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NSA Telephony Metadata Collection Program Remains Controversial Even After It Ends

On Nov. 29, 2015, *The Washington Post* reported that the National Security Agency (NSA) ended its controversial program that collected Americans' telephony metadata records. The end of the bulk collection program, which the NSA had justified under Section 215 of the USA PATRIOT Act, 115 Stat. 272 (2001), came after Congress passed the USA Freedom Act, Pub. L. No. 114-23 (2015), in June 2015. The 2015 law adopted new requirements that all metadata records remain under the control of telecommunications companies but allowed national security officials to access the records after obtaining a court order from the Foreign Intelligence Surveillance Act (FISA) Court. The USA Freedom Act also permitted a six-month transition period for the NSA to prepare for the collection program's end. (For more information about the NSA's widespread surveillance, see "Fallout from NSA Surveillance Continues One Year after Snowden Revelations" in the Summer 2014 issue of the Silha *Bulletin*, "Government Surveillance Critics Target Broad Authority of Executive Order 12333" in the Fall 2014 issue, and "Two Years After Snowden Revelations, National Security Surveillance Issues Still Loom" in the Summer 2015 issue.)

In its final months, the NSA's bulk collection program remained controversial. On Aug. 28, 2015, the United States Court of Appeals for the District of Columbia Circuit ruled that lawyer and privacy-activist Larry Klayman, as well as additional plaintiffs, lacked standing to challenge the NSA's ability to collect bulk telephone metadata under Section 215 of the USA PATRIOT Act. *Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. Aug. 28, 2015). In a *per curiam* opinion, the three-judge panel lifted a federal district court's preliminary injunction issued in 2013 by District Judge Richard J. Leon, who had stayed the injunction pending appeal. *Klayman v. Obama*, 957 F.Supp.2d 1 (D.D.C. 2013). (For more information on the injunction, see the section *U.S. District Courts Disagree on Constitutionality of NSA Metadata Program* in "NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches" in the Winter/Spring issue of the Silha *Bulletin*). The *per curiam* opinion noted that the case was remanded to the district court for further proceedings under the reasons found in separate opinions filed by Circuit Judge Janice Rogers Brown and Senior Circuit Judge Stephen F. Williams. Senior Circuit Judge David B. Sentelle dissented in the decision to remand, arguing that he would have ordered the case to be dismissed.

In the separate opinions, all three judges on the panel agreed that the plaintiffs had not sufficiently demonstrated that the NSA had actually collected their telephony metadata. "The record, as it stands in the very early stages of this litigation, leaves some doubt about whether plaintiffs' own metadata was collected," Judge Brown wrote. Judge Williams added, "Plaintiffs claim to suffer injury from government collection of records from their telecommunications provider relating to their calls. But plaintiffs are subscribers of Verizon Wireless, not of Verizon Business Network Services, Inc. — the sole provider that the government has acknowledged targeting for bulk collection."

The judges also doubted whether the plaintiffs would be successful in their litigation against the NSA, meaning that an injunction was not justified. Judge Williams wrote that the plaintiffs had "failed to demonstrate a 'substantial likelihood' that the government is collecting from Verizon Wireless or that they are otherwise suffering any cognizable injury. They thus cannot meet their burden to show 'likelihood of success on the merits' and are not entitled to a preliminary injunction."

Despite the lifting of the injunction, two of the judges were not ready to bar Klayman's lawsuit from moving forward. In her opinion, Judge Brown argued that the case should be remanded in order to gather further information. "On remand it is for the district court to determine whether limited discovery to explore jurisdictional facts is appropriate," she wrote. Judge Williams agreed with the decision to remand, writing, "It remains possible that on remand plaintiffs will be able to collect evidence that would establish standing." Judge Williams noted that the plaintiffs had submitted a motion to depose an NSA employee, but the lower court denied it as moot because the injunction was already in place. "Given the possibility that plaintiffs' efforts along these lines may be fruitful, I join Judge Brown in remanding to the district court for it to decide whether limited discovery to explore jurisdictional facts is appropriate."

Following the D.C. Circuit Court of Appeals' decision to lift the preliminary injunction, privacy advocates expressed disappointment over the appellate court's decision to overturn the preliminary injunction against the NSA's bulk collection program. "The U.S. Court of Appeals for the D.C. Circuit's opinion today in *Klayman v. Obama* is highly disappointing and, worse, based on a mistaken concern about the underlying facts. The court said that since the plaintiffs' phone service was provided by one subsidiary of Verizon — Verizon Wireless — rather than another — Verizon Business — they couldn't prove that they had standing to sue," Electronic Frontier Foundation (EFF) Executive Director Cindy Cohn wrote in an August 28 post on the organization's *Deeplinks* blog. "The court declined to consider the critically important questions of

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whether the U.S. Constitution allows the government to secretly shift from targeted to mass surveillance of the telephone calls (and associations) of Americans. … The court thus joined the government in requiring that one challenging the mass collection perform an almost impossible task — proving the still secret details of an admitted mass surveillance program in order to have a court determine whether it is constitutional."

In a separate case challenging the constitutionality of the NSA program, an Oct. 29, 2015 decision from the U.S. Court of Appeals for the Second Circuit rejected a request of the American Civil Liberties Union (ACLU) that the NSA end the program immediately rather than on November 29. *ACLU v. Clapper*, No. 14-42-cv, 2015 U.S. App. Lexis 18862 (2d Cir. 2015). Although the Second Circuit Court of Appeals had previously ruled that the program was not authorized under Section 215 of the USA PATRIOT Act in May 2015, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), Circuit Judge Gerard E. Lynch, writing for a three-judge panel, denied the ACLU's request for a preliminary injunction, determining that "[a]n abrupt end to the program would be contrary to the public interest in effective surveillance of terrorist threats, and Congress thus provided a 180-day transition period. Under the circumstances, we will defer to that reasonable decision." In denying the request, the court noted that any injunction would "be limited to the time before November 29 … and would require resolving momentous Constitutional issues."

COVER STORY

However, the NSA faced further challenges on Nov. 9, 2015 when Judge Leon issued a new order in *Klayman v. Obama* on remand from the D.C. Circuit Court of Appeals, granting another preliminary injunction barring the program from continuing to collect metadata. *Legal Times* reported on Sept. 2, 2015 that during a September preliminary hearing, Judge Leon had advised Klayman to consider amending his lawsuit by adding Verizon Business Service customers as plaintiffs to address the D.C. Circuit Court of Appeals' concerns about the plaintiffs' lack of standing. Judge Leon also suggested that Klayman make requests to the appellate court to expedite its mandate from the August 29 decision to allow the federal district court to begin addressing the court of appeal's concerns immediately. "This court believes … that there are millions, millions of Americans whose constitutional rights have been and are being violated," Leon said during the hearing, according to the *Legal Times*. "The window that's now running for action is small, in the world of law." The D.C. Circuit Court of Appeals later expedited the mandate. Klayman also amended his lawsuit to add plaintiffs J.J. Little and his law firm J.J. Little & Associates, P.C., who were customers of Verizon Business Services.

In the November 9 order, Judge Leon concluded that the D.C. Circuit Court of Appeals' requests for further discovery was not necessary as the added plaintiffs likely had standing to challenge the constitutionality of the NSA's metadata collection program. As a result, he enjoined the NSA from any future collection or searching of J.J. Little's metadata records, finding that the plaintiffs had shown a substantial likelihood of success on the claims that the NSA's program had violated their Fourth Amendment rights that protect individuals from unreasonable searches. Additionally, Judge Leon refused to stay his order pending appeal. "In my December 2013 Opinion, I stayed my order pending appeal in light of the national security interests at stake and the novelty of the constitutional issues raised. I did so with the optimistic hope that the appeals process would move expeditiously," Judge Leon wrote in the November 9 order. "However, because it has been almost two years since I first found that the NSA's Bulk Telephony Metadata Program likely violates the Constitution and because the loss of constitutional freedoms for even one day is a significant harm, … I will not do so today." The full text of Judge Leon's order is available at http://pdfserver.amlaw.com/nlj/NSA_klayman_20151109.pdf.

In a Nov. 10, 2015 blog post on *The Volokh Conspiracy*, Orin Kerr, the Fred C. Stevenson Research Professor at The George Washington University Law School, wrote that although the injunction was limited to the records of J.J. Little and his law firm, the order created a significant problem for the NSA. "Formally speaking, Judge Leon's remedy is narrow. It only involves the records of J.J. Little and his law firm," Kerr wrote. "But the government has claimed that because of the way the program is designed, it can't comply with a limited injunction like the one Judge Leon issued without shutting down the program entirely."

However, Kerr noted in subsequent updates to his original post that the D.C. Circuit Court of Appeals granted an emergency motion on November 10 for a stay of Judge Leon's order. *Politico* reported on Nov. 16, 2015 that the appellate court issued another order dissolving the emergency stay and creating a more permanent stay pending appeal without providing an explanation for its decision. The stay pending appeal would allow the NSA's bulk collection program to continue unfettered until the planned November 29 end, according to *Politico*.

On November 27, *The Washington Post* reported that the end of the NSA's bulk collection program did not necessarily mean that all of the records it held would also be deleted. According to the *Post*, the NSA had filed a request with the FISA Court that the agency be allowed to access historical metadata records until Feb. 29, 2016. In a November 27 press release, the Office of the Director of National Intelligence (ODNI) explained that the access to the historical records would be "limited to technical personnel and solely for the purpose of verifying that the new targeted production mechanism authorized by the USA FREEDOM Act is working as intended." The ODNI also noted that it believed the NSA was obligated to retain any metadata collected under Section 215 of the USA PATRIOT Act that was related to pending civil litigation. The metadata would be deleted upon resolution of the litigation, according to the press release.

Despite the program's end on November 29, many privacy advocates noted that further efforts must be taken to curb the U.S. government surveillance. In a November 30 post on the EFF's *Deeplinks* blog, EFF Civil Liberties Director David Greene and Activist Nadia Kayyali wrote that other programs continued to collect Americans' communications. "USA FREEDOM and the phase-out of the old mass collection of call records does not end unwarranted bulk surveillance. It is still going on with respect to other communications media and under the alleged authority of other laws. We continue to challenge the collection being conducted under Section 702 of the FISA Amendments Act and Executive Order 12333 next. Under 702, the government has siphoned communications directly from tech companies and the key infrastructure of the Internet and worse. Executive Order 12333 is supposed to protect Americans from Presidentially-directed spying; however, despite the protections, it is being used for mass spying that collects Americans' communications, address books, and other information," they wrote. "So as we mark a milestone in section 215 reform, we call again for substantial reform of 702 and 12333. And as a first step in that reform, the government must make the details of programs conducted under these authorities public."

Casey Carmody
Silha *Bulletin* Editor

Federal Courts Hand Down Major Copyright Decisions in High Profile Cases

Several major copyright decisions occurred in the fall of 2015. The United States Court of Appeals for the Ninth Circuit set new precedent by ruling that copyright owners must first consider "fair use" before issuing takedown notices under the Digital Millennium Copyright Act (DMCA). The United States Court of Appeals for the Eleventh Circuit rejected Raanan Katz' attempt to use copyright law to censor a photograph. A U.S. District Court determined that Warner/Chappell's copyright for the lyrics to "Happy Birthday to You" is invalid, and the United States Court of Appeals for the Second Circuit concluded that Google Books, a program that makes digital copies of copyrighted books, is a fair use of these works. The decisions all highlighted the growing complexity of applying the Copyright Act, especially in the digital media environment.

COPYRIGHT

Ninth Circuit Rules that Copyright Holders Must Consider Fair Use Prior to Issuing DMCA Takedown Notices

On Sept. 14, 2015, the United States Court of Appeals for the Ninth Circuit set new precedent for a copyright owners' ability to issue takedown notices under the Digital Millennium Copyright Act (DMCA). 17 U.S.C. § 512. The unanimous three-judge panel ruled that copyright holders must first consider "fair use" before issuing takedown notices to services like YouTube to remove videos that include copyrighted content. *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

In February 2007, Pennsylvania mother Stephanie Lenz posted a 29-second video to YouTube featuring her toddler dancing to musical artist Prince's "Let's Go Crazy." In June of that year, Prince's publishing administrator, Universal Music (Universal), included Lenz's video among hundreds of others as part of a takedown notice to YouTube, arguing that Prince's composition was the focus of the video and used without authorization. Once the notice was received, YouTube immediately suspended the video from its platform.

As required by Copyright Act 17 U.S.C. § 512(c)(3)(A)(v) the takedown notice included a statement that Universal had a "good-faith belief" that use of the composition was not authorized "by the copyright owner, its agent, or the law." However, Section 512(f) states that issuing notices without such a good faith belief could lead to potential consequences including liability "for any damages, including costs and attorney's fees incurred by the alleged infringer." Lenz contested the removal of her video and filed suit against Universal alleging, in part, that Universal "knowingly materially misrepresent[ed]" that her video was infringing content, and was thus in violation of Section 512(f). Lenz and Universal each filed motions for summary judgment, which the district court denied on Aug. 20, 2008.

> "[The Digital Millennium Copyright Act] requires copyright-holders to consider fair use before sending a takedown notification, and those that fail to do so can be held liable for damages."
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> **— Judge Richard Tallman, United States Court of Appeals for the Ninth Circuit**

On appeal, the Ninth Circuit affirmed the district court's denials of summary judgment, ruling that as part of the good faith belief requirement, a copyright owner must also consider whether such use of the copyrighted content would amount to "fair use" of the work; therefore making it eligible to be legally posted. Fair use, which is codified as Section 107 of the Copyright Act, includes journalistic accounts and criticism, educational uses for teaching or research, and brief, private postings that do not damage the commercial market for the work. The law "requires copyright-holders to consider fair use before sending a takedown notification, and those that fail to do so can be held liable for damages," wrote Judge Richard Tallman, who authored the majority opinion for the three-judge panel.

As considering fair use often involves a balancing of subjective factors, many have argued that this newly-clarified requirement may make it logistically more difficult and time consuming for copyright owners to evaluate whether a use of their content online actually qualifies for takedown notices. In a September 14 interview with *The New York Times*, Recording Industry Association of America spokesman Jonathan Lamy said, "We respectfully disagree with the court's conclusion about the D.M.C.A. and the burden the court places upon copyright holders before sending takedown notices."

However, acknowledging the "pressing crush of voluminous infringing content that copyright holders face in a digital age," the Ninth Circuit panel offered that a copyright holder's consideration of fair use "need not be searching or intensive" and "does not require investigation of the allegedly infringing conduct." Lenz's lawyer, Corynne McSherry of the Electronic Frontier Foundation (EFF), a digital rights advocacy group, argued in a September 14 press release that the ruling sends a strong message that copyright law does not authorize thoughtless censorship of lawful speech. "Congress gave copyright-holders extraordinary power to send an e-mail and take content offline," McSherry said in the statement. "With that kind of power comes responsibility to consider whether the posting was authorized."

***11th Circuit Decides* Katz v. Google**

On Sept. 17, 2015, the U.S. Court of Appeals for the 11th Circuit rejected Raanan Katz's attempt to use copyright law to censor a photograph. The court found that blogger Irina Chevaldina's use of the photo was "fair use" and did not infringe Katz's copyright. *Katz v. Google Inc.*, 2015 WL 5449883 (11th Cir. Sept. 17, 2015).

Raanan Katz is a commercial real estate tycoon and minority investor in the Miami Heat basketball team. In February 2011, commercial photographer Seffi Magriso, took Katz's photograph while he was standing courtside at a basketball

practice in Jerusalem. The candid photo shows Katz with his tongue sticking out, and in Katz's opinion, is "ugly, embarrassing and compromising." The photo was originally published in the Israeli newspaper *H'aaretz* on Feb. 22, 2011.

