

## Not Just a ‘Rogue Reporter’: ‘Phone Hacking’ Scandal Spreads Far and Wide

*Murdoch Closes News of the World and Speaks to Parliament while Public Outrage Grows over Tabloid Crime, Collusion, and Corruption*

A massive ethical and legal scandal enveloped the Rupert Murdoch-owned British tabloid *News of the World* in the summer of 2011, leading to its sudden closure. New allegations arose almost daily that reporters and private investigators illegally accessed the voice mail messages of politicians, celebrities, and private citizens. The revelations sparked worldwide public outcry and led to sweeping law enforcement investigations directed at top editors of the paper, executives at its parent company News Corporation, and the News Corp. chairman and CEO himself. Meanwhile, lawmakers and commentators explored the scandal’s implications for the news media business as a whole.

Allegations arose in July 2011 that private investigators working for *News of the World* accessed the voice mail account of Milly Dowler — a 13-year-old British girl who went missing in 2002 and was later found murdered. The investigators allegedly listened to the voice mail messages of worried family members and then deleted them to make room for new ones, giving her family and police false hope that Dowler was still alive and accessing her cellphone. The news fed a growing scandal that has been years in the works, involves dozens of reporters and editors at *News of the World*, and perhaps others associated with News Corp. holdings, even in the United States. The British police have also been criticized for handling early investigations poorly and for engaging in corrupt relationships with *News of the World* reporters and editors. On July 8, 2011, News Corp. announced that the July 10, 2011 issue of *News of the World* would be its last after 168 years of publication. News Corp. owns more than two hundred media outlets including *The Wall Street Journal* and *The Times* of London, the Fox television and film companies, and much of BSkyB, a British satellite TV company.

The so-called “phone hacking” scandal has led to more than a dozen arrests, resignations by top News Corp. executives and British police, the launching of several new investigations into News Corp. business practices, and pressured Murdoch to retreat from a business deal to purchase the remaining portion of BSkyB that he did not own. The U.S. Department of Justice and the Securities and Exchange Commission (SEC) are reportedly conducting preliminary investigations into the possibility of international law violations. The FBI is reportedly investigating allegations that Murdoch journalists hacked into the phones of victims of the Sept. 11, 2001 terrorist attacks or their families. British police have teamed up with Scottish authorities to continue investigating claims of phone hacking. Parliament launched a formal inquiry into the scandal and has questioned top News Corp. officials including Rupert Murdoch and his son, James Murdoch. The investigations and inquiries remain ongoing, and it is unclear what each effort will uncover about the details of a scandal that spans nearly a decade.

### **‘Phone hacking’ a Widespread Practice at News of the World**

The illegal practices *News of the World* reporters allegedly used to access the voice mail accounts of individuals ranging from famous athletes to family members of crime victims have been popularly labeled “phone hacking,” although that label suggests a more complex process of computer system manipulation than what apparently occurred. According to a Sept. 1, 2010 *New York Times Magazine* article, *News of the World* reporters, or private investigators the reporters hired, engaged in a practice known as “double screwing,” which involved two people calling the same cell phone at the same time. The first caller rendered the line busy, sending the second caller to a voice mail prompt. The second caller would then gain access to the phone’s voice mail in one of two ways. In some cases, the second caller might enter a generic passcode used by the mobile phone service provider which would grant access to any voice mail box on that company’s network, such as “1111” or “4444.” According to a July 14, 2011 post on the PBS blog Need to Know, in other cases, the

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# Security and Privacy in ‘The Year of the Hack’

The year 2011 may be remembered as “the year of the hack.” On the heels of WikiLeaks’ extensive disclosures of classified government records in 2010, dozens of businesses ranging from Sony to Citigroup to Google reported cyber attacks that compromised

their operations as well as sensitive consumer data. Some companies were targeted by the “hacktivist” collective known as “Anonymous” in retaliation for the decision to sever their ties with WikiLeaks. Others, including PBS, the U.S. Senate, and the CIA, were singled out by the “Lulz Security” collective, whose proclaimed mission was to expose gaps in security systems. Even the International Monetary Fund suffered what it called a “large and sophisticated cyber attack” that threatened to expose international economic data, with some investigators accusing the Chinese government of backing the assaults — a charge China denies. And the unfolding story of *The News of the World* phone-hacking scandal, which we explore in detail in our cover story, reminded us that unscrupulous behavior that compromises both privacy and security can extend to journalists, too.

The public clamored for reassurance that their personal information would be safeguarded in a digital world that seemed increasingly vulnerable, even as they eagerly adopted new social media innovations — some of which, like the identity disclosure requirements for subscribers to Google Plus and Facebook’s use of facial recognition software to scan photos posted online, were highly controversial. Predictably, legislators around the world called for stronger laws and regulations and more vigorous enforcement mechanisms. Law enforcement demanded, and in many instances received, greater authority to utilize social media to investigate and prevent crime. In May, nearly 10 years after the September 11 attacks, Congress voted overwhelmingly to extend surveillance powers under the USA PATRIOT Act just a day before they were set to expire.

The public has an insatiable appetite for disclosing and sharing personal information with ever-expanding circle of “friends.” But they want to do it on their own terms — and preferably, for free. Companies like Facebook and Google recognize that the information their users provide is a valuable commodity, and so they entice their customers to

disclose plenty of it as the price of admission to their digital playgrounds. Unless compelled to, however, those companies are not necessarily forthcoming about what they are doing with the information once they have it.

So it is not surprising that governments ranging from the U.S. Congress to the European Union are calling for greater transparency in cyberspace. They want to force companies to explain what data they collect, what use they make of it, and how users can opt out of the process, all in the name of giving the individual the right of control over personal information.

This is all very well. But the “right to control” will have First Amendment implications down the road. The European Commission (as well as, independently, some legislators in California), have called for an even more potent right: the “right to be forgotten,” or to be removed from databases such as Wikipedia and Google’s Streetview. This conflicts with United States law, which generally says that truthful information obtained legally from public sources cannot be censored. For example, *The New York Times* reported on August 27, 2011 that two entrepreneurs in Cincinnati, operating as “Larken Design,” are selling digitally retouched mug shots from 1955 that were discarded by the Alameda County (Calif.) sheriff’s department when it switched to a digital filing system. Scholars quoted in the story said that Larken’s sales of prints, posters, and tote bags are protected by the First Amendment.

But other countries consider privacy to be a fundamental right that trumps other interests like free expression. A recent poll found that 90 percent of Europeans polled support the “right to be forgotten.” I wonder how they would react to what Larken is up to?

\* \* \*

With this issue, we bid a fond and grateful farewell to Patrick File, who during his years as a graduate student at the School of Journalism and Mass Communication has served as a Silha Center research assistant, Silha Fellow, and editor of 13 issues of the *Silha Bulletin*. Patrick has dedicated much of his scholarly energy to the study of media law and ethics. He has labored tirelessly and patiently with a staff of law and graduate students to produce the quality publication that you are reading now, bringing creativity, insight, and good humor to the process. We wish him every success as he shifts gears to concentrate on completing and defending his doctoral dissertation. He will be very much missed.

— PROF. JANE KIRTLEY  
SILHA CENTER DIRECTOR AND SILHA PROFESSOR OF  
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private investigators would contact the cell phone provider and request a password change. It is unclear if the investigators posed as the customer or if companies readily fulfilled these types of requests. The “double screwing” technique practiced by *News of the World’s* investigators would probably not be effective on newer cell phone networks because they allow only the subscriber who sets the original password to subsequently change it, Need to Know reported.

## COVER STORY

In 2003, an investigation of Stephen Whittamore, a private investigator, led to the discovery of a client list containing the names of more than 300 British journalists from more than 30 media outlets, according to

an August 15, 2011 story in *The Washington Post*. The story said journalists used Whittamore to get personal information like private phone numbers. Among other things seized during a search of Whittamore’s home were the phone numbers of Milly Dowler and her family members, the story said. Whittamore’s 2005 conviction for violating the

Data Protection Act — a U.K. law that governs the security of personal data and prohibits companies and individuals from revealing personal information — “led only to a slight tap on the wrist: no fine, and a suspended sentence with no jail time,” the *Post* reported. Whittamore violated the law by misrepresenting himself as a relative or employer of the person whose phone number he was seeking. None of the journalists who hired him were investigated. According to the *Post* report, a 2006 Information Commissioner’s Office report largely based on the Whittamore case called for harsher sentences for violators of Britain’s Data Protection Act. It died in Parliament in 2008. “There was this sense out there that a little bit of gossip didn’t really do anyone any harm,” said Member of Parliament (MP) Chris Bryant, a Labour Party member from Rhondda, and a repeated target of the tabloid press, which he said he believes used illegal methods to obtain the private data of an ex-partner. “And politicians were terrified of putting their heads above the parapet and challenging these tabloids that sold millions of copies. We know now that was wrong.” According to the *Washington Post* report, politicians said the Whittamore case should have been a wake-up call to do something about the broader problem of phone hacking. “Every so often, an event like this happens and we have to ask ourselves deeper questions,” said MP Ed Miliband, Labour Party leader and Leader of the Opposition from the South Yorkshire constituency of Doncaster. “What does it say about our country? How did we let this happen? And how do we change to ensure this does not happen again?”

In 2005, the same year Whittamore was convicted, senior aides to the British royal family began noticing voice mail messages they had never heard were already in the saved message folders of their inboxes. During the same time period, *News of the World* ran stories with information known only

by a small group of individuals within the royal family. The Metropolitan Police Service (MPS), commonly referred to as Scotland Yard, which is responsible for Greater London and also has significant national responsibilities such as leading counter-terrorism efforts and protection of the British Royal Family and senior figures of the government, launched an investigation.

In 2006, Clive Goodman, a reporter at *News of the World*, and Glenn Mulcaire, a private investigator who worked for the newspaper, were charged with illegally listening to voice mail messages of the royal family, a criminal offense under section 79 of the Regulation of Investigatory Powers Act 2000. They were both found guilty and received prison terms. The editor

of *News of the World* at the time, Andy Coulson, resigned from his position and claimed he had no knowledge of the phone hacking practices. Soon after Coulson’s resignation, British Prime Minister David Cameron appointed Coulson to Director of Communications for the Conservative Party. In January 2011, Coulson resigned from

“Politicians were terrified of putting their heads above the parapet and challenging these tabloids that sold millions of copies. We know now that was wrong.”

— Chris Bryant  
Labour Party MP, Rhondda

the position because of continued media coverage surrounding the phone hacking scandal and allegations that he encouraged the practice while at the helm of *News of the World*. According to the June 2011 issue of *Vanity Fair*, Scotland Yard seized paperwork, computer records, handwritten notes, and audiotapes as part of its investigations into Goodman and Mulcaire. The investigation revealed 4,332 names or partial names of people the pair had taken an interest in, along with 2,978 cellphone numbers, 30 tapes containing voice mail messages, and 91 PIN codes to access voice mail boxes, *Vanity Fair* reported. The authorities notified five people outside the royal family that their voice mail messages may have been intercepted. Gordon Taylor, chief executive of the Professional Footballers’ Association and Max Clifford, a powerful British publicist, two of those notified, sued *News of the World* and the paper settled both cases for nearly \$2.5 million, the story said. According to *Vanity Fair*, Coulson described the phone hacking practice as the work of a “rogue reporter.” But, the “rogue reporter” defense began to unravel after a July 8, 2009 story in *The Guardian* suggested the practice was widespread. But critics dismissed initial reports as mere media-mudslinging. (See “Murdoch-owned British Paper Embroiled in Phone Scandal” in the Fall 2009 issue of the *Silha Bulletin*.)

