

Fallout from NSA Surveillance Continues One Year After Snowden Revelations

In June 2013, Glenn Greenwald and *The Guardian* reported that the National Security Agency (NSA) had been conducting widespread surveillance of the communications of Americans and foreigners. The reports were based on information that former NSA contractor Edward Snowden disclosed to Greenwald. During the course of the summer of 2014, Snowden continued to provide information to journalists documenting the widespread scope of the NSA's surveillance efforts. Congress also continued to consider legislation aimed at reforming the NSA's surveillance programs. (For more on Snowden's earlier disclosures, see "Snowden Leaks Reveal Extensive National Security Agency Monitoring of Telephone and Internet Communication" in the Summer 2013 issue of the *Silha Bulletin*, "Snowden Leaks Continue to Reveal NSA Surveillance Programs, Drive U.S. and International Protests and Reforms" in the Fall 2013 issue, and "NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches" in the Winter/Spring 2014 issue.)

NSA Collecting Images on Internet for Facial Recognition Programs

On May 31, 2014, James Risen and Laura Poitras of *The New York Times* reported that top-secret NSA documents revealed that the agency was collecting large quantities of images of people in the communications it intercepts. The agency was harvesting the images for use in its various facial recognition programs. Risen and Poitras obtained the top-secret documents that detailed the NSA's image harvesting efforts from Edward Snowden.

According to the *Times* story, the NSA uses software to intercept "millions of images a day" from e-mails, text messages, social media, and other forms of online communication. The leaked documents also revealed that the NSA considers personal identifiers, such as facial images and fingerprints, as important to identifying and tracking terrorism suspects as written and oral communications.

NSA spokeswoman Vanee M. Vines told the *Times* reporters that the NSA considers images a form of communication. As a result, the agency was required to get court approval in order to collect images of Americans in the same ways the agency must get approval to look at e-mails or listen to phone calls. Vines also told the *Times* reporters that the NSA did not have access to passport photos or images located in state driver license databases. She declined to say whether the NSA collected Americans' images from social media web sites, such as Facebook, or from the State Department's photo databases of applicants for foreign visas.

Risen and Poitras reported that the leaked documents showed that the NSA's facial recognition programs made a leap forward in 2010 when analysts were able to match images from an NSA database with images in a terrorist watch list database. The breakthrough allowed the agency to develop teams of analysts who could combine various database records with the facial images. The reporters also explained that the NSA has developed processes to intercept facial imagery from video teleconferences, foreign identity card databases, and airline passenger data.

Risen and Poitras also noted that the NSA's image harvesting efforts were far more comprehensive than earlier reports of other collection programs. In February 2014, *The Guardian* reported that the NSA had assisted its British counterpart, the Government Communications Headquarters (GCHQ), in collecting webcam images from millions of Yahoo! user accounts around the world. The program, codenamed Optic Nerve, allowed the British intelligence agency to conduct bulk collection and database storage of still images from Yahoo! webcam chats. Many of the images contained sexually explicit images that GCHQ had trouble preventing its staff from seeing.

Carnegie Mellon University facial recognition technology researcher Allesandro Acquisti suggested to Risen and Poitras that facial recognition programs pose important issues for privacy. "Facial recognition can be very invasive," said Acquisti. "There are still technical limitations on it, but the computational power keeps growing, and the databases keep growing, and the algorithms keep improving."

However, the NSA defended its systematic efforts to collect the images. "We would not be doing our job if we didn't seek ways to continuously improve the precision of signals intelligence activities – aiming to counteract the efforts of valid foreign intelligence targets to disguise themselves or conceal plans to harm the United States and its allies," Vines, the agency spokeswoman, told Risen and Poitras.

On June 3, 2014, Bloomberg's Chris Strohm reported that Admiral Michael S. Rogers, director of the NSA, also defended the program before participants at a Bloomberg Government cybersecurity conference, saying that the agency adheres to legal restrictions on using facial-recognition technology on American citizens. "In broad terms, we have to stop what we're doing if we come to the realization that somebody we're monitoring or tracking has a U.S. connection that we were unaware of," Rogers said in defense of the program. "We have to assess the situation and if we think there is a legal basis for this and we have to get the legal authority or justification."

NSA, continued on page 3



- 1 **Fallout from NSA Surveillance Continues One Year After Snowden Revelations**

[Cover Story](#)

- 6 **European Union High Court Holds That Citizens Have the “Right to Be Forgotten” from Internet Searches**

[International News](#)

- 9 **Jesse Ventura Awarded \$1.8 Million for Libel and Unjust Enrichment**

[Defamation](#)

- 11 **Supreme Court Says Warrants Are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection**

[Privacy](#)

- 13 **Supreme Court Strikes State Law Creating Speech Buffer Zones Near Abortion Clinics**

[Freedom of Speech](#)

- 15 **Supreme Court Rules Aereo Inc.’s Television Streaming Service Violates Copyright Law**

[Copyright](#)

- 17 **Verdicts Arrive in Phone Hacking Trial that Exposed Questionable Practices of British Tabloid**

[Media Ethics](#)

- 19 **Update: U.S. Supreme Court Declines to Hear Reporter’s Privilege Cases**

[Reporter’s Privilege](#)

- 21 **Journalists Arrested During Protests in Missouri; Journalists Abroad Face Dire Situations**

[Endangered Journalists](#)

- 24 **Court Rules Final Volume of CIA’s “Bay of Pigs” Historical Record May Be Withheld**

[FOIA](#)

- 25 **Near, *Sullivan* and the Management of Dissent in American Society**

[Gillmor Tribute](#)

Director’s Note

The Summer 2014 issue of the *Silha Bulletin* includes several articles adapted from “Global Privacy and Data Protection,” a chapter to be published in the course handbook for the Practising Law Institute’s **Communications Law in the Digital Age** conference, which will take place in New York City in November 2014. In addition to Silha research assistants Casey Carmody and Sarah Wiley, Patrick File, 2014-15 Silha Faculty Fellow, also provided invaluable assistance with the preparation of that chapter.

JANE E. KIRTLEY
SILHA CENTER DIRECTOR AND
SILHA PROFESSOR OF MEDIA ETHICS AND LAW

SILHA CENTER STAFF

JANE E. KIRTLEY

SILHA CENTER DIRECTOR AND SILHA PROFESSOR OF MEDIA ETHICS AND LAW

CASEY CARMODY

SILHA *BULLETIN* EDITOR

SARAH WILEY

SILHA RESEARCH ASSISTANT

ELAINE HARGROVE

SILHA CENTER STAFF

NSA, continued from page 1

NSA Suggests that Data Collection Systems Are Too Complex to Prevent the Deletion of Data

In a June 9, 2014 story, Andrea Peterson of *The Washington Post* reported that the NSA claimed that it could not comply with a court order enjoining the agency from deleting data because its collection and storage processes were too complex. The court order arose from *Jewel v. NSA*, which pre-dated the Snowden revelations and challenges the constitutionality of NSA programs that collect the telephone and Internet communications of Americans. *Jewel et al. v. NSA et al.*, No. 08-cv-4373-JSW (N.D. Cal. filed Sept. 18, 2008). The plaintiffs alleged that the government had been using surveillance devices authorized by Section 702 of the Amendments Act to the Foreign Intelligence Surveillance Act (FISA) to collect information about Americans from AT&T's network in violation of the Fourth Amendment and several statutes, including FISA, the Electronic Communications Privacy Act (ECPA), the Stored Communications Privacy Act (SCA), and the Administrative Procedures Act (APA). The U.S. District Court for the District of Northern California initially dismissed the case for the plaintiff's lack of standing, which was later reversed by the U.S. Court of Appeals for the Ninth Circuit. *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011). (For more information about the Ninth Circuit's decision, see "U.S. Supreme Court Rejects Challenge to Federal Surveillance Law" in the Winter/Spring 2013 issue of the *Silha Bulletin*.)

COVER STORY

At a June 6, 2014 hearing, Judge Jeffrey White reversed his previous emergency order that would stop the NSA from destroying data. The Electronic Frontier Foundation (EFF), legal counsel for the plaintiffs, requested that data collected under Section 702 of amendments to the Foreign Intelligence Surveillance Act be preserved for the case. In opposing the order, NSA Deputy Director Richard Ledgett said in a court filing that saving all the data would "present[] significant operational problems." Declaration of Richard H. Ledgett, Jr., Deputy Director, National Security Agency, *Jewel et al. v. NSA et al.*, No. 08-cv-4373-JSW (N.D. Cal. filed Sept. 18, 2008). To comply, Ledgett said, the NSA would be required to shut down many of the systems and databases used to collect and store information gathered under Section 702.

Ledgett also suggested that the data collection and storage systems are complex because of the privacy requirements that the Foreign Intelligence Surveillance Court (FISC) has placed on the NSA. He said that the collected data is dispersed among several different systems and databases that have data deleted manually and automatically on a regular basis. Ledgett argued that the NSA's attempts to save data not only had the potential to be ineffective but could also cause significant harm to national security because the agency had a finite amount of storage. The saved data would prevent the agency from collecting and storing new information, which Ledgett said could help prevent national security threats. As a result of these arguments, Judge White dismissed the emergency order requiring the NSA to preserve data. Minute Entry: Temporary Restraining Order Hearing, *Jewel et al. v. NSA et al.*, No. 08-cv-4373-JSW (N.D. Cal. filed Sept. 18, 2008). The EFF has made all of the documents related to the case available on its website at <https://www.eff.org/cases/jewel>.

EFF Legal Director Cindy Cohn told *The Washington Post's* Peterson that the government's argument against the order was troubling. "To me, it demonstrates that once the government has custody of this information even they can't keep track of it anymore even for purposes of what they don't want to destroy," Cohn told Peterson. "With the huge amounts of data that they're gathering it's not surprising to me that it's difficult to keep track — that's why I think it's so dangerous for them to be collecting all this data *en masse*."

Federal Privacy Watchdog Panel finds Foreign Surveillance Efforts Effective

On July 2, 2014, *The New York Times* reported that the Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency that Congress established in 2007, published a report on July 1 that stated it believed the NSA's efforts to spy on foreign Internet communications complied with American law. The PCLOB said that the NSA's collection program "fits within the 'totality of the circumstances' standard for reasonableness under the Fourth Amendment, as that standard has been defined by courts to date." The report, endorsed by all five members of the committee, indicated that the PCLOB believed that the NSA's interception of Internet communications had been a useful tool in gathering intelligence to combat terrorism. The report said, "[t]he program

"With the huge amounts of data that they're gathering it's not surprising to me that it's difficult to keep track — that's why I think it's so dangerous for them to be collecting all this data *en masse*."

— Cindy Cohn,
Legal Director,
Electronic Frontier Foundation

has proven valuable in the government's efforts to combat terrorism as well as in other areas of foreign intelligence." However, the PCLOB stated that some aspects of the NSA's surveillance efforts might raise privacy concerns, such as collecting communications that contain e-mail addresses and phone numbers of a target in the body of messages rather than in the address lines. The board noted that the challenges for the NSA to avoid collecting such information would eliminate important data that is useful to the agency.

A July 2 story by *Wired's* Kim Zetter reported that the board recommended that the agency should periodically review the interception of these types of communications in order to develop ways to place limits on its collection. The PCLOB also noted that there could be the potential for government intelligence analysts to examine Americans' communications that are incidentally swept up in searches of foreigners' Internet communications. The board recommended that FISA courts should maintain oversight on these "backdoor" searches of U.S. citizens' communications. The PCLOB's full report is available at <http://www.pclob.gov/All%20Documents/Report%20on%20the%20Section%20702%20Program/PCLOB-Section-702-Report.pdf>.

Several privacy advocates disagreed with the PCLOB's July report. Elizabeth Goitein, co-director of the Liberty and National Security Program at the Brennan Center for Justice, said in a July 2 press release that the NSA's Internet communications collection program was unconstitutional. "The board's recommendations are surprisingly anemic, particularly in light of its much more robust approach in its January report on the bulk collection of Americans' telephone records," said Goitein. "The Board, however, endorsed a 'foreign intelligence exception' to the Fourth Amendment's warrant requirement that is far broader than what any regular federal court has ever recognized." In a July 1 post on the organization's *Deeplinks* blog, EFF Legal Director Cohn wrote that the PCLOB's report "gives short shrift to the very serious privacy concerns that the surveillance has rightly raised for millions of Americans."

NSA, continued on page 4

NSA, continued from page 3

In a July 2 press release, Director of National Intelligence James Clapper praised the PCLOB's report. "In this important report, the PCLOB confirms that Section 702 has shown its value in preventing acts of terrorism at home and abroad, and pursuing other foreign intelligence goals," said Clapper in a press release. "We take very seriously the board's concerns regarding privacy and civil liberties, and we will review the board's recommendations with care."

Government Documents Reveal Surveillance Conducted on Prominent Muslim-American Leaders

On July 9, 2014, *The Intercept's* Glenn Greenwald and Murtaza Hussain reported that the NSA and FBI had been secretly monitoring the e-mails of at least five Muslim-American leaders, all of whom were American citizens. The leaders include political and civil rights activists, lawyers, and academics. All of the leaders strongly denied that they were involved in any criminal or terrorist activities. The information came to light after Greenwald and Hussein's three-month investigation of a spreadsheet titled "FISA recap" found in the documents that Edward Snowden leaked. The spreadsheet contained a list of 7,485 e-mail addresses that the agencies monitored between 2002 and 2008.

The Washington Post's Ellen Nakashima wrote in a July 9 story that the surveillance of the leaders was presumably conducted under FISA. However, it was unclear what the government's justification for surveillance was or whether the agencies had obtained warrants from a FISA court. Greenwald and Hussein explained that to conduct surveillance of American citizens under FISA, the agencies would be required to show probable cause that the individuals were "agents of an international terrorist organization or other foreign power" and that they were involved in illegal activity. Unnamed government sources told the reporters that the government conducted surveillance without a warrant on at least one of the five identified Muslim-American leaders.

Greenwald and Hussein also noted that a majority of e-mail addresses in the "FISA recap" spreadsheet did not have a name attached to the address. However, the document contained other information, such as nationality. The journalists found that 202 of the e-mail addresses were listed as belonging to "U.S. persons," while 1,782 e-mails appeared to belong to "non-U.S. persons." The remaining e-mails did not have a nationality designation. *The Intercept's* full story is available at <https://firstlook.org/theintercept/article/2014/07/09/under-surveillance>.

The revelation that several American Muslim leaders had been the subject of NSA and FBI surveillance prompted a swift response from 45 civil rights, human rights, privacy rights, and faith-based organizations. In a letter sent to the White House on July 9, organizations, such as the American Civil Liberties Union, Amnesty International, Brennan Center for Justice, Human Rights Campaign, and the Council on American-Islamic Relations, among others, called upon the Obama administration to explain to the public why the agencies were conducting surveillance on the Muslim-American leaders. The organizations also called upon the Obama administration to strengthen the Department of Justice's (DOJ) "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" by banning criminal profiling on the basis of religion and closing loopholes allowing racial profiling in relation to national security. A copy of the letter is available at <https://www.aclu.org/national-security/civil-rights-groups-ask-administration-explain-nsa-surveillance-american-muslims>.

In a joint statement on July 9, the Office of the Director of National Intelligence (ODNI) and DOJ denied that intelligence agencies had conducted any surveillance illegally. "It is entirely false that U.S. intelligence agencies conduct electronic surveillance of political, religious or activist figures solely because they disagree

with public policies or criticize the government, or for exercising constitutional rights," said the departments in the press release. "Our intelligence agencies help protect America by collecting communications when they have a legitimate foreign intelligence or counterintelligence purpose."

The revelations of NSA spying on prominent Muslim-American leaders followed an earlier report in July that much of the information that the NSA intercepts is related to ordinary Internet users rather than intelligence targets. With information from Edward Snowden, *The Washington Post's* Barton Gellman, Julie Tate and Ashkan Soltani reported on July 5, 2014 that nine out of 10 online user accounts from which the NSA had intercepted communications were not surveillance targets. Rather, the accounts were associated with regular Internet users, nearly half of whom were Americans, whose communications were caught while the agency was collecting information about someone else.

House Passes USA Freedom Act, Senate Considers Alternative Version of the Bill

On May 22, 2014, the U.S. House of Representatives passed the U.S. Freedom Act. The bill, which is intended to limit the NSA's ability to gather bulk telephony data of Americans, underwent several changes while in the House of Representatives before facing a significant overhaul in the U.S. Senate.

The initial version of the bill, introduced in the House by Rep. Jim Sensenbrenner (R-Wisc.) on Oct. 29, 2013, proposed to require the government to get prior court approval before obtaining business records related to specific individuals. The bill also included a variety of surveillance oversight requirements, such as the creation of a special advocate who could appear before the Foreign Intelligence Surveillance Court (FISC) to advance concerns over civil liberties, as well as requirements for greater public disclosure about the FISC's approval of the number and types of intelligence agencies' secret requests to gather information. The bill went to the House Judiciary Committee for review. On the same day, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) also introduced the USA Freedom Act in the U.S. Senate. (For more information about the USA Freedom Act, see "NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches" in the Winter/Spring 2014 issue of the *Silha Bulletin*.)

Initially, the USA Freedom Act competed with another proposal for reform, titled the FISA Transparency and Modernization Act of 2014 (FISA TMA), introduced by House Intelligence Committee Chairman Mike Rogers (R-Mich.) and Rep. C.A. Dutch Ruppersberger (D-Md.) on March 25, 2014. However, the House Intelligence Committee decided to abandon FISA TMA and approve the USA Freedom Act on May 8, 2014 after the House Judiciary Committee had made changes to the latter bill. The changes included the Judiciary Committee's decision to strip the plan to create the special advocate who would appear before the FISC on behalf of the public. The committee also removed language from the bill that could potentially have limited the FBI's ability to request bulk telephony metadata only to instances when it had an open investigation. The House Intelligence Committee unanimously approved the updated USA Freedom Act, which had also received unanimous approval from the House Judiciary Committee the previous day.