From May 3, 2011 to Sept. 24, 2012, one of Katz's disgruntled former tenants, Irina Chevaldina, published 25 blog posts that reproduced the photo of Katz along with critical remarks about the tycoon. Chevaldina reproduced the photo in her blog posts in three ways: (1) copied in its unaltered, original state; (2) accompanied by sharply worded captions; or (3) cropped and pasted into mocking cartoons. On June 3, 2012, Magriso assigned all of his rights in the photo to Katz. Katz then filed a complaint against Chevaldina alleging direct copyright infringement in an attempt to restrict use of the photo.

On May 11, 2015, the EFF filed an *amicus* brief arguing that First Amendment principles and values support Chevaldina's use of the photo. The brief pointed to an increasing trend in recent years: plaintiffs "abusing intellectual property law to do things it was never intended for, such as censoring criticism or suppressing information."

In a *per curiam* decision, a three-judge panel for the 11th Circuit concluded that Chevaldina's use of the photograph constituted fair use. "Every use of the photo on the blog was of a primarily educational, rather than commercial character ... to warn and educate others about [Katz's] alleged nefariousness," the opinion stated. In addition, the panel concluded that her use of the photo was to "ridicule and satirize his character." The court also highlighted that Katz had acquired the copyright "as an instrument of censorship against unwanted criticism," not for the purpose of commercially exploiting himself.

Chevaldina's attorney told *Forbes* writer Eric Goldman on September 21 that the decision will hopefully "give pause to those, like Mr. Katz, who want to use their wealth, the legal system in general, and copyright law in particular, to suppress criticism of them."

Happy Birthday Song Ruled to Be in the Public Domain

On Sept. 22, 2015, U.S. District Court judge George H. King determined that Warner/Chappell's copyright for the lyrics to "Happy Birthday to You" is invalid. King ruled that the copyright, which was originally filed by the Clayton F. Summy Co. in 1935, applied only to a specific arrangement of the song, and not the lyrics. *Rupa Marya, et al. v. Warner/Chappell*, 2015 U.S. Dist. LEXIS 129575 (C.D. Cal. Sept. 22, 2015).

According to the ruling, sisters Patty and Mildred Hill allegedly wrote "Happy Birthday" in 1893 and assigned the rights to Clayton F. Summy Co. who later registered the copyright in 1935. In 1988, Warner/Chappell paid $25 million to acquire Birch Tree Ltd., a small, Summy-founded company whose musical holdings allegedly included the "Happy Birthday To You" song. According to court documents, Warner/Chappell collected at least $1,500 in licensing fees from those wishing to use the song, or demanded $150,000 in maximum statutory damages for its unauthorized use. Accordingly, Warner/Chappell reported roughly $2 million per year in royalties from licensing "Happy Birthday To You."

> "Congress gave copyright-holders extraordinary power to send an e-mail and take content offline. With that kind of power comes responsibility to consider whether the posting was authorized."
>
> **— Corynne McSherry, Legal Director for the Electronic Frontier Foundation**

In August 2013, documentary filmmaker Jennifer Nelson filed a class action lawsuit seeking a court to declare the song open for public use and in the public domain. She brought the case after she was told she would have to pay $1,500 for a licensing agreement with Warner/Chappell. "Before I began my filmmaking career," Nelson said in a June 13, 2013 e-mail to *The New York Times*. "I never thought the song was owned by anyone. I thought it belonged to everyone."

In its decision, the court made a critical distinction between the music and lyrics as copyrightable elements for "Happy Birthday To You." Both parties agreed that the "Happy Birthday To You" melody was borrowed from a different song, "Good Morning to All," which was also penned by the sisters and had already passed into the public domain decades ago. However, the parties disagreed about the status of the lyrics. Warner/Chappell contended that the 1935 copyright registration of "Happy Birthday to You" by Summy Co. covered both the piano arrangement as well as the nearly universally known lyrics. However, plaintiffs alleged that the lyrics were published several times between 1901 and 1928 and the copyright certificates listed other authors, not the Hill sisters.

In his decision, King ruled that it was "unclear" whether the 1935 copyright registration included lyrics to the song in addition to a piano arrangement. "Defendants ask us to find that the Hill sisters eventually gave Summy Co. the rights in the lyrics to exploit and protect, but this assertion has no support in the record. The Hill sisters gave Summy Co. the rights to the melody, and the rights to piano arrangements based on the melody, but never any rights to the lyrics," Judge King wrote. Furthermore, the judge noted that the 1935 registration listed "Preston Ware Orem" as the author even though nobody believes Orem to have written the lyrics. Judge King determined that the copyright registration of "Happy Birthday to You" was "flawed," and thus invalid.

Without the court's judgment, the lyrics would not have been freely available in the public domain in the United States until 2030. "Happy Birthday is finally free after 80 years," said the plaintiffs' attorney Randall Newman on September 23, according to *The Guardian*. "Finally, the charade is over. It's unbelievable."

Newman may have spoken too soon, however, as the battle may be far from over. On Oct. 15, 2015, Warner/Chappell filed a motion for Judge King's reconsideration of his decision and as an alternative, has requested permission to file an immediate appeal. In addition, even if the court upholds its decision, the case will continue in order to determine whether Warner/Chappell will be forced to return millions of dollars of invalid licensing fees to those who paid for the pleasure of using "Happy Birthday To You."

Big Win for Google Books

After a decade of litigation in *Authors Guild v. Google*, the United States Court of Appeals for the Second Circuit handed Google a clear victory on Oct. 16, 2015,

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by rejecting the Authors Guild's claim that the Google Books Project infringes authors' copyrights. 804 F.3d 302 (2d Cir. 2015). The court found that by allowing a user to search for individual works or key terms and then view a few paragraphs of the resulting book is a "highly transformative" use of authors' books and, therefore, is a "fair use" under the 1976 Copyright Act.

In 2004, Google began its Google Books project, which involved the creation of digital copies of more than 20 million books without the permission of the books' copyright holders. Google Books provided a brief description of each book, including a list of the words and terms that appear most frequently within the book as well as occasionally providing a link to buy the book online or identifying the locations of libraries where the book can be found. The search function of Google Books allowed users to enter search words or terms that produced a list of all books in the database in which those terms appear, as well as the number of times the term appeared in each book. The search function also displayed a maximum of three "snippets" containing the word or term that a user queried. This "snippet" view was designed to show users enough context information surrounding the searched term in order to help the evaluate whether the book falls within the scope of their interest while also limiting the amount of information revealed so that an author's copyright is not threatened.

On Sept. 20, 2005, the Authors Guild filed a putative class action against Google arguing that the above activities infringed their copyrights. Google countered that its actions constitute "fair use" under Section 107 of the Copyright Act and are therefore not an infringement. On Nov. 14, 2013, the United States District Court for the Southern District of New York granted Google's motion for summary judgment, holding that Google's actions did in fact constitute fair use. The plaintiffs appealed the ruling. (For more information on the district court's ruling, see "Copyright Decisions Emphasize the Broad Protections of the Fair Use Doctrine in Infringement Cases" in the Fall 2013 issue of the Silha *Bulletin*.)

The Second Circuit three-judge panel affirmed the district court's ruling, explaining that Google's use increases public knowledge by making information about the plaintiffs' books available without providing the public with a substantial amount of the book protected by the plaintiffs' copyright. Writing for the majority, Judge Pierre Leval explained that "While authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public."

> "Most full-time authors live on the edge of being able to keep writing as a profession, as our recent income survey showed; a loss of licensing revenue can tip the balance. ... We are very disheartened that the court was unable to understand the grave impact that this decision, if left standing, could have on copyright incentives and, ultimately, our literary heritage."
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> **— Mary Rasenberger, Executive Director, Authors Guild**

Under Section 107, the Copyright Act sets out four factors to consider when trying to determine whether a use is fair and thus does not infringe copyright: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C §107. In determining whether the purpose and character of the use of Google Books would fall under fair use, the Court focused on whether the book search was "transformative" or "added something new, with a further purpose."

The Second Circuit ruled, "We have no difficulty concluding that Google's making of a digital copy of Plaintiffs' books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose," and thus qualifies as fair use.

Readers and researchers have praised the ruling, arguing that by upholding Google's programs as fair use, the court emphasized that the aim of copyright is intended to promote progress in the arts and sciences for public intellectual benefit. In an October 16 post on the EFF's *Deeplinks* blog, McSherry wrote, "Google Books has become an extraordinarily valuable tool for librarians, scholars, and amateur researchers of all kinds. It also generates revenue for authors by helping them reach new audiences."

The Authors Guild published a statement on October 16 insisting that the decision leaves writers "high and dry" and saying that it will seek review from the Supreme Court. In the statement, Authors Guild Executive Director Mary Rasenberger said, "Most full-time authors live on the edge of being able to keep writing as a profession, as our recent income survey showed; a loss of licensing revenue can tip the balance. … We are very disheartened that the court was unable to understand the grave impact that this decision, if left standing, could have on copyright incentives and, ultimately, our literary heritage."

Sarah Wiley
Silha Research Assistant

Judicial Redress Act the Next Step in a Replacement of EU-US Safe Harbor Framework; Controversial Cybersecurity Information Security Act Passes the Senate

Data security issues highlighted recent federal legislative updates, especially in the wake of the invalidation by the European Court of Justice (CJEU) of the EU Safe Harbor Framework governing transatlantic data flows. Legislative updates included the House's approval of the Judicial Redress Act, which could have extensive implications in light of the invalidation, and the Senate's advancement of the controversial Cybersecurity Information Sharing Act of 2015.

FEDERAL LEGISLATIVE UPDATE

House Approves Judicial Redress Act in the Face of Growing Concern Over the Security of EU-US Data Flows

In 2013, European Union (EU) officials and political leaders expressed significant concerns following former National Security Agency (NSA) contractor Edward Snowden's disclosures about widespread U.S. spying. In response, the European Commission set out a series of recommendations in November 2013 aimed toward rebuilding trust in EU-US data transfers. The full report, titled "Rebuilding Trust in EU-US Data Flows," can be found at http://ec.europa.eu/justice/data-protection/files/com_2013_846_en.pdf. The Commission, which has authority over commercial entities and law enforcement in the area of data protection, laid out two main initiatives. The first was to revise the EU Safe Harbor Framework, which governed transfers of personal data between the European Union and United States, and the second was the adoption of the so-called "Umbrella Agreement," which the Electronic Privacy Information Center (EPIC) described in a Nov. 4, 2015 blog post as an agreement meant to establish standards related to protections for international personal information data transfers for law enforcement purposes. Negotiations between the United States and EU about the terms of the agreement had initially begun in 2011.

On Sept. 8, 2015, European Union Commissioner for Justice, Consumers and Gender Equality Vera Jourová announced in a press release that the EU and United States had finalized negotiations on the "Umbrella Agreement." In an October 5 blog post, Center for Democracy and Technology (CDT) Representative and Director for European Affairs Jens-Henrik Jeppesen and CDT Senior Counsel and Freedom, Security and Technology Project Director Greg Nojeim noted that European officials would not formally sign and implement the agreement until European citizens could seek judicial redress — the legal relief or remedy for a wrong — for misuse of personal data. In March 2015, Rep. Jim Sensenbrenner (R-Wis.) and Rep. John Conyers (D-Mich.) introduced H.R. 1428, better known as the Judicial Redress Act of 2015 (Act), to address EU officials' concerns. The proposed bill would allow the U.S. Department of Justice to identify foreign countries whose citizens could bring civil actions against the government under the Privacy Act of 1974, 5 U.S.C. § 552a, if government officials mishandle personal data.

> "European law already provides redress rights for U.S. citizens, but U.S. law has to be updated to provide this redress for European citizens. The Judicial Redress Act will help restore public confidence in transatlantic data flows, which are vital for the continued economic growth of the U.S."
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> **— Mark MacCarthy, Senior Vice President for Public Policy of the Software and Information Industry Association**

However, EU-US data flows became much more complicated on Oct. 6, 2015 when the Court of Justice of the European Union (CJEU) struck down the US-EU Safe Harbor Framework, which had governed trans-Atlantic data transfers between the United States and European Union for nearly fifteen years. According to an October 6 story by *TechCrunch*, nearly 4,700 companies had used the Safe Harbor framework to self-certify that their outsourcing of EU citizens' personal data to United States processors provided adequate protections under the EU Data Protection Directive. Council Directive 95/46/EC, 1995 O.J. (L 281). Support for the Judicial Redress Act grew exponentially following the CJEU's ruling primarily because the CJEU cited the lack of adequate judicial redress in its decision as a reason for striking down the framework. Case C-362/14, *Maximilian Schrems v. Data Privacy Commissioner*, ECLI:EU:C:2015:650 (Oct. 6, 2015), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd2572f1740b454f319357fee208291fe2.e34KaxiLc3qMb40Rch0SaxuRchj0?text=&docid=169195&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=346076.

"European law already provides redress rights for U.S. citizens, but U.S. law has to be updated to provide this redress for European citizens," wrote Mark MacCarthy, the Senior Vice President for Public Policy of the Software and Information Industry Association, an organization to which many international data processing companies belong, in a Nov. 3, 2015 article in *The Hill*. "The Judicial Redress Act will help restore public confidence in transatlantic data flows, which are vital for the continued economic growth of the U.S."

On Oct. 20, 2015, the House of Representatives passed the Judicial Redress Act on a voice vote. In the October 5 blog post, Jeppesen and Nojeim suggested that the bill had several positive provisions in addition to extending the Privacy Protection Act's provisions to European citizens. They noted that the bill included mandates allowing individuals to access, review, and request correction of information collected on them by a federal agency; restrictions on government officials' access to data without consent; and provisions that create criminal and civil penalties in the event of violation. However, the public policy

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experts also argued that the proposed bill was not without its pitfalls.

"The Privacy Act does not extend to much of the classified data collected by U.S. intelligence agencies, meaning it is likely not the most effective tool for controlling the flow of personal information collected by U.S. secret surveillance activities, or enabling a person to learn whether such surveillance has impacted [him or her]," wrote Jeppesen and Nojeim. "While it covers sensitive personal information such as health, criminal, and financial information, it is also riddled with exceptions, and agencies apply it in ways that limit its effectiveness … [and so] even when it applies, Privacy Act protections are limited."

The Act also grants authority to the Attorney General to add or remove nations from the list of covered countries, depending on whether the country complies with the Umbrella Agreement and whether it is "effectively" sharing data or "imped[ing] the transfer of information (for purposes of reporting or preventing unlawful activity) to the United States by a private entity of person." As Jeppesen and Nojeim noted, this gives the Department of Justice the ability to threaten non-compliant countries, and as privacy and data security attorney Courtney Bowman noted in a Sept. 28, 2015 post on Proskauer's *Privacy Law Blog*, this authority gives the Attorney General the leeway to add non-EU countries in the future.

In an Oct. 20, 2015 press release, Rep. Sensenbrenner and Rep. Conyers along with Rep. Robert Goodlatte (R-Va.) called for the U.S. Senate to move quickly on adopting the Judicial Redress Act. "Today's bipartisan passage of the Judicial Redress Act will help restore our allies' faith in U.S. data privacy protections and helping facilitate agreements, such as the Data Protection and Privacy Agreement, that strengthen our trans-Atlantic partnerships with Europe," the representatives wrote. "This bill benefits not only our own law enforcement, but is a sign of good faith to our partners abroad. We are pleased with the resounding bipartisan support that has been shown for this measure by our colleagues, and urge the Senate to take up this measure as quickly as possible."