Frustrated by the lack of attention its coverage was receiving, *Guardian* editor Alan Rusbridger emailed then-*New York Times* editor Bill Keller, encouraging him to look into the phone hacking story, according to the *Vanity Fair* report. More than a year after *The Guardian’s* first report, a Sept. 1, 2010 story in *The New York Times Magazine* quoted former *News of the World* reporter Sean Hoare saying Coulson encouraged the phone hacking practice. Hoare gave a similar interview for the June 2011 *Vanity Fair* story, and said the practice was first used as a negotiation tactic to get publicists to offer alternative



stories in exchange for not using the private material. *The New York Times* story also quoted unnamed detectives from Scotland Yard alleging that investigations into complaints of phone hacking in 2006 and 2007 were deliberately curtailed because of a close relationship between the authorities and *News of the World*. John Whittingdale, a Conservative Party member from Maldon and the chairman of a parliamentary committee that has twice investigated the phone hacking, said “there was simply no enthusiasm among Scotland Yard to go beyond the cases involving Mulcaire and Goodman.” The *New York Times*’ interviews with more than a dozen former reporters and editors revealed the phone hacking went well beyond Mulcaire and Goodman. Sharon Marshall, a former *News of the World* TV editor, who witnessed phone hacking while at the tabloid said, “It was an industrywide thing. Talk to any tabloid journalist in the United Kingdom, and they can tell you each phone company’s four-digit codes. Every hack on every newspaper knew this was done.”

At the time the *New York Times Magazine* story was published, five people had filed lawsuits accusing News Group Newspapers, a division of Murdoch’s News Corp., of breaking into their voice mail. Additional cases were being prepared, including one seeking judicial review of how Scotland Yard handled the investigation. Bill Akass, the managing editor of *News of the World*, dismissed what he called “unsubstantiated claims” that phone hacking was widespread and told *The New York Times* that efforts had been made to introduce safeguards to prevent unethical reporting tactics. But despite what editors told *The New York Times* was a “zero tolerance” hacking policy, the story said *News of the World* executives had been warned about another suspicious incident after making those statements. A phone company alerted a TV personality that someone had called her cellphone and attempted to access her voice mail, the *Times* story said. A court order compelled the phone company to turn over the source of the call, which was a number traced to a reporter at *News of the World*. The tabloid told *The New York Times* the journalist had “been suspended from reporting duties” while it conducted an investigation.

Days after the *New York Times* story was published, politicians called for a new investigation. In the May/June 2011 issue of the *Columbia Journalism Review*, reporter Archie Bland said *The New York Times* “piece gave the story new life, and gave fresh ammunition to those who found it impossible to believe that the practice had not preceded Coulson’s reign, and had not been known higher up the foodchain.” According to a Sept. 4, 2010 story in *The Observer*, *The Guardian*’s sister newspaper, Lord John Prescott, a Labour Party politician who was deputy prime minister under Tony Blair, was one of the people whose phones may have been hacked. Prescott said he was “far from satisfied with the Metropolitan Police’s procedure in dealing with my requests to uncover the truth,”

and said he only learned he may have been a victim of hacking after “repeated requests.”

According to a Sept. 5, 2010 story in *The Telegraph*, Scotland Yard detectives asked *The New York Times* for its transcript of the interview with Hoare, but the newspaper refused. A post on Yahoo! News blog The Upshot said Keller said the paper would not assist in a police investigation. Scotland Yard’s assistant police commission insisted Hoare’s statements had “come from nowhere,” in terms of its investigation, according to a Sept. 6, 2010 BBC report. While the Labour Party was calling for a fresh inquiry, Education Secretary Michael Gove told the BBC that the *New York Times* story seemed “to be a recycling of allegations we have heard before” and dismissed the story

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as a product of newspaper “circulation wars” in the United States between the *Times* and the Murdoch-owned *Wall Street Journal*. The *News of the World* released a statement in response to the Sept. 1, 2010 article, quoted by the BBC on Sept. 6, 2010, alleging they had “repeatedly asked *The New York Times* to provide support of their allegations and they were unable to do so.” The tabloid

said by refusing to participate in the investigation, *The New York Times* confirmed suspicions that the story was “motivated by commercial rivalry.”

Nevertheless, the phone hacking scandal would not go away for *News of the World*. On Jan. 5, 2011, *The New York Times* blog The Lede reported the tabloid had suspended senior news editor Ian Edmondson, who was accused of intercepting actress Sienna Miller’s voice mail messages. Miller was one of the first to file a suit against the newspaper and her case led to the discovery of important information, *Vanity Fair* reported in its June 2011 story. Cases like Miller’s prompted another reopening of the investigation by mid-January. According to a Jan. 14, 2011 report in *The New York Times*, the Crown Prosecution Service said it would evaluate all of the evidence collected by Scotland Yard during its original investigation and any new material that had come forward since then. “The purpose of this assessment is to ascertain whether there is any material which could now form evidence in any future criminal prosecution relating to phone hacking,” the prosecutors said in a statement. On Jan. 21, 2011, Coulson resigned as Cameron’s director of communications, saying that “continued coverage of events connected to my old job at the *News of the World* has made it difficult for me to give the 110 percent needed in this role,” *Vanity Fair* reported. Five days after Coulson’s resignation, News Corp. turned over a large volume of emails to Scotland Yard, which officially named the phone hacking investigation “Operation Weeting,” an apparently randomly-chosen designation. Deputy Assistant Commissioner Sue Akers of the Serious and Organised Crime Command took over the

## Phone Hacking, continued from page 5

investigation and about 45 officers were working on the case as of May 2011, *Vanity Fair* reported.

According to the BBC, Scotland Yard's Assistant Commissioner John Yates had previously instructed officers that there were only a small number of victims, but it was becoming clear this was not the case. On April 5, 2011, *The New York Times* reported two journalists had been arrested, questioned, and released on bail in connection with the phone hacking scandal. The reporters were "arrested on suspicion of unlawfully intercepting mobile phone voice-mail messages," according to a police statement quoted by *The New York Times*. Although the statement did not name the individuals, *The New York Times* reported that "a person familiar with the investigation" identified the two as Edmondson, who was fired earlier in the year, and Neville Thurlbeck, the paper's chief reporter. The story called the developments "a potentially decisive turning point in an investigation that has been underway, often fitfully, since 2006." On April 14, 2011, another senior *News of the World* reporter, James Weatherup, was also arrested, according to a June 8 BBC "Q&A" article outlining the scandal.

Dozens of public figures, including Paul McCartney's ex-wife Heather Mills and James Hewitt, a former army officer who had an affair with the late Princess Diana, have considered and or started legal proceedings against the *News of the World*. The list of potential victims spans politicians, sports stars, actors, and prominent business people. It is unclear how many total targets there were, but the June *Vanity Fair* story gives a "conservative estimate" of 2,000, adding that the true figure may be double or triple that number. *The Guardian* reported in a July 7, 2011 story that police said there could be as many as 4,000 hacking victims. Alleged targets included actor Hugh Grant, comedian Steve Coogan, model Elle Macpherson, soccer stars John Terry and David Beckham, and possibly former Prime Minister Gordon Brown. On May 13, 2011 *The Guardian* reported News International set up a compensation fund worth £20 million, or about \$32 million, in order to pay to settle the suits. Miller settled her claim against the tabloid for around \$160,000, *The Guardian* reported. In response to the Miller settlement and the creation of the fund, a News International spokeswoman told *The Guardian*, "several weeks ago we admitted liability in certain cases and offered a genuine and unreserved apology. We hope to resolve other cases swiftly." Several lawsuits remained ongoing when the *Bulletin* went to press.

According to a June 10, 2011 report in *The Telegraph*, the scandal may not be limited to listening in on voice mail messages. Scotland Yard has established a new team to investigate claims that emails and computer files were illegally accessed by *News of the World*, *The Telegraph* reported. "The [Metropolitan Police Service] has set up a small team in order to assess the various allegations that have been made with a

view to establishing whether there is available evidence and if it would be appropriate to conduct any further investigation into these activities," a police letter said, according to *The Telegraph*.

On June 23, *The Guardian* reported another woman connected with the phone hacking scandal was arrested. The report said the woman arrested is believed to be Terenia Taras, who contributed more than 30 stories for *News of the World* and the ex-girlfriend of Greg Miskiw, the *News of the World*'s former assistant news editor. Her identity was later confirmed.

"As chief executive of the company, I feel a deep sense of responsibility for the people we have hurt and I want to reiterate how sorry I am for what we now know to have taken place."

— **Rebekah Brooks**  
**Former News of the World Editor**

### **Milly Dowler Allegations Lead to New Arrests**

According to a July 14, 2011 *Time* magazine story, *News of the World* prided itself on serving all social classes, including "the poorer classes." But after *The Guardian*'s July 4, 2011 report alleging Mulcaire hacked into messages left for Milly Dowler the public became outraged

at "the people's champion" exploiting ordinary people in their time of grief, the *Time* magazine story said. In a statement to *The New York Times*, Mark Lewis, the Dowler family's lawyer, called *News of the World*'s actions "heinous" and "despicable." The report of the hacking became significant because it showed the practice occurred five years before the arrests of Goodman and Mulcaire. The incident would also have taken place under former *News of the World* editor Rebekah Brooks, who had been promoted to chief executive of News International. "I hope you all realize it is inconceivable that I knew or worse, sanctioned these appalling allegations," she wrote in an email to employees in early July. On July 8, Coulson was arrested for questioning about his role in the phone hacking scandal and allegations about police bribes. On July 15, *The New York Times* reported Brooks and Les Hinton, the publisher of *The Wall Street Journal* since 2007, resigned as pressure mounted from politicians and investors in the United States and Britain. Brooks said in a letter that she had become a distraction to the company. "As chief executive of the company, I feel a deep sense of responsibility for the people we have hurt and I want to reiterate how sorry I am for what we now know to have taken place," Brooks wrote. Hinton, who oversaw Murdoch's British newspaper subsidiary when phone hacking was apparently rampant, resigned after questions arose about his involvement and knowledge of the illegal practice going on at newspapers under his control, *The New York Times* reported.

On July 17, 2011 Scotland Yard arrested Brooks on suspicion of illegally intercepting phone calls and bribing the police, *The New York Times* reported. Hours later, Britain's top police official, Sir Paul Stephenson, resigned as commissioner of the Metropolitan Police Service. *The New York Times* reported he stepped down because "the ongoing speculation and accusations relating to the Met's links with News International at a senior level" made it challenging to do his job. Stephenson's resignation also followed the July 14, 2011 arrest

of Neil Wallis, a former *News of the World* deputy editor, who had become a police public relations consultant after leaving the paper and who was also suspected of phone hacking. *The New York Times* reported Brooks' arrest was a "shock" to News Corp. "When she resigned on Friday, we were not aware that she would be arrested by the police," a News International official told the *Times*.

The Milly Dowler allegations also affected News Corp. more generally when Murdoch withdrew a bid to buy the portion of BSkyB satellite network that he did not own, at the urging of members of Parliament. A July 6, 2011 report in *The Wall Street Journal* said British Culture Secretary Jeremy Hunt had been expected to sign off on the deal soon after the public consultation period ended July 8, but the approval was delayed because of the phone hacking allegations related to Dowler. A July 13, 2011 Reuters story said Murdoch began to receive pressure from Parliament to withdraw his offer soon after the new allegations arose. Prime Minister Cameron, under fire over his own ties to former *News of the World* journalists, threw the government's support behind an opposition motion that denounced Murdoch's bid to extend his media power while police were investigating the alleged phone hacking, the story said. "It has become clear that it is too difficult to progress in this climate," News Corp. deputy chairman Chase Carey told Reuters, adding that the company remained "a committed long-term shareholder" in BSkyB.