On May 20, *The New York Times's* Charlie Savage reported that after the committees' approval, the Obama administration asked Democratic and Republican party leaders in the House for additional changes to the bill. One of the primary points of negotiation between the party leaders and the Obama administration focused on terminology. The USA Freedom Act proposed to limit government investigators' data access to searches that used a "specific selection term." Under the House Judiciary's and Intelligence Com-

mittee's drafts of the bill, the definition of "specific selection term" was "a term used to uniquely describe a person, entity or account." After the negotiations, House leaders accepted the administration's proposal to change the definition of "specific selection term" to mean "a discrete term, such as a term specifically identifying a person, entity, account, address, or device, used by the Government to limit the scope of the information or tangible things" that the government sought. Savage wrote that the administration argued for this change in definition because the bill's language created limits on the bulk collection of any type of business records, not just telephony metadata. The Obama administration suggested that without a definition change, the bill could hamper government authorities' normal investigation techniques, such as requesting the names from a hotel check-in log, when collecting various business records.

The changes to the USA Freedom Act prompted several privacy rights organizations that had approved of the committees' version of the bill to withdraw their support. Senior Counsel for the Center for Democracy and Technology (CDT) Harley Geiger told the *Times'* Savage that a change in definition of "specific selection term" would allow the government to collect large amounts of information as long as it specified some type of limit. "The government has shown remarkable capacity to creatively interpret terms that appeared clear, like 'relevant,' and this definition is ambiguous enough that it allows, if not entire-population-scale collection, large-scale collection," Geiger told Savage. Mark Jaycox, Nadia Kayyali, and Lee Tien of the EFF also criticized the changes to the bill in a May 20 post on the organization's Deeplinks blog. "Congress has been clear that it wishes to end bulk collection, but given the government's history of twisted legal interpretations, this language can't be relied on to protect our freedoms," they wrote.

Despite the objections of privacy organizations, the House passed the revised USA Freedom Act in late May on a 303-to-122 bi-partisan vote. In a May 22 press release, Rep. Sensenbrenner, the original sponsor, praised the passage of the bill but expressed some disappointment over the changes to it. "While I wish it more closely resembled the bill I originally introduced, the legislation passed today is a step forward in our efforts to reform the government's surveillance authorities," he said in the statement. "It bans bulk collection, includes important privacy provisions and sends a clear message to the NSA: We are watching you."

However, Andrea Peterson of *The Washington Post* reported on May 22 that many of the votes against the legislation came from the bill's co-sponsors. Rep. Jared Polis (D-Colo.), one of the co-sponsors who voted against the USA Freedom Act, released a statement on May 22 saying, "Unfortunately, the USA Freedom Act, which I cosponsored as introduced, has been watered down and co-opted to the point that it creates the possibility that NSA could misuse the bill — contrary to the legislative intent — to conduct broad searches of communication records."

Reform Government Surveillance, a coalition of leaders from several technology companies including Google, Facebook, Apple and others, also penned an open letter on June 5 criticizing the House bill and requesting the Senate to strengthen the proposed legislation. "The version [of the USA Freedom Act] that just passed the House of Representatives could permit bulk collection of Internet 'metadata' (e.g. who you email and who emails you), something that the Administration and Congress said they intended to end," wrote the group. "As the Senate takes up this important legislation, we urge you to ensure that U.S. surveillance efforts are clearly restricted by law, proportionate to the risks, transparent, and subject to independent oversight."

The Washington Post reported on July 29, 2014 that Sen. Leahy introduced a new version of the USA Freedom Act before the Senate had significantly considered the House's bill. The updated

version proposed to end the governments' ability to collect business records in bulk much like the House version of the bill. *The New York Times* reported on July 24 that Leahy's new bill included several changes to the version that the House passed in May, however. The bill's new language included a provision that once again required the appointment of a special privacy and civil liberties advocate who could appear before the FISC on behalf of the public. Leahy's version of the bill also allowed companies to publicly announce that they had received a FISA order requiring them to

"The USA Freedom Act bans bulk telephony metadata collection, includes important privacy provisions and sends a clear message to the NSA: We are watching you."

— Rep. Jim Sensenbrenner (R-Wisc.)

disclose data to the government after a one-year period, rather than the two years that the House bill established. The Senate's USA Freedom Act also changed the definition of "specific selection term." Under the new definition, a term must "narrowly limit the scope of tangible things sought to the greatest extent reasonably practicable." The definition also prohibited the search term from being "based on a broad geographic region, including a city, [s]tate, zip code, or area code."

An Aug. 4, 2014 Bloomberg BNA story reported that Sen. Leahy had developed the language of the new USA Freedom Act after negotiations with the NSA, FBI, Department of Justice and Offices of the Director of National Intelligence. *The Times'* July 24 story also reported that Leahy had consulted several privacy advocate groups on the language for the updated bill. The Senate did not consider Leahy's proposed legislation prior to a Congressional break during August 2014.

Several privacy advocate groups supported the revised USA Freedom Act bill. In a July 29 press release, Director of the ACLU's Washington Legislative Office Laura W. Murphy said that the new bill was an improvement in placing constraints on government surveillance. "We commend the Senate Democratic and Republican co-sponsors of this version of the USA Freedom Act, which significantly constrains the out-of-control surveillance authorities exposed by Edward Snowden," Murphy said in the statement. "While this bill is not perfect, it is the beginning of the real NSA reform that the public has been craving since the Patriot Act became law in 2001." On the same day, CDT President and CEO Nuala O'Connor said in a press release that the new bill was an improvement over the House's version. "This new version of the USA FREEDOM Act would be a significant step forward in protecting Americans from unnecessary and intrusive NSA surveillance," O'Connor said in the release. "We encourage the Senate to pass this bill as is, and the House to quickly follow suit without weakening the bill." Bloomberg BNA's August 4 story reported that several other groups had backed the new bill, including the Reform Government Surveillance coalition, the Open Technology Institute, Software & Information Industry Association (SIIA), the Computer and Communications Industry Association, and the Information Technology Industry Council.

Although groups praised Leahy's bill as an important first step to reforming surveillance, privacy rights organizations argued that the bill did not go far enough. The EFF's Nadia Kayyali noted in a July 29 post on the organization's blog that although the proposed legislation created several important restrictions on government

European Union High Court Holds That Citizens Have the “Right to Be Forgotten” from Internet Searches

On May 13, 2014, the Court of Justice of the European Union (CJEU) held that European citizens retain the right to have online search results deleted that link to information about themselves. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECLI:EU:C:2014:317 (May 13, 2014), available at <http://curia.europa.eu/juris/liste.jsf?num=C-131/12>. The court's decision required Google, and other similar search engines, to grant individuals' requests to remove links to third-party web pages that are found in search results when searching an individual's name. Some commentators have opined that the CJEU's ruling suggests that the court is endorsing the “right to be forgotten.”

The case involved a 2010 complaint that Mario Costeja González, a Spanish nation-

al, made to Spain's national data-protection agency, Agencia Española de Protección de Datos (AEPD). Costeja González filed his complaint with the agency after he found that a Google search of his name would provide links to news stories on the Spanish newspaper *La Vanguardia Ediciones SL's* web sites. The stories from 1998 provided information about a real estate auction that Costeja González used to pay for social security debts he owed the government. In the complaint, he asked the agency to require *La Vanguardia* to delete or alter the information about him found on the web pages. Costeja González also asked the agency to require Google Spain or Google Inc. to delete or conceal his personal information as well as the links that appeared in search results relating to the *La Vanguardia* stories. Costeja González argued that his financial matters had been resolved, which made the information found on *La Vanguardia's* web site irrelevant.

The AEPD dismissed the complaint against *La Vanguardia* because the agency found that the newspaper had published the information in accordance with the law. However, the AEPD upheld the complaints against Google Spain and Google Inc. The agency said that the Google companies were required to adhere to the EU's 1995 Data Protection Directive. As a result, the AEPD directed the companies to remove the information about Costeja González from its search results. Google Spain and Google Inc. appealed the agency's decision to Spain's National High Court, which referred the issue to the CJEU.

The CJEU decision focused on several issues from the Spanish high court. First, the CJEU held that Google was considered both a “processor” and “controller” of personal data under the Data Protection Directive. The court found that Google effectively recorded, collected, organized, stored, and disclosed data, which made

INTERNATIONAL NEWS

NSA, continued from page 5
surveillance, the USA Freedom Act did not limit the government's use of Section 702 of the FISA Amendments Act to justify Internet communication surveillance. Kayyali also explained that the USA Freedom Act did not affect Executive Order 12333, which the government has used to justify surveillance on both foreign individuals and U.S. citizens abroad.

House Intelligence Committee Chairman Rogers also criticized Leahy's bill in a statement sent by his staff to Bloomberg BNA on August 4. “The House-passed USA FREEDOM Act represents a carefully crafted balance between security and privacy which the White House ‘strongly’ supported,” Rogers told Bloomberg BNA. “[The new bill] disrupts that balance by taking away flexibility from and imposing significant operational constraints on the Intelligence Community.”

House Passes Amendment to Limit Surveillance “Backdoor Search Loophole”

On June 19, 2014, the U.S. House of Representatives voted to prevent the NSA from conducting warrantless searches of Americans' communications that are gathered pursuant to surveillance of foreigners, otherwise known as a “backdoor search loophole.” In a June 20 story, *The New York Times* reported that the House approved

the measure to limit such searches as an amendment to the 2015 defense appropriations act on a 293-123 bi-partisan vote. Rep. Thomas Massie (R-Ky.), along with several co-sponsors, including Rep. Jim Sensenbrenner, who sponsored the House version of the USA Freedom Act, offered the amendment in the House. Rep. Massie's amendment also prohibited intelligence agencies from using funds to request that technology companies alter their products or services to make surveillance easier.

Senior Director of Public Policy for the SIIA David LeDuc told Bloomberg BNA in a June 30 story that the amendment helped provide surveillance safeguards and protected technology companies' ability to compete around the world. “This vote demonstrates that members of Congress are taking very seriously, and seeking to balance with national security objectives, the need to ensure that U.S. IT products are not put at a disadvantage in markets around the world,” said LeDuc. “Achieving this balance is a critical objective for the U.S. IT industry and the U.S. economy as a whole.” Mark Rumold, staff attorney for the EFF, said in a June 19 statement on the organization's Deeplinks blog that the House had taken action to protect privacy. “[T]he House of Representatives took an important first step in reining in the NSA,” said Rumold. “We applaud the House for taking this important first step, and we

look forward to other elected officials standing up for our right to privacy.”

However, Ellen Nakashima and Andrea Peterson of *The Washington Post* reported on June 20 that several leaders of the House Intelligence Committee and House Judiciary Committee, which oversee issues related to intelligence agencies, opposed the amendment. Bloomberg BNA's June 30 story reported that House Judiciary Chairman Bob Goodlatte (R-Va.) suggested that the amendment would undermine the previously House-passed USA Freedom Act because the amendment had not considered the careful negotiations of the surveillance reform bill. Rep. Adam Schiff (D-Calif.), a member of the House Intelligence Committee, also told *The New York Times'* Charlie Savage on June 20 that he opposed the bill because the amendment was not tailored to properly provide exceptions for a search of previously collected surveillance information in emergency situations, among other reasons.

The overall prospects for the amendment remain unknown, as it will be considered next in the Senate as part of the overall defense appropriations legislation.

CASEY CARMODY
SILHA BULLETIN EDITOR

Google a “processor” as defined under the data protection directive. Google argued that it did not fall under the directive’s definition of a “controller” of the data processing because search engines do not have knowledge or working control over the data it provides from third-party web sites. But the CJEU rejected Google’s arguments finding that the Data Protection Directive’s intent was to maintain a broad definition of “controller” of data processing. The court noted that search engines play an important role in disseminating personal data online. Because of this role, the court found that it would be incompatible with the Data Protection Directive’s guarantees of data protection to consider search engines to fall outside of the definition of a “controller” of personal data.

Google also argued that the Data Protection Directive did not apply because Google Inc.’s data indexing and storage processing did not actually occur in Spain. The primary business purpose of Google Spain, a subsidiary of Google Inc., was to promote and sell advertising for Google.com. Thus, no data processing occurred in Spain, which relieved Google from being required to adhere to the data protection directive, the company argued. The CJEU rejected this argument, reasoning that Google Spain’s advertising revenue made the search result functions of Google economically viable. As a result, the court found that Google Spain’s activities were performed “in the context of” Google Inc.’s search engine data processing under the Data Protection Directive. The finding meant Google Inc. was required to adhere to the Directive because of the establishment of its business in Spain through Google Spain.

The CJEU next determined whether the Data Protection Directive required Google to remove links to information published on a third-party web site that appeared in the search results of a person’s name. Google argued that requests for information removal should be directed at third-party publishers because the publishers have the best ability to determine whether the information should be available to the public. The CJEU again rejected Google’s arguments, noting that the Data Protection Directive sought to ensure a high level of protection for the privacy of personal data. The court explained that search engines have a significant ability to interfere with individuals’ privacy rights because of the vast amounts of information that can be found about an individual through an online search. A compilation of information that could infringe on an individual’s right of privacy is far easier to create through the use of Internet search engines than without such a tool. “[S]ince that process-

ing [of a Google Internet search] enables any [I]nternet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the [I]nternet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could

“The Internet is a wonderful thing. It allows us to know what is going on in the world and I don’t want to see people effectively going through it to weed out the truth.”

— London Mayor Boris Johnson

have been only with great difficulty — and thereby to establish a more or less detailed profile of him,” wrote the CJEU.

The court noted that a fair balance should be struck between the public’s legitimate need of information and a data subject’s right to privacy. To strike the right balance, the court said that EU governments must consider the importance of the public having information about an individual against the potential impact that the information will have on the subject’s private life. In most cases, the court thought the subject’s fundamental right to privacy should outweigh the public availability of private information in online search results. Through this analysis, the CJEU found that a search engine was obligated to remove links to information on third-party pages when an individual’s name is the search subject even though the actual publisher was not required to delete the information.

The final issue the CJEU addressed was whether the Data Protection Directive allowed data subjects to demand that links be removed from search results on the basis that the information was prejudicial or that they wished the information to be “forgotten” after a length of time. Google’s argument was that information should only be removed if the data processing was in violation of the Directive or for other compelling reasons, not because the individual wanted the information to be “forgotten.” The court explained that information that is lawfully processed could eventually become incompatible with the Data Protection Directive over time when the information becomes “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing and in the light of the time that has elapsed.” In such situations, the operator of a search engine can be required to comply with a data

subject’s request that links to information be removed. The court also stressed that when government data protection agencies are considering whether requests for the removal of search result links should be enforced, the data subjects’ fundamental rights to privacy typically override both the economic interest of search engine operators and the public’s interest in having the information available. However, the court did state that some exceptions could occur, especially if the data subject plays an important role in public life for which particular information should remain available. In

addressing the specific case at hand, the CJEU determined that Costeja González’s request that Google delete search result links to the stories about his social security debts should be honored.

After the decision was released, commentators suggested that the CJEU’s decision now allows Europeans to hinder the ability of others to gather information. *Financial Times* reporters Alex Barker and James Fontanella-Khan wrote in a May 13 story that the decision also puts search engine operators in the position of making determinations of what information is in the public interest when receiving requests to delete particular links, particularly when the operators choose to remove information. On May 14, Mark Scott of *The New York Times* wrote that besides search engine operators determining when to delete information, the court gave little guidance on how data privacy protection agencies should apply the ruling. Data protection regulators in the different European Union member countries could hold significantly different views in applying the decision. With the likelihood of different agency interpretations of the CJEU’s decision, data subjects could potentially shop for friendly jurisdictions in order to make removal requests. *The Times* of London reported on June 17 that the mayor of London, Boris Johnson, specifically criticized the court’s decision saying that it could hinder the public from having information. “The Internet is a wonderful thing,” said Johnson. “It allows us to know what is going on in the world and I don’t want to see people effectively going through it to weed out the truth.”

In a May 14 op-ed in *The New York Times*, Jonathan Zittrain, a Harvard professor of law and computer science, noted that the CJEU’s ruling was narrow in one

EU Court Ruling, continued from page 7

respect, however. The court did not state that information about a data subject needed to be removed from a web site. Rather, the decision only required that links listed in search engine results upon searching a person's name must be removed. Individuals could still find the names of data subjects as well as the specific information by going directly to the web site that originally published it.

The BBC reported on May 15 that hundreds of people made requests to have information removed from Google's search index in the days immediately following the ruling, including a former politician seeking re-election, a doctor looking to remove links to negative reviews from patients, and a man convicted of possessing pictures of child abuse. By the end of May, Google had created an online form to handle the deluge of requests. On May 30, *The New York Times* reported that the form received more than 12,000 requests shortly after its launch. Google's form required users to submit links that they wanted removed as well as photo identification and a reason why the link should be removed. By July 2014, Google had received more than 70,000 requests to remove links, according to *The Guardian*.

However, *The Sunday Times* of London reported on June 6 that Google was not granting all requests to remove information. Google had denied the requests of some public figures maintaining that the CJEU's ruling did not extend to such individuals, according to *The Sunday Times*. Officials at Google also said that it would refuse to remove search links about private individuals if the information is relevant to the public, such as recent criminal offenses or reports of disciplinary procedures, the newspaper reported.

