profanity, or violence," Roberts wrote. "Simply put, the church members had the right to be where they were."

Roberts also observed that the Maryland jury ruled that Westboro's picketing was sufficiently "outrageous" to support Snyder's claim of intentional infliction of emotional distress. Quoting the 1988 case *Hustler Magazine, Inc. v. Falwell*, however, Roberts observed that "outrageousness ... is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression," adding, "what Westboro said, in the whole context of how and where it chose to say it, is entitled to special protection under the First Amendment, and that protection

cannot be overcome by a jury finding that the picketing was outrageous.” The picketers’ speech, Roberts concluded, “cannot be restricted simply because it is upsetting or arouses contempt,” quoting the 1989 decision in *Texas v. Johnson*: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

The court also dismissed Snyder’s “captive audience” argument, observing that the picketers “stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself.”

Justice Breyer concurred, emphasizing the majority’s narrow holding, arguing that “it does not hold or imply that the State is always powerless to provide private individuals with necessary protection” from invasion of personal privacy or infliction of emotional distress.

In a dissent, Justice Alito said that “our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.” Alito argued that the tort of intentional infliction of emotional distress is recognized by “most if not all jurisdictions” to protect “private persons at a time of intense emotional sensitivity ... [from] vicious verbal attacks that make no contribution to public debate.” Alito added, “When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”

Alito also noted, as did Roberts in the majority, that the federal government and 43 states, including Maryland, have enacted statutes that ban or limit picketing at funerals. Alito wrote that rather than eliminate the need for a civil remedy like intentional infliction of emotional distress, however, “[the statutes’] enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order.” Quoting the 2004 case *National Archives and Records Administration v. Favish*, Alito said, “at funerals, the emotional well-being

of bereaved relatives is particularly vulnerable. Exploitation of a funeral for the purpose of attracting public attention intrudes upon their ... grief, and may permanently stain their memories of the final moments before a loved one is laid to rest.” (For more on the *Favish* case, see “Citing Family Members’ Privacy, Supreme Court Allows Government to Withhold Foster Photos,” in the Spring 2004 issue of the *Silha Bulletin*. The Silha Center filed an *amicus* brief in support of California attorney Allan Favish in that case. See “The Silha Center Files *Amicus Brief* With the United States Supreme Court, Comments with the Council of Europe, And Department

“As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”

— Chief Justice John Roberts  
U.S. Supreme Court

of Homeland Security,” in the Summer 2003 issue of the *Silha Bulletin*. Brief for Respondent Allan J. Favish as Amici Curiae Supporting Respondent, *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (No. 02-954)).

Maryland’s funeral protest law was enacted in October 2006, almost four months after Snyder filed his complaint with the federal district court there. The law, Md. Ann. Code § 10-205, is typical of other states’ statutes: it makes engaging in specified types of conduct and speech at funeral processions a misdemeanor, prohibits picketing targeted at a funeral within 100 feet of the burial ceremony (other states’ laws extend this “buffer zone” up to 1,000 feet), and prohibits speech directed to a person attending a funeral that is likely to incite or produce an imminent breach of the peace. In a footnote, Roberts observed that Westboro’s picketing would have complied with the Maryland prohibition on picketing within 100 feet of a funeral service or procession.

Snyder’s suit did not allege a violation of the federal funeral protest law because his son was interned at a Maryland state veterans cemetery. The

federal law, the Respect for America’s Fallen Heroes Act, codified at 18 U.S.C. § 67 and 38 U.S.C. § 24, is applicable only to national cemeteries.

According to an analysis by First Amendment Center Scholar David Hudson, courts in Kentucky, Ohio and Missouri have enjoined or struck down all or parts of those states’ funeral protest laws, usually because they are unconstitutionally vague or overly broad and therefore ban constitutionally protected speech. The Westboro Baptist Church has been involved in several of the suits challenging state laws. Hudson’s analysis is available online at [http://www.firstamendmentcenter.org/press/topic.aspx?topic=funeral\\_protests](http://www.firstamendmentcenter.org/press/topic.aspx?topic=funeral_protests).

First Amendment Center Legal Correspondent Tony Mauro wrote on March 4 that experts on funeral protest laws expect that a second wave of litigation challenging those statutes might follow the *Snyder v.*

*Phelps* decision, and may reach the U.S. Supreme Court, despite the fact that the court said that as long as the laws are “content-neutral” they are unlikely to raise constitutional problems. (For more on the state and federal statutes banning funeral protests, see “Church Group’s Protests Spawn Legislation Limiting Demonstrations” in the Winter 2006 issue of the *Silha Bulletin*.)

Commentary on the case’s outcome reflected the controversial nature of the church’s speech. Numerous March 3 editorials in national newspapers supported the ruling. *The New York Times* agreed that the First Amendment extends to “even hurtful speech;” the *Los Angeles Times* said it protects “the right to be vile.” *The Wall Street Journal* observed that “even jerks are protected by the First Amendment,” and *The Washington Post* said that “the beauty of the First Amendment is often most vibrantly expressed under the ugliest of circumstances.”

The editorials reflected many news organizations’ argument that a ruling against the church would have threatened to silence public debate on

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controversial topics that might offend audience members. The Reporters Committee for Freedom of the Press joined with 21 news organizations in filing an *amicus* brief in support of the Westboro Baptist Church, in which Robert Corn-Revere, an attorney with Davis Wright Tremaine in Washington, D.C. wrote that “without a doubt, the church’s message of intolerance is deeply offensive to many, and especially so to gay Americans, Catholics, veterans, and the families of those who sacrificed their lives defending the United States. But to silence a fringe messenger because of the distastefulness of the message is antithetical to the First Amendment’s most basic precepts.” Corn-Revere

delivered the 2007 Silha Lecture.

Other commentators struggled with the result. Bob Schieffer, host of CBS News’ “Face the Nation,” wrote that “when there are those among us so selfish and cruel they are willing to use one of our most cherished freedoms to intrude on the grief of parents who have lost a child just to promote their cause, we must do everything legally possible to deter them.” John Farmer, a lawyer and columnist for the Newark, N. J. *Star-Ledger*, compared Justice Alito’s dissent to Justice Robert Jackson’s 1949 dissent in *Terminiello v. Chicago* in which Jackson stated, “There is a danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights

into a suicide pact.” Farmer wrote that all Constitutional rights are “subject to reasonable limits, the operative word here being ‘reasonable’ and involving the exercise of good judgment. The high court — with the notable exception of Justice Samuel Alito — failed that test in the Snyder case.”

Ultimately, however, Roberts wrote that the First Amendment required a ruling in favor of the church in spite of its odious speech. “Speech is powerful,” Roberts wrote. “It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.”

– PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

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that, outside the D.C. Circuit, the *Crooker* decision had been cited only five times in 30 years of federal appellate decisions. Kagan also wrote that three circuits had adopted a “High 2” interpretation, one reserved judgment, and three had not considered the matter. “The result is a 4 to 3 split among the Circuits. We will not flout all usual rules of statutory interpretation to take the side of the bare majority,” Kagan wrote.

David Mann, Milner’s attorney, told the Reporters Committee for Freedom of the Press for a March 7 story that “[w]e went into this with the goal of dismantling the High 2 exemption. I was never a believer that High 2 ever existed.” In a March 21 “roundup” on its website, law firm Sidley & Austin noted that “[s]ignificantly, *Milner* reaffirms the understanding that FOIA Exemptions are to be construed narrowly in order to promote the congressional objective of disclosure.”

**Utah Legislature Backpedals on Anti-Transparency Law**

On March 25, 2011, the Utah legislature voted to repeal a new public records law it had enacted only two weeks before. The move was preceded by calls for the law’s repeal by open government advocates and even the

state’s governor, who signed the bill into law on March 8.

The repealed law, HB 477, included provisions that removed some forms of electronic media—such as emails and voicemails—from the definition of “public record,” meaning that they would not have been subject to public disclosure under the state’s open records law. The law also increased fees that the state government could charge citizens requesting public records, and shifted the legal standard governing the conditions under which the state must disclose public records, making it easier for the government to prevent disclosure. Before HB 477 was passed, the state was required to disclose information “if the interests favoring access outweigh[ed] the interests favoring restriction of access.” Utah Code Ann. § 63G-2-401(6). Under HB 477, the burden of proof to establish that the interests of disclosure outweigh the interests of nondisclosure was on the requestor. HB 477 required the requestor of the document to establish “by a preponderance of the evidence.”

Utah citizens and First Amendment advocates criticized the law after its passage. About a hundred citizens protested at Gov. Gary Herbert’s March 8 bill signing, according to a March 8 story in Salt Lake City’s *Deseret News*. Several

lawmakers who opposed HB 477 spoke at the rally. Rep. Joel Briscoe (D-Salt Lake City) held up his state-issued cell phone to the assembled crowd and said “You guys are paying for this. You’re more than welcome to read it.” On March 15, the Society of Professional Journalists (SPJ) awarded Utah its annual “Black Hole” award, a tongue-in-cheek way to shame governments and officials that, in SPJ’s view, have egregiously violated principles of openness in government.

On March 21 Gov. Herbert called the legislature back into special session for the sole purpose of repealing HB 477. According to a March 21 press release announcing the special session, Herbert said he had considered a veto following the initial passage of the bill, but citing “veto-proof margins,” opted against it. Herbert said his decision to call the legislature back in special session was a result of the “loss of public confidence” that had occurred in the time since the bill’s passage. The law was repealed in its entirety on March 27. The AP reported that Herbert said he hoped the repeal would “restore public confidence” in Utah and its legislative process. When the *Bulletin* went to press, new amendments to the state’s open records law had not been passed.

– GEOFF PIPOLY

SILHA RESEARCH ASSISTANT

# Prank Phone Call, Hidden Camera Spur Ethical Controversies for News Media

## *Wisconsin Governor Speaks to Fake Benefactor, NPR Executives Speak to Fake Charity*

**D**eceptive journalistic practices punctuated two political controversies in early 2011, embarrassing powerful public figures and drawing additional media coverage and condemnation from journalists and commentators.

### ***Blogger Fools Wisconsin Governor with Prank Call***

On February 23, 2011 a Buffalo, N.Y.-based blog, The Beast, posted a recording of a phone conversation between its editor, posing as a powerful conservative financier, and embattled Wisconsin Gov. Scott Walker. Media outlets reported on Walker's comments, which primarily focused on his political strategy for passing a controversial budget bill that would strip state labor unions of benefits and collective bargaining rights. But the deceptive nature of the prank was also a subject for debate among journalists and commentators.

According to The Beast on February 23, editor Ian Murphy called Walker's office on February 22 via Skype, an Internet-based telephone system, posing as influential conservative activist David Koch. Koch is co-owner, with his brother Charles, of Koch Industries, an energy and consumer products company. The *Milwaukee Journal Sentinel* reported on February 23 that Koch is also a chief financial backer of Americans for Prosperity, which helped stage "Tea Party" rallies in Wisconsin and other states in 2009 and 2010, and that Koch Industries' political action committee contributed \$43,000 to Walker's fall 2010 campaign. The *Journal Sentinel* further reported that Americans for Prosperity announced it was spending \$342,200 on advertising to persuade Wisconsin residents to back Walker's plan

According to the *Journal Sentinel*, Koch Industries senior vice president

Mark Holden confirmed that the recording The Beast posted online was not David Koch, calling the prank a "fraudulent act."

Walker spent 20 minutes speaking with Murphy, believing he was Koch. In his blog post, Murphy expressed surprise at the ease with which he was able to set up a phone conversation with Walker via his chief of staff.