As the *Bulletin* went to press, the bill had been introduced in the United States Senate and was under consideration by the Senate Committee on the Judiciary.

Amid Criticism, U.S. Senate Pushes Forward with Cybersecurity Information Sharing Act of 2015

On Oct. 27, 2015, the United States Senate passed S.B. 754, the Cybersecurity Information Sharing Act of 2015 (CISA), by a vote of 74-21. The bill aims to encourage the sharing of information related to cybersecurity threats among private entities as well as between private entities and the government. The full text of the bill is available at https://www.congress.gov/bill/114th-congress/senate-bill/754. CISA allows these entities to share "cyber threat indicators" and "defensive measures" consistent with "cybersecurity purpose[s]." The bill has been widely criticized by privacy experts and attorneys alike. In a Nov. 2, 2015 blog post on *Data Protection Report*, Norton Rose Fulbright attorneys Boris Segalis and Kathryn Linsky wrote that the bill grants protections for participating bodies with proper authorization, including private entities, to monitor the information systems of other organizations. The bill also bars any causes of action against these entities for the monitoring of information that is in accordance with CISA's provisions. Further, it allows federal agencies and departments to share data with one another, including exchanging data with the Federal Bureau of Investigation or National Security Agency.

> "While it's important for the public and private sector to share relevant data about emerging threats, that type of collaboration should not come at the expense of users' privacy."
>
> **— Amber Cottle, Head of Global Public Policy and Government Affairs for Dropbox**

Opponents of CISA argued that the bill exposes individuals' data to a multitude of parties, while stripping them of privacy rights by not allowing them to opt-out of the monitoring. In an Oct. 26, 2015 open letter to U.S. Senators, 21 cybersecurity professors called for the Senate to reject CISA. The authors criticized the bill for doing little to effectively address the cybersecurity challenges affecting U.S. industry, while pointing out three principal problems: first, that CISA would allow "secret and ad hoc privacy intrusions" by giving federal agencies the ability to access previously private information on individuals without fear that such access would be known to those whose information was exposed; second, that companies would be permitted to attack cybersecurity threats without obvious limitations on scope; and finally, that companies would be allowed to act without fear of legal consequence for poor judgment "or worse." The full letter is available at https://www.elon.edu/e/CmsFile/GetFile?FileID=202.

On October 20, *The Washington Post* reported that several high-profile tech companies, including Dropbox, Apple, Yelp, Twitter, and the Wikimedia Foundation, had announced prior to the Senate's vote that they would not participate in CISA-supported monitoring if the bill becomes law. The companies argued that the bill would expose consumers' personal data in a way that would undermine many of their corporate missions. "While it's important for the public and private sector to share relevant data about emerging threats, that type of collaboration should not come at the expense of users' privacy," Amber Cottle, head of global public policy and government affairs for Dropbox, told the *Post*.

Earlier in 2015, the U.S. House of Representatives passed legislation similar to CISA, the Protecting Cyber Networks Act (H.R. 1560) and the National Cybersecurity Protection Advancement Act of 2015 (H.R. 1731). These bills are available at https://www.congress.gov/bill/114th-congress/house-bill/1560/text and https://www.congress.gov/bill/114th-congress/house-bill/1731/text, respectively. CISA awaits Congressional reconciliation with these bills before they can be sent to President Barack Obama to be signed in to law. Several experts, including Segalis and Linsky, have argued that if the bill does reach President Obama's desk, CISA is likely to become law.

Dillon White
Silha Research Assistant

News Organizations Grapple with Showing Depictions of Drowned Syrian Toddler

MEDIA ETHICS

On Sept. 2, 2015, Turkey's Dogan News Agency published a photo of a drowned 3-year-old boy who washed ashore on a Turkish beach after a boat carrying his family sank off the coast. The boy's family was fleeing Syria, which has been mired in a years-long civil war resulting in a major refugee crisis in Europe. That same day, *Washington Post* reporter Liz Sly used Twitter to share the picture, which quickly gained worldwide attention as it spread across social media platforms when users shared the image of the boy along with a different photo of a Turkish police officer carrying the child's body away from the shore. In covering the international refugee crisis in Europe and Syria, news organizations reporting on the story found themselves confronted with ethical challenges over whether they should publish the graphic images of the dead child. The photographs also sparked discussions over the power that images could have in shaping newsworthy topics.

In a September 2 column for *The New York Times*, Robert Mackey wrote that reporters, human rights activists, and global leaders had shared the image of the drowned Syrian toddler, who was later identified as Aylan Kurdi, to illustrate the ongoing war in Syria and to criticize European leaders for failing to act. According to the *Times*, Peter Bouckaert, emergency director for Human Rights Watch, shared the picture on Twitter, writing, "Drowned #SyrianRefugees washing up on #Turkey Bodrum beach today, #EU plans 2 meet on crisis in…12 days! #inaction." As the photo continued to spread online, Twitter users began to use "#KiyiyaVuranInsanlik," a Turkish hashtag meaning "humanity washed up ashore," to bring greater attention to the photo. However, the *Times* reported that other Twitter users began to question the ethics of choosing to share the graphic image of a dead child. "Hard to be online anymore. Respect the dead. Find out their name, origin, struggle, story anything but please respect the sacred bodies," wrote one Twitter user named Dima S., according to the *Times*. "For God's sake, now I see memes on [Facebook] of the little boy on the shore with some cheap sentimental lines attributed to it. Disgusting."

News organizations were also confronted with ethical questions over whether they should publish the pictures of the child's body on the shore. In a September 3 post on journalism think tank Poynter Institute's website, staff reporter Kristen Hare wrote that Poynter's chief ethicist Kelly McBride and senior faculty Al Tompkins suggested that news organizations often need to find a balance between publishing disturbing images and reporting on important world issues. "Sometimes it's gratuitous for the media to show images of death," McBride said. "But sometimes it's absolutely the most responsible thing journalists could do. Europe is in the midst of a dramatic, historical moment that will forever alter its future. The migration of refugees from the Middle East will change the continent's identity. This image of this drowned Syrian boy is about so much more." Tompkins further explained, "A single death, especially when it is a child, focuses our attention in ways that groups of despairing adults may not."

In its September 2 story, the *Times* reported that news organizations took varying approaches to the photos. Several organizations, including the *Times*, *The Wall Street Journal*, and the *Baltimore Sun*, published the photo of the police officer on a page inside the paper rather than on the front page. In a Sept. 3, 2015 story, National Public Radio (NPR) reported that other American news outlets chose to intentionally shift the focus from the images themselves to stories about the child's life and family. However, Keith Jenkins, *National Geographic*'s general manager for digital content, told NPR that creating such a shift was difficult. "For a lot us in the media, that moment of the first telling of that story is something that we don't control anymore," Jenkins said. "It spreads much quicker through various social media channels than we can catch up to."

Other American news organizations refused to publish the photos because the images had already permeated social media platforms, according to the *Times*' September 2 story. *Vox* editorial director Max Fisher explained that he declined to publish the pictures because he was worried that people were more interested in voyeurism rather than compassion. "I understand the argument for running the photo as a way to raise awareness and call attention to the severity of the refugee crisis, and I don't begrudge outlets that did," Fisher wrote in an e-mail to the *Times*. "[B]ut ultimately I decided against running it because the child in that photo can't consent to becoming a symbol."

The *Times* noted that both *The Washington Post* and the *Los Angeles Times* chose to publish the pictures of the dead child on their front pages. "The image is not offensive, it is not gory, it is not tasteless — it is merely heartbreaking, and stark testimony of an unfolding human tragedy that is playing out in Syria, Turkey and Europe, often unwitnessed," *Los Angeles Times* Assistant Managing Editor Kim Murphy told *The New York Times*. "We have written stories about hundreds of migrants dead in capsized boats, sweltering trucks, lonely rail lines, but it took a tiny boy on a beach to really bring it home to those readers who may not yet know the magnitude of the migrant crisis."

In the September 3 story, NPR also reported that several European publications, including British paper *The Independent*, placed the photo of the dead child on the front pages of their issues. Jane Martinson, head of the media desk at *The Guardian*, told NPR that such an emphasis on the photos was controversial but could possibly be justified. "The image used by *The Independent*, the natural reaction was to recoil. It was too upsetting, Just showing a dead child, the effect would be to make [readers] withdraw from the story," Martinson said. "It really did put a human face on this awful humanitarian crisis. It has the power to change the nature of the debate on what is happening and what our reaction should be and how we should deal with it. Against this argument were voices that asked, is it right to upset readers?"

In a September 3 *Washington Post* commentary explaining why she had shared the photo on Twitter, Sly wrote that she posted the picture to draw greater attention to the war in Syria because many people around the world

Images, *continued on page 10*

Images, *continued from page 9*

seemed to be unaware of or apathetic toward the conflict. "My colleagues and I have been writing about Syria's war for four years, about the desperation of the refugees who fled the country and the 250,000 people, including children, who have died over the course of the conflict. Some of us, Syrian and foreign journalists, have died, too, trying to tell their stories," Sly wrote. "Yet it has seemed that no one really paid much attention — at least, not it terms of seriously trying to solve the problem, seriously trying to help. If it takes photographs of dead children to make people realize children are dying, so be it."

Sly went on to argue that the picture of the drowned boy was not nearly as gruesome as many of the sights she had seen when reporting on the Syrian civil war. She wrote that the photo influenced the international debate about Syria, noting that the picture had appeared on the front cover of many British newspapers alongside calls for re-thinking strict policies of refusing to accept refugees. "It has all made me wonder whether squeamishness over depicting dead bodies is misplaced. Perhaps people really don't understand that this hugely brutal war is going to have hugely brutal consequences from which parents will inevitably try to protect their children," Sly wrote. "Perhaps if we had been bolder about publishing photographs of all the children who have died things wouldn't have reached this point?"

In the Sept. 4, 2015, episode of WNYC's "On the Media," host Brooke Gladstone agreed with Sly's assessment that the photos of the drowned child made powerful political points. "Why does this photograph enrage a world unmoved for so long by Europe's refugee crisis, after so many dead? Not because he's a child. There have been many such children. But because it is a single child … Studies show we are more moved to help when we see the image of one desperate child. That urge shrivels when we're confronted by two or three or more," Gladstone said. "Some editors have chosen not to publish or broadcast or post the picture, and I understand their reasons … But I think it should be seen. Not because I believe a picture can change the world. I don't believe that. But that slow drip, drip, drip of injustice rains down on us all, pounding on the roof of complacency, of cynicism, of indifference we shelter under. As it splashes against the windows, we feel increasingly uneasy. Each drop erodes our fortress a little more. And finally, with enough misery, the roof caves in … Maybe the image of [the child] finally will do it. It shouldn't require a death like his. But it almost always does."

The images of the drowned toddler also led some organizations to make arguments about the importance that photos can play in shaping important political issues. On Sept. 8, 2015, German-based tabloid *Bild*, the country's best-selling paper that often uses lurid photos, published an issue without any images, according to *The Washington Post*. Rather, the issue contained gray silhouettes where the pictures would normally have been set. *Bild* Editor-in-Chief Julian Reichelt wrote in a statement on the organization's website that the issue was intended to remind readers about the power of images. "Time and again, indeed currently we are hearing demands not to show images at all. We are asked to pixel them since human suffering is documented in too drastic a manner and people's dignity is taken away," Reichelt wrote. "This argument ignores the most important part. It is not the photo depicting the undignified situation. It is the war! The photo documents the world and this world is not hidden behind pixels … Without pictures the world would be more ignorant, the needy more invisible, more lost. Many crimes would simply be forgotten without a visual reminder[], no atonement, no penance, no apologies to prevent learning and memory."

In a September 15 column, *The New York Times*' Mackey reported that *Charlie Hebdo*, the satirical French newspaper that was the target of terrorist attacks in January 2015, published several editorial cartoons evoking the image of the drowned toddler in various ways. (For more information about the *Charlie Hebdo* attacks, see "*Charlie Hebdo* Attack Leaves Several Dead, Sparks International Debate on Limits of Free Speech" in the Winter/Spring 2015 issue of the Silha *Bulletin*). One cartoon depicted Jesus walking on water near a child who was drowning with the headline "The Proof That Europe Is Christian." Text accompanying the cartoon said, "Christians walk on water," and "Muslim children sink." Another cartoon, with the headline "So close to the finish…", depicted the drowned child near a McDonald's billboard that read "Two children's meals for the price of one," according to Mackey.

Mackey wrote that many Internet users took to social media platforms to criticize the French newspaper, arguing that the cartoons mocked the dead child. However, others came to the defense of *Charlie Hebdo*, arguing that many of the cartoons were being viewed without proper context. In fact, Mackey noted that *Charlie Hebdo* editor Laurent Sourisseau included an editorial in the issue with scathing criticism about the response of European leaders and the public to the images of the dead toddler despite not showing previous concern over the Syrian refugee crisis. Mackey explained that Corrine Rey, who drew the McDonald's cartoon, also defended her work on Twitter, writing "we are not mocking the child. Instead, we are criticizing the consumerist society that is being sold to them like a dream."

The Washington Post's Michael Cavna wrote in a September 16 column that political cartoonists differed as to whether *Charlie Hebdo* went beyond the bounds of decency when evoking the images of the Syrian boy. "The photo of Aylan Kurdi is extremely powerful," *New Yorker* cartoonist Liza Donelly told Cavna. "I believe there is no reason for a cartoonist to 'use' it — we can find other ways to express concern and outrage at the Syrian crisis. And to use the imagery of Aylan in that photo to create a joke — to be honest, I find that very disturbing. But, that said, if people want to draw cartoons that make fun of a tragically dead child, they should of course have the freedom to do so."

Political cartoonist Jen Sorenson told the *Post* that she didn't find the cartoons to be offensive, but she could understand concerns over the depictions. "While I did find other *Charlie Hebdo* cartoons to contain elements of bigotry, these seem to be mocking the callousness of Europe rather than the boy himself. I believe the intention is to show sympathy for the plight of refugees," Sorenson said. "I can see how some people might view the legs poking up out of the water [in the Jesus Christ cartoon] as slightly too goofy a comedic trope for a tragic situation. While I have not drawn Aylan myself, if I did, I would want to do it thoughtfully as part of a poignant cartoon. It's not an image that lends itself to jauntiness."

Casey Carmody
Silha *Bulletin* Editor

FAA Issues Drone Registration Requirements; California Updates Drone Regulations, Vetoes Others

Over the past several months, laws surrounding the use of drones have continued to evolve. Issues included the Federal Aviation Administration's (FAA) new guidelines for registration. Regulation of drones at the state level varies widely. While some states remain at the forefront of drone laws, others have done little, waiting for the federal government to take action on the issue. California Gov. Jerry Brown vetoed several drone bills and approved another, which sparked concern among journalists over limited rights of access.

JOURNALISM TECHNOLOGY

Federal Aviation Administration Moves Forward With Drone Registration Process

On Nov. 21, 2015, the FAA accepted the final recommendations of its drone task force for the registration of Unmanned Aircraft Systems (UAS). The report marks the end of the recommendation process and the beginning of the rulemaking one, according to a November 23 post on the website of the Aircraft Owners and Pilots Association, one of the 24 organizations representing manned and unmanned aircraft communities involved in shaping the recommendations. The full report of recommendations is available at http://www.faa.gov/uas/publications/media/RTFARCFinalReport_11-21-15.pdf.