In May 2014, Google formed an advisory panel that consisted of various technology company executives, privacy experts, regulators, and academics to discuss and issue a report on how the CJEU's ruling might affect the way Google can provide its search results to users throughout the world. On June 26, Charles Arthur of *The Guardian* reported that Google also began including a disclaimer on its European sites stating, "Some results may have been removed under data protection laws in Europe," when user searches include individuals' names.

The Guardian reported in July 2014 that links to several stories on British news organizations' web sites, including *The Guardian*, *Daily Mail*, and BBC, had been deleted. The organizations complained to Google, which later re-instated the links. Robert Peston, the economics editor for the BBC, said that Google had "cast me into oblivion" after Google notified him

that it had removed a link to one of his blog posts from 2007 about Merrill Lynch executive Stan O'Neal. On July 4, *The Guardian's* Matthew Weaver reported that in an interview Peston conducted with Google's European Director of Communication Peter Barron on BBC Radio 4's "Today" program, Barron told Peston that Google was still learning how to implement the ruling. "It is clearly a difficult process. We are committed to doing it as responsibly as possible," said Barron. "We are learning as we go. I'm sure we will get better at it and we are very

"We believe that the judgment of the Court is unworkable. It does not take into account the effect the ruling will have on smaller search engines which, unlike Google, are unlikely to have the resources to process the thousands of removal requests they are likely to receive."

— Baroness Usha Prashar,
Chairman of the Lords Select Committee

keen to listen to the feedback." Additionally, *The Telegraph* reported on August 15 that its website would maintain an up-to-date list of its online content that Google has removed links to in search results. The list is available at <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>.

On July 30, 2014, *The Guardian* reported that the British House of Lords' Home Affairs, Health and Education EU Sub-Committee published a report that was critical of the CJEU's ruling in May. In the report, the committee suggested that both the ruling itself and the Data Protection Directive were problematic. The committee described the "right to be forgotten" as "misguided in principle and unworkable in practice." The committee concluded that "neither the 1995 Directive, nor the Court's interpretation of the Directive, reflects the current state of communications service provision, where global access to detailed personal information has become part of the way of life." The committee's report also made a recommendation "that the Government should ensure that the definition of 'data controller' in the new [proposals for EU Data Protection] Regulation is amended to clarify that the term does not include ordinary users of search engines."

The chairman of the committee, Baroness Usha Prashar, said in a July 30 Lords Select Committee statement that the "right to be forgotten" created several problems.

"Neither the 1995 Directive, nor the CJEU's interpretation of it, reflects the incredible advance in technology that we see today," said Baroness Prashar in the statement. "We believe that the judgment of the Court is unworkable. It does not take into account the effect the ruling will have on smaller search engines which, unlike Google, are unlikely to have the resources to process the thousands of removal requests they are likely to receive." Baroness Prashar also noted that it was problematic to allow search engines to make deci-

sions as to whether they would delete information "based on vague, ambiguous and unhelpful criteria."

Legal observers have also noted a variety of challenges that the CJEU's decision could pose. Mark Sableman, a partner at Thompson Coburn LLP, wrote in a June 6 post on the firm's Internet Law Twists

and Turns blog that the CJEU's ruling could affect the operations of Internet publishers in the future. "By ruling on Google searches, a ubiquitous and central feature of the Internet, the Court sent a message to everyone about its concern about the privacy-free expression balance," wrote Sableman. "To oversimplify, because the [CJEU's] decision speaks to Google, the king of the Internet, it also speaks to all Internet publishers, and tells them to come armed with good justifications, not just habit and technological capabilities, for what they publish and make available." Tanguy Van Overstraeten and Richard Cumbley, attorneys at Linklaters LLP in Brussels, explained in a May 28 analysis of the case in Bloomberg BNA's *World Data Protection Report* that the court's decision could affect businesses besides search engines. "Whether this 'right to be forgotten' is specific to search engines or extends to other businesses is unclear, but this development should be watched carefully in certain sectors, such as credit reference agencies and social media," wrote Van Overstraeten and Cumbley.

CASEY CARMODY
SILHA BULLETIN EDITOR

Jesse Ventura Awarded \$1.8 Million for Libel and Unjust Enrichment

On July 29, 2014, after six days of deliberation, a federal jury awarded former Minnesota Gov. Jesse Ventura \$1.845 million in his lawsuit against *American Sniper* author Chris Kyle's estate. The jury found that Ventura proved his claim of defamation and awarded \$500,000 in damages. The jury also found that Kyle's estate had been unjustly enriched and awarded \$1,345,477 to Ventura.

DEFAMATION

In January 2012, William Morrow, an imprint of Harper Collins Publishers, published *American Sniper: The Autobiography of the Most Lethal Sniper in U.S. Military History*, by former Navy SEAL sniper Chris Kyle. The book reached number one on *The New York Times*' Bestsellers list on January 29, 2012. Included in the book and at the center of the lawsuit was a subchapter titled "Punching Out Scruff Face." The subchapter recounted an alleged 2006 incident that occurred between Kyle and Ventura at McP's Irish Pub in Coronado, Calif., where a group of Navy SEALs were attending a wake at the same time Ventura was attending a reunion gathering of Navy underwater demolition team members. Kyle wrote that numerous people were at the bar including an older celebrity SEAL, who he identified by the moniker "Scruff Face." Kyle wrote that Scruff Face made offensive remarks about the SEALs, their service in the Iraq war, and President Bush, including that the SEALs were "killing men and women and children and murdering" in Iraq and that the SEALs "deserved to lose a few." In response to the statements, Kyle wrote that he punched Scruff Face, causing him to fall to the floor. Kyle also wrote that he heard rumors that Scruff Face had a black eye while speaking at a SEAL graduation event the next day.

Although Kyle did not name Ventura in print, he alleged that Scruff Face was actually Ventura during book promotions on radio and TV shows. On January 4, 2012, Kyle appeared on the "Opie & Anthony Show," and stated that "Scruff Face" was his pseudonym for the former governor. Kyle named Ventura again the next day in an interview with Bill O'Reilly on FOX News and further elaborated on the alleged fight, mocking that Ventura had "fell out of his wheelchair" when Kyle had punched him.

According to court documents, Ventura filed a complaint in the United States District Court for the District of Minnesota against Kyle on January 23, 2012, asserting claims of defamation, misappropriation,

and unjust enrichment. Ventura claimed that a Google search found "more than 5,300,000 results, including news articles, videos, and blogs that repeated the defamatory statements and accusations." The complaint stated the alleged incident seriously injured his reputation and undermined Ventura's "future opportunities as a political candidate, political communicator, author, speaker, television host and personality." Kyle died as a result of gunshot wounds in February 2013. His wife, Taya Kyle, was appointed as the executrix of the estate and was substituted as the defendant in the case.

On March 19, 2014, U.S. District Court Judge Richard Kyle (no relation to the defendant) declined to grant summary judgment in the Kyle estate's favor on Ventura's defamation, misappropriation, and unjust enrichment claims. The court ruled that there was sufficient evidence for a jury to conclude that Kyle's story was materially false and that Kyle published his story with actual malice, meaning that Kyle had published the information with knowledge of its falsity or with reckless disregard of the truth. Judge Kyle set a trial date for July 2014.

The trial attracted significant attention from free speech advocates and media law professionals. Mark Anfinson, a lawyer and lobbyist for the Minnesota Newspaper Association and an adjunct professor at the University of St. Thomas in St. Paul, Minn., told the *Star Tribune* in a July 9, 2014 story that the case was "one of the most important First Amendment cases in recent Minnesota history." Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, observed in the same *Star Tribune* story that Ventura's case was unusual. "This is a bizarre situation, given that the author is no longer living," said Kirtley. "Truth or falsity by itself is not the only issue. Ventura must prove Kyle knew he was writing a lie, or acted recklessly in writing his account."

As a public figure, in order to prevail on his defamation claim, Ventura had to prove that Kyle's story about him was defamatory or hurt his reputation within the community; that the story was materially false by clear and convincing evidence; and that Kyle published the story knowing it was false, believing it was false, or having serious doubts about its truth. This "actual malice" standard for public figures was established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The ruling allows writers to make factual errors about public figures and be protected from liability as long as the error was made in good faith.

Trial briefs were submitted in April 2014. According to his trial brief, Ventura argued that the event recounted in *American Sniper* never happened and that "Kyle intended to inflict a vicious and deliberate assault on [Ventura's] character and reputation, and to turn the SEAL community and Americans against him." The brief stated that before the book was published, Ventura was often asked to speak at SEAL events, including SEAL graduation ceremonies, but had not been invited since the publication of the book. The brief also argued that because of the defamatory statements, Ventura had lost the respect he once had from the SEAL community, thus tarnishing his reputation.

In addition, Ventura's brief argued that Kyle misappropriated Ventura's name and likeness without Ventura's consent to gain publicity for the book. Legal claims for misappropriation of name and likeness were first recognized by the Minnesota Supreme Court in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).

Ventura also argued that Kyle's estate had unjustly benefited from Kyle's defamatory statements about Ventura. Unjust enrichment is an equitable doctrine that provides a remedy where another party knowingly received something of value to which he was not entitled, and the circumstances are such that it would be unjust for that person to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). The brief argued the publicity received from the false story and defamatory statements contributed to the book's success.

Kyle's brief countered that Ventura's defamation claim failed because the incident had happened and the account of the event was essentially truthful. To succeed on a defamation claim, a plaintiff must prove the defendant's statement was materially false. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). The brief argued that under the requirements of *Masson*, Ventura had to demonstrate more than minor inaccuracies or alterations, unless they "result in a material change in the meaning conveyed by the statement." The brief contended that Kyle's statements were not materially false and that testimony supporting the truth of Kyle's statements would be provided at trial. Furthermore, Kyle did not act recklessly by recounting the incident because he believed the statements to be true and accurate. In addition, the brief emphasized that, as a public figure, Ventura must establish material falsity by clear and convincing evidence.

Ventura, continued from page 9

To counter the misappropriation and unjust enrichment claims, the defense's brief argued that the success of Kyle's book had little to do with the alleged incident in *American Sniper* or publicity about it. Also, the brief argued that *American Sniper* and the contested incident were matters of legitimate public interest and that Ventura's bid for "all property and benefits" from income from the book violated the First Amendment. "If any such [public figure] could claim that allegedly false statements within a book or broadcast could support not only claims for defamation but also claims for misappropriation or unjust enrichment, the potential for wreaking havoc with free expression would be enormous. The focus could shift from any injury actual suffered by the plaintiff to the supposed benefits that the defendant sought or obtained," the brief argued.

The trial began on July 9, 2014 after a ten-member jury was selected. The attorneys for Kyle's estate sought to prove Kyle's account of the incident was true by offering corroboration by several barroom witnesses. The jury also heard a taped deposition given by Kyle before he died. During his deposition, Kyle maintained that "the events that happened in the book are true" and that "the essence of what was said [in the book] is accurate." In addition, the defense attorneys introduced evidence to suggest Ventura had ruined his own credibility with inflammatory statements over the past decade, including that Ventura had called the United States "fascist" during a news conference.

Ventura's attorneys called several witnesses who stated that the alleged fight never took place. One of the witnesses, Bill DeWitt, a friend of Ventura's, testified he was in McP's Irish Pub on Oct. 12, 2006, the night of the alleged incident, attending a reunion of the underwater demolition team class to which he and Ventura had belonged. DeWitt said he never saw the altercation nor heard Ventura make the remark that some SEALs deserve to die. Ventura also testified that although he was at the bar the night of the alleged incident, he did not have any verbal or physical confrontation with Kyle or anyone else that night. Despite admitting to being critical of the Iraq war, Ventura stated he has the utmost respect for the troops and he would never make such remarks about the SEALs.

Ventura's attorneys also argued that many of the witnesses for the Kyle estate had been drinking and that their descriptions of the incident were in conflict because the witnesses placed the verbal exchange and fight in different places. Some of the defense witnesses stated the event took place on the bar's patio, while others

said it took place in the parking lot and sidewalk.

Ventura's attorneys also provided photographs taken at a SEAL graduation the day after the alleged incident. These photos did not show that Ventura had a black eye or other physical effects "of supposedly having been punched directly in the face by a 220-pound trained killer," his counsel argued.

On July 22, 2014 the ten-member jury began deliberations. According to the instructions, the jurors first had to establish whether the incident recounted in *American Sniper* was true or false. If the jury

"The jury's verdict may seem like a vindication to Ventura, but it reminds those who write about public figures, especially in the freewheeling world of the blogosphere, that they do so at their own risk."

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

decided that the incident happened and the book's depiction of the event was mostly truthful, Ventura would not be able to prove his claim because truthful statements are protected by the First Amendment.

Under the Federal Rules of Civil Procedure, the jury must reach a unanimous verdict unless the parties stipulate otherwise. However, the *Star Tribune* reported on July 28 that after five days of deliberation, the jury wrote a note to Judge Kyle stating "we feel we will not come to a unanimous decision." In the *Star Tribune* article, Kirtley observed that the case was a difficult one for the jury. "The evidence is strongly disputed by both sides and [Chris] Kyle is dead, so he can't be cross-examined," Kirtley said in the story. "If one person disagrees with any one of the questions [posed by the judge], be it falsity, defamation or actual malice, then the jury is deadlocked." After Judge Kyle met with attorneys about the possibility of a hung jury, both the Kyle estate and Ventura agreed to accept a divided verdict. On July 29, 2014, jury came to an 8-2 decision in favor of Ventura, finding that Ventura had proved his claim of defamation. The jury awarded Ventura \$500,000 in damages on that count of the complaint. The jury also found that Kyle's estate had been unjustly enriched and awarded \$1,345,477 to Ventura.

Many attorneys and media professionals found the verdict surprising. In a July 30 interview on Minnesota Public Radio's

Morning Edition, David Schultz, a professor of law and political science at Hamline University, stated he was surprised that Ventura had prevailed because of the high standard public figures had to meet to prove defamation under *New York Times v. Sullivan*. "You have to show reckless disregard for the truth in a sense that you have to prove that not only were the statements false, but the person knew that they were false," Schultz said. "That's an incredibly high standard, and the reason why the standard is so high is to protect the First Amendment right of the public to really engage in free speech and to freely

criticize government officials." Schultz also noted that if the book publisher and author had never said Ventura's name during the publicity tour, there would have been "no chance anybody would've been filing for libel because no name was mentioned."

In a July 31

op-ed on MinnPost.

com, Kirtley warned that the verdict may have a chilling effect on those who write about public figures. "Some would argue that this is exactly the way it should work, and that authors who are not able to prove their claims should be prepared to pay the price," Kirtley wrote. "But the U.S. Supreme Court in *Sullivan* feared that legitimate stories would go unreported if that price was a crippling damage award. The jury's verdict may seem like a vindication to Ventura, but it reminds those who write about public figures, especially in the freewheeling world of the blogosphere, that they do so at their own risk."

On September 4, 2014, the *Star Tribune* reported that the attorneys for Kyle's estate filed a motion asking U.S. District Judge Kyle to dismiss the jury's \$1.8 million judgment in favor of Ventura. The motion also asked Judge Kyle to either grant a new trial or a judgment in favor of the Kyle estate. The motion claimed that the defamation award was "legally and factually inappropriate" and that Ventura failed to prove that Kyle's statements in the book were materially false. As the *Bulletin* went to press, Judge Kyle had not yet ruled on the motion and a hearing date had not yet been set.

SARAH WILEY
SILHA RESEARCH ASSISTANT

Supreme Court Says Warrants are Required to Search Cell Phone Data; Possible Implications for NSA Telephony Metadata Collection

On June 25, 2014, the U.S. Supreme Court held that law enforcement officers are required to obtain a warrant before searching an arrested individual's cell phone data. *Riley v. California*, 134 S.Ct. 2473 (2014). The ruling in

PRIVACY

Riley v. California provided a major privacy victory for individuals in an increasingly digital world where the laws and regulations of the analog age may no longer be effective. Commentators have suggested that the decision also could be a signal of the Court's skepticism toward the NSA's collection of telephony metadata.

Riley consolidated two lower court cases that arrived at different conclusions regarding whether the police could search digital information from a cell phone. In the first case, an officer stopped David Riley for driving with expired registration tabs. During the course of the stop, the officer learned that Riley was also driving with a suspended license. The officer impounded the car, which was searched by a different officer who found two handguns under the hood. Riley was arrested for possession of concealed and loaded firearms. A subsequent search of Riley revealed several items related to a street gang, as well as a smart phone. The arresting officer examined data on the phone and found what appeared to be information related to gang activity. A detective who specialized in investigating gangs subsequently examined the phone and found a variety of information on the phone, including several pictures that appeared to connect Riley with a shooting that occurred weeks earlier. Riley was charged with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder in connection with the earlier shooting. Before the trial, Riley attempted to have all evidence from his cell phone suppressed, arguing that it was retrieved under a warrantless search in violation of the Fourth Amendment. The trial court rejected Riley's argument. During the trial, several police officers testified about the cell phone search, and several of the collected photographs were entered into evidence. At the trial's conclusion, Riley was convicted on each count. The California Fourth District Court of Appeal affirmed Riley's conviction citing a California Supreme Court decision that said that the Fourth Amendment permitted searches

of cell phone data when the phone was found on an arrestee. *Riley v. California*, 2013 WL 475242 (Cal. Ct. App. 2013). The California Supreme Court declined to hear Riley's case before the U.S. Supreme Court granted *certiorari*.