In the conversation, Murphy encourages Walker to discuss his plans for resolving the political dispute surrounding the bill, which included large protests at the Wisconsin state capitol and during which 14 Democratic senators left the state in order to stall a vote. When Murphy suggested Walker should place troublemakers amid the crowd of protesters to stir support for ending the protests, Walker responded that he had "thought about that" but feared a backlash. "My only fear is if there's a ruckus caused that would scare the public into thinking maybe the governor has to settle to avoid all these problems," Walker said.

Walker also said that his office had considered inviting the Democrats back to the state on the premise of having an informal conversation, at which point the Republicans could declare that they had quorum and vote on the bill. "Legally, we believe, once they've gone into session, they don't physically have to be there," Walker said. "If they're actually in session for that day, and they take a recess, the 19 Senate Republicans could then go into action." The *Journal Sentinel* reported that a state senator had called the plan to "trick" Democrats disturbing, but Walker disputed the characterization of the plan as a trick. In a February 23 press conference Walker said he was "not going to allow one crank phone call to be a distraction," the *Journal Sentinel* reported.

While Walker defended and downplayed the statements, Murphy was scolded over his use of deception to get them on the record. The Society of Professional Journalists (SPJ) Ethics Committee "strongly condemn[ed] the actions" of Murphy and The Beast. In a February 23 press release, the SPJ said, "though the Buffalo Beast purports

to be an alternative news site with heavily slanted views that are neither fair nor objective, the fact remains that this interview was underhanded and unethical." The SPJ advised "credible news organizations" to "be cautious about how they report this already widely reported story," and to "realize that the information was obtained in a grossly inappropriate manner according to longstanding tenets of journalism." Specifically, the SPJ cited principles of the SPJ Code of Ethics that journalists "be honest, fair and courageous in gathering, reporting and interpreting news" while avoiding "undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public."

SPJ President Hagit Limor said "Murphy should be ashamed not only of his actions but of besmirching our profession by acting so shamelessly," calling the actions "a new low" for anyone claiming to be a journalist, the press release reported.

### ***NPR Executives Resign after Hidden Camera Sting***

On March 8, 2011, James O'Keefe, a conservative political activist known for producing controversial hidden camera videos, released a video on his website, Project Veritas, that led to the resignation of two top officials at National Public Radio (NPR) and energized an ongoing legislative effort to cut off federal funding for public broadcasting. The video, which some commentators called heavily and misleadingly edited, showed Ron Schiller, senior vice president of NPR and president of the NPR foundation, making negative comments about the Republican party and members of the conservative "Tea Party" political movement while also saying that NPR would be "better off in the long run without federal funding."

O'Keefe gained notoriety in September 2009 for hidden camera videos depicting employees of the nonprofit group Association of Community Organizations for Reform Now (ACORN) advising a couple posing as a pimp and prostitute.

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The controversy that followed the release of the video resulted in the elimination of the organization's federal funding and several lawsuits against O'Keefe and fellow filmmaker Hannah Giles. In California, the state attorney general launched an investigation into ACORN, concluding that the group was poorly managed but committed no crime. *The Los Angeles Times* reported April 2, 2010 that then-state attorney general Jerry Brown said "the evidence illustrates that things are not always as partisan zealots portray them through highly selective editing of reality. Sometimes a fuller truth is found on the cutting-room floor." (For more on the ACORN video and its fallout, see "ACORN Videos Provoke Media Debate, Trigger Lawsuit" in the Fall 2009 issue of the *Silha Bulletin*.)

In January 2010, O'Keefe and three associates were arrested in New Orleans after allegedly trying to infiltrate the office of Sen. Mary Landrieu (D-La.) in order to tamper with the office's phone system. According to an affidavit submitted by a Federal Bureau of Investigation (FBI) agent assigned to the case, two of the men entered the office dressed as telephone repairmen and asked to have access to the office phones, while O'Keefe recorded them using his cell phone. O'Keefe told Fox News commentator Sean Hannity in a Feb. 1, 2010 interview that he was investigating accusations that Landrieu's office had ignored phone calls from constituents about the health care debate. The FBI reported in a May 26, 2010 press release that O'Keefe and the others pled guilty to one count each of entering federal property under false pretenses. O'Keefe was ordered to pay a \$1,500 fine, serve 100 hours of community service, and was placed on three years' probation.

According to the Project Veritas website, the hidden camera video of Ron Schiller and NPR senior director of institutional giving Betsy Liley was recorded on Feb. 22, 2011. It depicts the two NPR executives at a lunch with two individuals from O'Keefe's organization who posed as members of a fictional group called the Muslim Education Action Center (MEAC), which the video identifies as "a Muslim Brotherhood Front Group." The Muslim Brotherhood

is an Egypt-based religious and political group that some have accused of being involved in terrorism. The NPR executives and fake representatives of MEAC met to discuss a possible \$5 million donation to NPR.

An 11-minute version of the video was released on the Project Veritas website on March 8 highlighting a series of controversial quotes from Schiller. Later that day, Project Veritas released a two-hour version of the video it described as "largely the raw video and audio of the entire conversation." Both videos are available at [www.theprojectveritas.com](http://www.theprojectveritas.com).

In the shorter version, Schiller appears to laughingly brush off the revelation that MEAC was founded by members of the Muslim Brotherhood and that one of its goals is to "spread the acceptance of Sharia across the world." Through the course of the lunch the two men pretending to represent MEAC paint their organization as anti-Jewish and interested in using their donation to influence NPR programming, while encouraging Schiller to share his opinions on several political topics. The video shows Schiller saying that the Republican Party has been "hijacked" by the "xenophobic" Tea Party, whose supporters are "seriously racist, racist people." He also said that, in his opinion, there was an "anti-intellectual move on the part of a significant part of the Republican party."

The day the video was released, Schiller announced that although he had been scheduled to leave NPR for a job with nonprofit, nonpartisan research and policy organization the Aspen Institute in the coming weeks, he and NPR had decided to make his resignation effective immediately. On March 9 *The Wall Street Journal* reported that Schiller had also decided not to take the position at the Aspen Institute. The *Journal* reported that the Institute said in a statement that "Ron Schiller has informed us that, in light of the controversy surrounding his recent statements, he does not feel that it's in the best interests of the Aspen Institute for him to come work here."

*The Washington Post* reported March 10 that NPR placed Liley on administrative leave in response to the video as well as Project Veritas' March 10 release of a recorded follow-up phone call made by one of its members to Liley, in which she suggested the group could

make its donation anonymously in order to shield it from government scrutiny. In a statement following the release of the video on March 8, NPR Senior Vice President of Marketing Dana Davis Rehm said, "The fraudulent organization represented in this video repeatedly pressed us to accept a \$5 million check, with no strings attached, which we repeatedly refused to accept." She said NPR was "appalled by the comments made by Ron Schiller ... which are contrary to what NPR stands for."

On March 10, many of NPR's on-air personalities also denounced Schiller's statements, calling them "offensive." Twenty-three individuals, including many of public radio's best-known names, signed an "open letter" that said they "were appalled" at Schiller's comments because they "violated the basic principles by which we live and work: accuracy and open-mindedness, fairness and respect." The full text of the letter, along with a list of its signatories, is available via the Poynter Institute's Romenesko blog at <http://www.poynter.org/latest-news/romenesko/122867/npr-hosts-journalists-appalled-by-ron-schillers-comments/>.

The day after the video was released, March 9, NPR Chief Executive Officer Vivian Schiller (who is not related to Ron Schiller) also resigned. According to *The New York Times* on March 9, Dave Edwards, the chairman of NPR's board of directors, said that Vivian Schiller offered to resign "if that was the board's will, and the board decided that it was." Edwards cited the "distraction" of the hidden camera incident, as well as the October 2010 firing of analyst Juan Williams, as having "hindered Vivian Schiller's ability to lead the organization going forward." Williams, who also worked as an analyst for Fox News, said in an Oct. 18, 2010 broadcast of "The O'Reilly Factor" that he felt uncomfortable on airplanes when he saw fellow passengers dressed in "Muslim garb." NPR Ombudsman Alicia Shepard wrote Oct. 21, 2010 that the firing was "poorly handled." In the Feb. 22, 2011 hidden camera video, Ron Schiller said he was "proud" of NPR's handling of the Williams situation, because NPR stood for "non-racist, non-bigoted straight-forward telling of the news" and fired Williams because he "lost all credibility" after making the remarks.



Vivian Schiller told *The New York Times* that although she “disavowed” Ron Schiller’s comments. “I’m the CEO, and the buck stops here,” she said, adding that she was “hopeful that my departure from NPR will have the intended effect of easing the defunding pressure on public broadcasting.”

*The New York Times* reported March 9 that some Republican lawmakers who consider NPR biased and want to cut its federal funding saw the video as further support for their cause. A Republican effort to cut federal funding for public broadcasting was started soon after the Williams firing, the *Times* reported, and on March 17 the U.S. House of Representatives passed a bill, H.R. 1076, that would prohibit federal funding of NPR and block local stations from using federal money to purchase programming content.

*The New York Times* reported that the measure passed the House 228 to 192, but it is unlikely to pass the Senate. The *Times* reported that both Republican and Democratic senators have expressed skepticism about cutting NPR funding because of its popularity among their constituents.

Meanwhile, several media outlets criticized the O’Keefe group for attempting to mislead viewers by selectively editing the video. On March 10, The Blaze, a website operated by Fox News commentator Glenn Beck, published a detailed analysis that compared the shorter 11-minute video to the longer “raw” footage. For example, The Blaze observed that throughout the longer video, the fake donors downplayed or obscured their supposed connections to the Muslim Brotherhood, making it unclear whether Schiller or Liley actually thought they were meeting with a “front group” for the Muslim Brotherhood. The Blaze also said the shorter video failed to contextualize Schiller’s negative comments about Republicans and conservatives by also showing more complimentary ones: Schiller said he “grew up Republican” and is “proud of that,” that he is a fiscal conservative and favors a limited government role in “personal lives” and “family lives.”

Moreover, The Blaze analysis observed that “the edited video implies Schiller is giving simply his own analysis of the Tea Party,” which “he does ... in

part, but the raw video reveals that he is largely recounting the views expressed to him by two top Republicans, one a former ambassador, who admitted to him that they voted for Obama.” The Blaze analysis said, however, that Schiller ultimately signaled his agreement with the opinion that Tea Partiers are “racist” and “xenophobic.” The Blaze said, “the larger context does not excuse his comments, or his judgment in sharing the account, but would a full context edit have been more fair?”

In the longer version of the video, Schiller amended his comment about NPR’s need for federal funding by expressing concern that if it were cut

“I tell my children there are two ways to lie. One is to tell me something that didn’t happen, and the other is not to tell me something that did happen. I think they employed both techniques in this.”

— Al Tompkins  
Media Ethicist, Poynter Institute

immediately, “we would have a lot of stations go dark.” The Blaze also observed that in the fuller version of the video Schiller “explains the risk to local stations in more detail and why NPR is doing ‘everything we can to advocate for federal funding.’”

Commentators considered what lessons should be drawn from the episode. *Time* magazine television critic James Poniewozik, writing at the magazine’s blog Tuned In, wrote March 13 that The Blaze’s coverage “doesn’t let ... Ron Schiller off the hook. But it shows O’Keefe edited the short version of his video to fit his anti-NPR agenda.”

According to NPR media correspondent David Folkenflik, elements of the video were “taken out of context.” On March 14, Folkenflik appeared on the NPR program “Morning Edition,” and wrote a post on the NPR website discussing the film with Blaze editor in chief Scott Baker and several media ethicists and commentators. Baker said, “there was certainly a lot there for conservatives and people of faith and Tea Party activists to be bothered about—but we felt like that wasn’t the whole story. There were a lot of other things said that may have been

complimentary to conservatives and to people of faith and Tea Party activists in the same conversations.”