The Washington Post reported on Oct. 19, 2015 that the FAA was beginning this recommendation process, announcing that a registration process was necessary in light of the increasing number of rogue drone accidents. Most notable among these incidents was the Oct. 9, 2015 crash of a drone near the White House, which resulted in a criminal citation against the man who operated it, according to an October 10 *International Business Times* story. As the *Post* reported, the decision from the FAA may have signaled an admission that it has thus far failed to effectively integrate drones into the national airspace. According to the *Boston Globe* on Oct. 20, 2015, the FAA reported more than 100 sightings of, or close calls with, rogue drones per month. This number was only expected to grow, according to the *Post*, with U.S. hobbyists projected to purchase approximately 700,000 drones in 2015, a nearly 65 percent increase from 2014.

The recommendations stipulated that drone owners must be at least 13 years old, but only an owner's name and physical address were suggested for registration, while e-mail address and phone number would be optional. When an owner registers with the FAA, he or she would receive an identification number to be applied to all drones operated by the owner. The task force also recommended that registration should be at no cost, or if required to charge owners by statutory regulation, to charge a *de minis* fee of $0.001. The final recommendations applied to drones weighing between 0.55 pound and 55 pounds, and proposed registration through owners, rather than through individual drones.

> "Registration gives us the opportunity to educate these new airspace users before they fly so they know the airspace rules and understand they are accountable to the public for flying responsibly."
>
> **— Michael Huerta, Federal Aviation Administration Administrator**

"What we're recommending at this point is that each owner has a registration number, and if that owner owns one airplane or a hundred airplanes, the same registration number can be used on all the airplanes that that owner owns," said the task force's co-chair and head of Google's drone project Dave Vos, according to a November 23 National Public Radio (NPR) story. NPR also reported that several fake drone registration sites offering registration for a fee had begun to appear while the government was setting up its registry process.

On December 14, The FAA announced in a press release that it had created a website to allow for drone registration. The agency said that owners must register UAS purchased prior to Dec. 21, 2015 by Feb. 19, 2016. For UAS purchased after December 21, the owner must be registered prior to operating the device outdoors. The registration process cost $5, but the FAA announced that it would waive the fee from Dec. 21, 2015 until Jan. 20, 2016 to encourage individuals to register quickly.

"We expect hundreds of thousands of model unmanned aircraft will be purchased this holiday season," said FAA Administrator Michael Huerta in the press release. "Registration gives us the opportunity to educate these new airspace users before they fly so they know the airspace rules and understand they are accountable to the public for flying responsibly." The FAA's registration process is available at www.faa.gov/uas/registration.

California Governor Vetoes Series of Drone Bills, Approves Another

On Aug. 27, 2015, the California Senate passed a bill that would have restricted the flying of drones at less than 350 feet above private property without the owner's permission. However, California Gov. Jerry Brown vetoed the bill, citing in his veto message that it could have "expose[d] the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation and new causes of action," according to a Sept. 10, 2015 story by *USA Today*. The full text of the veto message is available at https://www.gov.ca.gov/docs/SB_142_Veto_Message.pdf.

Slate reported on Sept. 2, 2015 that the bill was opposed by drone industry groups, who argued that it would stifle innovation and prevent job growth in the sector, as well as by the National Press Photographers Association (NPPA). In a September 3 letter to Gov. Brown opposing the bill, the NPPA argued that "journalists could be sued if a UAS they operated were to stray into the airspace overlaying the real property of owners while actually gathering newsworthy information of a different nearby location." The NPPA's full letter is available at http://blogs.nppa.org/advocacy/files/2015/09/SB-142-Letter-09-03-151.pdf.

Drones, *continued on page 12*

Drones, *continued from page 11*

The veto was the first of several issued by Gov. Brown against proposed drone legislation in California. According to the *Los Angeles Times* on Oct. 3, 2015, Gov. Brown vetoed three bills that would have expanded drone legislation in the state. The first would have created harsh criminal penalties for hobbyists who flew drones over wildfires and other emergencies; the second would have prohibited hobbyists from flying drones over K-12 schools without the school administration's approval; the third would have banned drones over prisons and jails, which the *Times* reported had been used in other states to drop contraband into prison yards.

"Each of these bills creates a new crime — usually by finding a novel way to characterize and criminalize conduct that is already proscribed," said Gov. Brown in his veto message. "This multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit." The full text of Gov. Brown's veto message is available at https://www.gov.ca.gov/docs/AB_849_Veto_Message.pdf

While the decisions represented a pattern of vetoing drone legislation, Gov. Brown did sign AB 856 into law, according to the *Los Angeles Times* on Oct. 6, 2015. The bill, designed to increase personal privacy from invasions by paparazzi, expanded the definition of a "physical invasion of privacy" to include the use of a drone into airspace over someone's land for the purpose of making a recording or taking a photo. Unlike the bill he vetoed in September 2015, AB 856 aimed to protect celebrities from the press rather than limit hobbyists' occasional uses of drones. As a result, news organizations and drone industry observers expressed concern that the expansion of drone laws to limit media usage could raise First Amendment problems, an issue that has been apparent for over a year. (For more on the history of journalists' concerns over drone regulations, see the section *Journalists Face Evolving, Uncertain Legal Landscape* in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue of the Silha *Bulletin*.)

On Nov. 20, 2015, the aviation law blog for the law firm Holland & Knight reported that a coalition of 22 leading news media organizations submitted public comments to the National Telecommunications and Information Administration (NTIA), the agency that serves as the President Obama's principal advisor on telecommunications policies, meant to guide the NTIA on protecting First Amendment rights as the government established UAS regulations. Among these recommendations were: the government should not "require journalists to defend use of images collected by UAS on a case-by-case basis"; "images and sounds gathered in public places are not private and should be entitled to protection"; and "editorial decisions, including decision about data collection and retention, must be left to journalists." The full public comments are available at http://www.hklaw.com/files/Uploads/Documents/Blogs/BlogAviation/NewsCoalitionComment_NTIA-BestPracticesProposals.pdf.

> "Many news groups believe that already existing privacy laws are sufficient to address these issues, and further, that some of them may be constitutionally suspect and subject to successful challenge if enforced. ... This country can ill afford to let [the drone] business go elsewhere, just because we can't get around to coming up with commonsense, not overly burdensome regulations."
>
> **— Mickey Osterreicher, National Press Photographers Association General Counsel**

"Unfortunately, [several] states have imposed laws that are specifically targeted at drone technology," said NPPA General Counsel Mickey Osterreicher during a June 17 interview with Gene Policinski on the Newseum Institute's "Journalism/Works" podcast. "Many news groups believe that already existing privacy laws are sufficient to address these issues, and further, that some of them may be constitutionally suspect and subject to successful challenge if enforced. ... This country can ill afford to let [the drone] business go elsewhere, just because we can't get around to coming up with some commonsense, not overly burdensome regulations."

Dillon White
Silha Research Assistant

Journalists, Newspapers Clash with Activists on College Campuses, Raising First Amendment Issues

During the fall of 2015, journalists, news organizations, and college newspapers found themselves facing conflicts with student protesters and civil rights advocates on several college campuses across the United States. A campus newspaper at a university in Connecticut faced significant criticism after it published an op-ed that questioned a nationwide activist group's tactics. In Missouri, a student photographer covering protests over racial discrimination faced backlash from activists located on the campus quad. These incidents have also raised questions over the conflicts between the value of the constitutional rights of free expression and civil rights activists' goals of a more inclusive society.

NEWS MEDIA CHALLENGES

Campus Newspaper Faces Funding Cuts after Controversial Op-Ed

On Sept. 28, 2015, *The Chronicle of Higher Education* reported that the student government of Wesleyan University in Middletown, Conn. was considering whether to strip the campus newspaper, *The Wesleyan Argus*, of student fees funding due to a controversial op-ed about the nationwide Black Lives Matter movement. According to the organization's website, Black Lives Matter was created in 2012 to draw attention to and combat institutional racism and violence against black individuals in the United States. The September 14 op-ed in the *Argus*, written by staff writer Bryan Stascavage, questioned whether the Black Lives Matter movement's tactics were enacting positive change or creating a dangerous environment for police officers.

The op-ed sparked significant backlash on the liberal-leaning Wesleyan University campus, according to *The Chronicle of Higher Education*. Students gathered signatures of more than 150 people on campus that called for the student government, the Wesleyan Student Assembly, to defund the *Argus* if the paper did not meet a list of demands, including reporting each month on the use of the paper's funding, actively recruiting minority students as writers, and creating front-page space for submissions from students who felt marginalized on campus, among other requests. "The undersigned agree to boycott the *Argus*, recognizing that the paper has historically failed to be an inclusive representation of the voices of the student body," the petition read, according to a September 21 story by the *Argus*. "Most specifically, it neglects to provide a safe space for the voices of students of color and we are doubtful that it will in the future."

In response to the protests, Wesleyan University President Michael Roth, Provost Joyce Jacobsen, and Vice-President for Equity and Inclusion Antonio Farias published a September 19 blog post on the university's website arguing for the value of including diverse opinions on campus. "Many students took strong exception to [Stascavage's] article; it was meant to be a provocative piece. Some students not only have expressed their disagreement with the op-ed but have demanded apologies, a retraction and have even harassed the author and the newspaper's editors. Some are claiming that the op-ed was less speech than action; it caused harm and made people of color feel unsafe," the administrators wrote. "Debate can raise intense emotions, but that doesn't mean that we should demand ideological conformity because people are made uncomfortable. As member of a university community, we always have the right to respond with our own opinions, but there is no right not to be offended. We certainly have no right to harass people because we don't like their views. Censorship diminishes true diversity of thinking; vigorous debate enlivens and instructs."

The Chronicle of Higher Education also reported that *The Ankh*, a Wesleyan University student publication produced primarily by students of color, published an open letter by "A Group of Concerned and Unapologetic Students of Color" that explained why students were protesting Stascavage's op-ed. "The *Argus* is an institution whose history of devaluing people of color in our community proves that it plays a role in the perpetuation of institutionalized racism," the group wrote. "We do not have the time, nor luxury, to be caught up in this smokescreen of free speech. Let us be clear: This is not an issue of your free speech. This is an issue of our voices being silenced, our communities under attack." The letter was also critical of the Wesleyan University administration for failing to provide adequate support for students of color who were responded to the *Argus* op-ed with protests.

On Oct. 19, 2015, the *Argus* reported that the Wesleyan Student Assembly voted on October 18 in favor of a resolution to reduce the newspaper's budget from $30,000 to $13,000 for the 2016-2017 academic school year. The resolution, titled "Stipends, Academic Credit, and Digitalization [*sic*] for on Campus Publications" re-directed the available $17,000 toward creating work study positions and website improvements for several other campus publications. Sponsors of the resolution argued that the reduction in funding was for environmental sustainability reasons because it would limit the number of print issues that the *Argus* could produce. The student government also considered whether the reduction in funding should be implemented immediately but opted to wait until the following school year.

Although the resolution was adopted, Wesleyan Student Assembly President Michael Roth recognized the problems with cutting funds from the newspaper under the argument of reducing paper waste so soon after the campus protests. "I do think that any decision about student publications made in the wake of a controversial op-ed should be understood with real caution, and the concern about sustainable funding is not something that should … target … newspapers about which there are content concerns," Roth said, according to the *Argus*. "It may be the right thing to reduce the number of copies of *The Argus* or any other group, but if sustainability is going to become a filter for the [student government] in a systematic way, I don't think that's where you would start. [The funding of other activities] is many times, I think, what *The Argus* gets, and I've never heard anyone [propose a reduction of those funds]. I am concerned, from what I heard in advance, that the [content] concerns get translated into other issues."

In an October 22 op-ed titled "Free speech is flunking out on college campuses," *The Washington Post*'s Catherine Rampell criticized Wesleyan Univer-

Activists, *continued on page 14*

Activists, *continued from page 13*

sity students for targeting the campus newspaper. "As someone who once wrote inflammatory columns for school newspapers, I find this thinly veiled retribution deeply saddening. Not just for sentimental reasons, and not just because student papers serve an important watchdog function unlikely to be filled by, say, the school music blog," Rampell wrote. "Crippling the delivery of unpopular views is a terrible lesson to send to impressionable minds and future leaders, at Wesleyan and elsewhere. It teaches students that dissent will be punished, that rather than pipe up they should nod along. It also teaches them they might be too fragile to tolerate words that make them uncomfortable; rather than rebut, they should instead shut down, defund, shred, disinvite. But the solution to speech that offends should always be more speech, not less."

Student Photog Confronted by University of Missouri Protesters

On Nov. 9, 2015, *The New York Times* reported that protesters at the University of Missouri had prevented a student photographer who was on assignment for ESPN from taking pictures in a public area on campus. The student activist group, called Concerned Students 1950, had been calling for members of the University of Missouri's administrative leadership to step down for failing to adequately address several racist incidents on campus during the previous months. Protests at the University of Missouri included demonstrations on campus, a highly-publicized hunger strike by graduate student Jonathan Butler, and black members of the university's football team threatening to boycott all football-related activities, including games, until President Timothy M. Wolfe resigned. On November 9, Wolfe announced that he would vacate his position, and University of Missouri Chancellor R. Bowen Loftin announced that we would step down to a less prominent role.

According to the *Times*, student photographer Tim Tai was attempting to photograph the reactions of students who had created a makeshift tent encampment on the campus quad after learning about the resignations. Several students formed a wall to block Tai from capturing photos and accused him of failing to respect students' requests that the encampment was a "safe space" free from any journalists. In a video posted on YouTube by University of Missouri student Mark Schierbecker, Tai told the protesters, "I am documenting this for a national news organization … The First Amendment protects your right to be here and mine." At one point, university employee Janna Basler, the director of Greek life and leadership on campus, confronted Tai, saying, "You are infringing on what they need right now, which is to be alone." Eventually, the wall of protesters walked toward Tai, forcing him away from the encampment. The video concluded when Schierbecker approached a woman, who was later identified as University of Missouri Assistant Professor of Communication Melissa Click, to ask whether he could still be in the area as a journalist. Click then shouted for assistance, saying, "Who wants to help me get this reporter out of here? I need some muscle over here." The complete video of the interaction between Tai and the protesters is available at https://www.youtube.com/watch?v=xRlRAyulN4o.

Schierbocker's video of the conflict between Tai and campus protesters caught the attention of national news organizations and various free press advocates, many of whom were critical of how the protesters acted. In a November 10 column, *The Washington Post*'s Erik Wemple argued that the protesters's actions were indefensible. "To watch the video of photographer Tim Tai getting pushed around by a turf-protecting scrum of protesters at the University of Missouri is to experience constitutional angst," Wemple wrote. "There's no excuse for protesters to push a photographer in a public square; there's no excuse for protesters to appeal for respect while failing to respect; there's no excuse for protesters to [disparage] the same rights that allow them to do their thing."

In a November 10 post for the *Columbia Journalism Review*, University of Kansas Assistant Professor Jonathan Peters acknowledged that the students in the video may not have been fully aware of First Amendment issues in public places, such as a campus quad. Peters had greater concerns about Basler's and Click's responses depicted in the video. "[B]ased on the evidence in the video, they behaved inexcusably — as adults in positions who should have known better. They should have known better than to think that people gathered in public have a right 'to be alone,' and known better than to call for 'some muscle' to 'get this reporter out of here.' Basler and Click treated students at their own university, journalists or not, in a way that dishonored the public trust placed in educators," Peters wrote. "Moreover, as public employees and arguably government actors under the federal constitution, Basler and Click tried to regulate First Amendment activity in a public forum (i.e., the media's peaceable assembly and newsgathering). That potentially exposes them and the University of Missouri to liability under 42 USC § 1983, a federal law that allows individuals to sue public agents and entities for deprivations of civil or constitutional rights."