The second case involved a police officer arresting Brima Wurie after the officer observed Wurie selling drugs from a car. After the arrest, the officer searched Wurie at the police station and found two cell phones. After a short time at the station, one of the phones repeatedly received calls from a number that was labeled as "my house." Police officers opened the phone, examined the phone's call log, and used an online phone directory to identify the apartment building address associated with the phone number. Police officers went to the apartment building, and, after brief surveillance, the officers obtained a warrant to search Wurie's apartment. Upon a search of the apartment, the officers found several varieties of drugs and related paraphernalia, a gun, and money. Wurie was subsequently charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. At trial, Wurie argued that the evidence gathered at his apartment should be suppressed because it was gathered as a result of an unconstitutional search of his cell phone. The district court denied his motion to suppress, and Wurie was later convicted on all counts. A divided three-judge panel of the U.S. Court of Appeals for the First Circuit overturned his conviction on appeal. The panel held that a search of a cell phone is distinct from searching other types of possessions found on a person because of the amount of personal data that phones can contain. As a result, the appellate court held police officers are required to secure a warrant before searching cell phone data. *U.S. v. Wurie*, 728 F.3d 1 (1st Cir. 2013). The Supreme Court then granted *certiorari*.

In a unanimous decision, the Supreme Court held that police officers are generally required to obtain a warrant before conducting searches of an arrested individual's cell phone data. The opinion, delivered by Chief Justice John Roberts, focused on when officers could reasonably conduct a warrantless search. The Court relied on three previous cases to narrow its analysis. In the first case, *Chimel v. California*, the Court held that searches of arrested individuals were reasonable

to ensure police officers' safety and to prevent the destruction of evidence. 395 U.S. 752 (1969). The searches were limited to areas within the arrestee's immediately control, however. The second precedent informing the Court's analysis was *United States v. Robinson*. 414 U.S. 218 (1973). In *Robinson*, the Court held that officers can search a person taken into custody on probable cause even though there may not be specific concerns about officer safety or destruction of evidence. Additionally, the *Robinson* Court held that police officers did not violate the Fourth Amendment when inspecting items found on an arrested individual. The final case that Roberts identified as key to the analysis was *Arizona v. Gant*. 556 U.S. 332 (2009). The *Gant* Court held that the *Chimel* decision allowed an officer to search an arrestee's vehicle only when the arrestee was unsecured and within reaching distance of the passenger compartment. The Court also found an exception to the Fourth Amendment's warrant requirement when officers had a reasonable belief that evidence of a crime might be found in an arrestee's vehicle.

In examining the precedents, Roberts noted that the technology of modern cell phones could not possibly have been imagined at the time of *Chimel* and *Robinson*. The key aspect in the Court's consideration of whether police officers needed to obtain a warrant was balancing the degree of intrusion a search would have on an individual's privacy against the legitimate government interest in the search, which is what the Court did in *Robinson*. Roberts noted, however, that the physical object examined in *Robinson* — a cigarette pack — was considerably different from a cell phone. Cell phones can contain massive amounts of personal data unlike most other physical objects. As a result, the Court refused to extend *Robinson* to allow officers to inspect data found on cell phones. Rather, the officers must obtain a warrant in most situations.

In examining the warrantless search exceptions that the Court established in *Chimel*, Roberts wrote that neither danger to officers nor preventing the destruction of evidence was a major concern in relation to cell phone data. The opinion explained that cell phone data itself does not pose any sort of physical risk to the arresting officers. The Court also dismissed the government's argument that

Phone Data, continued on page 12

Phone Data, continued from page 11

an inspection could alert officers that an arrestee's associates were heading to the scene of an arrest because no evidence was provided that such a situation had actually happened. As for the destruction of evidence, the government had argued that cell phone data could be encrypted or remotely erased before officers could secure a warrant. Roberts wrote that there was little evidence that data encryption or remote wiping of cell phone data was a prevalent problem for police officers. The chief justice pointed out that police officers have tools to prevent the loss of data from remote wiping. Officers can turn off the phone or place it in a specialized bag to disconnect it from the data network that would enable someone to perform a remote wipe.

Roberts acknowledged that an arrestee typically has lowered expectations of privacy. However, the Fourth Amendment is still applicable, which means that arrested individuals still have some expectations of privacy, especially when an intrusion could be substantial. Although other courts had allowed searches of various items found on an arrested individual under *Robinson* and *Chimel*, Roberts said, “[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” The opinion observed that the amount and combination of information on cell phones provides a comprehensive mosaic of an individual's life. Cell phones contain e-mails, information about personal contacts, phone call records, bank statements, prescription information, photos and videos as well as historical data recording dates and locations. The collection of such a large cache of information on a single device heightened privacy concerns.

Roberts also noted that the nature of the information contained on cell phones is far different than what officers can find in other physical objects. Cell phones can contain data about Internet searches, historical location tracking, and a variety of applications. All of these types of data provide an extensive amount of detailed information about an individual's life. Roberts contended that such information on a single device needed privacy protections from searches. “Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house,” wrote Roberts [emphasis in original]. “A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form — unless the phone is.”

The opinion also acknowledged the problems arising from how cell phone data is stored. Smart phones will often store data on the phone itself, but the phones also take advantage of cloud computing, which stores data on a remote server that the phone accesses through data networks. The Court explained that the data storage issue becomes problematic because officers could potentially examine data that was not actually on the phone. “Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and

“A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form — unless the phone is.”

— Chief Justice John Roberts

search a house,” wrote Roberts. Because officers could potentially view information that was not in the immediate vicinity of the arrestee, the Court held that privacy interests once again outweighed the need for a search warrant exception to search cell phones.

The Court also rejected several of the government's suggestions that would allow police officers to search an arrestee's cell phone data in particular circumstances, when officers believe it contains evidence of a crime, limiting searches to certain specific areas and types of data on the phone, and allowing officers to only search a call log. The Court dismissed these suggestions, noting that they would not provide clear, categorical principles that could help law enforcement officers adhere to constitutional searches.

In concluding the opinion, Roberts acknowledged that limiting police officers' abilities to search the phones of arrested individuals would have an impact on attempts to combat crime. However, the Court explained, “Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.” Although some exigent circumstances could exist to allow officers to conduct a warrantless search, the Court ultimately emphasized that the privacy interests related to cell phone data are great enough to require warrants.

Justice Samuel Alito wrote an opinion concurring in part and concurring in the

judgment. Alito emphasized two primary points. First, he discussed historical rationales that justified police officers conducting a search of an arrested individual to cast doubt that the main purpose was for officer safety or to prevent destruction of evidence. Alito noted that *Chimel* involved the lawfulness of searching the scene of an arrest rather than an individual. Therefore, the reliance on *Chimel* as precedent was suspect. Nonetheless, Alito explained that the Court's holding that cell phone data needed Constitutional protections because of the privacy interests was the right decision.

Alito's second point was to question the utility of federal courts outlining the privacy protections that should be afforded to digital technologies. He suggested that state legislatures and Congress should begin to consider legislation

that would provide more detailed privacy protections for the changing technology. “Legislatures, elected by the people, are in a better position than we [the Court] are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future,” wrote Alito.

Commenters noted that the Court's decision in *Riley* marked a step forward for digital privacy in situations beyond cell phone data searches. McDermott Will & Emory LLP attorneys David Quinn Gacioch, Bridget K. O'Connell and Heather Egan Sussman suggested in a July 2 *On the Subject* newsletter that the *Riley* decision could potentially affect searches of other digital data. “[T]he Supreme Court's decision recognizes the significance of an individual's expectation of privacy in content stored on or accessible through mobile phones in a way that creates the potential for many spillover effects into other contexts — such as the collection, storage and brokering of a user's web browsing or other digital data without clear user consent to do so,” wrote the attorneys. In a June 20 post on the White Collar Defense & Compliance blog, Alain Leibman, a partner at Fox Rothschild LLP, wrote that the decision could require investigators to obtain additional warrants to search digital devices. “The *Riley* case marks a watershed in Fourth Amendment jurisprudence — what suffices as probable cause for a warrant to search a file cabinet cannot any longer justify the search of a laptop possibly containing personal information

Phone Data, continued on page 13

Supreme Court Strikes State Law Creating Speech Buffer Zones Near Abortion Clinics

On June 26, 2014, the U.S. Supreme Court issued its opinion in *McCullen v. Coakley*, which held that a Massachusetts statute establishing protest buffer zones around abortion clinics violated the First Amendment's guarantees of free speech. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). The *McCullen* case directly addressed the competition between the free speech rights of

anti-abortion activists and states' attempts to regulate space near abortion clinics. Commentators were split in their reactions to the Court's decision to strike down the free speech buffer zones.

The case arose in Massachusetts after several individuals challenged a state law that aimed to regulate the space outside of abortion clinics where abortion opponents and pro-choice advocates had often clashed. The statute, initially enacted in 2000 as the Massachusetts Reproductive Health Care Facilities Act and later amended in 2007, prohibited individuals from "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½. The 35-foot buffer zones, which the statute required to be clearly marked, applied only during a facility's business hours. Individuals who were found to be in violation of the statute could be fined or serve time in prison or both. The statute also made exceptions for certain

types individuals who could enter the buffer zone, including people intending to enter the facility, employees of the facility, emergency and municipal workers as well as construction workers acting in the course of their employment, and people who were using the public sidewalk areas to get to a destination. The Massachusetts legislature had modeled the statute's original language on a Colorado law that the Supreme Court

which the United States Court of Appeals for the First Circuit affirmed, relying on its prior decisions upholding the 2000 version of the law. *McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009). When the case returned to the district court, the judge dismissed all but one as-applied challenges. *McCullen v. Coakley*, 759 F.Supp.2d 133 (D.Mass. 2009). The district court judge determined after a bench trial that the final challenge

should be dismissed because the law still allowed individuals the ability to use other avenues to communicate their message. *McCullen v. Coakley*, 844 F.Supp.2d 206 (D.Mass. 2012). The First Circuit Court

"If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled [the] petitioners' message."

— Chief Justice John Roberts

had upheld against a First Amendment challenge in 2000. *Hill v. Colorado*, 530 U.S. 703 (2000).

Several individuals, including Eleanor McCullen, who attempted to engage in conversation or distribute literature to women approaching the Massachusetts reproductive clinics throughout the state, brought suit against Attorney General Martha Coakley. The complainants sought to enjoin the enforcement of the buffer-zone law, claiming that it infringed upon their First Amendment rights on its face and as applied because the buffer zones had severely limited their ability to communicate with patients of the clinics. A district court judge dismissed all of the individuals' facial challenges to the law, *McCullen v. Coakley*, 573 F.Supp.2d 382 (D.Mass. 2008),

of Appeals affirmed the judge's ruling. *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013). The Supreme Court then granted *certiorari*.

Chief Justice John Roberts, writing for a unanimous Court, held that the Massachusetts statute violated the First Amendment rights of the individuals. The opinion observed that the Court had always viewed public streets and sidewalks as a place for First Amendment protections because they can serve as a forum for public discussion. Roberts wrote that because the law regulates areas considered public forums, it comes under the scrutiny of the First Amendment. However, the chief justice noted that the government could place restrictions on the time, place, and manner of

Buffer Zone, continued on page 14

Phone Data, continued from page 12

found there, and circumstances which may support a consent search of a home may not allow the search of an iPad located in the home," wrote Leibman.

Importantly, observers have suggested that the Court's decision could signal future trouble for the constitutionality of the NSA's collection of bulk telephony metadata. Marc Rotenberg, executive director of the Electronic Privacy Information Center (EPIC), told *Politico's* Josh Gerstein in a June 25 story that the *Riley* decision foreshadowed a future decision on the NSA's data collection while also protecting digital information. "This is a remarkably strong affirmation of privacy rights in a digital age," said Rotenberg. "The [C]ourt found that digital data is different and that has constitutional significance, particularly

in the realm of [the] Fourth Amendment . . . I think it also signals the end of the NSA program." In a June 26 post on the firm's Trademark and Copyright Law Blog, Foley Hoag LLP attorney Daniel McFadden described the Court's decision as a "shot across the bow of the NSA and other advocates of warrantless domestic metadata collection." McFadden explained that the Court's opinion indicated that the quantity and quality of digital data was important to privacy considerations. "In sum, the Court's opinion in *Riley* strongly suggests a willingness to find a Fourth Amendment privacy interest in metadata, at least to the extent that data can be aggregated to infer private information about the individual," wrote McFadden. "This outcome may have far reaching consequences in the ongoing debate concerning the proper balance

between national security and individual privacy in the United States."

However, Roberts did make a point of distinguishing the Court's holding about the searches at issue in *Riley* from other types of data collection, which could possibly include the NSA's programs. In a footnote, Roberts wrote, "Because the United States and California agree that these cases involve searches incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances."

CASEY CARMODY
SILHA BULLETIN EDITOR

Buffer Zone, continued from page 13 constitutionally-protected speech as long as the restrictions are “justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The Court’s analysis began by considering whether the Massachusetts statute was a content-neutral regulation. The petitioners argued that the law was not content neutral because its regulations disproportionately hindered speech related to abortion and favored the viewpoints and ideas of abortion clinic employees through the exceptions allowing them to work in the buffer zone. Roberts’ opinion dismissed these arguments. On the first point, Roberts explained that the law did not “draw content-based distinctions on its face.” The law’s stated purpose was to ensure public safety near the entrances and exits to abortion clinics. Roberts wrote that a law was not a content-based regulation just because it may incidentally affect abortion-related speech more than other types of speech.

The Court also noted that the exceptions allowing employees of the clinic to enter the zone in order to perform their job did not mean that the law was a content-based restriction. Roberts acknowledged that, at times, such exceptions could be the result of the government endorsing a particular viewpoint. However, the chief justice wrote that the exceptions in this case were reasonable for the operations of the clinic. He noted that nothing in the record before the Court indicated that the Massachusetts government had desired to endorse a particular viewpoint. The Court held that it did not need to conduct a more exacting strict scrutiny test of the law because it did not discriminate against any particular content of speech or individuals’ viewpoints.

Despite the fact that the law did not create content-based restrictions, Roberts explained that the law still needed to be “narrowly tailored to serve a significant government interest.” The Court said that the government did not have the power to suppress speech because it was more convenient than other ways to regulate behavior. The restrictions do not need to be the least restrictive means available, but the regulations cannot “burden substantially more speech than is necessary to further the government’s interest.” On this point, the Court found that the Massachusetts law failed constitutional muster because it placed too many burdens on speech when other means of regulation were available.

Roberts observed that the statute’s requirements were too burdensome because

the buffer zones had created significant barriers to the petitioners’ ability to speak with and distribute literature to women who were entering the clinic. The Court dismissed arguments that the petitioners could practice their rights to free speech through chanting or signs because they specifically intended to convey their message through conversation. “If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled [the] petitioners’ message,” Roberts wrote.

“That I don’t share Ms. McCullen’s views is beside the point. The great virtue of our First Amendment is that it protects speech we hate just as vigorously as it protects speech we support.”

— Laurence H. Tribe,
Harvard Constitutional Law Professor

The Court noted that the Massachusetts law appeared to be the only law in the country that established fixed buffer zones around the entrances to a clinic. The Court explained that the federal government and other states had found alternative ways to manage speech rights around abortion clinics using less burdensome means, including laws prohibiting intimidation or interfering with a person’s ability to enter an abortion clinic. Roberts wrote that the government authorities could utilize other types of public safety laws already enacted in Massachusetts, such as traffic ordinances, to manage crowds. “The point is [] that the Commonwealth [of Massachusetts] has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate,” he wrote.

The Court emphasized that Massachusetts authorities could not identify any prosecutions that it had initiated under other types of laws in an attempt to manage space around abortion clinics. Roberts wrote that the lack of cases suggested that Massachusetts had not considered alternative options less burdensome on free speech. The Massachusetts government had argued that the alternative regulations that the Court discussed would not work because they were difficult to pursue. Roberts dismissed the argument. “Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked,” he wrote. The Court reversed the lower court’s ruling and remanded the case for further proceedings.

Justice Antonin Scalia wrote an opinion concurring in the judgment that was joined by Justice Anthony Kennedy and Justice Clarence Thomas. Scalia suggested that Robert’s opinion continued a trend of the Court de-valuing the free speech rights of anti-abortion activists. “There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion,” Scalia wrote.

Specifically, Scalia argued that the Massachusetts statute was a content-based regulation of speech because it addressed only

speech issues related to abortion clinics. He also wrote that the exceptions allowed pro-choice advocates to express opinions while limiting the speech of anti-abortion activists. Therefore, Scalia wrote because the law was a content-based restriction, it

should have been struck down under a First Amendment strict scrutiny test. He also criticized the Court’s decision to provide an extensive explanation of the ways that the Massachusetts legislature could develop regulations of areas near abortion clinics. Scalia argued that the view of the statute as content neutral and discussion of alternative restrictions lowered the constitutional protection that the Court afforded to abortion-related speech.

Justice Samuel Alito also issued an opinion concurring only in the Court’s judgment. Alito wrote that the Massachusetts statutes’ employee exceptions allowed for viewpoint discrimination. He gave an example of an abortion protestor telling a woman in the buffer zone that the clinic would not provide sufficient answers about health decisions while an employee explains that the clinic would have good answers. Alito suggested that the protestor and employee gave opposing viewpoints, but only the former would be in violation of the law. “It is clear on the face of the Massachusetts law that it discriminates based on viewpoint,” Alito wrote. “Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.” Nonetheless, Alito agreed with the Court’s judgment that the law was unconstitutional.