Al Tompkins, a former broadcast journalist who works with the Poynter Institute journalism think tank, told Folkenflik “I tell my children there are two ways to lie. One is to tell me something that didn’t happen, and the other is not to tell me something that did happen. I think they employed both techniques in this.”

Tompkins also found fault in the video failing to show Schiller telling the two fake philanthropists that donors cannot expect to influence news coverage at NPR. At one point in the longer video

Schiller said “there is such a big firewall between funding and reporting: reporters will not be swayed in any way, shape or form.” Tompkins said, “the message that he said most often—I counted six times: He told these two people that he

had never met before that you cannot buy coverage. He says it over and over and over again.”

O’Keefe, in a March 13 appearance on the CNN program “Reliable Sources,” defended his practices. “Journalists have been doing this for a long time,” O’Keefe said. “It’s a form of investigative reporting that you use to seek and find the truth.” Calling the video “powerful” and “honest,” he said, “the tape cuts to the core of who these people are.”

But Baker told Folkenflik that the video misrepresented the two NPR executives. “I think if you look at two hours in total, you largely get an impression that these are pretty—they seem to be fairly balanced people, trying to do a fairly good job,” Baker said.

Folkenflik also observed that some journalists expressed regret for reporting on the video without giving it greater scrutiny. Politico blogger Ben Smith, for example, wrote, “the damage is, again, done; I regret having, even in what I thought was a cautious way, picked up the story.” Folkenflik reported that Dave Weigel, a political blogger for Slate, said, “the speed at which the media operates when a video comes out is a problem. I

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# Courts, Police Beginning to Address Issues Raised by Citizens with Cameras

**T**echnology has allowed more citizens to record government officials—especially police—doing their jobs in public places.

This change has moved questions about whether wiretapping laws allow recording to take place, and whether the First Amendment protects it, to the forefront of First Amendment advocates' attention.

## **Atlanta Police and Watchdog Group Reach Settlement Over Citizens Filming Police**

On Feb. 10, 2011, the City of Atlanta agreed to pay a settlement of \$40,000 to a volunteer for a citizen advocacy group, Copwatch of East Atlanta, over an incident that occurred when Atlanta police officers damaged the volunteer's cell phone after he used it to record the officers arresting a suspect. In addition to the financial settlement, the city agreed to implement police procedures for handling similar incidents.

On its website at <http://www.copwatchoea.org/>, Copwatch of East Atlanta describes itself as a community group of "civilians organized to protect ... communities from police abuse." When Copwatch members encounter a police traffic stop or an ongoing arrest, they record the event with handheld video cameras. If the group believes that the recorded incident documents an abuse of the arrestee's constitutional

rights, the group may provide the video to the arrestee for use in litigation, post the video on its website to draw public attention to the matter, or both.

The incident that gave rise to the February settlement occurred in April 2010, according to a Feb. 10, 2011 story in *The Atlanta Journal-Constitution*. While walking the streets of Atlanta's Little Five Points neighborhood, Marlon Kautz, a Copwatch volunteer, noticed two police officers, Mark Taylor and Anthony Kirkman, in the process of arresting a suspect. According to Kautz, shortly after he began filming the arrest on his cell phone's camera, Taylor and Kirkman approached him and demanded that he stop filming. Kautz refused, and the officers then removed his phone by force. "They grabbed me, put my hands behind my back and tried to forcefully pry the phone out of my hands and eventually they were able to," Kautz said, according to a February 11 story on Fox Five Atlanta's website.

In a March 25 interview with the *Silha Bulletin*, Kautz said that Kirkman confiscated his phone. Kautz said that when he called Kirkman the next day, Kirkman told him that he would only return the phone if Kautz provided him with the password so that Kirkman could delete the footage it contained, which Kautz said he refused to do. Although the phone was eventually returned, Kautz said that the video had been scrambled, rendering it unwatchable. According to the *Journal-Constitution*, Taylor and Kirkman received oral admonishments

for their actions, and their supervisor was admonished for failing to supervise them properly.

The *Journal-Constitution* reported that following the incident, Kautz filed a complaint with the City of Atlanta in lieu of a formal civil rights lawsuit, which gave rise to the February settlement. The settlement authorizes the payment of \$40,000 in damages to Kautz for the incident, which he said he will spend on Copwatch's continued operations. The settlement also provides that the Atlanta police department will amend its Standard Operating Procedures to "prohibit Atlanta police officers from interfering in any way with a citizen's right to make video, audio, or photographic recordings of police activity, as long as such recording does not physically interfere with the performance of an officer's duty."

Kautz praised the settlement for prohibiting officers from obstructing citizens filming them unless the citizens "physically interfere" with police work. "A lot of these policies [in other cities] are vague in terms of what constitutes 'interference,'" he said. "Some policies say you're interfering if you have a light on your camera that shines on the officers. The fact that this change to the Standard Operating Procedures manual says 'physical interference' is strong language."

The Atlanta city clerk's office told the *Bulletin* May 2 that city council approved the settlement and changes to police

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## **Deception, continued from page 17**

mean, the rush to be the first to report on a video—and, let's be brutally honest, the rush is to get traffic and to get people booked on [cable TV] shows to talk about it—and that nature leads you to not do the rigor and fact-checking that you would do in other situations."

*Columbia Journalism Review* blogger Joel Meares wrote March 8, the day that the video was released, that although NPR executives should take quick action to address the issue, "the rest of us should probably take

a breather before jumping to any conclusions about the magnitude or repercussions or deeper meaning of this morning's news. From where might we have learned such a lesson? From video scandals past. Think ACORN and think Shirley Sherrod: job- and organization-crippling scandals in which the media blindly aided and abetted. Note too that O'Keefe is a political point-scorer, and here he is scoring from a soft-target."

On March 15, after the full-blown scandal had cost Ron Schiller and Vivian Schiller their jobs and some journalists

had expressed regret for uncritically contributing to the scandal, Meares wrote, "We can only hope that, next time, the order in which this scandal and others like it have unfolded—headlines and drama first; reporting and vetting later—is reversed. Given the pattern that just repeated itself, we're not optimistic."

— PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

— SARA CANNON

SILHA CENTER STAFF

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procedures on March 7, and they took effect April 7.

Meanwhile, Atlanta Police Department Spokesman Carlos Campos told the *Journal-Constitution* for its February 10 story that the terms of the settlement were already being implemented and that “commanders have made it clear that Atlanta police officers in the field should not interfere with a citizen’s right to film them while they work in public areas.”

### **First Circuit to Consider Constitutional Right to Record Public Officials in Public Places**

A coalition of First Amendment advocates and media corporations filed an *amicus* brief on behalf of a lawyer who sued the city of Boston for violating his First Amendment rights after police arrested him for filming another citizen’s arrest.

In October 2007, Simon Glik recorded two Boston police officers arresting a suspect on Boston Common, according to a Jan. 12, 2011 story in *The Boston Globe*. Glik believed that the officers used excessive force when they removed a plastic bag from the suspect’s mouth in the course of a drug arrest. Glik recorded the incident on his cell phone camera, and was arrested and charged with violating Massachusetts’ wiretap statute, Mass. Gen. Laws ch. 272 §99. The statute’s preamble states that, because of the threat to personal privacy posed by “modern electronic devices ... the secret use of such devices by private individuals must be prohibited.” The statute makes it illegal to “willful[ly] intercept[ ]” any “oral or wire communication” without the consent of both parties to the communication. According to Glik’s appellate brief, the state eventually dismissed all charges under the wiretap statute.

On Feb. 1, 2010, Glik filed a suit in federal district court under 42 U.S.C. §1983 *et seq.* against the City of Boston and each of the three police officers who arrested him, alleging that his arrest violated his First Amendment rights. The district court denied the city’s motion to dismiss on June 8, 2010, and the city appealed. Brief of Plaintiff-Appellee Simon Glik, *Glik v. Cunniffe, et al.*, No. 10-1764 (1st Cir. 2010)

In January 2011, a coalition of First

Amendment advocates and media corporations filed an *amicus* brief supporting Glik. The coalition included Harvard Law School’s Cyberlaw Clinic, the Citizen Media Law Project, Dow Jones & Company, GateHouse Media, Globe Newspaper Company, The Massachusetts Newspaper Publishers Association, Metro Corp., NBC Universal, New England Newspaper and Press Association, *The New York Times*, Newspapers of New England, the Online

“Commanders have made it clear that Atlanta police officers in the field should not interfere with a citizen’s right to film them while they work in public areas.”

— Carlos Campos  
Atlanta Police Department Spokesman

News Association, and the Reporters Committee for Freedom of the Press. (Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, is a member of the Citizen Media Law Project’s Board of Advisors.)

In his brief, Glik argued that a number of U.S. Supreme Court cases recognize “the right to record matters of public interest.” Glik also argued that many lower court cases, applying the Supreme Court’s case law, have upheld the right of citizens to videotape or photograph “public officials in general or police officers in particular.” Glik’s brief noted that in cases where recording occurs in “traditional public fora” such as Boston Common, “the government has the highest burden to justify limitations on speech.”

The City of Boston asserted that even if Glik had a constitutional right to film the officers, the city and its employees are entitled to “qualified immunity,” a legal doctrine which can shield government officials from liability for violating of an individual’s constitutional rights. The city relied on a 2009 Supreme Court case, *Harlow v. Fitzgerald*, under which government officials are immune from liability in a §1983 civil rights action “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.” *Harlow v. Fitzgerald*, 547 U.S. 800 (2009)

The city also argued that there is no “Supreme Court or First Circuit case that clearly establishes Glik’s ... First Amendment right to record police officers carrying out their duties in a public place.” Brief of Appellant John Cunniffe, et al., *Glik v. Cunniffe, et al.*, No. 10-1764 (1st Cir. 2010)

On the issue of whether Glik’s right to film public officials in a public forum is “clearly established” for purposes of the city’s claim of qualified immunity, both sides’ briefs focused heavily on the 1st Circuit U.S. Court of Appeals case of *Iacobucci v. Boulter*. In that case, police arrested a citizen for filming

proceedings of a public meeting who later sued under § 1983, alleging that the arrest violated his First Amendment rights. The court held that Iacobucci had a First Amendment right to record the meeting without government interference. *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999)

Glik argued in his brief that *Iacobucci* supports his position that he is constitutionally protected from government interference in filming police officers, and that because *Iacobucci* was decided “eight years before [Glik’s] arrest, [it] gave fair warning to [the city] that [police officers] could not arrest [Glik] for videotaping them on Boston Common,” and that therefore Glik’s right to film public officials has been “clearly established” for purposes of analysis under *Fitzgerald*.

The city, meanwhile, contended that the “right to videotape a matter of public concern” is not supported by the *Iacobucci* opinion, and that Glik’s reliance on that case is therefore misplaced. The city argued that “Iacobucci was engaging in a First Amendment right because he was acting within his rights as conferred by the Massachusetts Open Meetings Law,” and that therefore the “plain reading of the opinion makes clear that Iacobucci’s lawful exercise of a First Amendment right concerned his right of access to

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a place open to the public,” and not the broader Constitutional question of whether a First Amendment right to film all public officials exists.

Glik’s brief rejected the city’s reading of the *Iacobucci* opinion, noting that the filming at issue in that case occurred not in the public meeting itself, but in the hallway when the plaintiff in that case was confronted by the police. Glik argued that “[t]he Court’s recognition of the plaintiff’s First Amendment right to film the hallway conversation is separate from the plaintiff’s First Amendment right of access to the public meeting,” and *Iacobucci* thus “clearly establishes” his right to film.