The video also prompted the University of Missouri School of Journalism Dean David Kurpius to release a November 10 statement lauding Tai's actions. "The Missouri School of Journalism is proud of photojournalism senior Tim Tai for how he handled himself during a protest on Carnahan Quad on the University of Missouri Campus," Kurpius wrote. "The news media have First Amendment rights to cover public events. Tai handled himself professionally and with poise." Kurpius also noted that the School of Journalism was reconsidering Click's courtesy appointment within the department, which allowed her to serve on thesis and dissertation committees for School of Journalism students.

That same day, the University of Missouri released a statement from Click apologizing for her actions. "Yesterday was an historic day at MU — full of emotion and confusion. I have reviewed and reflected upon the video of me that is circulating, and have written this statement to offer both apology and context for my actions," Click said in the statement. "I have reached out to the journalists involved to offer my sincere apologies and to express regret over my actions. I regret the language and strategies I used, and sincerely apologize to the MU campus community, and journalists at large, for my behavior, and also for the way my actions have shifted attention from the students' campaign for justice." The School of Journalism later announced that Click resigned her courtesy appointment within the department but remained on the faculty in the separate department of communication.

First Amendment experts also raised questions about the student activists assertion that the tent encampment should be considered a "safe space" free from journalists despite being in a public area. *The New York Times*' November 9 story reported that the Concerned Student

1950 group published a series of posts on Twitter defending the space after the conflict with Tai. "There were media personnel who were very hostile toward us when we asked to have certain spaces respected … If you have a problem with us wanting to have our spaces that we create respected, leave!," the group wrote in a series of tweets, according to the *Times*. "We ask for no media in the parameters so the place where people live, fellowship, & sleep can be protected from twisted insincere narratives … White, black, and all other ethnicities have been able to converse and build from fellowshipping at the campsite. That isn't for your story."

In a November 10 interview with WCCO, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, explained that journalists typically have the right to gather news in public spaces, saying, "In the U.S., the general rule is what you can see from a public sidewalk, public street, a public park, you may photograph, you may videotape." Kirtley also told WCCO that the protesters' argument suggesting that they had a right not to be photographed in the campus quad did not have much support because they were clearly in a public space.

In his November 10 post for the *Columbia Journalism Review*, Peters agreed that the protesters argument did not carry weight. "[I]t puzzles me why it would seem principled to the student activists to overtake a public forum for their own expressive activities and then to declare the forum a safe space, with the intent or effect of making it unavailable for others to engage in expressive activities there," Peters wrote. "That's inconsonant with the values that underlie the First Amendment — and the theory that public forums, like the quad, have been 'held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,' according to the U.S. Supreme Court. Indeed, a Missouri state law recently codified that very idea."

On November 10, *The Washington Post* reported that Tai also published a series of posts on Twitter thanking people for providing support but that it was never his intention to become part of a story. "A lot of hardworking journalists were physically blocked from doing their jobs — I just happened to be on video. I didn't ask for notoriety," Tai wrote on Twitter, according to the *Post*. "I don't have any ill will toward the people in the video. I think they had good intentions though I'm not sure why it resorted to shoving. … I'm a little perturbed at being part of the story, so maybe let's focus some more reporting on systemic racism in higher ed institutions."

On December 3, the Radio Television Digital News Foundation (RTDNF), the charitable and education group affiliated with the Radio Television Digital News Association, announced that it had chosen Tai for its First Amendment Defender Award. According to the RTDNF, the newly-created award honors an individual or organization who takes a public stand to support freedom of the press. "As seen in a viral video, Tai was confronted by university students, faculty and staff, threatening him with violence if he did not abandon his efforts to cover the protests," the group wrote in its announcement of the award. "Instead, he stood his ground and patiently asserted his First Amendment right to stand in a public place and report on the events around him."

Incidents Prompt Debates over Free Expression, Inclusion

Such incidents, as well as others, between the press and campus protesters have also been related to broader discussions about whether the "millennial" generation has become less tolerant of free speech values. In a November 2 op-ed for *The New York Times*' "Room for Debate," recent Brown University graduate Katie Byron argued that activists are not attempting to silence speech on campus. Rather, they are attempting to make university environments more inclusive for marginalized groups, which Byron argued was particularly important for victims of sexual assault. "Promoting a rigorous academic environment does not mean making space for every idea that pops into a student's head. Academic discussions make space in conversations to hear from people who have valuable knowledge to contribute," Byron wrote. "Students are not avoiding or silencing difficult conversations, they're learning to face them in ways that are both academically rigorous as well as sensitive to the needs of everyone in the room. Through these discussions, they are becoming a generation of leaders ready to create a more inclusive and just world."

In a separate post for "Room for Debate," Kathleen McCartney, president of Smith College located in Northampton, Mass., suggested that college students are developing new understandings of free speech. "In their own development as activists and leaders, students today are navigating the added complexities of online discourse, in which the ability to comment anonymously can be simultaneously liberating and destructive, giving voice not only to offensive ideas but to *ad hominem* attacks, and, in some cases, harassment," McCartney wrote. "Perhaps this is one of the reasons today's students are interested in the boundaries of free speech. As a society, we will benefit from the conversation they are fostering."

University of California, Los Angeles School of Law Professor Eugene Volokh wrote in his November 2 "Room for Debate" post that there is value in protecting ideas that people find disagreeable. "The Supreme Court's decisions 'protect the freedom to express' even 'the thought that we hate' — including 'discriminatory' viewpoints expressed by student groups at public universities. So wrote Justice Ruth Bader Ginsburg, no stranger to fights for equality but also a strong supporter of the freedom of speech. This came in her majority opinion in *Christian Legal Society v. Martinez* (2010), but the dissenters agreed on this," Volokh wrote. "Justice Ginsburg has seen how many civil rights movements succeeded in America, in large part because of their speech and the constitutional protection for such speech. Future movements, from all political positions, need that protection. And they won't get it if colleges teach students the habits of censorship rather

Casey Carmody
Silha *Bulletin* Editor

Electronic Arts Seeks Review from Supreme Court Over Video Game Right of Publicity Rulings

On Oct. 5, 2015, video game developer Electronic Arts (EA) filed a petition seeking Supreme Court review in *Davis v. Electronic Arts*, 775 F.3d 1172 (9th Cir. 2015). EA has asked the Court to reverse a U.S. Court of Appeals for the Ninth Circuit decision and rule that the First Amendment protects the use of realistic depictions of people in expressive works, including video games.

RIGHT OF PUBLICITY

In January 2015, a unanimous three-judge panel for the U.S. Court of Appeals for the Ninth Circuit ruled that former NFL players could sue EA for violations of their right of publicity. The plaintiffs argued that EA had used their likenesses as animated football players in its Madden NFL Football video game franchise. The games did not use these players' names, but created digital avatars that reflected the players' position, years in the NFL, height, weight, skin tone, and relative skill level. EA argued that their use of the players' likenesses was protected by the First Amendment and alleged an "incidental use" defense, arguing that the use of the former players' likenesses was incidental to the primary purpose of the video games' expression, which was to create an entertaining simulation of NFL football. (For more information regarding the Ninth Circuit's decision see "Ninth Circuit Rules First Amendment Does Not Protect NFL Video Game from Right of Publicity Suit" in the Spring 2015 issue of the Silha *Bulletin*.)

The right of publicity gives individuals the right to control use of their names and likenesses. However, the right of publicity is limited by the content producers' competing First Amendment rights to publish expressive material. Generally, right of publicity cases pit celebrities, whose appearances are often recognizable and valuable, against a content producer seeking to make commercial use of the celebrity's name or likeness without consent.

Courts have applied different legal tests to determine when the First Amendment insulates the user from suit. In *Davis*, the Ninth Circuit relied on its own right of publicity precedent by applying the "transformative use" test to determine whether the First Amendment defense applies. The test, established in the case *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), asks whether the challenged work is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."

In 2007, the Eighth Circuit applied a different test in its decision of *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), finding that a fantasy baseball game company's use of players' likeness was protected by the First Amendment. In *C.B.C. Distribution*, the Eighth Circuit reasoned that the information used to create the game "is all readily available in the public domain, and it would be strange law that a person would not have a First Amendment right to use information that is available to everyone." The court ruled that the company's First Amendment rights outweighed the publicity rights of the players. According to legal scholars, these differences have arguably constituted a circuit split which might lead the U.S. Supreme Court to grant review of *Davis*.

In its petition for review, EA argued that the Ninth Circuit's "transformative-use" test does not give enough weight to First Amendment concerns. "The Ninth Circuit's decision is not only wrong but also dangerous. Its transformative-use test is too vague and unpredictable, and too susceptible to a court's subjective artistic judgments, to be a workable First Amendment standard," the video game developer wrote in its brief. The petition also highlighted that the conflicting legal rules have real-world consequences and argued that "without this court's guidance, artists, musicians and other content creators will remain unsure what standards apply to their expression and, in particular, whether realistic depiction of real individuals is tortious."

Several *amicus curiae* briefs were also filed in support of EA. The Electronic Frontier Foundation (EFF) together with the Organization for Transformative Works and the Comic Book Legal Defense Fund filed a brief asking the Court to reverse the Ninth Circuit, arguing that the court should establish that First Amendment protection applies to speech regarding celebrities. "If the transformative use test is allowed to stand, it will become harder to create an artistic work based on real people without their permission. The likely result: celebrities of all stripes (actors, politicians, businesspeople) can effectively veto any portrayal they don't like," the *amici* wrote. The brief also insisted that the Court clarify a specific test for how the First Amendment limits the right of publicity because lower courts of appeals decisions are in such significant conflict that a specific work may receive protection in one jurisdiction while falling outside the law in another.

The Entertainment Software Association (ESA), whose members include 30 publishers of computer and video games, also filed an *amicus* brief in support of EA, arguing that the *Davis* decision conflicted with well-settled First Amendment doctrine that protects the dissemination of accurate speech about real people and events. Their brief further argued that *Davis* threatens the viability of other reality-based electronic games. "Reality-based video games are important tools for speech, equally deserving of First-Amendment protection as those tools invented in previous generations, such as books, films and even word of mouth," the ESA wrote in the brief.

Other *amicus* briefs urging the Supreme Court to take the case and find in EA's favor were filed by the Thomas Jefferson Center for the Protection of Free Expression and by 31 constitutional law professors. At the time the *Bulletin* went to press, the athletes had not filed any briefs.

Levine Sullivan Koch & Schulz LLP partner Nathan Siegel wrote in an Oct. 6, 2015 post on the firm's blog that, if granted review by the Supreme Court, the case could have broad implications for the right of publicity. "The Supreme Court has never meaningfully addressed the right of publicity at all," Siegel wrote. "As a result, the right of publicity has become one of the most contentious areas of media law and has produced much disagreement within lower state and federal courts about what the law should be." The decision whether to grant *certiorari* to review the case is expected in 2016.

Sarah Wiley
Silha Research Assistant

Obama Administration Backs Down on Cellphone Encryption Dispute, but Battles over Government Access to Technology Continue

On Oct. 10, 2015, *The New York Times* reported that President Barack Obama's administration announced that it would not seek legal avenues to compel technology companies to allow law enforcement access to users' encrypted cellphone data. The decision aligned with the opinions expressed by many technology companies, such as Apple, Google, and Microsoft, who argued that granting access to such data would not only harm consumers' trust in the industry, but would also create exploitable openings for cybercriminals, terrorists, and foreign government operatives.

DATA PRIVACY

The debate between technology companies and law enforcement officials over strong data encryption began in the wake of former National Security Agency (NSA) contractor Edward Snowden's disclosures in 2013 of U.S. intelligence agencies' widespread spying. Responding to concerns over NSA access to cellphone data, Apple released the iPhone 6, equipped with iOS 8, a new mobile operating system that utilized strong encryption techniques as the default setting. The software encrypts e-mails, photographs, and contacts based on a passcode unique to the phone's user, meaning that Apple could not access it. The tech companies' decision, and others like it, sparked outrage from members of the nation's security agencies, including from James Comey, director of the Federal Bureau of Investigation (FBI).

"What concerns me about this is companies marketing something expressly to allow people to hold themselves beyond the law," said Comey during a news conference, according to a Sept. 26, 2014 *New York Times* story. "The notion that someone would market a closet that could never be opened — even if it involves a case [with] a child kidnapper and a court order — to me does not make any sense." (For more information about the earlier debates between law enforcement and data encryption, see "Law Enforcement, Tech Companies Clash on Built-in Privacy Features" in the Fall 2014 issue of the Silha *Bulletin*, and "Update: Tech Companies, Law Enforcement Continue to Battle of Strong Encryption for Mobile Devices" in the Summer 2015 issue.)

Comey was not alone in his criticism. As *The New York Times* reported on Sept. 26, 2015, officials inside a number of U.S. intelligence agencies continued to express concerns that advanced technological developments were part of an effort to not only thwart the NSA, but also to shield technology companies from the requirement to respond to court orders involving encrypted information. The move marked a significant turn in the debate over government access to data. Whereas decisions over access have traditionally been a matter for Congress, encrypted technology has allowed telecommunications companies to dictate the government's authority to access information. According to the Federal Communications Commission's (FCC) website, the Communications Assistance for Law Enforcement Act, which Congress passed in 1994, requires telecommunications companies to design and modify their equipment to enable law enforcement to conduct electronic surveillance, better known as a wiretap.

> "The administration has decided not to seek a legislative remedy [to require technology companies to create backdoor access to encrypted mobile devices], but it makes sense to continue the conversations with industry."
>
> **— Director James Comey, Federal Bureau of Investigation**

However, according to a Nov. 1, 2014 story by *The Hill*, the law has never been updated to cover smartphones, leaving intelligence agencies little recourse in the face of expanded encryption, despite the topic receiving some debate among political leaders. *The Washington Post* reported on Oct. 8, 2015 that the fact that tech companies had significant control over how they held users' data put the Obama administration in a bind, forcing it to choose whether to pursue legal avenues for access to encrypted data to help law enforcement or to protect consumer privacy. At a cabinet meeting on Oct. 1, 2015, the administration opted for the latter, at least for now, according to the *Post*.

"The administration has decided not to seek a legislative remedy now, but it makes sense to continue the conversations with industry," said Comey during a Senate hearing of the Homeland Security and Governmental Affairs Committee on Oct. 8, 2015, indicating that the Obama administration was choosing to de-escalate the encryption debate with tech companies. Instead of pursuing legislation, the administration has instead decided to increase its efforts toward persuading tech companies to make encrypted data available in criminal or terror investigations, according to the *Post*'s October 8 story. Although companies like Apple will likely continue to build operating systems without so-called "backdoor" access for anyone other than the user, the government hoped that continued discussions with companies will change that practice. "We feel optimistic," an unidentified senior administration official told the *Post* on Oct. 8, 2015, who expressed that the government is making enough progress with companies to where seeking legislation is unnecessary. "We don't think it's a lost cause at this point."

In addition to the debates within the legislative and executive branches of the government, an Oct. 9, 2015 order by U.S. Magistrate Judge James Orenstein also kept the judicial branch in the debate over strong data encryption. According to an October 10 story by *The Washington Post*, Judge Orenstein, one of a number of the nation's magistrates tackling the surveillance debate, sought Apple's opinion in a case involving a government order to compel the company

Technology, *continued on page 18*

Technology, *continued from page 17*
to unlock an individual's smartphone. The smartphone at issue involved an operating system older than iOS 8, and in its response, Apple argued that it could not access any user data on modern smartphone systems, and it should not be compelled to do so on earlier systems either. Judge Orenstein ruled against the government, citing in his opinion that as a private-sector company, Apple was "free to choose its customers' interest in privacy over the competing interest of law enforcement." *In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant Issued by this Court*, 2015 WL 5920207 (E.D.N.Y. 2015).