Observers of the McCullen case expressed a range of opinions in response to the Court’s opinion. In a June 26 op-ed in *The New York Times*, Laurence H. Tribe, a Harvard constitutional law professor, said that he believed the Court’s decision

Buffer Zone, continued on page 15

Supreme Court Rules Aereo Inc.'s Television Streaming Service Violates Copyright Law

On June 25, 2014, the U.S. Supreme Court held that Aereo Inc.'s online services, which provided customers with broadcast television programming over the Internet, infringed on the exclusive right of television broadcasters to

COPYRIGHT

provide those broadcasts to the public under the Copyright Act of 1976. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014). Commentators have suggested that the ruling in Aereo delivered a major victory for broadcasting companies and copyright owners who seek to prevent unauthorized re-broadcasting of their works over the Internet, even though the Court stated that its holding is "limited" and not intended to "discourage or to control the emergence or use of different kinds of technologies."

The case arose out of a dispute over Aereo's technological capabilities. Aereo charged its subscribers a low monthly fee to receive broadcast television programs over the Internet. Once a subscriber selected the content she wished to view from

a menu on the company's website, Aereo's servers assigned one of the thousands of small, dime-sized antennas housed at Aereo's central warehouse to receive and record the broadcast for that specific subscriber. Once the antenna began to receive the broadcast, an Aereo transcoder translated the signals received into data that could be transmitted over the Internet to the specific subscriber.

The system then created a unique personal copy of the broadcast, stored it in a subscriber-specific hard drive or folder on a server, and transmitted the program only to the particular subscriber who asked to stream it. The service allowed subscribers to either stream broadcast programs to many different devices, such as an iPad or mobile phone, a few seconds after the initial over-the-air broadcast, or to save the program to watch later. Aereo neither owned the copyright to the works nor held a license from the copyright owners to transmit the works publicly.

Aereo argued that the data it streamed to each subscriber is the data made from the subscriber's own personal copy held in the subscriber specific folder. The system did not transmit data saved in one sub-

scriber's folder to any other subscriber. When two subscribers wished to watch the same program, for example, Aereo's system activated two separate antennas and saved two separate copies of the program in two separate hard drives or folders. It then streamed the television show to the subscribers through two separate transmissions, each from the subscriber's own personal copy.

The plaintiffs, who owned the copyrights in many of the programs Aereo was transmitting, included broadcasting companies, producers, and distributors. They sued Aereo in federal District Court in Manhattan in 2012. The plaintiffs alleged that Aereo's act of transmitting the programs constituted a public performance of copyrighted works and sought a preliminary injunction against the company. The plaintiff's argument specifically relied on a 1976 amendment to the Copyright Act that awards copyright owners the "exclusive right" to "perform the copyrighted work publicly" 17 U.S.C. § 106(4). The Act's Transmit Clause further defines that exclusive right to include the right to "transmit or otherwise communicate a performance

Aereo, continued on page 16

Buffer Zone, continued from page 14 was correct even though he personally viewed himself as a pro-choice supporter. "That I don't share Ms. McCullen's views is beside the point. The great virtue of our First Amendment is that it protects speech we hate just as vigorously as it protects speech we support," Tribe wrote. "[A]ll nine justices united to reaffirm our nation's commitment to allowing diverse views in our public spaces — although their unanimous result belied their divided reasoning."

Tribe also noted that the *McCullen* case was an example of the Court needing to create a balance between different constitutional values of women having the right to choose to have an abortion and First Amendment guarantees of free speech. "A woman's right to choose whether or not to terminate her pregnancy under [*Roe v. Wade*] guarantees her protection from the state," Tribe wrote. "This protection does not include a right to be shielded by the state from fellow citizens hoping to peacefully convince her that she's making the wrong choice."

Others also noted their conflicted views about the clash between the First Amendment and the ability of women to choose to have an abortion. In a June 26 press release, American Civil Liberties Union Legal Director Steven R. Shapiro said that

the majority's opinion showed the difficulty of balancing the competing interests. "We agree that a fixed buffer zone imposes serious First Amendment costs, but we also think the Court underestimated the proven difficulty of protecting the constitutional rights of women seeking abortions by enforcing other laws — especially regarding harassment — outside abortion clinics," Shapiro said in the statement.

However, in a June 26 post on *Slate*, United States Court of Appeals for the Seventh Circuit Judge Richard A. Posner was more emphatic in his disagreement with the Court's decision that he said "fetishizes First Amendment rights." He suggested that Roberts' opinion incorrectly cast the balance between competing issues when it said that public safety concerns did not trump the First Amendment. "The issue is not mainly . . . the maintenance of public safety. Most abortion protesters are not violent, and police will be present to protect the visitors to the clinic," Posner wrote. "The issue is the privacy, anxiety, and embarrassment of the abortion clinic's patients — interests that outweigh, in my judgment anyway, the negligible contribution that abortion protesters make to the marketplace of ideas and opinions."

On July 14, 2014, *The New York Times* reported that Democratic Massachusetts

State Senator Hargett L. Chandler introduced a new bill to regulate the space near health care facilities. State Attorney General Martha Coakley said that the language of the bill followed Roberts' explanation of what kinds of regulations would be permissible, according to the *Times* story. The bill's language would make it a criminal offense to intimidate people entering an abortion facility as well as prohibiting the obstruction of staff and patients' abilities to enter a clinic. The bill also gives law enforcement officers the ability to order crowds to disperse if more than two instances of obstruction had occurred. 2014 Mass. Legis. Serv. Ch. 197 (S.B. 2283) (West). Professor Tribe told the *Times* that the new Massachusetts proposal addressed many of the problems that the Court had pointed to in striking down the previous law. "It is a much more narrowly focused bill in terms of the conduct that it prohibits," Tribe told the *Times*. "It prohibits obstruction of access, which is not an expression of free speech." *The Boston Globe* reported that Governor Deval Patrick signed the bill into law on July 30.

CASEY CARMODY
SILHA BULLETIN EDITOR

... of the [copyrighted] work ... to the public, by means of any device or process, whether the members of the public capable of receiving then performance ... receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101. The district court denied the preliminary injunction on July 11, 2012. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F.Supp.2d 373 (S.D.N.Y. 2012).

A divided three-judge panel of the United States Court of Appeals for the Second Circuit affirmed the lower court’s decision on April 1, 2013, finding Aereo did not perform “publicly” within the meaning of the Transmit Clause because it did not transmit “to the public.” *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F.Supp.2d 373 (S.D.N.Y.2012), *aff’d sub nom. WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). Rather, the Court found that each time Aereo streamed a program to a subscriber, it sent a private transmission that is available only to that subscriber. (For more on the background of the case, see “Decisions in Favor of Website That Plays Broadcast Television Shows Online without Copyright Licenses Could Change Television’s Business Model” in the Winter/Spring 2013 edition of the *Silha Bulletin*.) The Supreme Court of the United States granted *certiorari* on January 10, 2014. The Obama administration, the National Football League, Major Baseball League and several media groups wrote *amicus* briefs in support of the television networks, while consumer groups and smaller cable companies submitted *amicus* briefs in support of Aereo.

In a 6-3 decision, the Supreme Court reversed and remanded the Second Circuit’s decision, holding that the video streaming service offered by Aereo infringed upon the exclusive right of copyright owners by publicly performing or transmitting the copyrighted programs.

The majority opinion, delivered by Justice Stephen Breyer, focused on two main questions to determine whether Aereo had infringed on American Broadcasting Companies, Inc.’s exclusive right to perform or transmit the copyrighted works publicly. The first question the Court addressed was whether Aereo had in fact “performed” the copyrighted work. Aereo argued in its brief that it did not “perform” under the meaning of the Copyright Act, but rather simply provided the equipment that “emulate[s] the operation of a home antenna and [digital video recorder (DVR)].”

In the Court’s analysis, Justice Breyer first discussed the Court’s previous decisions, in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968)

and *Teleprompter Corp. v. Columbia Broadcasting System Inc.*, 415 U.S. 394 (1974). In those decisions the Court found that community antenna television (CATV) systems, which were early versions of modern cable companies, did not violate copyright law by simply retransmitting network television broadcasts to customers via coaxial cables.

However, Breyer explained that Congress had amended the language of several sections of the Copyright Act to ensure that cable companies which retransmitted broadcasts fell within the scope of the Transmit Clause. “In 1976 Congress amended the Copyright Act in large part to reject the Court’s holdings in *Fortnightly* and *Teleprompter*,” Breyer wrote. The majority opinion noted that the Transmit Clause “thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals.” The majority concluded that “Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach” and found that Aereo was not simply an equipment provider. Rather, the Court held that Aereo performed or transmitted copyrighted work. The majority opinion recognized that Aereo’s technological system differed from the cable systems at issue in *Fortnightly* and *Teleprompter* because Aereo’s system was inactive until a subscriber chose to watch a television program. However, Breyer wrote that the technological differences between Aereo and CATV were not significant.

The second question the Court addressed was whether Aereo had performed the works publicly. Section 106 of the Copyright Act states that an entity performs a copyrighted work publicly when it performs at “any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.” Aereo argued that its transmissions were not public because Aereo made individual transmissions “to only one subscriber” and not to other subscribers. The majority found that this argument did not functionally distinguish Aereo’s service from the CATV services and that the amended Act suggested that “multiple, discrete transmissions” to individuals nonetheless constituted public performance. “The subscribers to whom Aereo transmits programs constitute the ‘public,’” Breyer wrote. “Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and known to each other.”

Justice Antonin Scalia filed a dissenting opinion, which Justices Clarence Thomas and Samuel Alito joined. Scalia argued that the majority disregarded bright-line rules

for assessing service-provider liability and instead adopted an ad hoc “looks-like-cable-TV” standard that “will sow confusion for years to come.” The dissent first contended that Aereo was not culpable for direct infringement because it did not perform the copyrighted works. Rather, the subscriber selected the copyrighted material that was transmitted. Scalia wrote that “Aereo does not ‘perform’ for the sole and simple reason that it does not make the choice of content.” However, the dissent recognized that although Aereo may not be a direct infringer, Aereo could be liable for secondary infringement as it facilitates and induces subscribers to perform the copyrighted works using its system. Scalia also equated Aereo’s services to “a copy shop that provides its patrons with a library card.” Scalia argued that Aereo’s system merely provided the technological ability to its subscribers to select, copy, and view copyrighted material at the subscriber’s sole discretion, which was something a subscriber could do through the legal means of a DVR.

The dissent also stated that although the Copyright Act was clear that Aereo’s services were legal, Aereo did seem to exploit what appeared to be a “loophole” in the law.” The dissent concluded that when “good lawyers ... identify and exploit [loopholes],” it is “the role of Congress to eliminate them if it wishes.”

Despite the majority’s statement that its decision was limited to the case at hand in order to avoid hindering other emerging technologies, such as cloud computing and DVR services, some commentators have predicted that the decision may provide openings for lawyers to argue that other forms of mass Internet streaming and storage services also violate copyright laws. In a June 30, 2014, Digital Media Law blog post, Sedgwick LLP attorney Paul Pittman argued that “despite the Court’s attempt to tread carefully, the decision to ignore the intricacies of the technology and focus on the ultimate effect of the service provided is significant and could hinder growth of unique technologies in this area.”

It also remains unclear how the decision will affect cloud computing and storage devices. In a June 26, 2014, *Techtimes* article, Mike Cannon pointed out that traditionally, service providers have not been held responsible for what their consumers do with the service. However, the fact that Aereo was merely providing the antennas and delivering the transmissions picked up by those antennas may leave room for interpretation that service providers could now be liable. For example, a cloud storage service such as Dropbox could not generally be held accountable if a person

Verdicts Arrive in Phone Hacking Trial that Exposed Questionable Practices of British Tabloid

On June 24, 2014, Rebekah Brooks, former editor of the now-defunct *News of the World*, was acquitted of all charges related to a British phone hacking scandal that prompted public inquiries, parliamentary hearings, and investigations as well as revealing many of the inner-workings of British tabloid newsrooms. However, the jury found Andy Coulson, who succeeded Brooks as editor and served as the director of communications for Prime Minister David Cameron, guilty of conspiring to hack phones while he served as editor of the *News of the World*. The Brooks acquittal and Coulson's conviction capped what several British news outlets had dubbed "the trial of the century."

MEDIA ETHICS

The trials of Brooks and Coulson arose after widespread accusations that *News of the World*, which was owned by Rupert Murdoch's News International (now News UK), had engaged in illegally accessing the voicemail accounts of celebrities and prominent news subjects since the early 2000s. Revelations that tabloids had been involved in phone hacking techniques arose after private investigators working for *News of the World* pleaded guilty to illegally listening to voicemail messages of British royalty in 2006, which also led to Coulson's resignation from *News of the World*. However, the phone hacking scandal garnered more political and public outrage in 2011 after *The Guardian* published a story revealing that *News of the World* staff had allegedly accessed and

listened to the voicemail messages of Milly Dowler, a 13-year-old girl who had gone missing and was found murdered in 2002. Extensive investigations followed which prompted the British Crown Prosecution Service (CPS) to file numerous criminal charges against Brooks and Coulson as well as several other former employees of *News of the World* throughout 2012. The charges included conspiring to unlawfully intercept communications from 2000 to 2006, bribing public officials, and conspiracy to pervert the course of justice. Brooks and Coulson pleaded not guilty to all charges in June 2013. (For more on the phone hacking scandal and subsequent charges, see "Update: Charges Filed in British Phone Hacking Case" in the Summer 2012 issue of the *Silha Bulletin*, "Not Just a 'Rogue Reporter': Phone Hacking Scandal Spreads Far and Wide" in the Summer 2011 issue, and "Murdoch-owned British Paper Embroiled in Phone Scandal" in the Fall 2009 issue.)

The trial, which began in October 2013, included testimony about the close ties between the British journalists and high-ranking politicians, *News of the World* journalists paying large sums of money to get scoops before their competitors, and *News of the World's* widespread phone hacking of Prince William, Prince Harry, Kate Middleton, and other prominent news figures during the course of several years. After the eight-month trial, the jury returned only one guilty verdict against Coulson for illegally intercepting voicemail messages. The jury acquitted Brooks of the phone hacking, bribery, and conspiracy to pervert justice charges. Several others associ-

ated with Brooks, including her husband, Charlie Brooks, were acquitted of charges of interfering with the course of justice. The jurors also could not come to agreement over two additional charges against Coulson of conspiring to cause misconduct in public office related to the purchasing of a royal phone directory. Coulson was later sentenced to 18 months in prison.

A day after the trial concluded, *The Times* of London reported that Brooks and her husband spoke outside their home to media representatives. Brooks told the press that she was relieved to have been found not guilty on the charges against her. "I am innocent of the crimes I was charged with and I feel vindicated by the unanimous verdicts," Brooks said. "When I was arrested, it was in the middle of a maelstrom of controversy, of politics and of comment. Some was fair but much of it was not, so I'm very grateful to the jury for coming to their decision." *The Guardian* also reported that Charlie Brooks said he stood by his comments from two years earlier that British prosecutors were engaging in a "witch hunt" targeting his wife. "Everything we said two years ago has proved to be true. Rebekah has been through an unprecedented investigation of an incredibly forensic and personal nature, the likes of which we've probably never seen," he told reporters.

Rebekah Brooks told the reporters outside her home that she continued to support her former colleagues, but that she could not say much because they could be facing additional charges in the future. "Today my thoughts are with my
Phone Hacking, continued from page 18

Aereo, continued from page 16

uses its service to allow others to download copyrighted content. After the *Aereo* decision, it is no longer clear that this is the case, Cannon wrote.

In a June 25, 2014, *MIT Technology Review* article, John Bergmeyer, a staff attorney at Public Knowledge, a technology policy think tank in Washington D.C., was quoted saying that the decision "will lead to uncertainty and litigation, because there is enough ammunition in there for future lawsuits."

However, other attorneys disagreed with Bergmeyer's assessment. Andrew Goldstein, a lawyer at Freeborn & Peters, a Chicago law firm that represents content providers, told the *MIT Technology Review* in the same story that he was not worried

that copyright holders could contend that storage services, such as Google Drive, Dropbox, or Amazon, were violating copyright law when a user accesses his or her own content. "I think the Supreme Court did the best job they could at making this as narrow an opinion as they could," Goldstein said. "They deliberately said they are not ruling on future technologies that are not before them."

Other similar television streaming services, such as Roku, TiVo, Mohu and Simple.TV, have interpreted the *Aereo* decision as clarifying that their technology and service model is legal under copyright law. The main technological difference between these companies' and *Aereo's* services are that customers of the former's services own the antennas and capture

signals in their homes, as opposed to the remote warehouse where *Aereo's* antennas were stored. In a June 29, 2014 *New York Times* story, Simple.TV founder Mark Ely and Mohu founder Mark Buff contended that a court would view their television broadcast reception technologies as adhering to private performance requirements under the Supreme Court's interpretation of copyright law. "Where you capture the signal makes all the difference," Ely told the *Times*. "[Simple.TV technology] fits squarely in fair use."

SARAH WILEY
SILHA RESEARCH ASSISTANT

Phone Hacking, continued from page 17
former colleagues who face future trials and I'm going to do everything I can to support them as I know how anxious the times ahead are," said Brooks. Brooks also declined to specifically discuss the trial's outcome for Coulson.

Several commentators raised questions about the revelations from the trial as well as the outcome that it produced. On June 25, Suzanne Moore, a columnist for *The Guardian*, wrote that the scandal and subsequent trial exposed troubling ties between journalists and politicians. "Those cheering Brooks'[] 'innocence' forget the actual victims of phone hacking and the bigger victim: a semblance of democracy," wrote Moore. "The best journalism seeks not to co[z]y up to power but to uncover its workings. It is deeply embarrassing to see journalists buy their way in to political circles via trinkets, and then publishing news that is not fit to print."