On August 19, 2011 *The Guardian* reported two more arrests in connection with the phone hacking scandal. A police detective was arrested on August 18 on suspicion of leaking details about Scotland Yard's investigation of the scandal, while Dan Evans, a former *News of the World* reporter, was also arrested on suspicion of phone hacking. "I made very clear when I took on this investigation the need for operational and information security. It is hugely disappointing that this may not have been adhered to," said Sue Akers, Scotland Yard's deputy assistant commissioner, who is leading the investigation into phone hacking at the *News of the World*. *The Guardian* declined to comment on reports that the leaks had been to *The Guardian*.

Beyond individual arrests, several government investigations are being conducted in response to the phone hacking practices of *News of the World*. Lord Justice Brian Leveson, a judge in the Court of Appeal and head of the Sentencing Council for England and Wales, is leading an inquiry into the scandal and a broader investigation into the media's practices and ethics at the request of Cameron, according to a July 20 report in *The Guardian*. The inquiry is scheduled to begin in September 2011 and the judge is expected to complete his report within 12 months. The inquiry will also examine publishers' involvement with politics and the police.

On July 19, 2011 Murdoch and his son James Murdoch voluntarily appeared before a special Parliamentary committee to answer questions about the phone hacking scandal that led them to shut down the *News of the World* on July 10. According to a July 19 broadcast of "Talk of the Nation" on NPR, Rupert Murdoch told the committee that because the paper was such a small part of his company, he lost track of the publication and its actions. James Murdoch's testimony about his knowledge

of the scandal suggested that he had been mistaken, misled, or he lied, according to an August 10, 2011 Bloomberg report. ABC News reported on July 18 that James Murdoch has been criticized for responding too slowly to initial allegations of phone hacking. James Murdoch also approved settlement payments to some of the tabloid's most prominent hacking victims. James Murdoch is expected to clarify his testimony, but had not yet done so when the *Bulletin* went to press.

According to an August 18, 2011 report in *The Scotland Herald*, the Strathclyde Police, Scotland's largest police force, have launched an investigation to examine allegations of phone hacking, breaches of data protection law, and police corruption. Scottish detectives are working with their London counterparts, Scotland Yard, the story said. *The Daily Mail* reported July 20 that U.S. Justice Department, FBI, and SEC preliminary investigations are exploring whether News Corp., which is based in New York, violated the Foreign Corrupt Practices Act (FCPA), which bans U.S.-based companies from paying bribes to overseas officials. The FBI will focus its investigation on whether Murdoch journalists hacked into the phones of victims of the Sept. 11, 2001 terrorist attacks or their families, the report said. A July 22 report in *The Guardian* said News Corp. could come under the SEC's scrutiny because it is partly responsible for policing the FCPA. The SEC will want to know if News Corp. properly declared all its account activities and whether it tried to cover up any bribes made within the United Kingdom under false accounting returns, the report said.

### ***News Corp. Ethics and the Scandal's Meaning for Murdoch***

The broader meaning of the scandal — now being referred to as "Hackgate" or "Murdochgate" on social media and by some media outlets — for Murdoch, his media empire, and the state of journalism has become a subject of much debate in the media community. In a July 9, 2011 commentary for *Newsweek*, veteran journalist Carl Bernstein compared the scandal to one that made him famous, and the inspiration for the "Hackgate" label, Watergate. "The circumstances of the alleged lawbreaking within News Corp. suggest more than a passing resemblance to Richard Nixon presiding over a criminal conspiracy in which he insulated himself from specific knowledge of numerous individual criminal acts while being himself responsible for authorizing general policies that routinely resulted in lawbreaking and unconstitutional conduct," Bernstein wrote. "Not to mention his role in the cover-up. It will remain for British authorities and, presumably, disgusted and/or legally squeezed News Corp. executives and editors to reveal exactly where the rot came from at *News of the World*, and whether Rupert Murdoch enabled, approved, or opposed the obvious corruption that infected his underlings."

In a July 19, 2011 post for *Rolling Stone's* Taibblog, contributing editor Matt Taibbi wrote that the scandal is being used "as an opportunity to do what should have been done years ago, which is indict Rupert Murdoch in the court of public opinion." Taibbi wrote that although Murdoch will suffer a blow over the scandal, it is still unclear how far the revelations will go. But Taibbi expressed concern that the



deeper lesson of the scandal will be overlooked. “Even if Murdoch and News Corp. go down, the basic problem that he represents is going to remain,” he wrote. “The *News of the World* scandal represents a step over an important moral line for the commercial media. In the constant effort to make money, companies like News Corp. have for decades now been sinking to even-lower depths to find sensational material.” Because of people like Murdoch, Taibbi argued, editors and reporters today do not have the discretion to reject stories that will bring in money to the publication on a moral basis. “The Edward R. Murrow model of responsible news is kind of a sucky commercial product,” Taibbi wrote. “Nobody who is in it for the money is going to ride that horse voluntarily.” Taibbi argued that the central issue is not a question of whether Murdoch broke the law himself, but rather the fact that he “did more than anyone else on earth” to create a climate where editors fail to listen to “something else that guides the individuals in these businesses — ethics, morality, patriotism, some non-commercial human thing — that prevents them from taking that step over the line.”

Simon Jenkins, a columnist for *The Guardian* and London’s *Evening Standard*, as well as a commentator for BBC, wrote a July 5 commentary for *The Guardian* analyzing how editors became embroiled in the phone hacking scandal. Jenkins pointed to increased commercial pressures that have led to “warped ethics” in newsrooms. “Pressure on editors and newspaper owners not just to ‘dumb-down’ but to abandon all scruple and restraint has been intense,” he wrote. For all newspapers, Jenkins wrote, the *News of the World* phone hacking scandal is a “moment of truth.” Jenkins argued that in order for the profession of journalism to continue, the industry “must believe in readers who will value, and ultimately pay for, quality reporting and comment. Tarnish that belief, and we really are out of a job,” he wrote. In a July 12 commentary for *The Guardian*, Jenkins also blamed politicians and their fear of the media’s influence over politics and public opinion for the continuous “media mischief” in Britain. Jenkins proposed a professional regulatory body to oversee complaints against the press rather than a government body, like Parliament, that

“The greatest safeguard of press ethics is always going to be the press itself. Britain still has diverse and vigorous newspapers. They should be left to judge, hang and bury their own. They are doing a good job of that just now.”

— Simon Jenkins  
Columnist, *The Guardian*

believes the press can make or break political careers. “The greatest safeguard of press ethics is always going to be the press itself. Britain still has diverse and vigorous newspapers. They should be left to judge, hang and bury their own. They are doing a good job of that just now,” he wrote, crediting *The Guardian* for holding *News of the World* accountable for its actions. Jenkins previously wrote columns for Murdoch-owned *The Times* of London and *The Sunday Times*, and edited *The Times* from 1990 to 1992.

In a July 11, 2011 commentary entitled “In Defense of Murdoch” for *The New York Times*, columnist Roger Cohen called Murdoch “good for newspapers over the past several decades, keeping them alive and vigorous and noisy and relevant.” Cohen said that although phone hacking is “indefensible” and, in his opinion, Fox News has significantly contributed to the polarization of American politics and eroded reasoned debate, and although he disagrees with Murdoch’s views on a range of issues

from climate change to the Middle East, he admires Murdoch’s “visionary, risk-taking determination that has placed him ahead of the game as the media business has transformed through globalization and digitization.” Cohen argued that without Murdoch, the British newspaper industry might have disappeared altogether, and the overall British media scene would be “pretty impoverished.” Despite the recent troubles, Cohen wrote, he believes Murdoch has been good for media and a more open world.

In the meantime, Murdoch is left vigorously defending his company as it faces the scandal. According to an August 10, 2011 report in *The New York Times*, Murdoch insisted he has the backing of the News Corp. board of directors and will stay on as chief executive. In a conference call with financial analysts and reporters, Murdoch emphasized that none of the problems at *News of the World* had affected other parts of News Corp. “We’re all committed to doing the right thing,” he said. “We have taken decisive actions to hold people accountable and will do whatever is necessary to prevent anything like this from occurring ever again.”

— HOLLY MILLER  
SILHA RESEARCH ASSISTANT



# Judges Rebuke Government on Leak Prosecutions

## *Adverse Rulings Do Not Slow Obama Administration's Pursuit of Leaks*

In the Obama administration's ongoing efforts to track down and prosecute leakers of classified information, one federal judge quashed a subpoena to a *New York Times* reporter for his sources

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while another rebuked the government's prosecution of a former National Security Administration (NSA) official as the case fell apart.

#### ***Risen Subpoena Quashed, Judge Raises New Question about Espionage Act***

On July 29, 2011, U.S. District Judge Leonie Brinkema granted most of *New York Times* reporter James Risen's motion to quash a trial subpoena demanding that he testify and identify his sources for his stories about an alleged Central Intelligence Agency (CIA) program aimed at undermining Iran's attempts to build a nuclear weapon. The subpoena was issued as part of the government's prosecution of Jeffery Sterling, a former CIA official who prosecutors claim leaked information about "Operation Merlin," a failed plan to pass flawed blueprints to Iran via a former Russian scientist. Sterling was indicted in December 2010 for the unauthorized retention and disclosure of "national defense information" in violation of the Espionage Act, 18 U.S.C. §793 *et seq.*, as well as mail fraud, "unauthorized conveyance of government property," and obstruction of justice. *United States v. Sterling*, 1:10cr485 (LMB), 2011 U.S. Dist. LEXIS 87514 (E. D. Va. July 29, 2011) (For more on Sterling's case — and the five other cases the Obama administration has prosecuted for similar leaks — see "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue of the *Silha Bulletin*.)

The subpoena Brinkema quashed on July 29 was the third issued to Risen in connection with the *Sterling* case. According to the opinion, which was released after a classification review on August 3, the first subpoena was issued by a federal grand jury sitting in the Eastern District of Virginia in January 2008 and sought Risen's testimony and information about his sources for chapter nine of his 2006 book "State of War: The Secret History of the C.I.A. and the Bush Administration." In chapter nine of the book, Risen described Operation Merlin as an "espionage disaster." The grand jury term expired before a final ruling could be issued on the first subpoena, but by that time the government had focused its investigation into the Operation Merlin leak on Sterling. The second grand jury subpoena was issued in January 2010, seeking "the where, the what, the how, and the when" regarding the disclosure of classified information for chapter nine of "State of War." On Nov. 30, 2010, Brinkema quashed the second subpoena, concluding that the government had "essentially admitted" that it had "more than enough evidence to establish probable cause to indict Sterling" and therefore did not need Risen's testimony. However, Brinkema left the door open for the government to pursue a trial subpoena against Risen, saying that because the government must prove Sterling's guilt "beyond a reasonable doubt" in a trial as opposed to the "probable cause" needed to indict him, the government might have a stronger argument that Risen's testimony was vital to its case.

Sterling was indicted on Dec. 22, 2010, and prosecutors issued a subpoena to Risen on May 23, 2011 seeking his testimony at trial. The government explained that it planned to ask Risen to identify Sterling as his source for chapter nine of "State of War," provide details about the reporter-source relationship between the two men, and authenticate his reporting in the book.