The coalition of *amici* argued that Glik’s right to film the officers is “clearly established.” Pointing to a long line of Supreme Court cases, the coalition contended that Glik’s actions fall under the clearly established right of news organizations to collect and disseminate information on matters of public importance, and that “citizens like Glik should be afforded no less information gathering protection than traditional media organizations.” However, the coalition brief went further, arguing that even if the court decides that the city is entitled to qualified immunity on the ground that Glik’s right to film is not clearly established, the court should use this case as an opportunity to declare that the right is now clearly established for the sake of future cases. “A clear statement that the First Amendment encompasses the right to record would deter an officer who might otherwise arrest a future Glik and would thereby prevent repeated infringement upon the freedoms at issue,” the coalition wrote. Brief of the Citizen Media Law Project, et al. as Amici Curiae Supporting Plaintiff-Appellee, *Glik v. Cunniffe et al.*, No. 10-1764 (1st Cir. 2011)

The coalition’s brief also addressed the issue of privacy under the wiretap

statute, an issue not central to the parties’ briefs. The *amicus* brief noted that the statute’s primary purpose is to protect privacy, but also said that the 1st Circuit’s case law instructs the court to “strike a balance between the privacy interests at stake and the First Amendment interests implicated.” In

“Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”

— Judge Emory A. Plitt Jr.  
Harford County (Md.) Circuit Court

cases such as the Glik arrest, where recording occurs in a traditional public forum, no party has a reasonable expectation of privacy, the coalition argued. Therefore, applying the wiretap statute to the Glik case would chill free expression by citizen-journalists who might otherwise hesitate to gather information of public importance for fear of prosecution.

No date had been set for oral arguments when the *Bulletin* went to press.

**Other Recent Cases: Mixed Results**

In April 2010, Maryland citizen Anthony Graber was prosecuted under that state’s wiretap statute, Md. Code Ann. § 10-402, for recording a police officer who pulled him over for speeding on his motorcycle. The video, recorded on a camera embedded in Graber’s motorcycle helmet, showed the officer pulling Graber over in an unmarked vehicle, and exiting the vehicle with his gun drawn. *The Baltimore Sun* reported Sept. 27, 2010 that after Graber posted

the video on YouTube, police raided his home and arrested him. The case was docketed for trial, but trial judge Emory A. Plitt Jr. dismissed the wiretap charges against Graber, leaving only the speeding charge. According to the *Sun*, Plitt wrote that “[t]hose of us who are public officials and are entrusted with

the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”

In another case, the American Civil Liberties Union (ACLU) of Illinois filed a lawsuit in

summer 2010 on behalf of two brothers who were prosecuted under that state’s eavesdropping law for filming their interaction with a police officer who pulled them over on suspicion of drunk driving. The Illinois eavesdropping statute, 720 Ill. Comp. Stat. Ann. 5/14-1, “prevents the recording of any part of a conversation without the consent of each participating party,” according to a Jan. 20, 2011 story on *Courthouse News*’ website. According to a Jan. 22, 2011 story in *The New York Times*, the ACLU argued that the act violates the First Amendment and “hinders citizens from monitoring the public behavior of police officers and other officials.” On January 10, U.S. District Judge Suzanne Conlon dismissed the ACLU’s claim, writing that reaching an opposite result would be an “unprecedented expansion of the First Amendment.” *ACLU v. Alvarez*, 10 c 5235, 2010 U.S. Dist. LEXIS 115354 (N.D. Ill., Jan. 10, 2011)

— GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT

# Second Circuit Rationale for Denying Privilege to Filmmaker: Failure to Maintain Independence

**O**n Jan. 13, 2011, a panel of the 2nd Circuit U.S. Court of Appeals issued its rationale for a July 2010 ruling in which it limited but upheld a subpoena for raw footage from a documentary about a lawsuit between Chevron Corp. and a group of Ecuadorian citizens. The court

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reasoned that the filmmaker, Joseph Berlinger, forfeited his journalist's privilege because he failed to show that he retained journalistic independence.

Berlinger's film, "Crude," followed environmental lawyer Steven Donziger as he pursued litigation both in the United States and Ecuador against oil giant Chevron for allegedly damaging the environment in and around its Ecuadorian drilling sites. According to the 2nd Circuit panel, the film also depicts "interviews with Ecuadorians dying of diseases perhaps caused by oil spills." Attorneys for Chevron argued that the film's final product omitted footage that they characterized as essential to their defense in the litigation "Crude" documented. Specifically, Chevron's lawyers claimed that the raw footage depicted Donziger attempting to improperly influence an Ecuadorian judge and improperly colluding with Ecuador's president, who allegedly favored the plaintiffs in the litigation. Chevron's attorneys also claimed that the raw footage shows a plaintiffs' medical expert "fail[ing] to maintain strict independence" in his assessment of the health hazards allegedly caused by Chevron's drilling interests. During pretrial discovery, when Chevron's attorneys requested the raw footage, Berlinger refused to comply, citing a journalist's privilege.

In June 2010, the 2nd Circuit panel issued an order without an opinion which narrowed a district court order to turn over all unused footage from the film. The 2nd Circuit directed Berlinger to provide to Chevron's attorneys any and all raw footage from "Crude" that depicted Donziger, expert witnesses involved in the Ecuador litigation, and Ecuadorian government officials. The

2nd Circuit's order also specified that the footage be used "solely for litigation, arbitration, or submission to official bodies," and ordered Chevron to pay any expenses related to the duplication or sorting of the footage. The panel's January 2011 opinion provided the legal rationale for the June 2010 order. *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) For more on the June 2010 order, see "Appeals Court Narrows, Upholds Subpoena for Film Outtakes" in the Summer 2010 issue of the *Silha Bulletin*.

In his majority opinion for the unanimous panel, Judge Pierre Leval wrote that the 2nd Circuit recognizes a "qualified evidentiary privilege for information gathered in a journalistic investigation." Determining "the existence . . . [and] the strength of the press privilege" in an individual case, according to the court, depends largely on how "independent" a journalist is relative to the story he or she publishes. For example, journalists whose stories "were commissioned . . . in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press," Leval wrote, and "those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weak privilege or none at all."

The court found that Berlinger surrendered his journalistic independence—and therefore his privilege against compelled disclosure of the raw footage—because Donziger approached Berlinger and solicited him to make "Crude" "from the perspective of [Donziger's] clients," and because Berlinger admitted that he had removed at least one scene from "Crude" at Donziger's request.

The court noted that its ruling should not be construed to imply that journalists forfeit the privilege every time they are solicited to produce a story or present reporting from the point of view of the person or entity that solicited them. Nonetheless, the court wrote, the journalist's privilege is not presumptively in favor of the party invoking the

privilege; rather, the journalist carries the burden to show "entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence." In this case, according to the court, Berlinger failed to meet that burden.

The court relied on a previous 2nd Circuit case, *Von Bulow v. Von Bulow*, in establishing the connection between journalistic independence and the strength of the journalist's claim to the privilege in a given case. In *Von Bulow*, a 2nd Circuit panel found that a woman who claimed to be writing a book about a high-profile murder could not claim the journalist's privilege because at the time she gathered the information at issue, her intent was to "vindicate" the murder suspect, whereas her decision to use the information to write a book about the trial arose later. The court held that the question of whether the privilege should apply turns on "intent to disseminate to the public at the time the gathering of information commences." *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987)

In *Chevron*, the panel acknowledged that the principal issue in *Von Bulow* was the "timing of the intention to make public dissemination," which was not central to the case before it. However, the panel wrote, the *Von Bulow* court also emphasized that the purpose of the journalist's privilege is to "protect the public's interest in being informed by a 'vigorous, independent press,'" which was the principal issue in *Chevron*.

Berlinger argued in his appellate brief that many of those interviewed in "Crude" expected the unedited footage to remain confidential, and that he cannot be compelled to disclose the raw footage because the privilege exists to "ensure[] that members of the press will be not conscripted to serve as unwilling arms of the legal system and [to] protect them from burdensome and intrusive disclosure requirements that will inhibit their ability to perform their critical social function—to investigate and report on significant, newsworthy events." Berlinger had asserted in an affidavit that his interview subjects "trusted

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**Chevron**, continued from page 21

that I would not turn over the raw footage to Chevron to be used against them.” The court called this statement “conclusory”—lacking in supportive evidence—noting that Berlinger did not submit “corroborative evidence that the persons filmed demanded that the footage of them be held in confidence.” The court added that the release form Berlinger submitted to those he filmed contained no confidentiality clause. The court therefore found no “promise of confidentiality” in the case of the “Crude” footage.

Berlinger further argued that the court’s order should have analyzed “Crude” scene-by-scene to determine which scenes were relevant to Chevron’s case, rather than compelling the disclosure of all footage involving Donzinger, Ecuadorian officials, and experts. The court disagreed, in part because Berlinger had failed to provide any proposed guidelines to distinguish between relevant and irrelevant material.

The case attracted *amici* for both Berlinger and Chevron. Prominent First Amendment attorney Floyd Abrams filed a brief supporting Berlinger on behalf of a coalition of media corporations and advocates which included ABC, CBS, NBC, The Associated Press, Gannett Co., the National Press Photographers Association, The New York Times Company, *The Washington Post*, the Reporters Committee For Freedom of the Press, and the Society of Environmental Journalists. Abrams’ brief relied largely on *Gonzales v. National Broadcasting Company, Inc.*, where the 2d Circuit held in 1999 that “where nonconfidential information is at stake, the showing needed to overcome the journalists’ privilege is less demanding than for material acquired in confidence.” Although the court held that a litigant can overcome the journalist’s privilege for nonconfidential information if “he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources,” Abrams argued in his brief that the *Gonzales* standard—although lower than the standard to overcome the privilege for confidential information—is “nonetheless significantly more substantial than the burden on a litigant seeking ordinary garden-variety

discovery” as with Chevron’s request for the raw footage from “Crude.” *Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999)

(Abrams delivered the 20th Annual Silha Lecture, titled “Confidential Sources of Journalists: Protection or Prohibition?” on Oct. 24, 2005. For more on the lecture, see “2005 Silha Lecture Features First Amendment Attorney

“It is essential to the creative process that outtakes—even nonconfidential ones—be generally protected from disclosure and that they be ordered produced only when they are truly needed for use in a litigation.”

— Floyd Abrams  
First Amendment attorney

Floyd Abrams” in the Fall 2005 issue of the *Silha Bulletin*.)

Berlinger relied on *Gonzales* in his brief as well, arguing that Chevron had failed to demonstrate the raw footage’s relevance to the proceeding, and that some of the footage was available from other sources because film crews employed by Chevron filmed much of the same material as Berlinger. Berlinger’s argument, the court wrote, “proceeds from the incorrect premise that our description in *Gonzales* of the showing necessary to overcome [journalist’s privilege] would apply regardless of whether the press entity claiming the privilege’s protections acted with independence. *Gonzales* said no such thing.”

Awaiting the panel’s 2011 opinion, on January 2 Abrams told *The New York Times* that “[i]t is essential to the creative process that outtakes—even nonconfidential ones—be generally protected from disclosure and that they be ordered produced only when they are truly needed for use in a litigation.”

On June 25, 2010, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told Reuters that the raw footage sought by Chevron should be subject to the same legal protections as a reporter’s notebook. However, Kirtley added that “it’s often a tough argument to make because it really does require a judge to buy into the

idea that what you’re protecting here is editorial and journalistic independence.”