A June 26 editorial of *The Times* of London, which is owned by News UK, criticized the CPS's decision to pursue cases against the former *News of the World* employees. Particularly, the editorial questioned whether the investigations and prosecutor's costs for the case, estimated at 35 million pounds or about 58.5 million dollars, were worth the single conviction. "Presumably the CPS calculated that the police had gathered sufficient evidence to ensure a better conviction," the editorial said. "That calculation turns out to have been spectacularly mistaken." However, *The Guardian's* Rowena Mason reported that former head of CPS Sir Keir Starmer defended the charges he initially oversaw against Brooks and others when he appeared on BBC's Andrew Marr Show. "What has been exposed is hacking at a high level, widespread hacking, and the question was who knew about it, and some of those questions have been answered by this trial," Starmer said. "Has anything really changed? The answer to that is yes. Before this trial . . . there was a feeling that journalists were above the law. I don't think there is that feeling any more."

Observers have also suggested that Coulson's conviction as well as the trial itself have affected the culture and practices of British tabloids, especially in relation to techniques for collecting private information. Roy Greenslade, a journalism professor at City University in London and media blogger for *The Guardian*, told *The Washington Post's* Karla Adam in a June 25 story that the trial put tabloid reporters on alert. "There are very few kiss-and-tell stories of the old kind. What the scandal has done is made the tabloids much more aware of ethics than they were previously,"

Greenslade told *The Washington Post*. "They have had a nasty shock."

In a June 26 posting on his blog for *The Guardian*, Greenslade also criticized several aspects of the news media's coverage of the trial. Specifically, Greenslade took issue with reports that the trial had cost taxpayers more than 110 million pounds. He explained that the 110 million pounds estimate included Murdoch's large defense fund for the accused. Greenslade wrote that the cost to taxpayers was about 35 million pounds. He also suggested that other news organizations failed to acknowledge that phone hacking was a widespread practice. "Although the [*News of the World*] was undoubtedly a rogue newspaper, as I wrote several times and way before the

"What has been exposed is hacking at a high level, widespread hacking, and the question was who knew about it, and some of those questions have been answered by this trial."

— Sir Keir Starmer,
Former Head of the British Crown Prosecution Service

hacking scandal broke, its journalistic agenda and the methodology some of its reporters employed, was not confined to its Wapping newsroom," wrote Greenslade. "The knowledge of how to hack into mobile phones was known to other journalists on other newspapers. And these reporters were under similar pressures to obtain stories. Newspapers that belittle the significance of hacking have reason to avert their gaze from such truths."

The New York Times editorial board called the *News of the World's* use of phone hacking techniques "shameful" in a June 26 editorial. "Any notion that tabloids might at worst be merely resourceful in adapting modern technology to their endless quest for scoops was dashed when the public discovered that the paper had intercepted the messages of agonized relatives left on the cellphone of a missing teenager, Milly Dowler, who was later found dead," the board wrote. "This wasn't the usual playful celebrity or royal family exposé unearthed via amusing dirty pool; this was the cruellest violation of privacy." However, the editorial praised *The Guardian's* work in exposing the hacking scandal, noting that the paper's reporting was "rebuttal enough to misguided proposals that Parliament enact watchdog measures that would compromise the press's ability to do its job in a free society."

The fallout from the scandal did not end with the Brooks and Coulson ver-

dicts, however. On June 25, *The Guardian* reported that Scotland Yard investigators sought to question Rupert Murdoch about crimes that his British newspapers may have committed. Prosecutors could potentially bring corporate charges against Murdoch's company in relation to the phone hacking scandal. If the company is convicted of conspiring to intercept phone communications, the members of the News UK board of directors, including Murdoch and his son James Murdoch, could face prosecution themselves. Investigators wanted to question Murdoch in 2013, but agreed to wait until the conclusion of the phone-hacking trial. *The Guardian* story also reported that News UK has been settling numerous civil suits and paying

damages to *News of the World's* phone hacking victims.

Coulson also continues to confront legal battles for his role in the phone hacking scandal. *The Guardian* reported on June 30 that the CPS announced that it would seek

a retrial of Coulson on the charges related to illegally obtaining royal phone numbers from the police. The BBC reported on August 6 that prosecutors had initiated charges against Coulson for perjury during an earlier trial in which former Scottish Socialist Party leader Tommy Sheridan sued *News of the World* for defamation. Coulson is accused of falsely testifying that he did not know about payments that *News of the World* journalist Clive Goodman made to private investigator Glenn Mulcaire or about the phone hacking the journalist and investigator conducted.

The Observer, which is *The Guardian's* sister newspaper, reported on August 9 that two lawyers associated with News International also face hearings due to the scandal. Harbottle & Lewis attorney Lawrence Abramson and former in-house attorney Jon Chapman will face a solicitors' disciplinary tribunal in October for their alleged cover-up of the scale of *News of the World's* phone hacking. The lawyers could face suspension or be removed from practicing law if the legal regulatory body finds them guilty.

CASEY CARMODY
SILHA BULLETIN EDITOR

Update: U.S. Supreme Court Declines to Hear Reporter's Privilege Cases

In the summer of 2014, the United States Supreme Court declined to hear two different cases raising issues about whether the First Amendment provides a reporter's privilege which would allow journalists to refuse to disclose the names of confidential sources as well as other information when called to testify

REPORTER'S PRIVILEGE

in court. The U.S. Supreme Court has only specifically addressed the issue once. In 1972, the Court held that the First Amendment did not allow journalists to refuse to testify before a grand jury about criminal activity that they personally witnessed. *Branzburg v. Hayes*, 408 U.S. 665 (1972). The lower courts' decisions in the separate cases that the Supreme Court refused to hear were split as to whether journalists could invoke such a privilege. Many press commentators praised the Court's decision to allow journalistic protections in one case to stand, but others expressed concern over the Court's silence on the lack of protections in the other case.

U.S. Supreme Court Declines to Hear Case Involving Fox News Reporter

On May 27, 2014, the Supreme Court issued a brief order saying that it would not hear the appeal of James Holmes requesting the Court to compel Fox News reporter Jana Winter to testify in court. Holmes is facing trial in Colorado for allegedly shooting and killing several people in an Aurora, Colo. movie theater on July 20, 2012. Attorneys for Holmes sought Winter's testimony after she obtained a notebook detailing the mass shooting plan that the accused shooter had allegedly sent to his psychiatrist. In January 2013, Arapahoe County District Court Judge William Sylvester approved a subpoena requesting Winter, a New York resident, to appear in court. The Colorado district court relied on the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, which all 50 states have adopted, to find that Winter should appear in Colorado. Judge Larry Stephen of the New York County Criminal Court approved the subpoena in March 2013. Winter appealed Stephen's decision to enforce the subpoena, but the New York Supreme Court Appellate Division, First Department ruled in August 2013 that Winter must comply with the subpoena. In December 2013, the New York Court of Appeals, the state's highest court, found in a 4-3 decision that Winter did not have to appear in the Colorado court. The high court held that New York's

shield law precluded Winter from being required to testify. (For more information about the lower court's ruling, see "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources," in the Fall 2013 issue of the *Silha Bulletin*.)

On March 6, 2014, attorneys for Holmes filed a petition for *certiorari* to the U.S. Supreme Court. Petition for writ of *certiorari*, *Holmes v. Winter*, No. 13-1096, 2014 WL 975922 (2014). They argued that the New York high court's decision had ignored the enforcement of the subpoena under the Uniform Act to Secure the Attendance of Witnesses because of "an unprecedented public policy exception designed to accommodate New York's Journalist Shield Law." The attorneys argued that the Uniform Act amounted to an interstate compact, which would mean that New York courts were obligated to enforce the Colorado district court subpoena. They also argued that Holmes' Sixth Amendment right to compulsory process would be hindered if the Uniform Act could not be used to enforce the subpoena requiring Winter to appear. In their April 25 brief opposing the writ of *certiorari*, Winter's attorneys argued that the Uniform Act was not an interstate compact because no courts have interpreted it to be one. *Holmes v. Winter*, 13-1096, 2014 WL 1678549 (2014). Winter's attorneys also argued that Supreme Court and other state supreme court precedent indicated that a defendant's Sixth Amendment rights are not violated when out-of-state witnesses are not required to appear to testify. The Supreme Court denied *certiorari* on May 27 without any explanation for its decision.

In a May 27 statement, Fox News, Winter's employer, said that it has happy with the Supreme Court decision to decline the case. "We're pleased that the Supreme Court has ruled in favor of free speech today," the company said in the statement. "The Court made it clear that Jana Winter can never be compelled to testify in Colorado, and that all New York-based journalists and media companies can rely on New York's strong shield law when they are covering news across the country."

The Associated Press' Dan Elliott reported in a May 27 story that Colorado Freedom of Information Coalition Executive Director Jeffrey Roberts also praised the decision. "It's good that she's protected here [in Colorado]," Roberts said. "It's hard to understand why [the defense] needed to know her sources in this case."

On August 19, Reuters reported that defense attorneys for Holmes asked Arapahoe

District Court Judge Carlos Samour to order a special probe to determine who leaked Holmes' notebook to Winter. The lawyers argued that at least one law enforcement officer had committed perjury because no one admitted to the leak while under oath. However, Reuters subsequently reported on August 28 that Samour had denied the defense's request to investigate. Samour acknowledged that it was possible that someone had lied about providing the notebook to Winter, but the defense attorneys could question the credibility of the various law enforcement officers during the trial. Reuters' earlier report noted that jury selection for Holmes' trial will begin in December 2014.

Supreme Court's Denial of New York Times Reporter's Appeal Raises Concerns

On June 1, 2014, the Supreme Court declined to grant *certiorari* in an appeal by James Risen, a reporter for *The New York Times*. Risen had previously refused to divulge information about the source he had used in his 2006 book, *State of War*. The book contained information about the CIA's failed attempt to sabotage Iran's nuclear program. The Department of Justice (DOJ) has claimed that Risen's source was former CIA employee Jeffrey Sterling, who is charged with violating the Espionage Act by allegedly disclosing classified information. The DOJ has claimed it is seeking Risen's testimony to pursue its prosecution of Sterling.

In 2011, Attorney General Eric Holder authorized a subpoena ordering Risen to testify at Sterling's trial. Risen moved to quash the subpoena. In July 2011, United States District Court Judge Leonie M. Brinkema issued a ruling limiting the scope of federal prosecutors' questions for Risen, including an order preventing attorneys from asking for the name of Risen's source. *United States v. Sterling*, 818 F.Supp.2d 945 (E.D. Va. 2011). The government appealed Brinkema's order, and a three-judge panel for the United States Court of Appeals for the Fourth Circuit overturned Brinkema's order in a 2-1 decision in July 2013. The majority held that the First Amendment did not provide journalists with a testimonial privilege in a criminal proceeding when they had personally witnessed criminal activity. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013). In October 2013, the full Fourth Circuit Court of Appeals denied the opportunity to consider the three-judge panel's

Privilege, continued on page 20

Privilege, continued from page 19
decision *en banc*. *United States v. Sterling*, 732 F.3d 292 (4th Cir. 2013). (For more information on the background of Risen's case, see "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources" in the Fall 2013 issue of the *Silha Bulletin*, and "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue.)

On Jan. 13, 2014, Risen's attorneys submitted a petition for writ of *certiorari* to the Supreme Court. Petition for writ of *certiorari*, *Risen v. United States*, No. 13-1009, 2014 WL 690255 (2014). The attorneys argued that the Court should grant *certiorari* to clarify whether the First Amendment provides a qualified testimonial privilege for journalists in the context of a criminal trial. The attorneys contended that lower federal appeals court had recognized a First Amendment reporter's privilege by holding that the Court's *Branzburg* decision was limited to grand jury proceedings only. They suggested that Risen's case presented an opportunity for the Court to recognize and outline the scope of a qualified First Amendment privilege. The attorneys argued that the Risen case also presented the opportunity to recognize and clarify the scope of a qualified journalist's privilege under federal common law. On March 26, 2014, several news organizations and reporters' advocacy organizations, including the Associated Press, National Public Radio, *The New York Times*, *The Washington Post*, and the Reporters Committee for Freedom of the Press (RCFP), among others, submitted an *amici curiae* brief on behalf of Risen to argue that the Supreme Court should take the case. The organizations argued that the Court's refusal to hear any further reporter's privilege cases since *Branzburg* had created confusion among lower courts about the application of a privilege and has led to journalists being jailed. *Amici* brief on petition for writ of *certiorari*, *Risen v. United States*, No. 12-1009, 2014 WL 1275185 (2014). On June 2, the Supreme Court declined to hear Risen's case without explanation.

The New York Times' Adam Liptak reported in a June 2 story that Risen said, "I will continue to fight," after the Supreme Court's decision was announced. However, the Supreme Court's refusal to hear the case means that Risen has exhausted all of his legal remedies to fight the subpoena. If the DOJ seeks enforcement of the subpoena requiring him to testify and he refuses, Risen could face contempt of court charges and the possibility of jail.

However, Joel Kurtzberg, Risen's attorney, said that the government could prevent such an outcome for the *Times* journalist. "The ball is now in the government's court," Kurtzberg wrote in an e-mail to the *Times*

on June 6. "The government can choose not to pursue Mr. Risen's testimony if it wants to. We can only hope now that the government will not seek to have him held in contempt for doing nothing more than reporting the news and keeping his promises [to keep his sources' names confidential]."

On May 27, *The New York Times*' Charlie Savage reported that Attorney General Eric Holder had suggested during a meeting with reporters that he did not intend to jail reporters despite the government's legal pursuit of retaining the ability to do so. "As long as I'm attorney general, no reporter who is doing his job is going to go to jail," Holder

"We are extremely disappointed that the Supreme Court declined this opportunity to uphold journalists' ability to protect confidential sources, which is an essential tool utilized by a free press in newsgathering for the public trust."

— Bruce D. Brown,
Executive Director,
Reporters Committee for Freedom of the Press

said, according to Savage. "As long as I'm attorney general, someone who is doing their job is not going to get prosecuted." According to a June 27, 2014 *New York Times* story, the government will likely resume its case against Sterling soon, which means that Risen would once again face likely pressure to testify. The *Times* reported that despite Holder's assurances that no journalist would go to jail on his watch, the government has other options than jail time to compel Risen's testimony, including asking the trial judge to fine Risen or narrowing the scope of questioning so Risen would not need to reveal his source.

The Court's decision to deny *certiorari* also raised the concern of several news organizations, press advocacy groups, and media observers. According to Liptak's June 2 story, *The New York Times* Executive Editor Dean Baquet said that the Court's decision was problematic for reporter-source relationships. "Journalists like Jim [Risen] depend on confidential sources to get information the public needs to know," said Baquet. "The court's failure to protect journalists' right to protect their sources is deeply troubling." In the June 27 story, Steven Aftergood, an expert on government transparency with the Federation of American Scientists, told the *Times* that Risen's case has the potential to chill reporting. "If the government proceeds and pursues the subpoena, especially if Mr. Risen goes to jail or is fined at some intolerable level, it will

deal a withering blow to reporting that runs against the government's wishes," Aftergood told the *Times*.

In a June 2, 2014 press release, RCFP Executive Director Bruce D. Brown said that the Court's decision to allow the Fourth Circuit Appellate Court's decision to stand would cause news sources to dry up. "We are extremely disappointed that the Supreme Court declined this opportunity to uphold journalists' ability to protect confidential sources, which is an essential tool utilized by a free press in newsgathering for the public trust," Brown said in the release. "The lower court's ruling sends an

undeniable chill through current and future news sources who would want to come forward with information essential to the well-being of the community and the country."

In an Aug. 14, 2014 news update on the RCFP's website, Emily Grannis wrote that several press advocacy organizations had delivered a

petition with more than 100,000 signatures, including those of 20 Pulitzer Prize winners, to the White House. The petition called on the Obama administration to discontinue the effort to compel Risen's testimony, calling it "an assault on freedom of the press." The organizations that initiated the petition included the Center for Media and Democracy, Fairness & Accuracy in Reporting, Freedom of the Press Foundation, *The Nation*, *The Progressive*, and RootsAction.org. Several other organizations were listed as supporting the petition, including the Committee to Protect Journalists, Free Press, the Government Accountability Project, the Project on Government Oversight, Public Citizen, Reporters Without Borders, and RCFP.

Grannis reported that the announcement of the petition's submission was during an Aug. 14 National Press Club event where Risen was a featured speaker. Risen said that the petition left him "speechless." "I also know that it's really not about me. It's about some basic issues that affect all Americans and all journalists," Risen said, according to Grannis. "I'm willing to do this for the future of journalism . . . There's no way to conduct aggressive investigative reporting without confidential sources."

CASEY CARMODY
SILHA BULLETIN EDITOR

Journalists Arrested During Protests in Missouri; Journalists Abroad Face Dire Situations

During the summer of 2014, journalists around the world faced significant threats of arrest, jailing, and the loss of their lives. In the United States, racial tensions that erupted into sustained protests led to situations in which police officers arrested journal-

ENDANGERED JOURNALISTS

ists covering the demonstrations. Abroad, journalists were detained in Iran and convicted of “falsifying news” in Egypt. In Iraq, members of a militant group beheaded journalists who had been missing for several years. The group posted a video of the executions on YouTube. Several press advocacy organizations have decried the violence targeted at journalists. The incidents also highlight the dangerous situations journalists find themselves in when reporting from areas mired in conflict.