Brinkema ruled that the 4th Circuit recognizes a qualified privilege for journalists to refuse to testify about confidential sources, and that the

government failed to satisfy a three-part balancing test used to determine whether a subpoena against a reporter should be upheld. She upheld the subpoena only insofar as it requires Risen to confirm that he was the author of a particular newspaper article or book chapter; that the newspaper article or book chapter is accurate; and that certain statements in that article or chapter were, in fact, made by an unnamed source. "A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook," Brinkema wrote.

Brinkema explained that, contrary to the government's argument that the U.S. Supreme Court ruled that there is no federal reporter's privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the 4th Circuit has interpreted Justice Powell's concurrence in that case to mean that a privilege is available in some circumstances, and has recognized a qualified privilege since the 1977 case *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977). The sum of the Circuit Court's rulings on reporter's privilege since *Steelhammer* have established the rule, Brinkema wrote, that "if a reporter presents some evidence that he obtained information under a confidentiality agreement, or that a goal of the subpoena is to harass or intimidate the reporter, he may invoke a qualified privilege against having to testify in a criminal proceeding."

Having established that Risen had a valid confidentiality agreement with his source for his discussion of Operation Merlin in "State of War," Brinkema applied a three-part balancing test for determining whether the privilege should be overcome, which the Circuit Court devised in the 1986 case *LaRouche v. National Broadcasting Corp.*, 780 F.2d 1184 (4th Cir. 1986).

Under that test, Brinkema wrote, the court must consider 1) whether the information sought is "relevant" to the case, 2) whether that information "can be obtained by alternative means," and 3) whether there is a "compelling interest" in the information.

Brinkema wrote that neither party disputed the relevance of the information the government sought, but that the

government failed to prove that it could not be obtained by means other than Risen's testimony, or that there was a compelling interest in its disclosure. The government argued that there were no alternative means to Risen's testimony about his sources because only Risen could provide eyewitness testimony, as opposed to circumstantial evidence, about the identity of his source, and that "it is self evident that ... Risen is the only source for the information that the government seeks." However, Brinkema argued that neither *LaRouche* nor any other case places the bar for information about confidential sources at eyewitness testimony as opposed to circumstantial evidence, and that the government had presented evidence that undermined its claim that Risen, and Risen alone, could provide the information about his confidential source. "This argument clearly misstates the evidence in the record," Brinkema wrote, "which ... includes numerous telephone records, email messages, computer files, and testimony that strongly indicates that Sterling was Risen's source." A motion Sterling filed with the Eastern District of Virginia on Feb. 24, 2011 stated that, as part of its evidence supporting the case against Sterling, the government "provided ... various telephone records showing calls made by ... Risen" as well as "credit card and bank records and certain records of his airline travel." The information was probably acquired via third-party subpoenas to Risen's telephone and credit card service providers, unbeknownst to Risen.

Brinkema also observed that a former intelligence official with whom Risen consulted on his national security reporting testified before the grand jury that Risen had told him that Sterling was his source for information about Operation Merlin. Brinkema concluded that "the second *LaRouche* factor weighs heavily in favor of quashing the subpoena."

Brinkema ruled that the government also failed to show that there was a "compelling interest" in forcing Risen to testify about his confidential sources. The government first argued that under 4th Circuit precedent the "compelling interest" analysis should not apply to criminal cases, but Brinkema

disagreed, arguing that "the case law does not distinguish between civil actions and criminal cases. Accordingly, for a compelling interest to exist, the information must be necessary, or at the very least, critical to the litigation at issue." The government also argued that because it must prove Sterling's guilt beyond a reasonable doubt at the trial stage, as opposed to the "much lower evidentiary standard" of probable cause at the grand jury stage, Risen should be forced to testify. However, Brinkema explained, rather than argue that Risen's testimony is necessary or critical to

**"A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook."**

**— Judge Leonie Brinkema  
U.S. District Court, Eastern District of Virginia**

demonstrating Sterling's guilt beyond a reasonable doubt, the government argued that Risen's testimony would "simplify the trial and clarify matters for the jury" and "allow for an efficient presentation of the government's case." Brinkema wrote, "an efficient or simpler trial is neither necessary nor critical to demonstrating Sterling's guilt beyond a reasonable doubt." If doing so were sufficient to satisfy *LaRouche*'s compelling interest standard, Brinkema concluded, "there would hardly be a qualified reporter's privilege."

Although media and free press advocates generally praised the decision upholding a reporter's privilege in the Risen case, one of the more legally technical passages of the Brinkema decision raised some alarm. In addressing the second part of the *LaRouche* test and arguing that other means were not available to obtain the information Risen could provide, the government claimed that the grand jury testimony of the former intelligence official who named Sterling as Risen's source would be inadmissible at trial because it would qualify as hearsay. To the contrary, however, Brinkema stated that "any statements by Risen to a third party that Sterling was his source would be admissible hearsay under

Fed. R. Evid. 804 (b)(3) as a statement against interest." Under the federal rules of evidence, a statement that would otherwise be considered hearsay qualifies for an exception when it "is actually adverse to the speaker's penal interest."

According to Brinkema, Risen's alleged admission to a third party that Sterling was his source would be adverse to his penal interest "because receiving classified information without proper authorization is a federal felony under 18 U.S.C. 793(e)."

Steven Aftergood, an expert on government secrecy and national security policy who follows the Obama leak prosecutions closely on his blog Secrecy News, said Brinkema's statement that Risen could be guilty of a felony for "receiving

classified information without proper authorization" was incorrect, "almost certainly a misunderstanding and a misrepresentation of the law."

In an August 4 post, Aftergood explained that the section of the Espionage Act Brinkema cited "deals with unauthorized transmission of classified information; contrary to her assertion, it does not prohibit unauthorized receipt at all." Aftergood said, "The espionage statutes including 793(e) are notoriously ambiguous and susceptible to multiple, conflicting interpretations, but no one has ever read them as Judge Brinkema did." Moreover, Brinkema sought to support her interpretation of § 793(e) with a footnote citing "U.S. Sentencing Guidelines Manual § 2M3.3 (providing a base offense level 29 for convictions for the 'Unauthorized Receipt of Classified Information')." But according to Aftergood, although § 2M3.3 provides sentencing guidelines for multiple statutes, the only one that concerns "unauthorized receipt of classified information" is 50 U.S.C. § 783(b), which applies only to agents or representatives of a foreign government, or to members of a Communist organization. "In other words, unless Mr. Risen is a foreign agent or a Communist, there is no statute

that specifically prohibits him from receiving classified information without authorization. There just isn't," Aftergood wrote. The passing claim by Brinkema, Aftergood said, "adds new confusion to an area of the law that is already complicated and contested. Ideally, one hopes that she would see fit to correct the record."

On August 24, the government filed a motion for reconsideration arguing that "there is no equivalent for Risen's eyewitness testimony" in the Sterling trial.

### **Federal Judge Chides Prosecutors in Drake Leak Case**

On June 9, 2011, Former NSA official Thomas Drake pleaded guilty to a single count of "exceeding authorized use of a computer" in violation of 18 U.S.C. § 1030, after initially being charged with numerous offenses under the Espionage Act for allegedly leaking information about government wiretapping programs to *Baltimore Sun* reporter Siobhan Gorman in 2006 and 2007. Commentators like Secrecy News' Steven Aftergood said the government's sudden agreement to strike a plea deal demonstrated that its case was weaker than it had realized when it zealously pursued Drake, and had subsequently fallen apart. Drake's April 14, 2010 indictment included five counts of "retention of classified information" under the Espionage Act, 18 U.S.C. § 793 (e), one count of obstruction of justice, and four counts of making false statements.

Previously, Judge Richard D. Bennett of the U.S. District Court for the District of Maryland had declined to force Gorman to testify in the case. On March 31, 2011, *The Baltimore Sun* reported that Bennett said in a hearing that although he would permit Gorman's articles about NSA program and management problems to be admitted as evidence in Drake's trial, he would not allow Gorman to be called as a witness. Bennett said forcing Gorman to testify could end in a "deep, dark hole," and he was not inclined to jail reporters for refusing to reveal sources, the *Sun* reported.

On July 15, 2011, Bennett sentenced Drake to one year of probation and 240

hours of community service. According to a transcript of the sentencing hearing, Bennett declined to impose a \$50,000 fine as part of the sentence, which the government argued was important to "send a message" and discourage future leaks of classified information. The judge observed that the case had already taken a heavy toll on Drake, adding that he did not qualify to receive a government pension for his time served in the military or with the NSA, and that the case had a disastrous effect on his career. "There has been financial devastation wrought upon this defendant

"Somebody somewhere in the U.S. government has to say to somebody, the Department of Justice, that the American public deserves better than this."

— Judge Richard Bennett  
U.S. District Court, District of Maryland

that far exceeds any fine that can be imposed by me. And I'm not going to add to that in any way," Bennett said.

The judge also scolded government prosecutors for what he called "unconscionable" treatment of Drake, whose house was searched by federal agents investigating the leaks but who was not formally charged until two and a half years later. Bennett asked whether there was an explanation for the delay, but the government could offer none. Bennett, making reference to the government's interest in deterring future leaks, said "I don't think that deterrence should include an American citizen waiting two and a half years after their home is searched to find out if they're going to be indicted or not. ... It is at the very root of what this country was founded on against general warrants of the British. It was one of the most fundamental things in the Bill of Rights that this country was not to be exposed to people knocking on the door with government authority and coming into their homes. And when it happens, it should be resolved pretty quickly, and it sure as heck shouldn't take two and a half years before someone's charged

after that event. And that weighs heavily, obviously, upon this particular judge." Bennett added, "somebody somewhere in the U.S. government has to say to somebody, the Department of Justice, that the American public deserves better than this." Bennett was appointed to the federal bench in 2003 after being nominated by President George W. Bush.

### **Other Leak Investigations Continue**

On June 17, *The New York Times* reported that the Obama administration's campaign against government leaks does not appear to have been slowed by

any adverse rulings. The story reported that Stephen Kim, a former foreign policy analyst contractor for the U.S. State Department who is charged with leaking classified information about North Korea to Fox News, is "next in line in the

Obama administration's unprecedented crackdown on leaks." Kim pled not guilty to the charges on Aug. 27, 2010, and on Aug. 24, 2011, Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia denied several of his motions to dismiss, allowing the government to proceed with its prosecution.

In the meantime, the government's investigation of WikiLeaks has continued, although much of it remains shrouded in secrecy. Pfc. Bradley Manning, the military intelligence analyst charged with leaking thousands of military and diplomatic documents and other information to WikiLeaks, is still awaiting a trial at Fort Leavenworth Joint Regional Correctional Facility in Kansas. Manning's charges include numerous violations of the Uniform Code of Military Justice (UCMJ) including Article 104, "aiding the enemy," a charge which can carry the death penalty. Prosecutors have stated that they do not intend to seek the death penalty in Manning's case, however.

Glenn Greenwald, a blogger for the website Salon, reported June 9, 2011 that several people have been subpoenaed to

**Leaks, continued on page 12**



# Silha Lecture Features Mark Stephens, International Free Expression Advocate

On Oct. 4, 2011, international media lawyer and free expression advocate Mark Stephens will present the Silha Center's 26th Annual Lecture, "Free Speech and the Digital Challenge Around the Globe: A

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Conversation With Mark Stephens." Stephens specializes in defending free speech and freedom of information worldwide as head of the International and Media department for the London-based law firm Finers Stephens Innocent.