Following the 2d Circuit’s 2011 opinion, Garrett Epps, Professor of Law at the University of Baltimore and a former *Washington Post* reporter, criticized the ruling on *The Atlantic*’s website, calling the ruling “a bad decision, and one that will cause mischief down the road.” In particular,

Epps criticized the panel’s emphasis on journalistic independence as the lynchpin of the journalist’s privilege. “Many stories begin because someone involved approaches a reporter. If that by itself raised questions about ‘independence,’ few

journalists would merit the privilege,” Epps wrote. “Putting the burden on the journalist to convince a trial court he is ‘independent’ turns the First Amendment on its head. It makes every trial judge a press critic.” Epps argued that the *Chevron* case is evidence that Congress should enact a federal journalist’s shield law. If such a law had been in place, he contended, it would have covered Berlinger from the moment Donzinger approached him, and avoided the “folderol” over whether “Crude” was sufficiently “independent.”

Berlinger told the *Los Angeles Times* in July 2010 that he feared a ruling against him could undermine documentarians’ ability to make films similar to “Crude” in the future. “The nature of the relationship [between a filmmaker and his subjects] is one of trust and access,” he said. “And these kinds of stories are built on a trusting relationship.”

On March 7, U.S. District Judge Lewis Kaplan issued a 131-page order granting a preliminary injunction which prevents the Honduran plaintiffs from collecting an \$8.6 billion judgment awarded to them by an Ecuadorian court. According to Kaplan’s order, the “Crude” outtakes were “remarkably informative about the ... litigation and related matters bearing heavily on this motion and ... provide a significant part of the evidentiary record.” The outtakes, Kaplan wrote,

**Chevron**, continued on page 23

# Journalists Face Challenges in Covering Revolution in North Africa, Middle East

**A**s popular uprisings unfolded across North Africa and the Middle East in early 2011, journalists on the ground faced many challenges in covering the story. Threats to newsgathering and reporting usually came from the governments that protesters were seeking to depose, and included restrictions on communications, harassment, assaults, and detention.

The chaotic and violent atmosphere led advocacy group the Committee to Protect Journalists (CPJ) to say the

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region posed “enormous challenges” for journalists.

On April 16, CPJ said there had been more than 450 attacks on journalists, including eight deaths, amid the unrest in Libya, Egypt, Bahrain, Tunisia, Yemen, Syria, Saudi Arabia, and Iraq. On April 12, Reporters sans Frontières (RSF or Reporters without Borders) reported on its website that governments in the region had made “no concessions to media” and were engaging in “indiscriminate repression.”

### Libya

In Libya, conditions for reporters were especially dangerous because of inconsistent and unpredictable treatment by the government and military. The government initially appeared willing to allow journalists to report freely on the conflict, but detentions and abuse—mostly by the Libyan military—led to international outcry.

The Gadhafi government’s treatment of reporters ranged from ham-handed attempts to spin coverage of the uprising in its favor to sudden crackdowns and abuse. According to a

U.S. State Department press release on February 24, senior Libyan government officials told U.S. diplomats that although members of a few television networks—CNN, BBC Arabic, and Al Arabiya—would be allowed into the country to report on the situation there, reporters who had entered the country illegally would be considered al-Qaida collaborators. *The Guardian* of London reported February 23 that after rebels took over the Northeast region of the country near Benghazi the previous week, some journalists entered the country overland, crossing the border from Egypt. Under Gadhafi, Libya has been mostly closed to foreign media, *The Guardian* reported, and Deputy Foreign Minister Khalid Kayem said journalists who had crossed the border were there “illegally and will be considered outlaws.”

On February 26, however, *The New York Times* reported that the government had lifted its complete ban on foreign journalists, re-opened Internet access after severely restricting it, and stopped confiscating cell phone chips and camera memory cards from those leaving the country. A group of invited journalists were taken on a tour of Tripoli on February 27, the *Times* reported, in an attempt to show that things were peaceful there and the people supported Gadhafi. While visiting an area known as the Friday market, however, the *Times’* David Kirkpatrick reported that signs appeared everywhere of a hasty clean-up after a riot the previous day. “A young man approached the journalists to deliver a passionate plea for unity and accolades to Colonel [Gadhafi], then slipped away in a white van full of police officers,” Kirkpatrick wrote. “Meanwhile, two small boys surreptitiously offered bullet casings that they presented as

evidence of force used on protesters the day before.”

Another government-led visit, to the site of a British airstrike against a Gadhafi compound, led to a dispute among journalists about their role in the middle of the conflict. A report posted March 21 on Fox News.com said the journalists were brought to the area “to show them damage from the initial attack and to effectively use them as human shields” against a second attack. The Fox News report said, “British sources confirmed that seven Storm Shadow missiles were ready to be fired from a British aircraft, but the strikes had to be curtailed due to crews from CNN, Reuters and other organizations nearby” leading to “a great deal of consternation by coalition commanders.” But CNN correspondent Nic Robertson rejected the “human shield” claim, as well as the implication that Fox News reporters had opted not to participate in the visit, according to a March 21 story posted on CNN.com. In an interview with CNN host Wolf Blitzer on March 21, Robertson called the report “outrageous and hypocritical” because it left out the fact that “a Fox staffer was among the journalists on the trip,” which Robertson called “hurried.” Robertson added, “I expect lies from the government here. I don’t expect it from other journalists. It’s frankly incredibly disappointing.” An update to the original Fox News story said the network stood by its account, adding that “a security guard hired by Fox News did accompany the group.”

In a televised speech on March 2, Gadhafi criticized the international journalists he invited to Tripoli, according to the *Times*, which based its report on a translation from Arabic to English carried live on Libyan state

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prove that Donzinger “continues to threaten and pressure judges at all levels, particularly those hearing suits that implicate government interests,” and it would be improper to allow a judgment to stand when based on such improprieties. *Chevron v. Donzinger*, 11

Civ. 0691, 2011 U.S. Dist. LEXIS 22729 (S.D.N.Y. March 7, 2011)

According to a March 8 story in *The New York Times*, Kaplan’s ruling could “prevent[] the plaintiffs from enforcing the ... ruling anywhere outside Ecuador.” Because Chevron has no assets in Ecuador, the *Times* reported, the

plaintiffs were expected to look to the United States and other countries where Chevron operates in order to enforce the Ecuadorean court’s ruling and collect damages. Therefore, Kaplan’s injunction could mean an end to the case.

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## Libya and Egypt, continued from page 24

television. “Libya doesn’t like foreign correspondents,” Gadhafi said. “They shouldn’t even know about the weather forecasts in Libya, because we are suspicious.”

In an April 10 report, the *Times*’ Kirkpatrick said that the government had presented so-called evidence of civilian casualties from U.S. and British airstrikes in Tripoli hospitals that was so sloppily staged that even the government escorts leading the tours did not refrain from pointing out that the blood in a hospital bed was fake. In another instance, on April 6, Kirkpatrick reported that 26 journalists were “suddenly ordered, without explanation or pattern, to leave Libya the next day. By the end of the night, many had negotiated individual exemptions. Then at breakfast the next morning, another official announced that the exemptions were no good, a bus was coming to dump the journalists in Tunisia, and it was time to go. But by 11 a.m. it was finally clear that there would be no bus to the border at all. Who in the government pushed for the expulsions and who might have stopped them is impossible to determine.”

CPJ reported that as of April 15, it had documented more than 80 attacks on the press in Libya, including two fatalities, a gunshot injury, 49 detentions, 11 assaults, two attacks on news facilities, and the jamming of broadcast transmissions from Qatar-based television network Al-Jazeera and United States-based Al-Hurra. CPJ also reported that two international journalists had been expelled from Libya.

Several high-profile instances of harassment, detention, and beatings of journalists were reported. On March 9, three BBC journalists were released after being subjected to what they described as 21 hours of torture. According to *The New York Times* on March 9, reporter Feras Killani, cameraman Goktay Koraltan, and producer Chris Cobb-Smith said they were beaten with fists and rifles, hooded, and subjected to mock executions after being taken captive while trying to reach the scene of a battle in Zawiyah. Cobb-Smith said that at one point near the end of their detention, the three journalists were lined up facing a wall. “A man with a small sub-machine gun was putting it to the nape of everyone’s neck in turn.

He pointed the barrel at each of us,” Cobb-Smith said. “When he got to me at the end of the line, he pulled the trigger twice. The shots went past my ear.” According to the journalists’ account of the ordeal at <http://www.bbc.co.uk/news/world-africa-12695138>, they were released shortly thereafter, with an

“A young man approached the journalists to deliver a passionate plea for unity and accolades to Colonel [Gadhafi], then slipped away in a white van full of police officers.

— David Kirkpatrick  
*The New York Times*

apology for the “mistake by the military.”

*The New York Times* reported March 21 that *Times* Beirut bureau chief Anthony Shadid, reporter and videographer Stephen Farrell, and photographers Tyler Hicks and Lynsey Addario were detained in Ajdabiya on March 15 by forces loyal to Gadhafi. The reporters were trying to escape the city as fighting intensified.

The journalists said their treatment over the six days of their detention ranged from humane to brutal. According to the March 21 *Times* account, each checkpoint stop along their route toward Tripoli “allow[ed] for a new group of soldiers to land a fresh punch or a rifle butt in [the reporters’] backs.” Addario, especially, was the subject of unwanted attention. “There was a lot of groping,” Addario said. “Every man who came in contact with us basically felt every inch of my body short of what was under my clothes.”

After several days of negotiations between Libyan and American officials, including a demand that an American diplomat come to Tripoli to receive the journalists, the *Times* reporters were released into the custody of Turkish diplomats and allowed to cross into Tunisia on March 21. According to Human Rights Watch (HRW) on April 15, the journalists’ driver, Mohamed Shaglouf, was captured along with the reporters on March 15, but had not been heard from since then.

On April 15, HRW called for the release of nine foreign and six Libyan journalists detained or missing in the

country. Among the detained foreign journalists were James Foley, an American correspondent for the online publication *Global Post*; Manuel Varela, a European Press Agency photographer from Spain; Clare Morgan Gillis, an American freelancer working for *The Atlantic*, *Die Welt*, and *USA Today*; and

Anton Hammerl, a London-based South African freelance photographer. HRW said the journalists were detained by government security forces on April 5 in Brega, and were held “incommunicado” in Tripoli since April 8, forbidden to contact

their families or receive visiting diplomats. On April 25, CPJ reported that Foley and Varela were allowed to place phone calls to their families on April 23, who they told they were not injured or being mistreated. CPJ also reported that Hammerl and Gillis “appeared in government custody” on April 22 “and are apparently in good health.”

HRW also said April 15 that an American freelancer, Matthew VanDyke, had gone missing near Brega. VanDyke was last seen March 13, HRW reported. According to CPJ, VanDyke arrived in Libya on March 6 via the country’s eastern land border with Egypt, and last spoke to his family on March 12. HRW also reported that at least six Libyan journalists known for being critical of the government had been arrested and their whereabouts, as of April 15, were unknown.

The Associated Press (AP) reported on April 20 that two acclaimed photojournalists died while covering the conflict. Tim Hetherington and Chris Hondros were killed in Misrata, a port city controlled by revolutionaries and besieged by Gadhafi’s troops. Hetherington was co-director of the critically acclaimed Afghanistan war documentary “Restrepo” as well as an award-winning photographer for *Vanity Fair* and other publications. Hondros, a winner of the Robert Capa Gold Medal, worked for Getty Images. *The New York Times* reported that the photographers were among a group of journalists covering house-to-house fighting along Tripoli Street in Misrata.



Both Hetherington and Hondros died of shrapnel injuries. Two other photographers were also injured. Reports conflicted as to whether it was a rocket-propelled grenade or a mortar that hit the group. No media outlets reported that the journalists were themselves the target of the attack.