Journalists Become Targets of Police in Coverage of Protests over Shooting

On Aug. 9, 2014, Michael Brown, an unarmed 18-year-old African American, was shot and killed after a confrontation with a white police officer in Ferguson, Mo., a suburb of St. Louis. Tensions rose as witnesses’ accounts of the shooting began to conflict with the law enforcement reports of what had happened. Groups began to organize demonstrations on August 10 to protest what they considered to be unsatisfactory responses from government authorities over the incident. Confrontations between demonstrators and the police led to more protests in Ferguson and on social media, the escalation of police using military-styled tactics to manage demonstrations, and Missouri Gov. Jay Nixon declaring a state of emergency and imposing a city-wide curfew. However, the police’s use of force and the enforcement of a citywide curfew only escalated conflicts during the course of several days throughout August. The city’s history of race relations — Ferguson’s population is primarily black yet a majority of authorities in government are white — exacerbated the tensions in the community.

While covering the unfolding events in Ferguson, many journalists found themselves swept up in law enforcement authorities’ attempts to manage the protestors and demonstrations. On August 14, *The Washington Post*’s Wesley Lowery reported that police had arrested him the previous day as he worked in a

McDonald’s dining area. Lowery wrote that he was in the restaurant to recharge his phone and respond to questions on Twitter. Several police officers entered the McDonald’s and asked Lowery and Huffington Post reporter Ryan Reilly for identification. The officers left but returned a short time later to order everyone to leave the restaurant. Lowery began recording video of his interaction with the officers on his phone. An officer told him to stop

be so disregarded, particularly after the journalists identified themselves as members of the press, is almost unthinkable — yet it happened, and happened quite violently according to news reports.”

The RCFP sent a letter on August 15 that was addressed to the Ferguson Police Department, as well as the St. Louis County Police Department and Missouri State Highway Patrol, calling on the agencies to refrain from arresting journalists.

“The actions in Ferguson demonstrate a lack of training among local law enforcement in the protections required by the First Amendment as well as the absence of respect for the role of newsgatherers.”

— Letter from Press Advocacy Organizations to Ferguson Police Department

recording, but Lowery maintained that he had the right to do so. Lowery wrote that he received conflicting information as he attempted to leave, and, as a result, the officers arrested him for not complying with directions. Reilly was also arrested. Lowery reported that officers refused to provide any identification information and that the reporters were told they were arrested for trespassing at McDonald’s. Lowery wrote that he and Reilly were later released without being charged with a crime or receiving a report of the arrest.

On August 18, *The Washington Post* reported that other journalists had also been arrested, including Robert Klemko of *Sports Illustrated*, Neil Munshi of the *Financial Times* in Chicago, and Rob Crilly of *The Telegraph*. The police let the journalists go shortly after the arrests. According to the *Post*, other journalists had also reported that police had threatened to arrest or use mace against them.

Law enforcement authorities’ actions against the press in Ferguson have led to criticisms from press advocacy organizations and media observers. In an Aug. 14, 2014 press release, the Reporters Committee for Freedom of the Press (RCFP) Executive Director Bruce D. Brown commented, “The right to record and report on police activities is a First Amendment right — and one essential to the journalist’s role as a watchdog and guardian of public accountability for law enforcement and other public officials. That it should

Several other press advocacy groups and media organizations also signed the letter, including the Associated Press, the Huffington Post, the Fox News Network, *The Washington Post*, the American Society of News Editors, the Society of Professional Journalists (SPJ),

and Reporters Without Borders (RSF), among others. The organizations expressed concern that law enforcement authorities had not been more forthcoming with information about the shooting as well as the accounts of police hindering the newsgathering ability of journalists. “Officers on the ground must understand that gathering news and recording police activities are not crimes,” the organizations wrote in the letter. “The actions in Ferguson demonstrate a lack of training among local law enforcement in the protections required by the First Amendment as well as the absence of respect for the role of newsgatherers. We implore police leadership to rectify this failing to ensure that these incidents do not occur again.” The full letter is available online at <http://www.rcfp.org/sites/default/files/2014-08-15-Ferguson-media-coalition-letter.pdf>.

On August 15, *Politico* reported that Missouri law enforcement authorities had come to an agreement with the American Civil Liberties Union (ACLU) acknowledging that journalists as well as the general public have the right to record the activity of police as long as the recording does not interfere with law enforcement’s duties and operations. The *Politico* story noted that the agreement came one day after the ACLU had filed a federal lawsuit against Missouri law enforcement authorities on behalf of a journalist who the police had told to stop recording footage. In an

Journalists, continued on page 22

Journalists, continued from page 21

August 15 press release, ACLU of Missouri Legal Director Tony Rothert said, “The role of both the media and the ACLU is to make sure that the rule of law is being followed. It will be easier to do that in Ferguson, now that all parties agree the media, and the public at large, have the right to record police interactions.”

Significant Concerns Raised After Al-Jazeera Journalists Convicted in Egypt

On June 23, 2014, an Egyptian judge convicted three Al-Jazeera journalists of conspiring with the Muslim Brotherhood to broadcast false reports, according to *The New York Times*. Two of the journalists, Canadian Mohamed Fahmy and Australian Peter Greste, were sentenced to seven years in prison. The other journalist, Egyptian Baher Mohamed, was sentenced to 10 years in prison. Three additional journalists were tried in absentia. The court convicted each one and sentenced all to 10 years in prison.

Fahmy, Greste, and Mohamed were arrested in December 2013 based on accusations that their reporting was supportive of the Muslim Brotherhood, which the Egyptian Government had declared a terrorist organization the previous week. At the time, the *Times* reported that several members of the Egyptian blogging and activist community were surprised about the arrests. Many had viewed the journalists’ work as being critical of the Muslim Brotherhood. In a June 23, 2014 story, Al-Jazeera reported that evidence used against the journalists during the trial included BBC podcasts, news reports that had been published while none of the journalists were in Egypt, videos and recordings about issues unrelated to Egypt, and a music video by Australian singer Gotye.

The conviction drew the condemnation of world leaders as well as press and human rights advocates. On June 23, the Associated Press reported that Australian Prime Minister Tony Abbott had said that he had discussed Greste’s situation with Egyptian President Abdel Fattah el-Sisi. “I did make the point that as an Australian journalist, Peter Greste would not have been supporting the Muslim Brotherhood, he would have simply been reporting on the Muslim Brotherhood,” Abbot said, according to the Associated Press. “The point I made was that in the long run, a free and vigorous media are good for democracy, good for security, [and] good for stability.”

The White House also released a statement on June 23 that criticized the Egyptian trial court’s decision. “The

prosecution of journalists for reporting information that does not coincide with the Government of Egypt’s narrative flouts the most basic standards of media freedom and represents a blow to democratic progress in Egypt,” the White House wrote in the statement. “As we have said many times before, democracy is about more than elections. True democracy requires thriving democratic institutions, including a vibrant free press that is empowered to hold the government accountable to the people.”

A December 2013 report by Elana Beiser of the Committee to Protect

“As we have said many times before, democracy is about more than elections. True democracy requires thriving democratic institutions, including a vibrant free press that is empowered to hold the government accountable to the people.”

— White House Statement on jailed journalists in Egypt

Journalists (CPJ) listed Egypt as one of the top 10 jailers of journalists. On June 23, Human Rights Watch Middle East Director Joe Stork said in a story on the organizations’ website that the sentences of the journalists was a trend in Egypt. “Unfortunately, today’s verdict is not an aberration,” Stork said. “In President [e]l-Sisi’s Egypt, simply practicing professional journalism is a crime, and the new constitution’s guarantees of free expression are not worth the paper they’re written on.” In a statement posted on the RSF website that same day, RSF Secretary General Christophe Deloire accused the Egyptian government of attempting to silence opposing political views. “Not content with criminalizing all political opposition, the Egyptian authorities are pursuing a policy of gagging news media that try to offer a different take on reality from the government’s,” said Deloire, according to the post.

On Aug. 21, 2014, Al-Jazeera reported that the journalists had all appealed their convictions. The date for a full hearing of the reporters’ appeal had not yet been set when the *Bulletin* went to press.

Washington Post Correspondent, Other Journalists Arrested in Iran

On July 24, 2014, *The Washington Post* reported that its foreign correspondent in Iran, Jason Rezaian, was arrested in Tehran on July 22. Rezaian holds dual

American and Iranian citizenship. The newspaper reported that the Iranian government had also arrested Iranian citizen Yeganeh Salehi, a reporter for United Arab Emirates newspaper *The National* and Rezaian’s wife, as well as an unnamed freelance journalist who was Iranian-Americans with dual citizenship. News organizations also reported that a fourth journalist was arrested, but later reports were conflicted over whether a fourth arrest had taken place. *The New York Times’* Thomas Erdbrink reported that the unnamed freelance journalist was released on August 21. However, Rezaian

and Salehi remained in custody. The arrests have raised alarm among news organizations and press advocacy groups because of the Iranian government’s refusal to provide much information about the circumstances surrounding the arrests.

The Iranian government has provided very little

explanation for why it arrested the four journalists. The Associated Press reported on August 18 that Gholam Hossein Mohseni Ejeji, a spokesman for Iran’s justice department, told reporters that the government was in the “initial stages of investigation” in its case against the journalists, and that the investigation was related to “security issues” but refused to further elaborate. The *Times’* August 21 report also indicated that the Iranian government had not been forthcoming about the locations where it was holding the Rezaian and Salehi.

In an August 4 op-ed in the *Times*, Haleh Esfandiari, the director of the Middle East Program at the Woodrow Wilson International Center, suggested that the arrests of the journalists were related to internal conflict in the Iranian government. “Jason Rezaian, *The Washington Post’s* correspondent in Iran, was arrested in Tehran on July 22 almost certainly not because of anything he had written, but because the hard-liners among Iran’s ruling elite seek to embarrass and weaken President Hassan Rouhani, a moderate,” wrote Esfandiari. “For good measure, they arrested Mr. Rezaian’s wife, Yeganeh Salehi, also a journalist, and two American citizens working as freelance journalists.”

In a July 28 post on the organization’s website, the CPJ’s Jason Stern criticized the Iranian government over differing

reports on who was arrested and the lack of information about the arrests. “CPJ is working hard to clarify the confusion over who has been arrested and why. But ultimately the onus falls on Iranian officials to explain,” wrote Stern. “The confusion could be settled right now if those responsible for the arrests would come forward and explain why at least four more people have been ensnared in the spider web of Iran’s intelligence and judicial systems. Better yet, they could simply release them.”

Amir Bayani of Article 19, an advocacy group for freedom of expression worldwide, wrote in an August 7 blog post that Rezaian and Salehi’s stories had often attempted to provide a positive image to Iran. “There have been a number of accounts from those who had crossed paths with Rezaian and Salehi who have noted the enthusiasm and love the pair had for Iran and their exemplary mission to share this love with the world,” wrote Bayani. “It is thus more perplexing and perturbing that the motives of these arrests are so uncertain.”

Rezaian and Salehi had not yet been released from detention in an unknown location as the *Bulletin* went to press.

Missing American Journalists Executed by Islamist Militants in YouTube Videos

On Aug. 19, 2014, *The New York Times* reported that the Islamic State of Iraq and Syria (ISIS), an extremist Islamist militant group based in the Middle East, had posted a video on YouTube of a masked man beheading journalist James Foley. Although there were initial questions over authenticity, Foley’s family later confirmed that the person in the video was Foley and that he had been killed. The 40-year-old Foley had been working as a freelance journalist for Boston-based Internet publication GlobalPost and for Agence France-Presse. Foley had been missing for nearly two years after he disappeared in Syria on Nov. 22, 2012.

On August 20, *The Washington Post* reported that the video, which YouTube later removed, showed a masked ISIS fighter criticizing President Barack Obama’s decision to engage in military action against ISIS, calling the decision “a slippery slope towards a new war against Muslims,” as he stood beside a kneeling prisoner. After a short clip of Obama’s August 7, 2014 press conference announcing the use of air strikes in Iraq, the

prisoner read a statement that criticized the U.S. government’s military actions. The masked man identified the prisoner as “James Wright Foley, an American citizen of your country,” before beginning the execution. Later in the video, the masked fighter threatened to kill another prisoner, who was identified as missing freelance journalist Steven Joel Sotloff, before saying, “The life of this American citizen, Obama, depends on your next decision.”

On August 20, the *Times* reported that ISIS had previously stated that it would

“Foley and thousands of other journalists risk their lives every day to seek truth and report it, and it is unconscionable they would face intimidation and violence by those who kill innocents for political gain.”

— Society of Professional Journalists Statement

release Foley if the United States agreed to pay a ransom or conduct a prisoner swap. However, the United States maintains a policy of refusing to negotiate ransoms or exchanges with groups that it considers terrorist organizations. The *Times* story reported that the U.S. Special Operations team had attempted to rescue Foley during the summer of 2014, but the mission was unsuccessful. Reuters also reported on August 21 that Foley’s family received an e-mail from ISIS in November 2013 demanding ransom money. The Foley family did not hear from the militant group again until a week before the video of Foley’s death was posted online. The latter e-mail said that Foley would be executed.

Several press advocacy organizations have criticized ISIS over the execution of Foley. In an August 19 statement, CPJ Chairman Sandra Mims Rowe said that Foley’s death was troubling. “The barbaric murder of journalist James Foley, kidnapped in Syria and held almost two years, sickens all decent people. Foley went to Syria to show the plight of the Syrian people, to bear witness to their fight, and in so doing to fight for press freedom,” said Rowe in the statement. “Our hearts go out to his family, who had dedicated themselves to finding and freeing Jim.” On the same day, SPJ issued a press release condemning ISIS’ actions.

“Foley and thousands of other journalists risk their lives every day to seek truth and report it, and it is unconscionable they would face intimidation and violence by those who kill innocents for political gain,” the organization wrote in the press release.

RSF Secretary General Deloire suggested in an August 20 statement on the organization’s website that ISIS’ killing Foley was misguided. “If the authenticity of this video claiming responsibility for James Foley’s murder is confirmed,

Islamic State would seem to be pushing its brutal treatment of hostages to the extreme,” said Deloire in the statement. “Foley did not work for the US government. He was an experienced international reporter whose sole interest was to report the news, not

represent his nation.”

On September 2, *The Washington Post* reported that ISIS released another video depicting the execution of Sotloff. U.S. intelligence agents determined the next day that the video was authentic, according to the *Post*. The video surfaced after the United States conducted additional airstrikes targeting ISIS in Iraq during late August. In the three-minute video, a masked fighter with a British accent said, “I’m back, Obama, and I’m back because of your arrogant foreign policy towards the Islamic State.” The video also depicted Sotloff reading a statement, saying that he was “paying the price” for U.S. foreign policy in the Middle East, before he was executed.

The Washington Post also reported on September 3 that the masked fighter in the videos had a British accent, which led to speculation that the same person committed the executions in both ISIS videos. Despite several reports that British intelligence analysts were close to identifying him, the militant remained unidentified as the *Bulletin* went to press.

CASEY CARMODY
SILHA BULLETIN EDITOR

Court Rules Final Volume of CIA's "Bay of Pigs" Historical Record May Be Withheld

On May 20, 2014, the United States Court of Appeals for the District of Columbia Circuit ruled that a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request by the National Security Archive (the Archive) seeking records concern-

FOIA

ing the Central Intelligence Agency's (CIA) account of the April 17, 1961 "Bay of Pigs" invasion was protected by Exemption 5 (5 U.S.C. § 552(b)(5)). Exemption 5 permits agencies to withhold records involving an agency's "deliberative processes." *National Security Archive v. Central Intelligence Agency*, 752 F.3d 460 (D.C. Cir. 2014).

The case began in 2005, when the Archive filed a FOIA request seeking four of the five volumes of "The Official History of the Bay of Pigs Operation," a report about the failed invasion of Cuba that CIA staff historian Dr. Jack Pfeiffer had compiled during the 1970s and '80s. One volume of the historical documents had been previously released under the Kennedy Assassination Records Collection Act. 44 U.S.C. § 2107. The CIA acknowledged that it had received the Archive's request in September 2005, but did not communicate further with the Archive.

In April 2011, the Archive filed suit in the United States District Court for the District of Columbia against the CIA for failing to respond to its request. In July 2011, the CIA released volumes I, II, and IV with "minimal redactions." However, the CIA refused to release Volume V, "CIA's Internal Investigation of the Bay of Pigs Operations," claiming that it was exempt under FOIA's deliberative process privilege exemption, which allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In September 2011, the CIA filed a motion for summary judgment with the federal district court. On May 10, 2012, Judge Gladys Kessler granted the CIA's motion, finding that the CIA had proven that Volume V was both predecisional, meaning it was a communication occurring before agency officials made a final decision on an issue, and deliberative, meaning it was a record used to help agency officials

make a final decision about an issue. Kessler cited testimony by Martha Lutz, an information review officer with the CIA, who had stated that Pfeiffer had been assigned the task of preparing a classified history of the Bay of Pigs. As Pfeiffer completed drafts of his reports, agency administrators reviewing them consistently found serious deficiencies with his work. As a result, the reports "never moved beyond the first stage of the CIA's review process," Kessler wrote.

Kessler emphasized that the CIA stated that Volume V "reflected the give-and-take of the consultative process" because it was a draft history that contained "inaccurate historical information" and "controversial opinions" about the events described. In addition, while compiling Volume V, historians working on the document for the agency had disagreed about the information that was included. Kessler wrote that because the CIA operates in secrecy with little oversight, the agency's historians struggle to compile accurate reports from the incomplete information they receive. "[I]t is particularly important that inhouse historians . . . feel free to present their views, theories, and critiques of the [CIA's] actions," she wrote. Kessler found that such incomplete drafts fit within the "predecisional and deliberative" specifications of FOIA's exemption 5.