Stephens, who *The Times* of London has described as "one of the best advocates for freedom of expression," has litigated high profile cases in the United Kingdom, United States, Iraq, Singapore, and Russia, among other places. In 2010 and 2011 he was involved in the proceedings to extradite WikiLeaks founder Julian Assange to Sweden. (For more on the U.S. government's pursuit of WikiLeaks in response to its release of classified government documents, see "Judges Rebuke Government on Leak

Prosecutions" on page 9 of this issue of the *Silha Bulletin*, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, and "WikiLeaks' Document Dump Sparks Debate" in the Summer 2010 issue. Silha Center Director Jane Kirtley discussed "The WikiLeaks Quandary" in the Director's Note in the Fall 2010 issue.)

In 2002, Stephens successfully opposed attempts to force *Washington Post* correspondent Jonathan Randal to testify before the Hague War Crimes Tribunal about atrocities he observed while covering the Yugoslav War in the 1990s. Stephens argued that "compelling journalists to give evidence at war crimes trials puts their lives at risk because they become automatic targets." (For more on the Jonathan Randal case, see "Former Washington Post Reporter Subpoenaed by International Criminal Tribunal" in the Summer 2002 issue of the *Silha Bulletin*, and "Qualified Privilege for War Correspondents Recognized by ICTY" in the Winter 2003 issue.)

Stephens is a Trustee of Index on Censorship, and Chair of the International Board of the Media Legal Defence Initiative. In June 2011, he was named a Commander of the Order of the British Empire (CBE) for his service to the legal profession and the arts.

The lecture will be held at 7:00 p.m. in Coffman Union Theater on the East Bank Campus of the University of Minnesota in Minneapolis, and will include an opportunity for audience Q & A. The event is free and open to the public. No reservations or tickets are required.

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

— ELAINE HARGROVE  
SILHA CENTER STAFF

— PATRICK FILE  
SILHA BULLETIN EDITOR

## Leaks, continued from page 11

testify before a grand jury in Alexandria, Va., that is investigating the possibility of prosecuting WikiLeaks itself or its principals, including founder Julian Assange. *The New York Times'* June 17 story called the grand jury investigation "a rare effort to prosecute those who publish secrets, rather than those who leak them." Greenwald reported that those subpoenaed include David House, a researcher at the Massachusetts Institute of Technology and founder of the Bradley Manning Support Network; Manning's ex-boyfriend Tyler Watkins; and Nadia Heninger, a cryptography

expert at the University of California San Diego. Greenwald reported that at least some of those subpoenaed had vowed not to cooperate with the grand jury.

In March 2011, a federal judge upheld an order demanding the disclosure of account information of three Twitter users with ties to WikiLeaks, finding that the users lacked standing to challenge the order, the order was valid because it was "relevant and material to a legitimate law enforcement inquiry," and did not violate the Fourth Amendment bar on unreasonable search and seizure because it did not infringe on

"an expectation of privacy that society considers reasonable." (For more on the WikiLeaks investigation case see "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue of the *Silha Bulletin*. Mark Stephens, the 2011 Silha Lecturer, has worked as an attorney for Assange; his lecture is titled "Free Speech and the Digital Challenge Around the Globe: A Conversation with Mark Stephens." See "Silha Lecture Features Mark Stephens, International Free Expression Advocate" on the top of this page of the *Silha Bulletin*.)

— PATRICK FILE  
SILHA BULLETIN EDITOR



# U.S. Supreme Court Strikes Down Ban on Violent Video Game Sales to Minors

## California Law Violated First Amendment

**O**n June 27, 2011, the Supreme Court of the United States struck down a California law that prohibited the sale or rental of violent video games to minors, declaring video games to be protected speech under the First Amendment and

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finding the law itself incapable of satisfying the “strict scrutiny” required to restrict protected speech.

The law at issue, California Civil Code § 1746, was sponsored by California State Senator Leland Yee (D-San Francisco) and passed the California State Legislature in 2005. The law bans the sale of “violent video games” to those under the age of 18 and mandates conspicuous labeling beyond the self-regulatory system already in place and implemented by the Entertainment Software Rating Board (ESRB). The act contains a two-part test classifying games as violent: those “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being” and which “a reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors ... [is] patently offensive to prevailing standards in the community as to what is suitable for minors ... [and] causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” The definition mimics the rule of law announced by the U.S. Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) a case which upheld a New York statute prohibiting the sale of pornography to minors, but the California law targets works appealing “to a deviant or morbid interest of minors” rather than “prurient interests.”

Trade groups representing video game and software companies challenged the law on constitutional grounds, resulting in a preliminary injunction on the law’s enforcement. Both the District Court

for the Northern District of California and the 9th Circuit Court of Appeals ruled that the law violated the First Amendment. (Attorney Paul Smith, who represented the video game trade groups before the U.S. Supreme Court, discussed the case and his argument in the 2010 Silha Lecture. For more on his lecture and more background on the case, see “U.S. Supreme Court Weighs California’s Ban on Violent Video Game Sales,” in the Fall 2010 issue of the *Silha Bulletin*.)

The justices voted 7 to 2 to uphold the 9th Circuit’s decision that the law violated the First Amendment. *Brown v. Electronic Merchants Association*, 131 S. Ct. 2729, 2011 U.S. LEXIS 4802 (U.S. June 27, 2011)

The majority opinion by Justice Antonin Scalia established at the outset that video games qualify for First Amendment protection. They “communicate ideas — and even social messages — through many familiar literary devices ... and through features distinctive to the medium.” Scalia wrote that California was “trying to make violent-speech regulation look like obscenity regulation,” invoking precedent barring legislative creation of new categories of unprotected speech. The majority found guidance in its decision in *United States v. Stevens*, 130 S. Ct. 1577 (2010), a case in which the court declared a statute criminalizing the creation, sale, or possession of depictions of violence against animals unconstitutional. In his majority opinion in *Stevens*, Chief Justice John Roberts wrote that the Supreme Court does not have “a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” (For more on the *Stevens* case, see “Supreme Court Strikes Down Law Banning Depictions of Animal Cruelty, Citing ‘Alarming Breadth’ of Statute,” in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

Scalia also recognized the considerable First Amendment protections afforded to minors and wrote that the government may not bar distribution of protected materials to them except in narrow circumstances.

The legitimate power to protect children from harm may not be used to bar protected material “solely to protect the young from ideas or images that a legislative body thinks unsuitable for them,” Scalia wrote.

The court rejected California’s arguments analogizing its statute to *Ginsberg*’s permissible ban on selling pornography to children, asserting an absence of any longstanding tradition of restricting children’s access to violent literature. Scalia recounted a list of violent literary works commonly accepted as mainstays of school curricula. “Grimm’s Fairy Tales, for example, are grim indeed,” he wrote.

Responding to California’s argument that the level of interactivity enabled by video games renders the medium wholly unique, Scalia quoted 7th Circuit Judge Richard Posner’s majority opinion in *American Amusement Machine Assn. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) declaring that the difference between literature and video games is merely one of degree. “Literature when it is successful draws the reader into the story, makes him identify with the characters ... to experience their joys and sufferings as the reader’s own,” Posner wrote.

Because the law imposed restrictions on what the court deemed protected speech, California needed to demonstrate that it was drafted to pass “strict scrutiny,” a standard requiring that the legislation be “justified by a compelling government interest” and “narrowly drawn to serve that interest.”

In addressing whether the law was justified by a compelling interest, the court rejected California’s argument that aiding of parental authority constituted such an interest. The court observed that the ESRB voluntary ratings system, which assigns an age-specific rating to every video game sold at a retail outlet, was successful in its efforts to curb the renting or selling of adults-only games to minors. Citing a 2009 FTC report to Congress finding that because of this system “the video game industry outpaces the movie and music industries” in “restricting target-

**Video Games**, continued on page 14

**Video Games**, continued from page 13

marketing of mature-rated products to children; clearly and prominently disclosing rating information; and restricting children's access to mature-rated products at retail," regarded the California law's contributions to the preexisting system as comparatively modest. The majority thus declined to find that California had shown the compelling state interest required to pass strict scrutiny.

Scalia wrote that the law was also not tailored to meet California's ostensible government interest. Following the state's admission that it could not show a causal link between violent video games and harm to minors, the court found that the studies the state offered as support for the law merely showed a correlation between violent video games and violent behavior in children, not that the games caused violent behavior. Further, the court pointed to testimony by the author of a study that California relied upon to support § 1746 who said that video games' effects on children's aggression were indistinguishable from effects produced by exposure to violence on television. As a result, the court found the law to be "wildly underinclusive when judged against its asserted justification" because it targeted only the video game industry while excluding similar content available on other media.

The court also found the law to be underinclusive because § 1764.1(c) stated that the law did not apply "if the violent video game is sold or rented to a minor by the minor's parent, grandparent, aunt, uncle, or legal guardian." The court regarded California's purported solution as inefficient considering the supposed dangers of the medium. "The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, or aunt's, or uncle's say-so suffices," Scalia wrote. "That is not how one addresses a serious social problem."

In contrast to its insufficient protections, the court judged the law's intended reach as overinclusive,

recognizing that not all parents are concerned about their children's consumption of violent materials. Rather than being narrowly tailored to "assist parents," the court said the law's ultimate effect was to "support ... what the state thinks parents *ought* to want."

Justice Samuel A. Alito Jr. wrote a concurring opinion, which was joined by Chief Justice John Roberts. Alito said that the statute was unconstitutionally vague, thus failing to provide the fair notice required by the Constitution for laws to be considered valid. Alito wrote

Justice Scalia's majority opinion quoted from the court's 2010 decision in *U.S. v. Stevens* where the court said it does not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."

that the lack of a history of restricting violent expression could lead to disagreement about which depictions excite "deviant" or "morbid" impulses, and that the California legislature relied on undefined societal or community standards to ascertain the meaning of those terms. But Alito also criticized the majority's First Amendment analysis. Disagreeing with the contention that *Stevens* controlled the case, he said he doubted the decision that a law purporting to solely limit minors' access to violent video games needed to satisfy strict scrutiny. Alito also expressed reluctance to regard video games as analogous to literature. Calling the majority's classification "premature," he warned of the possibility of "games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence."

Justices Clarence Thomas and Stephen Breyer wrote separate dissenting opinions. Thomas approached the case from a characteristically originalist vantage point, seeking evidence that the statute would comport with the "original public understanding" of the First Amendment. He recited a

litany of puritan child-rearing practices dating to the colonial era, concluding that "the Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors."

Breyer disagreed with the majority's conclusion that the California law was unconstitutionally vague and unable to survive strict scrutiny, arguing that the terms employed by the statute such as "kill," "maim," and "dismember" were sufficiently narrow to give a clear indication of the material they covered,

and questioning the merits of the majority's distinction between photographs of nudity and depictions of extreme violence. He regarded the law's restrictions on speech as modest and justified by a compelling interest, citing scientific data

illustrating the effect of violent video games on children.

Members of the video game industry were enthusiastic about the court's decision. "I think that the Supreme Court decision today really put the kibosh on this type of legislation where you have an outright restriction on minor's access to video games based on their violent content," said Sean Bersell, Vice President of Public Affairs for the Entertainment Merchants Association, in an interview with *PC World Magazine*.

Cheryl Olson, a public health researcher specializing in children and video games, wrote in a *The New York Times* op-ed that the California law made assumptions about the effect of violent video games on children in order to draft policy solutions. "If we want to mitigate risks of harm to our children (or the risk that our children will harm others), we need research on the specific effects of the most commonly played violent games, and of playing violent games in social groups," she wrote.

Supporters of the annulled legislation, however, said they remained undeterred by the court's ruling. Common Sense Media (CSM), a non-profit group devoted to fostering parental accountability

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# U.S. Supreme Court Invalidates Vermont Prescription Confidentiality Law

## *Dissenters Argued Court Should Apply Commercial Speech Doctrine Rather Than Strict Scrutiny Analysis*

**O**n June 23, 2011 the U.S. Supreme Court struck down a Vermont law restricting the sale, disclosure, or use of pharmacy records that reveal the prescribing practices of physicians, ruling that it violated the First Amendment by imposing content- and speaker-based burdens on protected expression.