CPJ reported that two other journalists have been killed in the Libyan conflict: Mohammed al-Nabbous, founder of the online Libya Al-Hurra TV, shot in the rebel stronghold of Benghazi on March 19; and cameraman Ali Hassan al-Jaber of Al-Jazeera shot near Benghazi on March 13.

### **Egypt**

During the revolt in Egypt against President Hosni Mubarak in late January and early February of 2011, the government demonized and attacked the press in a way that appeared to be more organized than in Libya. As the Egyptian demonstrations grew, the government sought to block the transmission of broadcast news and communication via the Internet. Meanwhile, as reporters flooded Cairo to report on the revolution, crackdowns came in the form of intimidation and attacks by security forces, police, and even gangs deployed by the Mubarak regime.

Al-Jazeera was an early target of government attempts to silence media coverage of the massive protests, which centered on Cairo's Tahrir Square. CPJ reported on January 30, the sixth day of protests, that the government-operated satellite company that carried Al-Jazeera had stopped carrying the signal. The government also ordered the offices of all Al-Jazeera bureaus in Egypt shut down and the accreditation of all of the network's journalists revoked. On January 31, CPJ reported that six Al-Jazeera reporters were briefly detained in Cairo and their cameras permanently confiscated.

Egyptian officials also essentially shut down the Internet from January 28 to February 4. According to *The New York Times* on February 15, the government used its control over a central server located in Cairo to cut off almost all Internet traffic into and out of the country on January 28. The *Times* reported that individual Internet service providers were also ordered to shut down by government decree,

which their licensing agreements require. Although some domestic connectivity continued during the five-day blackout, almost all traffic between citizens in the "technologically advanced, densely wired country" and the rest of the world was halted, the *Times* reported, calling the government response to the quickly growing movement "a dark achievement that many had thought impossible in the age of global connectedness."

The Mubarak regime also engaged in old-fashioned intimidation, harassment, violence, and detention to limit international news coverage of the revolution. On February 3, the *Times* reported that as the protests grew, journalists increasingly found themselves to be the targets of "an apparently coordinated campaign ... intended to stifle the flow of news that could further undermine the government."

According to a February 3 story by *The Christian Science Monitor*, CPJ said it received nearly 100 reports of damage to news organization property or individuals being detained or attacked over the 36 hours between February 1 and February 3. In a post on The Huffington Post on February 3, CPJ Executive Director Joel Simon wrote that "the world [should] speak with one voice" to insist that Mubarak end the media crackdown. "What is frightening ... is that sweeping efforts to suppress the media often lay the groundwork for most brutal kinds of repression, from the Tiananmen Square massacre to the 2009 post-election crackdown in Iran," Simon wrote. "As brutal as the violence has been in Egypt over the last several days, there is also no question that the presence of the international media has acted as something of a restraint."

Among the incidents the *Times* reported February 3 were an ABC News crew that was carjacked and threatened with beheading, a Reuters office in Cairo that was stormed by a "gang of thugs," and four journalists from *The Washington Post* that were detained by forces suspected to be from the Interior Ministry.

National Public Radio reporter Lourdes Garcia-Navarro reported February 3 that she was surrounded in an otherwise quiet neighborhood in Cairo by an angry crowd who accused her and her colleagues of being Israeli spies or Al-Jazeera reporters. Eventually

a military escort arrived, Garcia-Navarro reported, but not before "an Egyptian-American colleague, Ashraf Khalil, was repeatedly punched in the face."

Garcia-Navarro reported that reporters closer to Tahrir Square were subject to even more harassment and violence. She said the experience of *Time* magazine's Andrew Butters was "typical." Butters said although bands of armed men carried out the attacks, in some parts of the city the security services appeared to be orchestrating them. "I was grabbed by a young guy with a club who hauled me over to an improvised checkpoint," Butters said. "A few of them punched me and [it] was clear what they were doing [was] coordinating with the police and rounding up all foreigners and they were being coordinated and commanded by an agent from the Interior Ministry who looked straight out of central casting, with leather trench coat and walkie-talkie." Butters said he was eventually released.

CNN correspondent Anderson Cooper was the subject of one of the most high profile attacks, as he and his crew were "set upon by pro-Mubarak supporters" in an area near the Egyptian Museum in Cairo on February 2 and repeatedly kicked and punched in the head. Cooper recorded the attack on a video camera he was carrying, and it was later broadcast on CNN.

The AP reported February 4 that two Fox News journalists were severely beaten by a mob near Tahrir Square on February 2. Correspondent Greg Palkot and cameraman Olaf Wiig had retreated to a building, the AP said, but someone threw a firebomb inside the building and the men were attacked as they rushed out, according to Fox Senior Vice President for News Michael Clemente.

Numerous other international news organizations had journalists detained during the height of the protests, the AP reported, including Paris-based all-news television channel France 24, Toronto's *The Globe and Mail*, and Polish state television TVP.

Meanwhile, the AP reported that Greek daily newspaper *Kathimerini* said its Cairo correspondent was briefly hospitalized after being stabbed in the leg in Tahrir Square, and another Greek newspaper photographer was punched

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in the face. Swedish public broadcaster SVT said one of its reporters was also stabbed. The AP said Kyodo News agency reported that two Japanese freelance photographers were attacked while covering the protests, and one of them slightly injured.

CPJ reported that some government television broadcasters, as well as private stations whose owners were loyal to Mubarak, portrayed foreign journalists as endeavoring to destabilize the country. On February 5, CPJ reported that the networks that supported Mubarak frequently accused Al-Jazeera and other international news organizations of having a “hidden agenda,” of attempting to “incite the people,” while calling local journalists “infidels” for working with international media.

*The New York Times* reported February 3 that government attempts to suppress coverage “were somewhat effective,” as major international television networks, including the BBC, CNN, and Al-Jazeera were unable to broadcast from in and around Tahrir Square, thanks to being chased off, detained, or forcibly removed from their bases set up in hotels near the square.

According to the AP on February 4, evening news anchors Katie Couric of CBS and Brian Williams of NBC eventually left Egypt in order to broadcast live without interference. Williams’ show moved to Jordan and Couric returned to New York. The AP also reported that Arabic-language satellite channel Al-Arabiya “pleaded on an urgent news scroll for the army to protect its offices and journalists.”

In an incident that did not appear to be politically driven, CBS News reported February 15, that on February 11, the day Mubarak announced his resignation, Chief Foreign Correspondent Lara Logan was separated from her crew amid the largely jubilant crowd, “was surrounded and suffered a brutal and sustained sexual assault and beating before being saved by a group of women and an estimated 20 Egyptian soldiers.” Logan returned to the United States the following day, and was released from the hospital on February 16, CBS News reported.

In a February 19 Op-Ed in *The New York Times*, investigative journalist and foreign correspondent Kim Barker

wrote that the Logan incident was not an isolated or even unusual incident for women reporting abroad, but that similar assaults are rarely reported, and should be more widely discussed as part of the professional environment for female reporters overseas. Barker said that CPJ, which keeps the most comprehensive

“What is frightening ... is that sweeping efforts to suppress the media often lay the groundwork for most brutal kinds of repression, from the Tiananmen Square massacre to the 2009 post-election crackdown in Iran.”

— Joel Simon  
Executive Director,  
Committee to Protect Journalists

statistics on worldwide journalist attacks and murders, does not catalogue sexual assaults.

On April 13, more than two months after Mubarak stepped down and the Egyptian military took over, CPJ reported that some restrictions on press freedom continued, including a requirement that local print media obtain approval for all mentions of the armed forces before publication. CPJ called the rule a “substantial setback for press freedom in Egypt.”

### **Bahrain, Syria, Yemen**

Similar press restrictions and attacks on members of the media occurred amid popular uprisings in Bahrain, Syria, and Yemen. CPJ reported March 14 that in Bahrain, plainclothes security forces beat a photographer working for the independent daily *Al-Wasat* as he tried to cover a demonstration in Manama.

On April 12, Karim Fakhrawi, founder and board member of *Al-Wasat*, died while in police custody, CPJ reported April 15. Bahrain’s official news agency said via Twitter that Fakhrawi died of kidney failure, but photographs published elsewhere online show a body identified as that of Fakhrawi with extensive cuts and bruises, CPJ said. The CPJ report said that the Bahraini government had accused *Al-Wasat* of “deliberate news fabrication and falsification” in early April, announced plans to file criminal charges against

three of the paper’s senior editors, and deported two other senior staffers.

In its March 14 report, CPJ said a list called the “Bahrain list of dishonor,” had circulated online, identifying people as “collaborators aiming to sell their country.” CPJ said that the list’s author was unclear; upon review of it, CPJ

“found the names of at least nine critical journalists.”

In Syria, reporters were expelled and others blocked from reporting from the most active sites of unrest. On March 28, CPJ reported that two Reuters reporters were kicked out of the country after a two-day detention for working there

without authorization and filming “in an area where filming is not permitted,” according to Syrian authorities.

Another Reuters reporter had his press credentials revoked for “false” coverage, CPJ reported. On March 25, security forces blocked journalists from the southern city of Daraa, which CPJ described as “the birthplace of the political unrest now sweeping Syria.” At least one satellite network—private, Dubai-based Orient TV—said its signal had been jammed in Syria after extensively covering protests in Daraa, CPJ reported.

Syrian senior presidential adviser Buthaina Shaaban claimed in a March 24 press conference that “the problem is with some media organs who wanted to exaggerate the figures, who wanted to exaggerate what happened,” CPJ reported. Shaaban said “Syrian state television tells the truth; no one else.”

In Yemen, CPJ expressed concern April 18 for the whereabouts of Ahmad Al-Mohamadi, whom it described as a reporter for the privately owned news channel Suhail, with ties to the opposition party Al-Islah, and a contributor to independent weekly *Al-Nass*. After being summoned for questioning by Republican Guards on April 16, Al-Mohamadi could not be reached two days later, CPJ reported.

In its April 18 report, CPJ also reported that several journalists for

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# Minnesota Senate Expands Floor Access; State Supreme Court Approves Cameras

In Spring 2011, both the Minnesota Senate and the state judicial branch changed policies regarding media access. The Senate expanded its media credentialing criteria in a way that allows new and different media outlets to cover proceedings from the floor of the Senate chamber, and the Minnesota Supreme Court approved a pilot program allowing cameras to cover certain types of civil cases, even without the parties' consent.

## ACCESS

### *Minnesota Senate Expands Media Credentialing Criteria*

On March 3, 2011 the Minnesota Senate approved a media credentialing reform measure which expanded previous rules, allowing a wider range of journalists—including bloggers—to cover the body's proceedings in the Senate chamber.

According to the Minnesota legislature's website, "[e]ach [legislative] body adopts the rules under which it operates." The credentialing reform measure came as part of revisions to the Minnesota Permanent Rules of the Senate. Specifically, the measure enacted changes to Rule 16, which governs media access to the Senate floor.

The old version of Rule 16, citing concerns over "limited floor space" in the Senate, restricted access to "permanent floor space" to "those news agencies that regularly cover the legislature." The rule listed specific news entities that were allowed permanent floor access: "The Associated Press, St. Paul *Pioneer Press*, St. Paul *Legal Ledger*, [Minneapolis] *Star Tribune*, Duluth *News-Tribune*, The *Forum*, Rochester *Post-Bulletin*, St. Cloud *Times*, WCCO radio, KSTP radio, Minnesota Public Radio and Minnesota News Network." The old rule set aside two additional permanent

floor seats for other news agencies, which were allocated at the discretion of the Secretary of the Senate, and noted that journalists not specifically granted access by the rule "may occupy seats provided in the Senate gallery" along with the rest of the general public.