Technology and commerce experts also continued to disagree with the idea that legal requirements to allow access to encrypted data were workable. In a Dec. 2, 2015 story by *The Verge*, technology specialist Walt Mossberg highlighted the impossibility of such a solution, noting that there was "no such thing as a backdoor in an encrypted device whose use could be limited to duly-authorized US agencies." According to a July 2015 research paper authored by several prominent security technologists and led by computer scientist and cybersecurity expert Peter Neumann, any attempt at establishing a backdoor to encrypted data would put the world's critical infrastructure and most confidential data in jeopardy. The authors of the paper argued that once a system is breached, any number of actors could access the data, which is a fear that many organizations have echoed. The full paper is available at http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf?sequence=8.

According to an Oct. 10, 2015 story by *Wired*, a number of interest and advocacy groups sought even greater assurances from the Obama administration that it will not pursue backdoor access. "The government should not erode the security of our devices or applications, pressure companies to keep and allow government access to our data, mandate implementation of vulnerabilities or backdoors into products, or have disproportionate access to the keys to private data," said one such group, savecrypto.org, a coalition of technology businesses, civil liberties advocates and press freedom groups in an online petition to the Obama administration.

However, *The Washington Post* reported on Dec. 9, 2015 that the high-profile terrorist attacks in Paris and San Bernardino, Calif. may be preventing the Obama administration from providing strong assurances that it will always maintain the same course on encryption. At a Senate Judiciary Committee hearing on December 9, Comey said that it would be "useful" for Congress to "drive [the] conversation" surrounding encryption, according to the *Post*. The assertion prompted Sen. Dianne Feinstein (D-Calif.), vice chairman of the Senate Intelligence Committee, to call for legislation allowing for government access to encrypted data, saying, "If there is a conspiracy going on" with terrorist groups using encrypted data, "that encryption ought to be able to be pierced." The comments echoed Sen. John McCain's (R-Ariz.) statements on November 17, calling the United States' current practices regarding encrypted data "unacceptable" in the wake of the November 13 terrorist attacks in Paris, which killed 130 people and injured more than 350 people.

> "Calls to force private companies to weaken the security of their devices and software to ensure law enforcement access are misguided. This weakening will compromise the security of Americans by making their personal information and communications more vulnerable to cyberattack and theft."
>
> **— Neema Singh Guliani, Legislative Counsel for the American Civil Liberties Union**

Although it is not clear whether either the attacks in Paris or in California involved encrypted data, they did serve to reignite the encryption debate, including in New York City, where fears over another attack similar to that of September 11 continue to drive legislative policy, according to *The Washington Post* on Nov. 18, 2015. In his remarks during the November 18 Cybercrime Symposium at the Federal Reserve Bank in New York City, Manhattan District Attorney Cyrus R. Vance, Jr., an outspoken critic of the data encryption practices of private companies, said that he would call on Congress to pass a law requiring smartphone contents to be accessible to law enforcement with search warrants, according to the *Post*. Vance, whose office has been successful in executing more than 100 warrants between September 2014 and October 2015 related to smartphone access in criminal cases, argued that access to encrypted devices will save lives.

However, even members of the Obama administration expressed doubt that the government would reverse course on the issue, as no legislation on encryption has been drafted or proposed."I don't think the attack in Paris, even of this magnitude, is going to provide the level of political impetus to push something," one unnamed aide told the *Post* on November 18.

Although the terrorist attacks reignited the encryption debate, critics of government access to data maintain that such access will create more problems than it solves. "Calls to force private companies to weaken the security of their devices and software to ensure law enforcement access are misguided," Neema Singh Guliani, the legislative counsel for the American Civil Liberties Union, told the *Post* in its November 18 story. "This weakening will compromise the security of Americans by making their personal information and communications more vulnerable to cyberattack and theft."

Dillon White
Silha Research Assistant

Department of Defense's New Law of War Manual Brings Calls for Revision from Journalistic Community

In June 2015, the United States Department of Defense issued its "Law of War Manual" (Manual), which is the agency's comprehensive manual presenting its interpretation of the law of war. Previously, each branch of the U.S. Armed Forces had issued its own legal guidelines on armed conflicts. The new, approximately 1,200-page document will serve as the uniform legal guide for all branches of the military for the first time. However, several news organizations and press advocacy organizations were critical of how the manual defined journalists and newsgathering activities, which led to calls for the Department of Defense to revise several sections of the guidelines.

NEWSGATHERING

According to section 4.24 of the Manual, journalists fit into one of three different categories, including "members of the armed forces, persons authorized to accompany the armed forces, or unprivileged belligerents." The first category includes military journalists who are members of the armed forces acting as journalists or in some similar other public affairs capacity. Military journalists "have the same status as other members of the armed forces," according to the Manual. All other journalists are considered "independent journalists and other media representatives," which military authorities should view as civilians. However, the Manual suggested that journalists could also be considered "unprivileged belligerents," which are defined as "persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and [prisoner of war] status)."

Section 4.24.3 of the Manual, entitled "General Rules for the Treatment of Civilian Journalists and Journalists Authorized to Accompany the Armed Forces," stated that civilian journalists who put themselves in "areas of military operations" are at risk for being injured or killed by the enemy. The Manual recommended that in order to minimize that risk, journalists should "seek to distinguish themselves from military forces." In addition, the Manual suggested that journalists should recognize that if they disclose information about combat operations, military officials have the authority to consider that the journalist is "taking a direct part in hostilities." The Manual further explained that if journalists take direct part in hostilities against a State, they "may be punished by that State after a fair trial."

> "The Manual, as it is currently drafted, might be read to empower governments to judge for themselves whether a U.S. journalist's work is spying, and to punish the journalist accordingly. This ambiguity heightens the risk to journalists around the world, and gives aid and comfort to governments and regimes that seek to restrict independent journalism."
>
> **— Michael Oreskes, Vice President of News and Editorial Director for National Public Radio**

Section 4.24.4 of the Manual addressed issues related to journalism and spying. The Department of Defense warned that the journalistic newsgathering activities about military operations "can be very similar" to a spy gathering intelligence. The Manual also advised journalists to carry identification, such as the card commonly issued to authorized war correspondents or other "appropriate identification." Finally, section 4.24.5 recommended that journalists be aware that military officials may seek to review news stories to ensure sensitive information is not revealed. The Manual also maintained that military officials retained the authority to restrict access to certain areas during combat operations. The complete text of the Department of Defense's document is available at http://www.dod.mil/dodgc/images/law_war_manual15.pdf.

After the Manual was publicly released, several news organizations and press advocates warned that many of these sections could create dangerous challenges for journalists covering wartime operations. Complaints focused on the Manual's suggestion that journalists could be considered "unprivileged belligerents," warnings that the publication of information was akin to taking part in hostilities, and recommendations that journalists carry documents identifying themselves as members of the media. Others also raised concerns over the Manual's ambiguous standards that could lead to the military to consider a journalist's activities as spying.

In an Aug. 19, 2015 letter to Secretary of Defense Ashton B. Carter, National Public Radio (NPR) Senior Vice President of News and Editorial Director Michael Oreskes criticized the Manual because it "creates dangerous ambiguity around the collection of information for use in reporting." Oreskes wrote that the Manual does not provide clear distinctions between "newsgathering and spying" except for recommending that journalists "act openly and with the permission of relevant authorities" while carrying documents to prove their identities. Oreskes argued that these recommendations go against "some basic principles of journalism ethics" calling for journalists to act independently without interference from government authorities. Oreskes also noted that "acting openly" could create significant safety concerns for journalists.

"The Manual, as it is currently drafted, might be read to empower governments to judge for themselves whether a U.S. journalist's work is spying, and to punish the journalist accordingly," Oreskes wrote. "This ambiguity heightens the risk to journalists around the world, and gives aid and comfort to governments and regimes that seek to restrict independent journalism." Oreskes' full letter is available at http://www.scribd.com/doc/275495673/Michael-Oreskes-Letter#scribd.

Manual, *continued on page 20*

Manual, *continued from page 19*

In a July 31 post on the Committee to Protect Journalists' blog, Senior Advisor for Journalist Security Frank Smyth criticized the Manual's suggestion that journalists could be defined as "unprivileged belligerents." According to Smyth, the definition did not have any legal basis.

"This broad and poorly defined category gives U.S. military commanders across all services the purported right to at least detain journalists without charge, and without an apparent need to show evidence or bring a suspect to trial," Smyth wrote. "At a time when international leadership on human rights and press freedom is most needed, the Pentagon has produced a self-serving document that is unfortunately helping to lower the bar."

Smyth suggested that the use of "unprivileged belligerent" as a way to define journalists in the Manual has raised several concerns about the treatment of any individuals that the military detains. "Prisoners of war are protected internationally with rights that include being treated humanely, having their status as prisoners of war reported to a neutral body such as the International Red Cross, and being held with the expectation of release once hostilities end," Smyth wrote. "[Unprivileged belligerents] may be subject to domestic laws. The domestic penalties for such suspects can include the death penalty for those found guilty of spying."

On August 10, *The New York Times* editorial board also called for Carter to revise the Manual's section regarding journalists, suggesting that the legal guidance ran contrary to established American law and principles. "Allowing [the Manual] to stand as guidance for commanders, government lawyers and officials of other nations would do severe damage to press freedoms," the editorial board wrote. "Authoritarian leaders around the world could point to it to show that their despotic treatment of journalists — including Americans — is broadly in line with the standards set by the United States government. … For the Pentagon to conflate espionage with journalism feeds into the propaganda of authoritarian governments."

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley also reacted to the Manual in an August 11 interview with the International Press Institute, saying she was concerned by the "cavalier" nature of the statement regarding states' need to censor journalists' work or the use of other measures to keep journalists from revealing sensitive information to the enemy. She said the absence of definitions makes the section overbroad and places no clear parameters on the use of prior restraints. Citing *New York Times Co. v. United States*, 403 U.S. 713 (1971), Kirtley said that the U.S. Supreme Court did not accept national security concerns as a legitimate reason to halt the publication of military-related information, but also noted that that decision was made at a time when security risks were different from today's.

> "Your Manual is concerned with bad journalistic apples of whom you can offer no examples. ... My concern is that in the hands of such a bad apple commander, the manual could be used as a document of impunity, for commanders who are just trying to operate badly under the radar to save themselves from embarrassment, prosecution or worse."
>
> **— Bob Garfield, Host of WNYC's "On the Media"**

During the August 14 episode of WNYC's "On the Media," co-host Bob Garfield interviewed Department of Defense Deputy General Counsel for International Affairs Charles A. Allen about the Manual's treatment of journalists. During the discussion, Garfield asked Allen whether he could cite an operation that had been jeopardized by reporters in the field during any of the last five wars. When Allen replied that he had no specific cases in mind, Garfield responded, "Your manual is concerned with bad journalistic apples of whom you can offer no examples. ... My concern is that in the hands of such a bad apple commander, the manual could be used as a document of impunity, for commanders who are just trying to operate badly under the radar to save themselves from embarrassment, prosecution or worse."

However, Allen told Garfield that the Pentagon was aware of press advocates' criticisms of the Manual. "We are certainly going to consider comments that have been made. … And, we would consider those with regard to this section which has again about two pages of a very large manual, that's not to say it's a small matter," Allen told Garfield. "The fact that it is being construed in the way it has been is something of major concern to us. We are going to be receiving comments. And those will be considered seriously as we make updates to the manual."

On August 29, Al-Jazeera reported that an unidentified Department of Defense official said that the department had been "responding to press queries regarding the manual and are hoping to conduct further exchanges with journalists and representatives from journalism organisations [*sic*]." The unidentified official also told Al-Jazeera that any concerns that officials could use the Manual to hinder journalists' ability to accurately report on war were unfounded. "This manual emphasises [*sic*] that journalists are civilians and must not be attacked for engaging in journalism," the official said. "Moreover ... this manual does not in any way affect existing [Department of Defense] policies with respect to the media, which is to support open and independent reporting on U.S. military operations." The official also explained that the Department of Defense was working with new media personnel to clarify any misunderstandings related to the manual, according to Al-Jazeera.

Although officials indicated that some changes to the Manual would be forthcoming, the Department of Defense had not formally announced any changes to the Manual before the *Bulletin* went to press.

Elaine Hargrove
Silha Center Staff

Journalists Face Troubling Criminal Convictions Domestically and Abroad

During the fall of 2015, journalists domestic and abroad faced charges of criminal conduct that could result in lengthy prison sentences and, in one case, physical punishment. In October 2015, an American social media editor was convicted of helping a hacker alter a headline on a national news organization's website. In November 2015, Iran announced that it had convicted a *Washington Post* reporter of unspecified crimes and sentenced him to serve time in prison. Meanwhile, officials in Saudi Arabia announced in November 2015 that they would consider whether they would pardon a jailed blogger. However, the blogger still faces the possibility of lashing while officials consider his case.

ENDANGERED JOURNALISTS

Editor Found Guilty of Aiding Anonymous

On Oct. 7, 2015, *The Washington Post* reported that a jury in Sacramento, Calif. found journalist Matthew Keys guilty of violating the Computer Fraud & Abuse Act (CFAA). 18 U.S.C. §1030. Keys was found guilty on all three counts he was charged with under the law, including conspiracy to commit computer hacking, transmission of malicious code causing unauthorized damage to a protected computer, and attempting to transmit malicious code to cause unauthorized damage to a protected computer. The maximum sentence under these charges is 25 years in prison.

In 2013, federal prosecutors brought charges against Keys for aiding hacker activist group "Anonymous" in altering a Tribune Company website. According to the indictment, Keys lost his job with KTXL Fox 40, a local TV station in Sacramento owned by the Tribune Company, in 2010. Keys later posted login credentials to the Tribune Company's content management system to a chat room run by Anonymous. In the online forum, he told unidentified Anonymous hackers that he was a former employee of the Tribune Company and then proceeded to publish a username and password that would provide access to the company's servers. Keys then wrote "go fuck some shit up," according to the indictment.

The indictment alleged that a hacker with the pseudonym "Sharpie" subsequently used the credentials to access a Tribune server and made alterations to a news story's headline on the website of the *Los Angeles Times*, which is also owned by the Tribune Company and shared an online network with KTXL Fox 40. Although the changes to the headline were corrected after approximately 40 minutes, the government alleged that the attack caused nearly a million dollars in damage.

Throughout the course of his defense against the prosecution, Keys has argued that he had never provided such information to hackers. "Let's be clear: I never passed a username or password to Anonymous," Keys told the *Washington Post* on October 8. Keys, who was hired as a deputy social media editor for Reuters before his indictment in 2013, has maintained that unknown parties captured the login credentials when he was investigating Anonymous in online chat rooms. "The government wanted to send a clear message that if you want to cover a group they don't agree with, and you're not complicit with [the government], they will target you," Keys told *Vice News* on October 7, after his conviction.

Although the statutory maximum punishment for Keys' crimes is 25 years, a spokesperson for the U.S. Attorneys Office said on October 7, "While it has not been determined what the government will be asking the court for, it will likely be less than 5 years." Sentencing is scheduled for Jan. 20, 2016.

In the wake of Keys' conviction, several commentators condemned the possibility of a lengthy prison term. "So [he] did something dumb; we know that," Andy Carvin, formerly of National Public Radio, tweeted according to *Mashable*. "But prison time for helping deface a web page? Come on now." Former National Security Agency contractor Edward Snowden also tweeted his astonishment at the conviction. "For defacing an @LATIMES article for 40 minutes, journo @MatthewKeysLive faces 25 years. Years," Snowden tweeted on October 7.