“The choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available is one that the First Amendment makes for us,” Justice Anthony Kennedy wrote, on behalf of a 6 to 3 majority. “The State may not burden the speech of others in order to tilt the public debate in a preferred direction.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (June 23, 2011)

The case arose after the Vermont General Assembly passed Vermont’s Prescription Confidentiality Law, 18 V.S.A. § 4631 in June 2007. The law was meant to block pharmaceutical manufacturers and marketers from selling or using patients’ prescription data for marketing purposes. Among the reasons the Vermont General Assembly gave for passing the law was to protect “the privacy of prescribers ... and ensure costs are contained in the

private health care sector ... through the promotion of less costly drugs” and to “ensur[e] prescribers receive unbiased information.” The legislation was proposed in reaction to a practice called “detailing,” whereby pharmaceutical companies use prescription data to target doctors with samples of drugs and medical studies that support the advantages of prescription medications. Knowing a doctor’s prescribing habits helps salespersons become more effective in tailoring their sales practices, the court’s opinion said. In a July 3 column in the *Bennington (Vt.) Banner*, Vermont Governor Peter Shumlin, a member of the legislature at the time the law was passed, said the tactics pharmaceutical companies use to market their drugs work so well that doctors in Vermont “were increasingly prescribing expensive brand-name drugs instead of cheaper, and just as effective, generic drugs.” The results, Shumlin said, are higher insurance premiums and an added problem to “out-of-control” health care spending. Legislatures in Maine and New Hampshire passed similar laws in an attempt to control information pertaining to brand-name pharmaceuticals, according to a June 23 Associated Press (AP) report.

In August 2007, IMS Health, SDI Health, and Source Healthcare Analytics filed a lawsuit in United States District Court for the District of Vermont claiming the law violated their First Amendment right to communicate accurate health data to third parties for the purposes of “marketing or promoting a prescription drug.” The three companies identified themselves in court filings as “among the world’s

largest publishers of information, research, and analysis for the health care and pharmaceutical industries.” Pharmaceutical Research and Manufacturers of America, a drug industry trade group, joined IMS, SDI, and Source as a party to the suit. In April 2009, the U.S. District Court for the District of Vermont upheld the law. IMS appealed to the U.S. Court of Appeals for the 2nd Circuit. In November 2010, the 2nd Circuit reversed and remanded the District Court’s decision and held the Vermont law violated the First Amendment by burdening the speech of pharmaceutical marketers and data miners without an adequate justification. The State of Vermont asked the U.S. Supreme Court in December 2010 to review the 2nd Circuit decision, and the Supreme Court agreed, hearing oral arguments on April 26, 2011.

First Amendment advocates including The Associated Press and the Reporters Committee for Freedom of the Press joined other media companies and press freedom groups in filing an *amicus curiae* brief urging the court to strike down the law. The brief argued that upholding the law would allow Vermont and other states to pass laws that would “severely impair or destroy the incentive to gather and publish” data that can be used to inform “discussion of undeniably consequential health care issues.” The brief also expressed concern that a ruling in favor of Vermont “could sanction unprecedented limitations on access to a broad range of information by publishers, journalists and the public.”

In its opinion in *Sorrell*, the Supreme Court affirmed the 2nd Circuit ruling,

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## **Video Games**, continued from page 14

for children’s media choices, filed an *amicus* brief supporting California in the Supreme Court case. In a press statement released shortly after the decision, CSM CEO and Founder James Steyer wrote that “this is a sanity issue, not a censorship issue ... we look forward to working with national and state policymakers on another common-

sense solution in the very near future.” The Parents Television Council, a similar nonprofit devoted to “responsible entertainment,” denounced the result in a press release issued the same day as the decision by writing that the court “replaces the authority of parents with the economic interests of the video game industry.”

Senator Yee, who sponsored the law, said he would reintroduce it in a form that would pass constitutional scrutiny, according to a June 27 Associated Press report. “It’s disappointing the court didn’t understand just how violent these games are,” Yee said.

– MIKEL J. SPORER  
SILHA RESEARCH ASSISTANT



**Vermont Law**, continued from page 15 agreeing with its analysis that the Vermont legislature's rationale did not justify the restrictions the law placed on the First Amendment rights of pharmaceutical companies to distribute data for marketing purposes. Because the court held that the marketing practices are a form of speech, it subjected the Vermont law to heightened constitutional scrutiny because it imposed content- and speaker-based burdens on protected expression. "The law first forbids sale subject to exceptions based in large part on the content of a purchaser's speech. It then bars pharmacies from disclosing the information when recipient speakers will use that information for marketing," Kennedy wrote. "Finally, it prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, i.e., speech with a particular content, as well as particular speakers, i.e., detailers engaged in marketing on behalf of pharmaceutical manufacturers." In practical operation, Kennedy wrote, "Vermont's law 'goes even beyond mere content discrimination, to actual viewpoint discrimination,'" citing the court's ruling in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). In *R.A.V.* the court held content-based regulations that place "special prohibitions on those speakers" who express disfavored views are unconstitutional. Therefore, because of the law's content-specific restriction, the court said heightened judicial scrutiny was warranted, with Vermont having the burden to justify the law by proving it advanced a substantial government interest and that the measure was designed to achieve that interest, which the court ruled that it failed to do.

Vermont sought to meet the heightened standard of judicial scrutiny by arguing it had a substantial governmental interest in protecting medical privacy, including physician confidentiality, avoiding harassment, and maintaining the integrity of the doctor-patient relationship. The state argued the law was specifically drawn to address those concerns. The state also said the prescription data law is integral to achieving public policy objectives, particularly improving public health and reducing health care costs. The court disagreed. Kennedy said Vermont could

have addressed confidentiality through a "more coherent policy" by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. "Instead, Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers," wrote Kennedy. Because of the information's widespread availability and potential uses, the court said the state's asserted interest in

"The choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available is one that the First Amendment makes for us."

— Justice Anthony Kennedy  
U.S. Supreme Court  
*Sorrell v. IMS Health Inc*

confidentiality did not justify the burden on protected expression. Vermont also argued that heightened constitutional scrutiny was unwarranted because the law regulated the sales, transfer, and use of prescriber-identifying information, which is conduct, not speech. However, the court declined to accept that distinction, pointing to its decision in *Bartnicki v. Vopper*, 532 U.S. 514 (May 21, 2001), when it held "the creation and dissemination of information are speech for First Amendment purposes." (For more on the *Bartnicki* decision, see "U.S. Supreme Court Rules In Historic *Bartnicki* Case" in the Summer 2001 issue of the *Silha Bulletin*.) Kennedy wrote that facts are often the beginning point for speech which is essential to the advance of knowledge, so therefore there is a strong argument that the data in question are speech under the First Amendment.

Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg and Elena Kagan. Breyer argued that the majority wrongly applied the heightened level of scrutiny to the Vermont statute and it should have been held constitutional. The law's "effect on expression is inextricably related to a lawful governmental effort to regulate

commercial enterprise," Breyer wrote. "The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this court has previously applied when the government seeks to regulate commercial speech." Breyer wrote that the Vermont statute survived the *Central Hudson* "intermediate" commercial speech standard, along with other more limited "economic regulation" tests. The *Central Hudson* test asks (1)

whether the speech at issue concerns lawful activity and is not misleading (2) whether the asserted government interest is substantial; and if so, (3) whether the regulation directly advances the interest asserted; and (4) whether it is more extensive than

necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). Breyer wrote that Vermont sufficiently demonstrated that its statute "meaningfully furthers substantial state interests." The majority's ruling may have opened "a Pandora's Box of First Amendment challenges to many ordinary regulatory practices," Breyer wrote.

Vermont Attorney General William Sorrell and other Vermont politicians expressed disappointment in the court's decision. "We knew going in that this Supreme Court has frequently sided with large corporations. Our challenge now will be to continue to work to protect medical privacy and reduce health care costs without violating the Supreme Court's ruling. This is a step back, but not the end of the story," Sorrell said in an interview for a June 23 report in the *Burlington (Vt.) Free Press*. Sen. Patrick Leahy (D-Vt.) told the *Free Press* the decision was "another example of this Court using the First Amendment as a tool to bolster the rights of big business at the expense of individual Americans." Sen. Bernie Sanders (I-Vt.) called the decision "an absurd ruling" and an invasion of his privacy and relationship

**Vermont Law**, continued on page 17



# State Shield Laws: New Jersey Denies Blogger's Claim; Other States Expand and Extend Privilege

In spring 2011, West Virginia passed the 40th shield law in the United States granting reporters a privilege to withhold the identity of confidential sources, Hawaii extended the shield law it passed in 2008, and Arkansas legislators voted to amend its existing law to include television and Internet reporters. But the Supreme Court of New Jersey ruled that its shield law does not extend to a blogger who posted negative comments about a software company.

## JOURNALIST'S PRIVILEGE

### *New Jersey Shield Law Does Not Extend to Blogger*

The New Jersey Supreme Court unanimously held June 7 that the state legislature did not intend to provide an absolute testimonial privilege in defamation cases to people who posted comments on Internet message boards. The case arose after Shellee Hale, a Washington state-based blogger, licensed private investigator, and “life coach,” made statements in an Internet forum accusing software company Too Much Media and two of its officers of engaging in criminal behavior, including making physical threats and profiting from a security breach that jeopardized the privacy of subscribers to pornography websites. When the company deposed Hale as part of its

defamation case against her, she claimed the shield law protected her right not to answer questions about her sources of information. (See “Blogger Cannot Claim New Jersey Shield Law,” in the Summer 2009 issue of the *Silha Bulletin*.) The June 7 judgment affirmed and modified an April 22, 2010 ruling by the Superior Court of New Jersey, Appellate Division. *Too Much Media LLC v. Hale*, 20 A.3d 364 (N.J. 2011)

Although the state Supreme Court held that the shield law did not apply to Hale, its decision threw out portions of the appellate court decision requiring those seeking shield law protections to show that they follow professional journalistic standards or have traditional media credentials. The Supreme Court held Hale did not qualify for protection because the law requires persons invoking the shield to have some connection to a publication that is similar to traditional media, whether online or not. Chief Justice Stuart Rabner wrote in his unanimous opinion that the shield law “language does not mean that a newsperson must be employed as a journalist for a traditional newspaper or have a direct tie to an established magazine. But he or she must have some nexus, relationship, or connection to ‘news media’ as that term is defined.” The court found Hale did not have that qualifying relationship.

According to a June 8 report in the Newark, N.J. *Star-Ledger*, Too Much

Media attorney Joel Kreizman welcomed the court's decision and is pleased the defamation lawsuit against Hale can finally proceed. “We’ve been stuck on this issue for over two years. This case normally would have gone to trial by now,” he said. Hale’s attorney, Jeffrey Pollock, told *The Star-Ledger* he will ask the New Jersey Supreme Court to reconsider its ruling that the standard it created will apply retroactively to Hale. The Heartland Institute, a Chicago-based policy research group, expressed concern over the narrow scope of people who qualify for protection under the shield law. “Putting aside the wisdom of shield laws, they should not exist to protect only certain classes of Americans a court defines as ‘journalists.’ Freedom of the press is not truly free if the definition of ‘press’ is left up to the whim of a judge,” said Jim Lakely, co-director of the institute’s Center on the Digital Economy, in an interview with *The Star-Ledger*.