Following Kessler's ruling, the Archive appealed the case to the United States Court of Appeals for the District of Columbia Circuit. In a split decision, the three-judge panel ruled in favor of the CIA, finding that Exemption 5 of FOIA allowed the agency to deny the Archive's request. Writing for the majority, Judge Brett Kavanaugh noted that the Archive had made five arguments for the release of Volume V. The two judge majority found all of the arguments unpersuasive. First, the Archive argued that the CIA had never authorized a final version of Volume V, which meant that the draft version of the historical record was the only one available. The majority said that "to require release of drafts that never result in final agency action would discourage innovative and candid internal proposals by agency officials and thereby contravene the purposes of the privilege."

Second, the Archive argued that the CIA had already released documents

similar to Volume V. Kavanaugh found that argument to be unpersuasive, noting that a requirement for agencies to release exempted information because similar information had been released would "discourage them from voluntarily releasing information, which would thwart the broader objective of transparent and open government."

Third, the Archive argued that the CIA had not identified any specific harm that would arise from the release of Volume V. Citing *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 311 (D.C. Cir. 2011), Kavanaugh wrote, "Congress enacted FOIA Exemption 5 . . . precisely because it determined that disclosure of material that is both predecisional and deliberative does harm an agency's decision[-]making process."

Fourth, the Archive argued that because more than 50 years had passed since the Bay of Pigs incident, the deliberative process privilege no longer applied. Kavanaugh disagreed, writing that the deliberative process privilege "generally do[es] not have an expiration date." The release of older agency documents, like those found in Volume V, "would have the effect of chilling current and future agency decision[] making because agency officials — realizing that the privilege evaporates over time — would no longer have the assurance that their communications would remain protected," he wrote. "And without that assurance, they . . . would not feel as free to advance the frank and candid ideas and advice that help agencies make good decisions."

Finally, the Archive argued that portions of Volume V might contain factual information that was not protected under the deliberative process privilege. The Archive maintained that the CIA should be obligated to disclose any factual information that was "reasonably segregable." However, Kavanaugh agreed with the district court that Exemption 5 protected the entirety of Volume V. He cited the court's previous findings to explain that agency historians are often required to selectively choose particular factual information to include in drafts of historical records, which "is part of the deliberative process" and "involves policy-oriented judgment." Relying on the precedents, Kavanaugh held that the factual infor-

Bay of Pigs, continued on page 25

Near, Sullivan and the Management of Dissent in American Society

Editor's Note: On April 23, 2014, the School of Journalism and Mass Communication and Silha Center for the Study of Media Ethics and Law hosted "How Far From Near? 50 Years of New York Times v. Sullivan in Minnesota and Beyond: A Symposium Honoring the Legacy of Silha Professor Emeritus Donald M. Gillmor." The symposium honored the late Donald M. Gillmor, founding director of the Silha Center and first Silha Professor of Media Ethics and Law. University of Wisconsin-Milwaukee Associate Professor David S. Allen, a panelist at the symposium and former student of Gillmor, submitted the following article reflecting and expanding his thoughts on the cases and legal issues discussed during the event.

Digging through some old files in preparing for this conference, I stumbled upon a paper I wrote for one of Don Gillmor's seminars in 1989. I had known Don for three years at that point, having been his student, a Silha Center fellow, and

his teaching assistant. It was an admittedly awful paper and Don was not letting me get away with it. Towards the end of the paper, Don wrote in red ink in the margins: "This paragraph suggests you have no conclusions—you are fudging!" He was, of course, right. I was fudging and I didn't have any conclu-

sions. And while Don always let me tackle whatever strange topic crossed my path, he never would let me get away with fudging. I hope that what follows is up to Don's standards.

While the U.S. Supreme Court cases *Near v. Minnesota* and *New York Times v. Sullivan* are frequently examined from the perspective of their impact on press regulation, less examined is the role these cases have played in configuring the contours of the management of dissent. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Both cases come at the beginning of fundamental cultural shifts in the American understanding of the public forum — those spaces where people come together to freely express themselves and exchange ideas. See D. S. Allen, "Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones," 16 *Comm. L. & Pol'y* 383 (2011). I'd like to explore the ways that both *Near* and *Sullivan* reflect and shape those shifts in our understanding of the public forum.

Near and the Establishment of the Idea of the Public Forum

It is difficult to imagine that the legal concept of the public forum did not exist in the United States at the time of the *Near* decision. The *Near* decision, of course, comes during a fundamental rethinking of the role of the courts in protecting civil liberties, and the public forum would become one of those areas to be carved out for protection.

K. L. Hall, *The Magic Mirror: Law in American History* 313 (Oxford University Press, 1989). And while we can trace the history of citizens using public spaces for the purposes of dissent from the liberty tree in revolutionary times to the modern-day occupy movement, it was not until 1939, in *Hague v. CIO*, 307 U.S. 496 (1939), that the U.S. Supreme Court began its exploration of what we today call the public forum. See H. Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*," 1 *Sup. Ct. Rev.* 1 (1965).

Part of the move toward establishing the public forum was limiting what is known as the police power, and Chief Justice Charles Evans Hughes devotes a great deal of attention to that task. The police power, the idea that the state has the ability to act in ways that will promote the public welfare, E. Freund, *The Police Power: Public Policy and Constitutional Rights* 3 (Arno Press 1976) (1904), is today rarely linked directly to First Amendment questions, but in 1931 it was a topic that could not be ignored.

Much of the discussion of the police power in those years was shaped by the Ernst Freund's classic work, *The Police Power*. Freund, a progressive University of Chicago law professor who is often credited with beginning the administrative law movement, divided ideas about the police power into three spheres or categories: (1) a "conceded sphere" where ever-increasing levels of regulation affect

Near, continued on page 26

Bay of Pigs, continued from page 24

mation could not be separated from the records that the Archive had requested.

Finding none of the Archive's arguments persuasive, the majority affirmed the district court's decision to grant summary judgment to the CIA.

Judge Judith Rogers filed a dissenting opinion, noting that although Volume V was the work of only one person, his work did not proceed beyond the first stage of the CIA's review process and therefore did "not incorporate information and perspectives that would arise from the internal review process." As a result, Rogers found no evidence that the contents of Volume V could be considered "deliberative."

Rogers further disagreed with the majority that the release of only a por-

tion of Volume V might reveal policy-oriented judgements, particularly if the agency extracted the facts and presented them as an "inventory, presented in chronological order." She also criticized the lower court for making a decision without reviewing Volume V *in camera*, observing that the CIA had admitted in documents presented to the court that Volume V contained only "a small amount of classified information."

On May 21, 2014, the Archive released a statement criticizing the appeals court ruling. "The D.C. Circuit's decision throws a burqa over the bureaucracy," Archive director Tom Blanton said in the statement. "Presidents only get 12 years after they leave office to withhold their deliberations,

and the Federal Reserve Board releases its verbatim transcripts after five years. But here the D.C. Circuit has given the CIA's historical office immortality for its drafts, because, as the CIA argues, those drafts might 'confuse the public.'"

At the time the *Bulletin* went to press, the Archive had not announced whether it would pursue an appeal of the panel decision.

Pfeiffer's four declassified volumes are available online at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB355/index.htm>.

ELAINE HARGROVE
SILHA CENTER STAFF

Near, continued from page 25

the safety, order and morals of society, (2) a “debatable sphere” concerned with the regulation of production and distribution of wealth, and (3) an “exempt sphere” where moral, intellectual and political movements are protected by individual liberty. *Id.*, at 11. While Freund admitted that these spheres often overlap, this categorization was intended to make administrative law not only easier for government to use, but also as a way to constrain government. For Freund, “speech and press are primarily free, but that does not prevent them from being subject to restraints in the interest of good order or morality.” *Id.*, at 11. This management of the speech and press was acceptable as long as it was done in a way that was “uniform, impartial and reasonable.” *Id.*, at 521.

The police power and its categorization of public life into spheres was central to the government’s ability to manage society, a role that was the subject of a wide-ranging societal debate among different groups in the early to mid 1900s that often divided progressives and pragmatists. Broadly speaking, progressives, such as Freund, were more likely to see a positive role for government and elites to play in the management of public life, while pragmatists tended to be more suspicious of that role. Those differences were captured in John Dewey’s classic review of Walter Lippmann’s 1922 book, *Public Opinion*, (terming Lippmann’s book “perhaps the most effective indictment of democracy as currently conceived.” J. Dewey, “Public Opinion,” *New Republic*, May 3, 1922, at 286.), but also in pragmatist critiques of administrative law offered by Harvard’s Roscoe Pound. R. E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” 106 *Mich. L. Rev.* 399, 422 (2007). For the progressives, the goal was designing administrative agencies that would use the police power wisely and ethically to improve society. For the pragmatists, the police power reserved far too much power to the government and limited the formation of a true public sphere. In some ways, as the *Near* decision came before the U.S. Supreme Court, the pragmatists were winning. As Reuel Schiller has argued, the *Near* decision came at a time of growing skepticism about not only the police power, but also about the ability and wisdom of putting too much power in the hands of administrative experts. The cure in

the eyes of many was giving the courts more power over public life. *Id.*, at 423. It is easy to see this debate reflected in Chief Justice Hughes’ opinion in *Near*. He paints a dour picture of public life at that time, with a society that contains a newspaper industry that suffers from “miscreant purveyors of scandal” but also a growing government that is desperately in need of being checked. As the administration of government becomes more complex, Chief Justice

“While the U.S. Supreme Court cases *Near v. Minnesota* and *New York Times v. Sullivan* are frequently examined from the perspective of their impact on press regulation, less examined is the role these cases have played in configuring the contours of the management of dissent.”

— David S. Allen, Associate Professor,
University of Wisconsin-Milwaukee
Department of Journalism,
Advertising, and Media Studies

Hughes wrote, “[t]he opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.” *Near*, at 719-720.

The solution to this problem for Chief Justice Hughes was not using the police power to limit those miscreants, but to learn to accept the good with the bad, noting that “[s]ome degree of abuse is inseparable from the proper use of everything . . .” *Id.*, at 718.

By the end of the decade, the break from the police power in the area of the expressive freedom would be complete and in *Hague v. CIO* the court, through Justice Owen Roberts, planted the seeds of the idea of the public forum. The *Hague* decision built on a view of society heavily influenced by pragmatism — an influence that becomes clear by examining the work of the American Bar Association’s Committee on the Bill of Rights. The committee’s influential friend-of-the-court brief in *Hague*, written by New York lawyer Grenville Clark and Harvard professor Zechariah Chafee, Jr., makes

it clear that the purpose of the public forum is its social nature — its ability to bring a diverse citizenry together into a cohesive public. As Clark and Chafee wrote in the brief: “The informal character of the outdoor meeting is often of advantage in developing questions and answers — one of the best ways of forming public opinion . . . [I]t may fairly be said that the outdoor meeting is the most democratic forum of public expression.” Brief for the Committee on the Bill of Rights of the American Bar Association as *Amicus Curiae*, at 14, *Hague v. Comm. Indus. Org.*, 307 U.S. 496 (1939).

Clark, whose writings have generally been forgotten, publicly endorsed a pragmatic theory of free speech that envisioned a vital public forum and called on cities to

create “Hyde Park” areas as a way of protecting the public nature of expressive freedom. See D. S. Allen, “The Ethical Roots of the Public Forum: Pragmatism, Expressive Freedom, and Grenville Clark,” 29 *J. Mass Media Ethics* 138 (2014). That pragmatist vision of the public forum, however, did not last long.

Sullivan and the Categorization of Public Life

While the move away from the pragmatist-influenced public forum is too complex to detail in any depth in this short space, suffice it to say that many ideas and movements converged to erode the social nature of the public forum and replace it with one that came to focus more on individual expression. One historian has summed up the 1960s and 1970s as a time when society began moving away from integration and toward diversity, where the nation became less a melting pot and more a cluster of discrete peoples and cultures. B. J. Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics* 68-71 (Da Capo Press, 2001).

The *Sullivan* decision’s impact on the public forum lies less in what it said about dissent and more in the structure of public life put forward

by Justice William Brennan's opinion. While his call for "uninhibited, robust and wide-open" speech on "public issues" was a powerful call to protect dissent, *Sullivan*, at 270, at times that statement is difficult to square with the Court's future actions.

Much of this tension can be traced to Justice Brennan's categorization of public life. He begins in *Sullivan* by limiting the decision to "public officials" and speech about "official conduct" — terms that he refused to define in any specificity, *Sullivan*, at 284 — and starts the Court on its journey toward not only the categorization of libel plaintiffs but the categorization of other areas of expressive freedom.

The role categorization plays in democratic life was not exactly a new idea in 1964. A wide range of scholars from Immanuel Kant to Max Weber to Michel Foucault have noted the importance of categorization and have helped us understand the paradox it presents for democratic life — that while categories help us understand our world, they also serve as instruments through which power is exercised and established. See R. Jones, "Categories, Borders and Boundaries," 33 *Progress in Human Geography* 174, 176 (2009). For the Warren Court at the time of the *Sullivan* decision, categorization was seen as a way of insulating free-speech decisions from the vagueness of balancing tests. See J. H. Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," 88 *Harv. L. Rev.* 1482, 1500 (1975).

It wasn't long before the categorization introduced in *Sullivan* began to spread to the management of other areas of public life. Specifically, the Court began to use categorization as a new way to think about the public forum. Beginning in 1972, the Court began categorizing public space eventually evolving into today's public forum doctrine.

In addition to categorizing libel plaintiffs, Justice Brennan was also one of the first to categorize public space. In the 1974 case *Lehman v. City of Shaker Heights*, where the majority of the Court found that a city's decision to prohibit political advertisements on its

transit system did not violate the First Amendment, Brennan dissented. 418 U.S. 298, 308 (1974). In doing so, he made a distinction between two types of government property—public and nonpublic forums. The determination is made by examining the "primary use to which public property or facility is committed and the extent to which that use will be disrupted if access" is allowed. *Id.*, at 312.

"Near and Sullivan reflect fundamental shifts in thinking about the role that government and the courts play in the management of dissent within society and help us understand where we are today."

— David S. Allen, Associate Professor,
University of Wisconsin-Milwaukee
Department of Journalism,
Advertising, and Media Studies

It didn't take long, however, for Justice Brennan to recognize the paradox of categorization. In a 1976 case where the majority found that it was acceptable for partisan political activities to be prohibited on the public grounds of a military base primarily because it was not considered a public forum, Justice Brennan again dissented. Denying that the categorization of the public space, which he helped launch, was the dominant way of evaluating First Amendment issues, Brennan also began to see the problems that categorization might raise for freedom of expression. As he noted, "[W]ith the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed even though they are basically compatible with the activities otherwise occurring at the locale." *Greer v. Spock*, 424 U.S. 828, 860 (Brennan, J., dissenting).

Despite Justice Brennan's objections, the die had been cast. The public forum doctrine continued to develop with multiple permutations until we arrive at the point today where expressive freedom is largely determined

by the type of space people use for expressive purposes — a doctrine that, as Robert Post has noted, is "virtually impermeable to common sense." R. C. Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 *UCLA L. Rev.* 1713, 1715 (1987). But what is more difficult to consider is how Justice Brennan's *Sullivan* decision leads us to today's version of expressive freedom

— a freedom that is dominated by zoning rules and spatial regulations and filled with "free speech zones," "cages," "pens," and "buffer zones." These areas tend to paint a picture of democracy and dissent as being an abhorrent, fearful activity, something with which citizens are not

invited to engage. That is a picture of democracy that is very different from the picture of democracy offered by either Justice Brennan or the pragmatists.

To conclude — and trying to do so without fudging too much — for me *Near* and *Sullivan* are important far beyond their impact on press law. They reflect fundamental shifts in thinking about the role that government and the courts play in the management of dissent within society and help us understand where we are today. While *Near* began the move to limit the use of the police power because of a mistrust of government, *Sullivan* — perhaps unintentionally — allows the police power to creep back into the management of public life under the cloak of the categorization of public life.

DAVID S. ALLEN,
ASSOCIATE PROFESSOR
UNIVERSITY OF WISCONSIN-MILWAUKEE
DEPARTMENT OF JOURNALISM,
ADVERTISING, AND MEDIA STUDIES

Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612) 625-3421

Non-profit Org.
U.S. Postage
PAID
Twin Cities, MN
Permit No. 90155



SILHA CENTER
FOR THE STUDY OF MEDIA ETHICS & LAW
SCHOOL OF JOURNALISM
& MASS COMMUNICATION

THE 29TH SILHA LECTURE

SEE NO EVIL: Why We Need a New Approach to Government Transparency



FEATURING DAVID A. SCHULZ

- > Partner, Levine Sullivan Koch & Schulz, LLP
- > Co-director of the Media Freedom & Information Access Clinic at Yale University Law School
- > Counsel to the Associated Press, The New York Times, The Guardian, and other investigative news organizations

OCTOBER 6, 2014 AT 7:00PM

COWLES AUDITORIUM

UNIVERSITY OF MINNESOTA,
WEST BANK, TWIN CITIES
CAMPUS

FREE & OPEN TO THE PUBLIC;
RESERVATIONS NOT REQUIRED

On the 25th anniversary of *Department of Justice v. Reporters Committee*, David A. Schulz, a leading advocate for press access and the public's right to know, explores the judicial and bureaucratic debilitation of the landmark Freedom of Information Act since 9/11 and the urgent need to broaden and enforce the First Amendment right of access to government proceedings and records.

The discussion will consider the untapped potential of the constitutional access right and the role of the press in illuminating issues ranging from "secret law" articulated by the Foreign Intelligence Surveillance Court, to plans to prevent Guantanamo detainees from testifying publicly at their own trials, to a state's ability to hide lethal injection formulas used for executions.



SILHA CENTER
FOR THE STUDY OF MEDIA ETHICS & LAW
SCHOOL OF JOURNALISM
& MASS COMMUNICATION
COLLEGE OF LIBERAL ARTS
UNIVERSITY OF MINNESOTA