In a telephone interview with *The Washington Post* shortly after his October 7 conviction, Keys expressed his anger over the jury's decision. "It's bulls—. The verdict is bulls—, the case is bulls—, the charges are bulls—," Keys said, according to the *Post*. "He shouldn't be doing a day in jail," Key's attorney Jay Leiderman told the *Los Angeles Times* on October 7. "With love and respect, [*The Times*'] story was defaced for 40 minutes when someone found it and fixed it in three minutes. What do you want, a year a minute?"

Keys and Leiderman both said that they intend to appeal the verdict, according to the Post.

Washington Post *Reporter Jason Rezaian Sentenced in Iran*

On Nov. 22, 2015, an Iranian state news agency announced that *Washington Post* reporter Jason Rezaian was convicted and sentenced to prison, according to *The Washington Post*. The *Post* reported that Iranian officials did not specify the charges under which a court convicted Rezaian. They also did not release details about his punishment other than that Rezaian had been sentenced to prison. The *Post* reported that Gholam Hossein Mohseni-Ejei, a spokesman for Iran's judiciary, did not say how long the prison term would be. "The verdict has been issued but has not been officially handed down to the accused or his lawyer," Mohseni-Ejei said. "Given the fact that the verdict has not been officially handed down, I cannot reveal the details, but what I can say is that the accused has been sentenced to prison." Rezaian's lawyer, Leila Ahsan, told the *Post* that he had faced four charges, including at least one charge of espionage, but did not have many other answers. "I have no information about details of the verdict," she said. "We were expecting the verdict some three months ago."

Rezaian, who holds dual American and Iranian citizenship, was arrested on July 22, 2014, along with his wife Yageneh Salehi and two other unnamed journalists. At the time of the arrest, Salehi was an Iranian correspondent for the United Arab Emirates' *The National*. According to reports, Salehi and the other journalists were later released on bail. However, Rezaian remained imprisoned in Evin Prison, one of Iran's notoriously inhumane facilities. According to a July 22, 2015 story by *The Atlantic*, Iranian officials had kept Rezaian in isolation and denied him medical treatment. During the course of the ordeal, the Iranian government provided little information about why it had arrested Rezaian and the other journalists. Ahsan has previously told *The Washington Post* that it was not until April 2015 that she learned of specific charges against him, which included "collaborating with hostile

Endangered, *continued on page 22*

Endangered, *continued from page 21*

governments," and "propaganda against the establishment."(For more information on Rezaian's arrest and trial, see "Journalists Arrested During Protests in Missouri; Journalists Abroad Face Dire Situations" in the Fall 2014 issue of the Silha *Bulletin*, and "Journalists Abroad Face Uncertain Legal Challenges; U.S. Television News Reporters Slain During Live Report" in the Summer 2015 issue.)

After announcement of the conviction, U.S. State Department spokesman John Kirby condemned the Iranian government's decision. "We've seen the reports of a sentence in the case of U.S. citizen Jason Rezaian in Iran but cannot confirm the details ourselves at this time," Kirby said, according to the *Post*'s November 22 story. "If true, we call on the Iranian authorities to vacate this sentence and immediately free Jason so that he can be returned to his family."

Other governmental organizations have also been largely critical of Iran's treatment of Rezaian. On November 11, Reuters reported that United Nations officials urged Iranian officials to release all captive journalists, including Rezaian, who had been "arbitrarily and unlawfully arrested for their peaceful exercise of fundamental rights." The call came after Iranian officials had arrested several more journalists on November 2. "Freedom of expression is central to guarantee open, free and fair political processes," said David Kaye, the United Nations special rapporteur on the right to freedom of opinion and expression. On December 3, Rezaian was the recipient of the Radio Television Digital News Foundation's First Amendment Award. The award honors an outstanding individual or organization that champions the First Amendment and press freedoms.

According to a December 2 story by the *Washington Post*, Rezaian has been held in prison longer than any journalist in Iran. Ali Rezaian, Jason Rezaian's brother, told NPR on December 3 that Jason is being held largely in isolation, with one other person. "He's very depressed," Ali said. "He's angry; he just doesn't understand why this is all happening and gets very little information." On November 26, Ali had told France 24 English that Jason would be appealing the court's decision. However, a formal appeal cannot occur until Rezaian's attorney has received details of the verdict. As the *Bulletin* went to press no official appeal had been filed.

Imprisoned Saudi Blogger Raif Badawi May Be Given Pardon

On Nov. 28, 2015, the United Arab Emirates-based *The National* reported that Swiss Secretary of State Yves Rossier announced the possibility of a pardon for Saudi blogger Raif Badawi, who had been imprisoned and subject to lashing for criticizing Saudi Arabia's leaders online. "A procedure for a pardon is now under way before the head of state, that is King Salman," Rossier told Swiss newspaper *La Liberté*. According to a November 30 post on the website of Reporters Without Borders, Rossier had made the statement after an official visit to Saudi Arabia. The Swiss secretary of state also noted that Badawi's sentence had been suspended while the pardon was under consideration.

In 2012, Badawi and female-rights activist Suad al-Shammari, were arrested for declaring a "day of liberalism" and calling for an end to the domination of religion over public life in Saudi Arabia on the website "Free Saudi Liberals." Upon the completion of a trial, a court initially sentenced Badawi to seven years in jail and 600 lashes. A Saudi appeals court later overturned the ruling and ordered a retrial. In May 2014, a trial court again ruled against Badawi, establishing a harsher sentence of 1,000 lashes and 10 years in jail in addition to a $266,000 fine for "insulting Islam." Because 1,000 lashes at once would likely be fatal, Saudi judges declared that Badawi was to be whipped in installments of 50 lashes each for 20 weeks. Badawi, who had been imprisoned since his initial arrest, received 50 lashes in January 2015, but government officials announced that they had suspended further lashings due to medical concerns, according to a Sept. 17, 2015 story by *The Washington Post*.

However, human rights activist group Amnesty International announced in a June 7, 2015 press release, that Saudi Arabia's Supreme Court decided to uphold the lower courts' decisions. Ensaf Haidar, Badawi's wife, told Al-Jazeera on June 7, that his case had been under review for several months and that his family found the court's decision surprising. "We had had some hope before that maybe he would get his sentence reduced," she said. CNN reported on October 27 that Haidar published a statement on the Raif Badawi Foundation website announcing that an informed source told her that the lashings of Badawi would begin again. "The informed source said the flogging will resume soon but will also be administered inside the prison," she said, according to CNN. "It is worth mentioning that the same source had warned me of Raif's pending flogging at the beginning of January 2015 and his was confirmed, as Raif was flogged on [January 9]."

Haidar appealed to Saudi Arabian King Salman bin Abdulaziz Al Saud to allow her husband's deportation to Canada, where she had been granted asylum with the couple's three children. "I call on his Majesty King Salman to gracefully end my husband's ordeal and to pardon him," she said in the statement, according to CNN. "I also appeal to his Majesty to allow him to be deported to Canada to be reunited with his family and children, who have been deprived of their father for more than four years."

Badawi's case has garnered worldwide attention and criticism over the Saudi government's harsh treatment of journalists and dissidents. During a January 8 press briefing, U.S. Department of State spokeswoman Jen Psaki said that the "United States government calls on Saudi authorities to cancel the brutal punishment." In a June 7 statement, Canadian Foreign Affairs spokesman Nicolas Doire said that Canada will continue to consider Badawi's sentence a violation of human dignity and that it is asking for clemency in his case. "The promotion and protection of human rights are an integral part of Canada's foreign-affairs policy. Although Badawi is not a Canadian citizen, we will continue to make our position known publicly and through diplomatic channels," said Doire.

After the Supreme Court upheld the harsher sentence, Philip Luther, Amnesty International's Middle East and North Africa program director condemned the decision. "Blogging is not a crime and Raif Badawi is being punished merely for daring to exercise his right to freedom of expression," Luther told the Australian Broadcasting Company on June 7. On Oct. 6, 2015, free speech advocacy organization English PEN awarded Badawi the Pinter Prize, an award that honors individuals who have been persecuted for exercising expression.

In the November 30 post, Reporters Without Borders continued to call for further attention to Badawi's case. "We urge the Saudi authorities to approve Raif Badawi's pardon and we hope that we will soon be able to see this young blogger released and reunited with his family. We meanwhile remain vigilant and call for the international pressure to be maintained," the group wrote.

Sarah Wiley
Silha Research Assistant

Recent Cases and Pending Decisions Put Media Law Issues in Spotlight in Multiple States

A number of states dealt with high-profile media law issues during the fall of 2015 that could have far-reaching implications for journalists and citizens. Issues included Minnesota's expansion of body camera use by police officers and the availability of public transit videos, California's expansion of libel law protections and its new requirement for search warrants for certain electronic materials, North Carolina's First Amendment decision on social media use as conduct rather than speech, and Montana's landmark expansion of shield law protection for journalists.

STATE LAW UPDATES

Minnesota Court of Appeals Rules Metro Transit Surveillance Videos Are Public Data

On Aug. 24, 2015, a Minnesota Court of Appeals ruled that surveillance videos from Metro Transit buses are public information. *In re KSTP-TV v. Metro Transit*, No. A14-1957 (Minn. Ct. App. Aug. 24, 2015). The case stemmed from a KSTP story on two incidents, one involving a bus accident in Minneapolis and the other involving a fight between a driver and a bicyclist. The news station requested the videos from the Metropolitan Council (Council), the organization that oversees Metro Transit. However, the Council refused to disclose the videos, citing that the recordings constituted personnel data under the Minnesota Government Data Practices Act (GDPA). Minn. Stat. § 13.01 *et seq.* KSTP filed a data practices complaint with the Minnesota Office of Administrative Hearings, in which the administrative law judge deemed the data to be public and ordered the Council to provide KSTP with the videos. The Council appealed.

Under the GDPA, "personnel data" is defined as government data maintained because the individual is a government employee. Minn. Stat. § 13.32, subd. 1. In its decision, the Minnesota Court of Appeals determined that the videos were maintained for a variety of reasons, and not primarily to monitor the employees of the Metro Transit. It ordered the Council to release the videos to KSTP, declaring that the videos constituted public data. On Sept. 21, 2015, the Council appealed the issue to the Minnesota Supreme Court, which agreed on Nov. 17, 2015 to hear the case.

Questions Remain in Debate Over Body Camera Use by Minnesota Police

According to a Sept. 11, 2015 story by the Minneapolis *Star Tribune*, an oversight panel for the Minneapolis Police Department, the Police Conduct Oversight Commission, issued a report outlining how Minneapolis police officers should use body cameras. The report was part of a larger move in Minnesota to implement responsible use of body cameras among police officers, and it followed months of research conducted by the panel, including a review of practices in other cities within the state and the collection of input from the community. Separately, *The Pioneer Press* reported on Sept. 15, 2015 that St. Paul police had distributed surveys to the community during the summer months of 2015, asking about the availability of the footage to be collected from the cameras, with questions including, "Do you believe in certain places where you have an expectation of privacy, like your home, that video recorded by police body-worn cameras should automatically be considered private?"

> "We don't want a [police body camera] system that makes it look like we're hiding our behavior, but we also don't want that to be at the expense or cost of individual privacy for victims. We're trying to find common ground that meets everyone's needs."
>
> **— Axel Henry, St. Paul Police Department Commander**

At the heart of the debate over body cameras was the balance between protecting the privacy of individuals who are filmed and the desire for greater transparency in police operations. "We don't want a system that makes it look like we're hiding our behavior, but we also don't want that to be at the expense or cost of individual privacy for victims," said St. Paul Police Department Commander Axel Henry in the *Pioneer Press*' September 15 story. "We're trying to find common ground that meets everyone's needs."

This was the balance that the Police Conduct Oversight Commission was attempting to address throughout its deliberations. According to the *Star Tribune*'s September 11 report, the Commission recommended requiring officers to wear the cameras during all law enforcement activities, as well as any noncriminal interactions with citizens, provided the officers first receive consent. It also recommended that videos of such encounters be retained for a minimum of 280 days, the length of time that a citizen has to file a complaint against an officer, with footage involving use-of-force encounters retained for three years and any footage involving a death to be retained indefinitely. The full report is available at http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-148199.pdf.

The *Star Tribune* noted that two points of contention over the report remained: the editing and viewing of the footage, and its release to the public. First, the report recommended that to increase transparency and accountability, officers should not be allowed to view or edit footage until after they have written their incident reports. Second, the report recommended that, while footage will be made publicly available under the GDPA, subjects in the footage should be informed prior to the release of any videos in which they are depicted.

The Associated Press (AP) reported on December 1 that Minnesota lawmakers are still no closer to resolving these issues, even with the upcoming 2016 legislative session beginning in March. The *Pioneer Press* reported on Sept. 15, 2015, that at least 41 other law enforcement agencies in Minnesota outfit their officers with body cameras, even without a state law, but as the AP noted, the lack of state legislation means that agencies have the ability to set their own rules for

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State Laws, *continued from page 23*
how long videos can be stored and when to release them.

According to a December 2015 report from the Minnesota Law Enforcement Coalition — which consists of the Minnesota Chiefs of Police Association, the Minnesota Sheriff's Association and the Minnesota Police and Peace Officers Association — the leading legislative priority for the group in 2016 should be the passing of a comprehensive body-camera law. The report highlighted the need to "strike a balance between personal privacy and transparency," noting that the question of public access to body camera footage could have extensive implications for the effectiveness of Minnesota police. The report argued that body cameras raised privacy concerns for citizens who interact with officers — especially during interactions that are non-criminal — and, if the legislature declares body camera data to be public, then some individuals may be dissuaded from calling the police in the first place. The report outlined nine guiding principles for the legislature to consider, including that a body camera bill should: classify and "clarify when body-worn camera footage is public and accessible"; classify "body worn camera footage taken in places where there is a reasonable expectation of privacy as private on individuals unless an officer uses deadly force that causes great bodily harm"; make "video data … available to the data subject or a representative of the subject within a reasonable period of time"; and require "data requests to be for a specific event with an approximate time and date."

Until the Minnesota legislature makes a decision, guidance regarding body camera usage remains unclear. According to a September 15 *Pioneer Press* article, sixteen Minnesota cities filed an application with the Minnesota Department of Administration for a temporary declaration that camera footage be presumed private in most instances. In response, the Information Policy Analysis Division (IPAD), a division of the Minnesota Department of Administration, issued a report providing examples of body camera videos that can or must be private, including footage that would reveal the identities of undercover police or informants, domestic abuse victims, or sex crime victims, according to the *Duluth News Tribune* on Oct. 14, 2015. In its report, IPAD stated that any footage identifying protected individuals would need to be deleted, and parts of footage involved in active investigations would be kept private. However, the Department of Administration acknowledged that in the absence of legislative action ruling otherwise, state law requires most of the videos to be public because footage would be classified as law enforcement data under the GDPA. The guidance provided in IPAD's report is not legally binding, but it could serve to direct the legislature's efforts in March 2016. The report is available at http://www.ipad.state.mn.us/docs/bodycamdata.pdf.

> "The new [Montana] law protecting journalists' sources on third-party servers addresses the reality of the digital age we live in."
>
> **— Jim Rickman, Executive Director, Montana Newspaper Association**

"Although a data subject in a body cam video has access to private data about him/herself and can share the video as the subject deems appropriate, law enforcement is obligated to review the video prior to release and make decisions about potentially redacting data about other subjects in the video," IPAD wrote in the report, leaving open the possibility that law enforcement could redact important information under the auspices of privacy.

California Expands Libel Provisions to Online Publications

The Washington Post reported on Sept. 30, 2015 that California Gov. Jerry Brown signed Assembly Bill 998 (AB 998) into law, extending the state's libel retraction and damages provisions to online publications. The state's libel retraction statute, which was adopted in 1931, limited the damages available to plaintiffs in libel cases against media defendants in instances where the defendant published a retraction at the request of the plaintiff.