Bruce Rosen, a New Jersey media lawyer, said in an interview for a June 7 Reporters Committee for Freedom of the Press (RCFP) story that a positive aspect of the ruling is that it should be easier for traditional and online journalists to show a court that the shield law applies to them. “If you collect news and it’s clear you’re connected to a news organization, you’ll be fine,” Rosen said, but “if

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with his doctor, the *Free Press* story said.

In his July 3 column in the *Bennington Banner*, Shumlin expressed disappointment in the ruling, but also called it “hardly surprising.” “This is the same court that opened the door in the *Citizens United* case for corporations to manipulate our elections; the same court that has consistently sided with corporate interests against consumers in recent years.” (For more on *Citizens United v. FEC*, see “Supreme Court Strikes Down Campaign Finance Regulation for Corporations” in the Winter/Spring 2010 issue of the *Silha*

*Bulletin*.) “I am proud to stand with our unified congressional delegation in opposition to the court’s ruling,” Shumlin said.

Dr. Norman Ward, president of the Vermont Medical Society, said the court seems “to be oblivious to the realities of practicing medicine in a world where drug salesmen target doctors, and doctors have neither the time nor the quick ability to check their claims,” during a June 23 broadcast of National Public Radio’s (NPR) “All Things Considered.” “When I write a prescription for a patient based on my best medical judgment, that is a private

interaction. For that information to be subsequently sold and repackaged as marketing ammunition for use to influence my prescribing habits is distasteful to me and to many colleagues,” Ward told NPR.

Randy Frankel, an IMS vice president, told the AP for its June 23 story that prescription data is used in health care areas beyond marketing. Frankel praised the decision “as a great benefit in terms of improving patient care.”

— HOLLY MILLER  
SILHA RESEARCH ASSISTANT

you're not connected with any news organization and you're venting online, you may not have those protections." Rosen told the RCFP that the court drew a reasonable line between a reporter and someone commenting on a subject online. "For the general public, it makes it harder for individual bloggers to have automatic protection," Rosen said. "They're going to have to pass the test."

Jonathan Peters, a lawyer and fellow at the Missouri School of Journalism, wrote in a June 10 post on the blog MediaShift that New Jersey's shield law is among the broadest in the country. But Peters cautioned that the opinion may be "setting out principles that might handicap the news media of the future" because "as [online news] outlets evolve, perhaps as they become more collaborative and interactive, they might not be similar anymore to the traditional news media, insofar as that term refers to 'newspapers, magazines, press associations, news agencies, wire services, radio, [or] television.'"

In an interview with *The Star-Ledger*, Rosen, representing the New Jersey Press Association, said this ruling is just the beginning of a conversation about the state's shield law. "This conversation is going to go on for years, but it's a good place to start," he said.

### **West Virginia Enacts 40th Shield Law**

On March 12, 2011 the West Virginia state legislature enacted H.B. 2159, adding §57-3-10, "Reporters' Privilege," to the Code of West Virginia. The statute, which was signed by Acting Gov. Earl Ray Tomblin in April and took effect June 10, extends a qualified privilege with few limitations to reporters seeking to protect confidential sources of information, supplementing existing state constitutional protection.

Under the law, reporters cannot be "compelled to testify in civil, criminal, administrative, or grand jury proceedings" without "the consent of the confidential source." Reporters also cannot be compelled "to produce any information or testimony that would identify a confidential source" without the consent of the source. The privilege may be overcome, however, when the testimony "is necessary to prevent imminent death, serious bodily injury, or

unjust incarceration."

The statute defines a reporter as "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public for a substantial portion of the person's livelihood, or a supervisor, or employer of that person in that capacity." The law also extends to student journalists, "provided that [the] student reporter at an accredited educational institution ... meets all of the

"The bottom line is with a strong shield law, the public gets information that may be vital to it and its understanding of events of the day or government-related activities."

— Jim Smith  
Executive Editor

*The Parkersburg (W. Va.) News and Sentinel*

requirements of this definition, except that his or her reporting may not provide a portion of his or her livelihood."

The West Virginia legislation also mandates that the section not be read "to limit any existing constitutional protections afforded any person under the United States or West Virginia Constitutions," a provision which, in an April 6, 2011 report, the RCFP called "significant ... in light of [West Virginia] courts' general acceptance of the state Supreme Court's articulation of a qualified reporter's privilege in *Hudok v. Henry*." In *Hudok*, 389 S.E.2d 188 (W.Va. 1989), reporters claimed a privilege under the free press clause of the First Amendment and under Article II, Section 7 of the West Virginia Constitution to decline to answer questions or to divulge information obtained in the course of newsgathering. The Supreme Court of Appeals of West Virginia held "disclosure of a reporter's confidential sources or news-gathering materials may not be compelled except upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." The original draft of the shield law contained the *Hudok*

test, but the House Judiciary Committee ultimately omitted that language.

Media and First Amendment advocates supported the law, but not without some skepticism. In an Editor's Log blog post on *The Parkersburg (W. Va.) News and Sentinel* website, *News and Sentinel* Executive Editor Jim Smith wrote, "the bottom line is with a strong shield law, the public gets information that may be vital to it and its understanding of events of the day or government-related activities." But Smith also expressed concern: "It will

be interesting to see how effective the law is in practice. Unfortunately, there always seems to be a broad difference between the intent and spirit of a law and how it is actually followed."

Student Press  
Law Center (SPLC)  
Director Frank

LoMonte praised the student journalist provision of the bill in a blog post on the organization's website on March 14, saying the bill would make West Virginia's shield law among the strongest in the nation for student journalists. In a March 10 column in the Charleston, W.Va. *Daily Mail*, two days before the law passed, LoMonte encouraged the West Virginia Legislature to recognize student journalists as it considered the measure. "With the ranks of full-time salaried journalists shrinking, unpaid college students increasingly are providing the news coverage that communities rely on to stay informed. Student journalists assume all of the same risks and responsibilities that professionals do, and they should be entitled to all of the same protections," he wrote.

The new shield law may be applied for the first time after the Supreme Court of Appeals of West Virginia, the state's highest court, held that a trial judge erred in ordering a newspaper to reveal the identities of anonymous sources and documents in a defamation suit. *Lincoln Journal v. Hustead*, No. 35734, 2011 W. Va. LEXIS 25 (W. Va. May 2, 2011)

In that case, *The Lincoln (W. Va.) Journal* and individual reporters

petitioned the Supreme Court of Appeals for a writ of prohibition to prevent Judge Jane Husted from enforcing a Sept. 14, 2010 order compelling them to reveal sources and newsgathering materials. Husted's order stemmed from a series of articles in *The Lincoln Journal* that alleged illegal campaign donations by the owner of a rival newspaper and other individuals to local candidates in 2008 primary elections. The reports cited several anonymous sources and Lincoln County Prosecuting Attorney William J. "Jackie" Stevens II. The stories also referred to copies of the criminal complaints that had been submitted to the paper and to Stevens. The state's high court ruled May 2 that the lower court "was required to separately identify each allegedly defamatory article with specificity, each source therein that the plaintiffs sought through discovery, and thereupon conduct for each article a separate *Hudok* analysis," rather than analyze them all together.

Because the lower court review will be conducted after the new shield law is in place, it may benefit the newspaper. David Barnette, *The Lincoln Journal's* lawyer and general counsel for the West Virginia Broadcasters Association, told the RCFP for a May 9 story that when the case undergoes further review, the newspaper may avoid the *Hudok* analysis if the court applies the new shield law, although the law allows the reviewing judge to consider the *Hudok* factors if he or she chooses. By applying the *Hudok* test, Barnette said, "The court can go beyond what the Legislature can do."

### **Arkansas Updates Shield Law**

On March 30, 2011, the Arkansas General Assembly approved a measure that included new forms of media in its existing shield protections. S.B. 772 amends Arkansas Code §16-85-510, changing the current title of the law from "Disclosure of newspaper, periodical, or radio station sources" to "Disclosure of media sources." The amendment also adds "television station" and "Internet news source" to its list of protected entities, which already included "any editor, reporter, or other writer for any newspaper, periodical, or radio station," or the manager or owner of those organizations. The Arkansas shield law protects the listed media entities from

disclosure of "the source of information used as the basis for any article he or she may have written, published, or broadcast" to "any grand jury or to any other authority" unless it can be "shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of public welfare."

In an April 6 RCFP report, Philip Anderson, a media lawyer with Williams & Anderson PLC in Little Rock, Ark., said the state's original shield law was introduced in 1936 and was amended in 1949 to include the new media of its time — radio. The bill was unanimously approved in the House and Senate and, pending no problems arising during the review of the session's work, the amendment will take effect in fall 2011.

The amendment was introduced after Michael Tilley, co-owner and editor of *The City Wire*, an online publication, contacted Sen. Jake Files (R-Fort Smith), asking whether the state shield law should be updated to include more modern media. Tilley told the RCFP that "it never hurts to take the grey area out of the law." In a March 29 story on the amended shield law, *The City Wire* described its involvement: "Prior to the beginning of the 88th Arkansas General Assembly, *The City Wire* sent a formal request to Files asking him to consider amending the shield law. Owners of *The City Wire* believe the law was vague with respect to online web publications, especially those that are 'pure' in the sense that they are not a subsidiary or direct operation of a traditional news outlet."

### **Hawaii Extends Shield Law for Two More Years**

On April 28, the Hawaii Legislature passed a two-year extension of that state's shield law. Hawaii became the 36th state to enact a shield law in 2008 with H.B. 2557, which added §621, "Limitation on compellable testimony from journalists and newscasters; exceptions" to the Hawaii Revised Statutes. (See "Hawaii Enacts 36th State Shield Law," in the Summer 2008 issue of the *Silha Bulletin*.) The law will now provide a shield for Hawaiian journalists until July 2013.

The law provides a qualified privilege for journalists or newscasters currently or previously associated with

a newspaper, magazine, news agency, press association, wire service, or radio or television station or network. The law also protects digital operations of those organizations and extends to online journalists, like bloggers, who regularly report on information of public interest. The privilege does not extend to journalists who witness a crime or commit a crime. In 2009, a state district court judge ruled that the law exempted an independent documentary filmmaker from responding to subpoenas or being deposed in a lawsuit involving a property dispute. (See "Hawaiian Shield Law Protects Independent Filmmaker" in the Fall 2009 issue of the *Silha Bulletin*.) By contrast, in January 2011 a panel of the 2nd Circuit U.S. Court of Appeals in New York upheld a subpoena to a documentary filmmaker, reasoning that he forfeited his journalist's privilege by failing to retain journalistic independence. (See "Second Circuit Rationale for Denying Privilege to Filmmaker: Failure to Maintain Independence" in the Winter/Spring 2011 *Bulletin*.)

Some members of the press and advocates questioned why the legislature did not make the measure permanent. In a June 29 interview with the *Silha Bulletin*, media lawyer Jeff Portnoy of the Hawaii law firm Cades Shutte said the extension rather than permanent enactment of the law seemed to be based on "some intramural issues having nothing to do with the media, but between the legislature and the judiciary about who should deal with rules of evidence." The RCFP reported April 8 that some members of the Judiciary's Standing Committee on Rules of Evidence want to re-examine the law after they gather information about other states' shield laws and the law's effect on the media and how cases are handled. Portnoy told the *Honolulu Star-Advertiser* for an April 7 story that the review should have been requested when the bill passed in 2008. "The judiciary considers it a matter of evidence," he said. "Obviously we disagree. They had three years to do it." Senate Judiciary Committee Chairman Clayton Hee (D-Kauai-Kaneohe) told the *Star-Advertiser* the



# States Consider Bans on Undercover Recording at Agricultural Operations

## *Iowa, Florida, and Minnesota Bills Could Hinder Investigative Reporting*

**D**uring their 2011 sessions, state legislatures in Iowa, Minnesota, and Florida considered bills that would criminalize recording undercover videos of agricultural operations, drawing First Amendment concerns from animal rights activist groups and media who argued the bills could outlaw journalistic investigations that expose unsafe and unsanitary farming conditions.