The new version of Rule 16, approved by a vote of 57 to 5 and entitled "Credentials for News Coverage," takes a different approach. Rather than restricting credentials to specific news organizations, the rule now permits the Senate Sergeant at Arms to issue credentials to "organizations or individuals who demonstrate that they provide frequent news coverage of the legislature." In order for a journalist to demonstrate that he or she "provide[s] frequent news coverage of the legislature," the journalist must provide the Sergeant at Arms with "three examples of news coverage of legislative matters produced by the organization or individual" in the preceding year. These examples of news coverage may be audio or video recordings or written materials, and the journalist must also include with these examples a description of how they were distributed to the public. To avoid concerns about possible political bias, the rule prohibits the Sergeant at Arms from considering "any opinion expressed in the examples" when making the credentialing determination. The Sergeant at Arms must issue credentials or reject an application within 14 days, and if a journalist is denied credentials, the rule now permits the applicant to appeal the case to the Senate Committee on Rules and Administration.

The new rule takes the number of available seats into account, limiting the number of seats on the floor of the Senate to six, and in the Senate gallery to 10. The rule also sets aside an additional four seats on the floor of the Senate for television news organizations

that already have a lease agreement for access to the capitol press area. According to the rule, "[a]ll other gallery access will be provided on a first-come, first-served basis to individuals and organizations with credentials and passes" issued by the Sergeant at Arms.

The new rule codifies the recommendation of a working group of Senate staffers, bloggers, and journalists, who presented the proposed changes to the Senate Committee on Rules and Administration in February. According to a February 28 blog post by David Brauer, a journalist for MinnPost.com and a member of the working group, the group was unanimous in proposing the changes that were ultimately reflected in Rule 16.

In a March 3 post about the Senate's adoption of the working group's proposal, Brauer wrote that the principal change is that the new rule will permit a more diverse group of journalists into the Senate to cover proceedings. Brauer said that bloggers will be eligible for credentials, provided that they can meet the required "three examples" standard the new rule embodies.

In his February 28 post, Brauer wrote that the provision of the rule prohibiting the Sergeant at Arms from considering opinions in journalists' applications would "almost certainly" mean that "more 'ideological' journalists will get credentials," noting that "the Minnesota and U.S. Constitutions don't limit freedom of the press to perceived non-ideologues." Brauer added, however, that the new text of the rule prohibits registered lobbyists or "publications 'owned or controlled' by lobbyists, political parties and party organizations" from eligibility for media credentials.

Conservative political blogger Mitch Berg, another member of the working group, praised the Senate's non-partisan approach to drafting the new rules. In

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### *Libya and Egypt*, continued from page 26

local publications had been beaten while trying to cover demonstrations. Four had their cell phones confiscated and were forced to leave the protests.

In another instance, a reporter covering a rally "received an anonymous phone call asking him to stop his coverage and to leave the scene immediately" before he was beaten, CPJ reported. CPJ also

reported that a shipment of newspapers had been confiscated by authorities, and its driver beaten, on April 15.

— PATRICK FILE  
SILHA FELLOW AND BULLETIN EDITOR

**Minn. Access**, continued from page 27

a March 2 post on his blog Shot in the Dark, Berg wrote that the Minnesota Senate now has “the most transparent, open and non-partisan media process of any state government body in the United States. Literally ... there are none better.”

### ***Cameras in Courtrooms Pilot Program Advances in Minnesota***

A pilot program which will allow cameras into Minnesota trial courtrooms beginning on July 1, 2011 received approval from the Minnesota Supreme Court on March 21, 2011. The court rejected two proposals to monitor the program’s effectiveness that had been considered by an advisory committee of judges and lawyers. Under the court’s order, the program must be monitored for its effectiveness over its two-year life span, and will be limited to certain civil cases.

The court’s order amended Rule 4 of the Minnesota General Rules of Practice, the rule that had previously imposed a presumptive ban on cameras which could be overcome only by an order of the trial judge and consent of all parties in the case. Under the pilot program, cameras will be allowed in civil proceedings when a judge approves them. The court cited “continuing concerns” about admitting cameras into criminal proceedings which date back to a 2009 order on cameras in the courtroom, where the court wrote that “[n]umerous participants in the justice system who work on a regular basis with victims and witnesses expressed the firmly held view that televised proceedings would make a difficult situation even more problematic.”

The pilot program will not permit cameras in all civil proceedings, however. Under the court’s order, “child custody proceedings, marriage dissolution proceedings, juvenile proceedings, child protection proceedings, paternity proceedings, and petitions for orders for protection” are ineligible for camera coverage. Additionally, cameras will never be permitted to photograph jurors, either during trial or during jury selection. Cameras will not be permitted to record proceedings if the judge is not physically present in the courtroom, nor will they be permitted to film witnesses unless the witness consents. On April 25, the court

issued an additional order excluding civil commitment proceedings, which can include cases of people suffering from mental illness as well as predatory sex offenders. (For more on the evolution of the Minnesota pilot program see “Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings” in the Fall 2010 *Silha Bulletin*, and “Minnesota High Court Approves Cameras-in-Court Pilot Program” in the Winter 2009 *Silha Bulletin*.)

The court’s order also required the advisory committee to monitor the program for its effectiveness. According to the order, the advisory committee

“We know that whatever the committee comes up with won’t be scientifically valid. All the court is looking for is an effect overall.”

— Justice David Stras  
Minnesota Supreme Court

submitted a report to the court in October 2010 proposing two potential courses of action for monitoring the pilot project: a broad, comprehensive research study to measure cameras’ impact, or a more informal study supported by anecdotal reports from participants in proceedings which have been covered by cameras. The committee formulating the comprehensive study consisted of scholars at the University of Minnesota, including Eugene Borgida, a University of Minnesota psychology professor who conducted a small-scale study on cameras in Minnesota courtrooms in the 1990s, and Jane Kirtley, *Silha* Professor of Media Ethics and Law and Director of the *Silha* Center.

The court wrote that although it had no doubt that the comprehensive study would be an effective mechanism to monitor the impact of camera coverage of trials, “a number of factors led us to decide against the formal research study, many of them related to budgetary constraints facing the judiciary.” The court noted that the formal study’s projected cost was approximately \$750,000. Although the proposal did not call for the state judicial branch to pay for the program, the court cited difficulty in raising those funds as being a consideration in its rejection. In addition, the court expressed concern about the

formal study’s requirement that district judges fill out multiple surveys used to compile data about the program. The court wrote that “at this time, when the judiciary has incurred repeated budget cuts and shortfalls, and faces continuing serious budget constraints, we are unwilling to impose additional burdens on district judges.”

The court also rejected a second option proposed by the advisory committee: a “scaled down” study based on reports and surveys of court participants describing their experiences with cameras in the courtroom. The court emphasized that although this

approach could be implemented more quickly and less expensively than the formal study, it would still impose burdens on the judiciary because the judicial branch would ultimately be responsible for

designing, distributing, and collecting the reports and surveys.

Despite rejecting the advisory committee’s two proposed courses of action for monitoring the program, the court wrote in its order that “the Advisory Committee ... will monitor the pilot project” and report on its effectiveness to the committee.

As for implementation of the pilot program, the court’s order instructs the advisory committee to “identify media coordinators,” whose role will be to “facilitate interaction between the district courts and the electronic media during the course of the pilot project.” The order emphasized, however, that “the media coordinators will not be employed or funded by the judicial branch.”

On April 12, the advisory committee met to address two items in the court’s order: implementation of the pilot program and monitoring. Mark Anfinson, an attorney for media outlets who had originally petitioned the Supreme Court in 2007 to allow cameras in courtrooms, said that he had assembled a preliminary list of people, many of whom work for television and radio stations, who would “work well as media coordinators.” Taking note of the Court’s instruction that the coordinators not be employed by

**Minn. Access**, continued on page 29

# Minnesota News Council Closes after 41 Years

## *Funds, Complaints Dry Up*

**O**n Jan. 27, 2011, the Minnesota News Council (MNC) announced that it was shutting down after 41 years of adjudicating complaints about media coverage in Minnesota.

MNC President Tony Carideo announced the council board of directors' decision to close at the 2011 Minnesota Newspaper Association (MNA)

convention, according to a January 28

### **MEDIA ETHICS**

Associated Press report. In a statement on the MNC website dated February 1, Carideo cited a lack of funding and a drop in complaints as reasons for the decision to close.

The MNC was founded in 1970 by the MNA in response to concerns within that organization that trust in the media was declining. According to the MNC website, in the late 1960s the MNA asked University of Minnesota journalism professor Ed Gerald to study the British Press Council (which would later become the Press Complaints Commission). Gerald traveled to London to study the work of that council, and concluded that it was successful at resolving complaints about media coverage and restoring public trust. Based on those findings, the MNA started the Minnesota News Council, which was incorporated in December 1970 and held its first complaint hearing in 1971.

The MNC took complaints from citizens, sought responses from news

media organizations, and held public hearings for people who complained that the actions of media outlets were misleading, inaccurate, or otherwise in violation of the Society of Professional Journalists code of ethics, which the MNC cited as a guideline for filing complaints.

The council held 155 hearings between 1971 and 2009. Participation was voluntary, and the council's decisions were not legally binding. According to the MNC website, at its founding, the organization had "24 voting members, half of them journalists and half laypersons, and a sitting justice of the state supreme court as chairperson at public hearings." After 2002, when committee chair Justice Edward Stringer retired from the court, hearings were chaired by a retired justice. The hearings were the most visible method of fulfilling the council's mission to "promote fair, vigorous and trusted journalism by creating a forum where the public and the news media can engage each other in examining standards of fairness."

In a February 3 blog post by David Brauer of MinnPost.com, MNC Executive Director Sarah Bauer said 10 percent of complaints actually led to hearings, and said "working with the public short of a formal hearing" was "an underappreciated part of the council's mission." Bauer said those who filed complaints sometimes relented if council staff decided their objection did not justify a formal hearing, and that at other times, "connecting the person to the media" would "foment a resolution."

According to a January 31 article

proposed monitoring options, Stras said "we know that whatever the committee comes up with won't be scientifically valid. All the court is looking for is an effect overall. It could be a survey, it could be something else. It's up to the committee." The committee proposed that the media coordinator's role could include preparing and administering surveys to participants in trials.

Borgida, whom the advisory committee had recommended conduct the formal research study that the court ultimately rejected, said he was "disappointed" that the March 21 order did not endorse the larger pilot

program and research assessment or allow cameras in criminal trials. In an email to the *Bulletin*, Borgida said that "the monitoring of the pilot program to commence on July 1st of this year simply will not be able to address the Court's original set of questions about [cameras in the courtroom] in a scientifically valid fashion. What probably will be produced will be more of a post hoc, anecdotal report which, ironically, the Court order recognized as inadequate to the task at hand."

posted on the First Amendment Center website, Rem Rieder, editor and senior vice president of *American Journalism Review*, said the closure was unexpected because the MNC was more successful than many other news councils. "While news councils have hardly flourished in the U.S., the Minnesota News Council was part of the journalistic landscape for a long time," Rieder said. "It seemed like one of the rare successes in the world of news councils." Rieder called the MNC's longevity an "impressive anomaly." Remaining U.S. news councils include the Washington News Council of Washington state, Media Council Hawaii, and the New England News Forum, based at the University of Massachusetts Amherst.