However, the statute only applied to newspapers and radio broadcasts, which also included television broadcasts, according to an October 2 report by the *Columbia Journalism Review*. In 2014, a California Court of Appeal for the Second Appellate District ruled that the retraction statute, Cal. Civ. Code § 48a, did not include online publications because legislative intent dictated that "[a]t the time the statute was enacted in 1931, or amended in 1945, a 'newspaper' was understood to mean a publication that was on inexpensive paper, often daily." The court determined that "[h]ad the legislature intended the statute to apply to defamatory material published on an online website, it could have amended the statute to say so." *Thieriot v. The Wrapnews*, unpublished opinion available at http://www.courts.ca.gov/opinions/nonpub/B245022.PDF.

In response to the 2014 ruling, Assembly Member Donald Wagner (R-Irvine) introduced AB 998. According to the *Columbia Journalism Review*, the California Newspaper Publishers testified in support of the bill, and it easily passed both houses. AB 998 replaces the term "newspaper" with "daily or weekly news publication," defined as "a publication, either in print or electronic form, that contains news on matters of public concern and that publishes at least once a week." The full bill is available at http://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160AB998. According to an Oct. 30, 2015 post on the Reporters Committee for the Freedom of the Press (RCFP) website, AB 998 does not apply to entities that publish at less than weekly intervals.

The bill goes into effect on Jan. 1, 2016.

Montana Passes Landmark Shield Law Protecting Electronic Information Held by Third-Party Service Providers

On Oct. 1, 2015, Montana's House Bill 207 (HB 207) took effect, which amended the state shield law, known as the "Media Confidentiality Act," by prohibiting "government bodies from requesting or requiring disclosure of privileged news media information from services that transmit electronic communications." The RCFP noted on its website on Oct. 22, 2015 that although the previous version of Montana's shield law created protection against subpoenas that required journalists to disclose information about sources, it did not prevent prosecutors, criminal defendants, or civil litigants from issuing subpoenas to third-

party communication providers, such as e-mail services and phone companies, that could potentially retain journalists' electronic records.

The RCFP noted that the amendments to the law signaled a milestone for press freedom in the evolving media environment. "The new law protecting journalists' sources on third-party servers addresses the reality of the digital age we live in," Montana Newspaper Association Executive Director Jim Rickman told Montana's *Great Falls Tribune* on Oct. 2, 2015.

A majority of states have shield laws in place, but only three other state statutes address third-party subpoenas. These states — California, Connecticut, and Maine — protect journalists through requiring the government to notify reporters of third-party subpoenas, but they provide only a qualified privilege that renders the protections inapplicable in certain situations. However, Montana's updated law provides an absolute privilege in all situations.

"I hope this will lead other states to follow," said Rep. Daniel Zolnikov (R-Billings), the sponsor of the bill. "If we make this a bigger issue in the state, we can get the ball rolling at the national level."

California Expands Search Warrant Requirements

On Oct. 8, 2015, *The Washington Post* reported that California Gov. Brown also signed Senate Bill 178 (SB 178) into law, also known as the California Electronic Communications Privacy Act (CalECPA). It requires law enforcement officers to acquire a search warrant prior to viewing private e-mails, text messages, and GPS data located on smartphones, laptops, and cloud data storage on remote servers. The bill, introduced by Sen. Mark Leno (D-San Francisco) had support from a number of technology companies like Google and Apple, all of whom saw an increase in law enforcement demands for access to consumer data in recent years, as well as from privacy organizations such as the American Civil Liberties Union and the Electronic Frontier Foundation.

"For too long, California's digital privacy laws have been stuck in the Dark Ages, leaving our personal e-mails, text messages, photos and smartphones increasingly vulnerable to warrantless searches," said Leno in an Oct. 8, 2015 statement on his office's website. "That ends today with the Governor's signature of CalECPA, a carefully crafted law that protects personal information of all Californians. The bill also ensures that law enforcement officials have the tools they need to continue to fight crime in the digital age."

Although some opponents of the bill, such as the National Association to Protect Children, argued that SB 178 could result in the destruction of evidence prior to government access, the *Los Angeles Times* reported on Oct. 8, 2015 that the bill allows exceptions to the warrant requirements in the event of emergencies during certain types of law enforcement investigations.

> "If accessing a Web site is conduct and not speech, the scope of potential government regulation of our use of Web sites (and the Internet in general) vastly expands — not a development we should welcome."
>
> **— David Post, Senior Fellow, New America Foundation's Open Technology Institute**

North Carolina Sex Offender Case Muddles First Amendment Issues

On Nov. 6, 2015, the North Carolina Supreme Court rejected a First Amendment challenge to a provision of a state law that banned convicted sex offenders from accessing commercial social networking sites. *State v. Packingham*, 2015 WL 6777115 (N.C. Nov. 6, 2015). The case arose from convicted sex offender Lester Packingham, who created a Facebook page under a pseudonym. When Durham Police Department identified a profile picture on the Facebook page as Packingham, authorities charged him with violating N.C.G.S. § 14-202.5, which made it a criminal offense for anyone convicted of a sex offense to "access a commercial social networking Web site [that] … permits minor children to become members or to create or maintain personal Web pages on the [site]."

The Washington Post reported on November 10 that the key issue surrounding the North Carolina statute was whether the law's design to restrict people from communication with others in specific ways was a restriction on speech or on conduct.

This distinction is critical to First Amendment challenges, as any such challenge hinges on the level of scrutiny applied to the governmental action. If the government seeks to regulate speech, it must prove that a regulation is necessary to serve a compelling state interest, as opposed to the regulation of conduct, which stipulates that regulation is permissible so long as the neutral regulation advances a substantial government interest. In its decision, the North Carolina Supreme Court held that the law regulated conduct, finding that the regulation had only an incidental effect on speech and was therefore subject to only the lightest judicial scrutiny, according to the *Post*.

First Amendment experts have expressed concern over the court's decision deeming that accessing Facebook is conduct rather than speech. Although some commentators have noted that the decision is specific to sex offenders, others have read the ruling more broadly, arguing that the Court's conduct-based determination could have far-reaching implications. "The majority's version of things makes for some pretty ghastly First Amendment law, and will, if followed by other courts, have dreadful consequences," David Post, a Senior Fellow at the New America Foundation's Open Technology Institute, told *The Washington Post*. "If accessing a Web site is conduct and not speech, the scope of potential government regulation of our use of Web sites (and the Internet in general) vastly expands — not a development we should welcome."

Dillon White
Silha Research Assistant

30th Annual Silha Lecture Addresses Challenges to Reporting on National Security Matters

Since Sept. 11, 2001, the Annual Silha Lectures hosted by the Silha Center for the Study of Media Ethics and Law have often discussed striking the proper balance among issues of government transparency, freedom of the press, the public's right to know, and national security. The 30th Annual Silha Lecture: "Clear and Present Danger: Covering National Security Issues in the Post 9/11 World," held on Oct. 19, 2015 in the Coffman Memorial Union Theater on the University of Minnesota campus, drew these important themes together again. Pulitzer Prize-winning *New York Times* investigative journalist James Risen and attorney Joel Kurtzberg addressed the legal and journalistic challenges that arise when reporting on national security issues and using confidential sources in the years following the September 11 terrorist attacks in New York City. Silha Center Director and Professor of Media Ethics and Law Jane Kirtley moderated the discussion.

SILHA CENTER EVENTS

Risen and Kurtzberg began the lecture by discussing their recent court battle with federal prosecutors and the United States Department of Justice (DOJ). In 2011, Risen was subpoenaed to testify before a grand jury during the investigation of Jeffrey Sterling, a former Central Intelligence Agency officer who was later found guilty of violating the Espionage Act by leaking classified information. Federal prosecutors believed that Risen had used Sterling as a source for his book, *State of War*, and two articles on national security issues. Prosecutors contended that Risen's testimony was necessary because the journalist was the only person who had direct knowledge of whether Sterling had actually disclosed classified material. Risen refused to testify, arguing that the First Amendment created a journalist's privilege that allowed him to reject government requests that he disclose confidential information.

In July 2011, United States District Judge Leonie M. Brinkema issued an order that prevented federal prosecutors from asking Risen about his source. *United States v. Sterling*, 818 F.Supp.2d 945 (E.D. Va. 2011). The DOJ appealed the order, which a divided three-judge panel of the United States Court of Appeals for the Fourth Circuit overturned in 2013. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013). In July 2014, Risen petitioned the U.S. Supreme Court to hear his case, but the court declined to do so. However, DOJ officials dropped their requests for Risen's testimony in January 2015, stating in court filings that Risen's consistent and steadfast refusal to identify his source "laid to rest any doubt concerning whether he will ever disclose his source or sources. He will not." (For more information on the background to Risen's case, see "Espionage Conviction Ends Lengthy Struggle to Compel Journalist's Testimony" in the Winter/Spring 2015 of the Silha *Bulletin*, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, "Update: Supreme Court Declines to Hear Reporter's Privilege Cases" in the Summer 2014 issue, "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources" in the Fall 2013 issue, and "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue.)

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> **— James Risen, *New York Times* journalist**

Despite the victory, Risen and Kurtzberg predicted that their case will affect how journalists report national security issues in the future. "This impacts journalists everywhere. Journalists simply need to be able to uphold confidentiality if they are going to be successful in doing their jobs," Kurtzberg said during the lecture. In addition to the possibility of being held in contempt for not identifying confidential sources, Kurtzberg warned that journalists could still face criminal charges under the Espionage Act. He noted that although a journalist has never been charged with violating the Espionage Act, the question over whether a journalist could be punished for publishing classified information remains unanswered. Kurtzberg argued that the language of the statute has been left "intentionally vague and ambiguous," which could lead to criminal prosecutions of journalists.

Risen and Kurtzburg also discussed the differences in how President George W. Bush's administration had handled Risen's case as compared to President Barack Obama's administration. Kurtzberg said the Bush administration had "zero concern" for any negative First Amendment consequences that would result in the DOJ's pursuit of Risen's testimony. Alternatively, Kurtzberg believed the Obama administration when it said that it wished to accommodate First Amendment concerns, even though the administration failed to effectively do so. However, Risen disagreed with Kurtzberg's assessment, arguing, "To me, with the Obama administration, the bottom line is that they are no different from the Bush Administration when it comes to the war on terror and national security. The only difference is that the [Obama administration] feel[s] bad about it."

Risen said that newspapers are an important check on government power, especially in recent years. "All of the subjects we debate since 9/11 have been able to get out to the public because of the press," he said. Kurtzberg also argued that the government's rampant over-classification of various records contributes to the public's lack of knowledge. He suggested that the government often designates information classified for reasons other than national security, such as that the information might be potentially embarrassing. Kurtzberg pointed out that the lack of congressional oversight of the national security community has meant that the press is needed to provide such a check on

government. Risen agreed, saying, "The war we are currently fighting has been entirely classified and [reporters] have had to fight inch by inch to try to tell the American people what is going on."

Turning to the separate but related issue about government leaks to the press, Risen expressed sympathy for the position of former National Security Agency contractor Edward Snowden as a whistleblower. Risen asked the audience to imagine a situation where one had to "go to your boss and tell him that everything you think he is doing is wrong" rather than to expose any wrongdoing to the public. "How long do you think you would have your job?" he asked. "You hear so much about back channels and that Snowden should have gone through back channels to address his concerns instead of leaking, but these back channels don't exist."

Kurtzberg and Risen also discussed their views on shield laws, which are statutes that grant journalists a privilege to refuse to testify about sources or information obtained during the newsgathering and publication process. Although Congress has often debated such a law, no federal shield legislation has been enacted. However, many states have adopted such laws or offer similar protections for reporters.

When asked whether a national shield law would be beneficial, Kurtzberg said, "the devil is in the details as to what kind of protection you're going to get." He highlighted two main issues: who is considered a "journalist" under the law, and what exemptions should exist for national security purposes. "'Any blogger sitting in their underwear' is what is always brought up. If they decided to put up a blog that night, are they a journalist?" he asked. "There's always debate about that." As for national security exemptions, Risen said that any exemption would cause problems. "I think that any national security loophole is dangerous because I know how the government works, and I know what they'll do is they'll reverse engineer that as soon as possible," Risen said. "They'll take that national security loophole and turn it on its head [to determine what type of journalism related to government leaks may be acceptable]. … Any kind of system in which you give some government body the power to decide what is acceptable journalism and what is not, I think, erodes the First Amendment

Kurtzberg proposed that the "best way to cut through all the red tape and get [a shield law] passed on the federal level would be to have a very simple bill." Kurtzberg explained that the DOJ currently has guidelines for when a subpoena can be issued to a journalist, which includes balancing First Amendment concerns with the necessity of information when conducting a leak investigation. However, Kurtzberg noted that third parties do not have any legal power to demand that the DOJ is adhering to its own guidelines. "My bill would be very simple and give third parties recourse to make sure that the DOJ is doing what they say they are doing already. Let courts be an independent judge to hold whether the government is actually complying with those guidelines," Kurtzberg said. Risen added that although many states have enacted shield law protections for journalists, government prosecutors can often get cases involving leaks into federal courts in order to avoid such state laws. Thus, a federal shield law would provide additional protection for reporters.

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> **— Attorney Joel Kurtzberg**

Kurtzberg and Risen also called attention to the surprising fact that some media organizations were hesitant to support Risen because they feared his case could backfire and create delays when lobbying for a federal shield law. According to Kurtzberg, many organizations did not want to promote Risen's case because they wanted to wait for a "better fact pattern" without complications related to national security issues. However, Kurtzberg asked, "If we can't defend our journalists when they are writing about issues of national security, issues that really matter to the public, then what are we fighting for in the first place?"

In the concluding minutes of the lecture, Risen warned that relying on large leaks of government information, such as the incidents with Chelsea Manning and Snowden, was not sustainable for good journalism in the future. He argued that one of the unintended consequences of the government's numerous investigations of leaks has created an environment in which most government sources have become afraid to speak with reporters, even regarding non-classified information. "The crackdown on leaks has made it very difficult [for] that normal organic relationship between reporters and the government. So there's a huge clampdown on any form of dissent within the government, and I think that's been like a lid on a pressure cooker," Risen said. "So the only people now willing to come out are the people that are willing to risk their entire life to [disclose information to the press]. … They say, 'I'm gonna get one shot at this, and I'm going to take as much as possible.' But there's not very many people like that, and I think that's why you've seen Manning and Snowden. That's not a business model for journalism, and it's not a model for the way government should work."

A video of the lecture is available on the Silha Center website at silha.umn.edu. Silha Center activities, including the annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

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Silha Research Assistantships

The Silha Center offers Research Assistantships to outstanding law and graduate students with an interest in media law and media ethics. Silha Research Assistants are responsible for writing, editing and producing the Silha *Bulletin* during the academic year and the summer semester. They also assist Silha Professor Jane Kirtley with a variety of research projects, such as preparing a comprehensive outline on global privacy for the Practising Law Institute's annual *Communications Law in the Digital Age* conference handbook; *amicus* briefs (including before the Supreme Court of the United States); and comments on proposed rules and regulations submitted to federal, state and international bodies.

The number of available Research Assistantships varies from year to year. Appointments are competitive. A strong academic record and excellent legal research and writing skills are required. Journalism experience is strongly preferred. Applicants must be currently enrolled at the University of Minnesota. Applications for Summer 2016 and for the 2016-17 academic year will be due in **March 2016**.

For more information, please visit the Silha Center website at http://www.silha.umn.edu