According to Carideo's February 1 statement, the MNC faced a twofold challenge in recent years: funding shrank with the economic downturn, while public reliance on the organization also dwindled. In his February 3 blog post, Brauer wrote that the organization's budget "collapsed" as the Star Tribune Foundation was shut down, and backers such as Target and Thrivent Financial pulled their funding. Bauer said "The first big hit was the loss of Star Tribune Foundation support at the top level," adding that the St. Paul *Pioneer Press* continued to back the MNC, but its contributions waned as the economy worsened. In the end, Brauer wrote, the MNC's annual budget dwindled from \$220,000 to \$75,000-\$100,000.

Carideo wrote in his statement that board members tried petitioning local universities to take on the work

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### **Minn. Access, continued from page 28**

the judicial branch, Anfinson added that under the terms of the pilot program, the media coordinator's role "won't be onerous" because "civil cases aren't generally regarded as being as much of a public interest as criminal cases, which would reduce the workload of the media coordinator in the pilot phase."

The committee also addressed the issue of monitoring. Justice David Stras, the Supreme Court's liaison to the committee, emphasized that the court will leave the specifics of the monitoring program to the committee. Noting that the Court rejected the committee's two

– GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT

# Silha Spring Events Highlight Paradoxical Heroes of Press Freedom

## *Historians Discussed Jack Anderson and Justice William Brennan*

The spring 2011 events hosted by the Silha Center for the Study of Media Ethics and Law highlighted two important and contrasting figures in the American history of freedom of the press: Jack Anderson, a controversial muckraking journalist, and William Brennan, the Supreme Court justice widely considered to be one of the First Amendment's greatest champions.

On April 4, Mark Feldstein discussed some of the ethical problems raised by investigative journalism at the Silha Spring Ethics Forum, entitled "The Morality of Muckraking: Journalistic

### SILHA CENTER EVENTS

Ethics from Jack Anderson to Julian Assange."

Feldstein, himself a veteran award-winning investigative journalist who now teaches at George Washington University and directs the Journalism Oral History Project, is the author of a new book chronicling the adversarial relationship between Anderson and Richard Nixon: "Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington's Scandal Culture." In the book, Feldstein chronicles Anderson's dogged attempts to uncover the Nixon administration's darkest and most closely held secrets, as well as Nixon's subsequent attempts to discredit—and allegedly, even assassinate—the influential and widely read columnist.

In his talk, Feldstein explained that the title "Poisoning the Press" had two meanings. One meaning applied to a plot—formulated in March 1972 by Nixon operatives G. Gordon Liddy and E. Howard Hunt—to stage a fatal accident in order to kill Anderson. Proposed methods included poisoning an aspirin bottle in Anderson's home or staging a car crash or mugging. Arrests for the Watergate break-in ultimately sidelined the plot, Feldstein said.

The other meaning of "poisoning the press," Feldstein explained, applied to the role Nixon's and Anderson's scandal

mongering played in a deterioration in the standards of political journalism that lasts to the present day. According to Feldstein, Nixon even once suggested that a conservative news network should be developed as a counterweight to the perceived liberal bias of other news media. "Fox News was Nixon's idea," Feldstein said.

In his presentation and question-and-answer session with a capacity audience in Murphy 130, Feldstein highlighted the ethical challenges that Anderson and other investigative journalists face. A key question, Feldstein asked, is "do ends justify means?" For Anderson, those means often included ploys that most journalists and journalism professors would decry, Feldstein said, such as lying, stealing, bribing sources, and even more serious illegal activities. Anderson employed those investigative means in pursuit of both what Feldstein called "high brow" stories, like national security issues and other problems of serious public importance, as well as "low

Justice William Brennan probably would have disapproved of Jack Anderson and Julian Assange and their tactics, in spite of his reputation as an ardent defender of the First Amendment.

brow" stories, such as "sexposés" about politicians' personal lives, including "outing" allegedly gay public officials and figures. Feldstein said Anderson did not consider himself a moral philosopher, "he just liked to nail the S-O-Bs."

Feldstein also drew connections between the arenas of politics and journalism of the 1970s and today. Nixon "went berserk" over his administration's leaks of secret information, Feldstein said, drawing a comparison to the aggressive pursuit of leakers and whistleblowers by the Obama administration. But Feldstein contrasted Anderson's approach of standing up for his sources—by "body-blocking" government officials with blackmail and threats—to other media organizations' relative silence in defense of their

sources. Feldstein said that *The New York Times* did not vociferously defend "Pentagon Papers" leaker Daniel Ellsberg when he was prosecuted by the Nixon administration in the 1970s, nor, more recently, embattled WikiLeaks founder Julian Assange or Army Pfc. Bradley Manning, who is accused of leaking numerous documents to WikiLeaks. (For more on Obama's prosecutions and their implications for the news media, see "Open Government Advocates Criticize Obama's Prosecution of Leakers," the cover story of this issue of the *Silha Bulletin*.)

In comparing Anderson to Assange, Feldstein said there were similarities as well as differences. On one hand, he said both men were "generally disliked"—"bad boys with a cult following"—and both were sometimes considered to be "irresponsible and reckless." On the other hand, Feldstein explained that Anderson was "more schooled in journalism" and was therefore "more careful" than Assange, who he said is learning his

methods of disclosure and discretion along the way.

At his April 11 talk, constitutional law professor and former *Wall Street Journal* Supreme Court reporter Stephen Wermiel gave a description of Justice

William Brennan that suggested that the justice would have disapproved of Anderson and Assange and their tactics, in spite of his deserved reputation as an ardent defender of the First Amendment.

Brennan's "love-hate" relationship with the press was a central theme of Wermiel's talk, entitled "Justice Brennan: Champion of the Free Press." Wermiel is co-author of the critically-acclaimed biography: "Justice Brennan: Liberal Champion." The book chronicles Brennan's life and 34-year Supreme Court tenure from 1956 to 1990, during which the justice played a significant role in shaping the contemporary judicial view of the role of freedom of speech and the press, becoming one of the most influential justices in history.

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## Silha Events, continued from page 30

Brennan, Wermiel explained, had a “schizophrenic” relationship with the press because his robust, principled defense of the First Amendment did not always match the “private Justice Brennan,” who did not particularly like reporters or want to have anything to do with them. Wermiel provided several anecdotes that illustrated Brennan’s personal distaste for reporters, including a long-standing refusal to talk to a *New York Times* reporter because of the paper’s coverage of a scandal that implicated Brennan’s son, and an instance when Brennan pushed a journalist out of an elevator before the doors closed when he was surprised and bothered by the reporter’s line of questioning.

Meanwhile, Wermiel explained, Brennan’s “deep seated” faith in the “multifaceted, critical, core role” the press plays in a democracy drove his strong and consistent defense of the news media’s First Amendment rights. Wermiel cited a dissent Brennan

wrote, but decided not to publish, in the 1985 case *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* as one of Brennan’s most passionate defenses of press freedom. At the time, many people in the legal community, including some of Brennan’s colleagues on the court, were criticizing the “actual malice” standard for libel of public officials and figures that Brennan articulated in the 1964 case *New York Times v. Sullivan*. According to that standard, a public official or public figure cannot win damages in a libel case unless he or she can prove that the offending statement was published with knowledge of its falsity or reckless disregard for whether it was true or false. In his unpublished dissent, Brennan wrote that if it abandoned that the “actual malice” standard, the court would demonstrate little confidence in citizens’ abilities to debate and discuss matters of public importance and determine the best course of action, instead giving that responsibility to courts and the government. In so doing, Brennan wrote,

“we desert our most ennobling ideals.”

Wermiel also discussed Brennan’s “unique” approach to deciding cases, which made him so influential. Although he was not considered one of the court’s “intellectual giants,” Wermiel said, “he was the best lawyer among them.” It was Brennan’s focus on winning majorities through compromise, rather than holding firmly to a set of principles, that led to his success from “behind the scenes,” Wermiel said. Of Brennan’s notorious knack for compromise, Wermiel said, “he wouldn’t give away the entire store, but he’d give up several shelves full” in order to reach a majority.

Both authors signed copies of their books following the presentations. Silha Center events are supported by a generous endowment from the late Otto Silha and his wife, Helen. Audio of both events is available on the Silha Center’s Web site at <http://silha.umn.edu/events>.

– PATRICK FILE  
SILHA FELLOW AND BULLETIN EDITOR

## News Council, continued from page 29

of the news council, and discussed continuing their efforts on a volunteer basis, but “none of those avenues bore fruit.” According to Brauer’s post, Carideo said money remaining in the MNC’s endowment fund would go to the “Minnesota News Media Institute, a Minnesota Newspaper Association-affiliated nonprofit, to hold public forums, train journalists and fund research projects.”

The MNC’s funding losses coincided with another problem for the organization. As Brauer wrote in his February 3 post, “The public didn’t rely on the News Council like it used to.” According to Brauer, the MNC averaged four to six hearings annually until 2008, but the number of complaints had dropped steadily starting in the early 2000s. Brauer also wrote that “complaints fell from 142 in 2003 to 50 in 2008, 35 in 2009, and 25 in 2010.”

In his February 1 statement on the MNC website, Carideo cited the “growth and expansion of the Internet” as contributing to shrinking public engagement with the news council. “The proliferation of blogs, which allowed news consumers their own distinct voices, email and comment sections to online news stories, provided an

instantaneous outlet for complaints, concerns and commentary on the news. Our hearing process, which was both thorough and, as a result, time-consuming, couldn’t measure up to the instant access allowed by electronic media,” Carideo wrote.

In his February 3 blog post, Brauer noted that some members of the media community did not view the closure as a huge loss. MNA General Counsel Mark Anfinson said that while the MNC was a “glorious experiment that goes down to the honor and praise of its creators” its goals of reducing libel claims and bolstering the credibility of the news media were not “ultimately met.”

According to the First Amendment Center, Rieder said news councils face unique problems. “The deck is stacked against them. To succeed, they need the willing participation of the news organizations they plan to scrutinize, both in terms of participating in the process and helping to fund the council.” Rieder said tensions with media have caused problems for other news councils. “The opposition of major newspapers is what killed the National News Council,” Rieder added. The National News Council was founded in 1973 and dissolved in 1984.

Jane Kirtley, director of the Silha Center and professor of media ethics

and law at the University of Minnesota, told the First Amendment Center that the council “was voluntarily supported (financially and ‘morally’) by many Minnesota-based media, but those who did not support it were still subject to being brought before it involuntarily for a hearing, and could be tried in absentia if they refused to participate.” Kirtley also said that the council had taken complaints “from governmental entities (like city councils) regarding ‘fairness’ in editorials” some of which “were thinly disguised libel claims that the governmental entities would never have been able to bring in a court of law—and for good reason, in my judgment, because of the First Amendment protection for statements of opinion.” Kirtley told the First Amendment Center that she had shared her concerns about the Minnesota News Council with its last two directors.

Carideo told Brauer that the loss of the council meant the loss of an “independent voice.” In his February 1 statement, Carideo thanked the MNC’s supporters, and said “becoming the longest-living organization dedicated to fair and trusted journalism in America” was “something to be proud of.”

– SARA CANNON  
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**2011 Silha Lecture: Mark Stephens, Attorney for Julian Assange**  
**October 4, 2011, 7:00 p.m. - Coffman Union Theater**

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Join us for the 26th Annual Silha Lecture, featuring attorney Mark Stephens. Stephens is the head of the International and Media department at the London-based law firm Finers Stephens Innocent. He has argued many high profile cases in Great Britain since the 1980s, and in 2008, *The Times* of London called him “one of the best advocates for freedom of expression.”

Stephens has represented WikiLeaks founder and editor in chief Julian Assange since 2010.



**More details to come at [www.silha.umn.edu/events](http://www.silha.umn.edu/events).**