### ACCESS

For some years, the agricultural industry has argued that videos shot and released by animal rights groups present a distorted view of their operations and unfairly represent meat production practices. Criminalizing the production of the videos, industry officials say, would deter animal rights organizations from distributing misleading videos and

prevent contamination of agricultural facilities.

On March 17, 2011 the Iowa House of Representatives passed H.B. 589, a broad bill that proposed blocking the recording of images or sounds at agricultural facilities without owner consent. However, the Iowa Senate did not pass the bill before the legislative session ended. Under the bill, a person would be guilty of “animal interference” if he or she produced “a record which reproduces an image or sound occurring at the animal facility,” possesses or distributes “a record which produces an image or sound occurring at the animal facility,” or entered “onto the animal facility, or remains at the animal facility, if the person has notice that the facility is not open to the public.” The bill also applies to “crop operation interference,” using identical language to the “animal interference” provisions, but replacing the word “animal facility” with “crop operation.” Violation of the law as a first offense would be charged as an aggravated misdemeanor, further offenses a Class D felony. The proposed law would not apply “to an animal

shelter, a boarding kennel, a commercial kennel, a pet shop, or a pound.”

Under the Iowa bill, a person would also be guilty of “animal facility fraud” if he or she willfully obtained access to an animal facility or a crop operation through “false pretenses for the purpose of committing an act not authorized by the owner.” This would include making “a false statement or representation as part of an application to be employed.”

Similar legislation with nearly identical language was introduced in Florida and Minnesota in March 2011 and April 2011, respectively. The Florida and Minnesota bills would also ban covert recording of farming practices, distributing those recordings, and punish individuals who took jobs at farms with the purpose of gaining access to record the facility’s practices.

The Florida bill, S.B. 1246, differed only slightly from the Iowa and Minnesota legislation by explicitly listing photography separately from “images” and recordings. The Iowa and Minnesota bills had a broader definition of “image” that could also include still photography. The Florida bill passed the Senate, but

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committee’s concerns remained unclear after the hearing. “I’m sure that will be clear after the report comes out,” Hee said. Committee member Les Ihara (D-Kahala-Palolo) said his vote for the extension of the shield law was to keep the measure alive, according to the *Star-Advertiser*. “I would support making it permanent,” he said, “it’s just better to move it forward and try to see what the judiciary has to say.” Portnoy said he met with the judiciary committee in early June and said that there “seems to be a general consensus that some type of journalistic privilege is appropriate.” “But you never know when you put a committee of lawyers and judges together what mischief they will cause,” he said. Portnoy said he is happy with the two year extension for now, and is

“optimistic” there will be a permanent measure in the future.

The *Star-Advertiser* report said the Society of Professional Journalists, The Associated Press, and several Hawaii news organizations representing broadcast, print, and online media submitted testimony to the Senate committee supporting making the law permanent. “If we want investigative reporting in Hawaii and want people to feel comfortable that they can come forward with information, we need this law,” said Malia Zimmerman of HawaiiReporter.com in an interview for the story.

Since 2007, Zimmerman has been fighting a subpoena of her newsgathering materials used in a HawaiiReporter.com story about a Kauai dam failure

that killed seven people. Portnoy, who is Zimmerman’s attorney, told the *Bulletin* June 29 that the subpoena has been dormant for more than a year, but hypothetically could “raise its head again” after the pending litigation that gave rise to the subpoena was approved to move forward by a Hawaii appellate court. (For more on the Zimmerman case, see “Hawaii Enacts 36th State Shield Law,” in the Summer 2008 issue of the *Silha Bulletin*, and “Reporter Shield Law Update” in the Winter 2008 issue.)

Because the Hawaii shield law will expire in 2013, the Rules of Evidence Committee will have to recommend whether to retain the statute, codify it, or repeal it before the start of the 2012 legislative session.

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died in the House after no vote was taken before the end of the session. The Minnesota legislation, H.B. 1368, did not pass the House or Senate before the legislative session ended.

Though the bills died at the end of their states' legislative sessions, they are likely to be reintroduced. Jacksonville, Fla. television network First Coast News reported that Sen. Jim Norman (R-Pasco), the author of the Florida bill, said he intends to file the bill again next year. The Associated Press (AP) reported on June 13 that the Iowa measure "initially had plenty of support, reflecting the importance agriculture holds in a state that leads the nation in production of corn, soybeans, hogs and eggs. Although most Iowa residents live in cities, agriculture remains important [to] them and is a powerful force in the Legislature."

Lawmakers, bill proponents, and industry officials cited concerns about contamination and negative publicity as their central reasons for proposing the laws. On May 5, 2011, *The New York Times* reported that proponents of the bills said undercover investigators could bring disease into facilities. "There's viruses [sic] that can put these producers out of business, whether it's cattle, hogs or poultry," said Iowa Senate President John Kibbie (D-Emmetsburg), a supporter of the ban.

More frequently, however, legislators and farming groups said they want to prevent fraudulent job seekers from shooting videos that give unfair perspectives and are used for publicity rather than reporting animal abuse to authorities. The AP reported on March 14, 2011 that bill proponents argued that people with concerns about abusive practices should report them to the police and seek to prevent them through other channels. The AP reported that in 2009, a video shot at a Spencer, Iowa chicken hatchery was released which included footage of male chicks "being tossed into grinders," but no complaints were ever filed about the hatchery. Tom Shipley, a lobbyist with the Iowa Cattlemen's Association, told the AP "we believe [a new law] can help prosecute people who, while they claim to have animals' interests at heart, don't really follow through and report the animal abuse — if in fact there actually is

anything — immediately like they're required to." Shipley said activists "hang on to that information for publicity purposes."

Minnesota Sen. Doug Magnus (R-Slayton) told the *Minneapolis Star Tribune* in April 2011 that the Minnesota bill was aimed at preventing harassment and sabotage of facility operations. "These people who go undercover aren't being truthful about what they're doing," he said. According to a March 15 report in *The Des Moines Register*, Iowa lawmakers have claimed activists

"[The bills are] an attempt to criminalize whistle-blowing at a time when we need more transparency about animal welfare, not less. It goes after people with a really broad brush."

— Howard Goldman  
Minnesota Director  
Humane Society of the United States

from People for the Ethical Treatment of Animals (PETA) shot a video in 2008 but did not turn it in to law enforcement for six weeks after it was recorded. The video showed employees of a farm near Bayard, Iowa abusing sows. In a March 17 interview with Des Moines TV station KCCI Rep. Annette Sweeney (R-Alden), the Iowa bill's sponsor, alleged that some undercover videos of animal facilities are "staged." States News Service reported May 5 that PETA's general counsel sent a letter to Sweeney asking her to "cease and desist from making defamatory comments regarding PETA's undercover investigation footage."

Meanwhile, animal rights advocates say the legislation unconstitutionally infringes on free speech and would have a chilling effect on whistleblowers trying to bring attention to cases of animal cruelty, according to the April 9 *Star Tribune* report. Howard Goldman, Minnesota director of the Humane Society of the United States, called the Iowa, Minnesota, and Florida bills "an attempt to criminalize whistle-blowing at a time when we need more transparency about animal welfare, not less. It goes after people with a really broad brush." *The New York Times* reported May 5 that the bills, if passed, "could run afoul

of the Supreme Court's ruling last year in *United States v. Stevens*." In *Stevens*, the court held that a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, striking it down on the basis that it was facially invalid under the First Amendment. *United States v. Stevens*, 130 S.Ct. 1577 (Oct. 6, 2009) (See "Supreme Court Strikes Down Law Banning Depictions of Animal Cruelty, Citing 'Alarming Breadth' of Statute" in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

According to *The New York Times*, under the bills, taking a picture of any agricultural facility or crop operation, even while standing on public property, would be illegal. Although much of the media attention focused on

the bills' provisions governing animal facilities, at least one media advocacy group raised concerns about the breadth of the proposed legislation. The National Press Photographers Association (NPPA) decried the broad nature of the Florida and Iowa bills in two blog posts on the Advocacy Committee section of its website. In a March 18 post, NPPA Advocacy Chair Alicia Calzada wrote that the Iowa bill's language "elevates editors and news organizations to the status of criminals if they publish, or even possess undercover footage of farms, crops or animal facilities." Calzada wrote on March 2, "we contacted the offices of the author of the bill and NPPA Attorney Mickey Osterreicher has received assurances from staff members that the bill is being amended to specifically relate to trespassers on private property." Despite the assurances, Calzada wrote that criminalizing photography made her "very uncomfortable."

On April 15, the *Quad City Times* of Davenport, Iowa noted opponents' First Amendment argument that the Iowa legislation "would outlaw undercover journalistic investigations that seek to expose potentially unsafe and unsanitary conditions for animals, workers,

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and consumers.” Iowa state senator Matthew McCoy (D-Des Moines) told *The New York Times* that he introduced amendments to weaken or block the bill because “he was worried that it would open Iowa to abuses that could jeopardize food quality and undermine the very agricultural interest supporting the legislation.” McCoy said, “if they have nothing to hide and they are operating ethically, they should have no fear.” In an interview with National Public Radio (NPR) for its April 13 “Morning Edition” program, McCoy said a bill that limits opportunities for industry oversight “could set a dangerous precedent.”

Rose Acre Farms Manager Andrew Kaldenberg told NPR during its April 13 “Morning Edition” broadcast that he welcomes reporters because his farms have nothing to hide. Rose Acre Farms is one of Iowa’s largest chicken farms and egg producers. In February 2010, an undercover activist from the Humane Society recorded footage at Rose Acre Farms of “chickens living in cramped cages and some dead birds whose carcasses were left so long they’d been mummified,” NPR reported. The Humane Society released the video three months later. Kaldenberg said the farm’s real problem is with activist organizations that are promoting “an agenda which is vehemently against how the industry produces food” and people who misrepresent their true purposes for getting hired. “Morning Edition” reported that large chicken, hog, and cattle organizations said the pending Iowa legislation was mischaracterized, and that it was not meant to prevent whistleblowing but rather to keep people who misrepresent themselves from getting hired.

*The New York Times* reported on May 5 that Iowa legislators answered whistleblowing concerns with two amendments after the state’s attorney general expressed problems with the initial bill. The first provision would require a person to turn over all recordings of suspected criminal activity at agricultural facilities to authorities within 72 hours of their occurrence. Anna Dey, a lobbyist and staff attorney for the American Civil

Liberties Union of Iowa, told *The New York Times* that the provision effectively eliminated the possibility for extended undercover operations and “constitutes a warrantless seizure of property.” The second provision recommended striking all of the bill’s language and replacing it with a change to the state’s trespass law, *The Times* reported. Posing as a worker is often the way activist groups or journalists gain access to agricultural facilities. Undercover videos shot by the Humane Society of the United States showed workers slamming chickens into metal bins and dead birds littering cages at the nation’s largest egg farms, according to a *Los Angeles Times* article on April 8, 2010. The organization’s efforts caught the attention of companies like Wendy’s, Sonic Corp., and the parent company of IHOP and Applebee’s, all of which shifted to using cage free eggs, the *Los Angeles Times* reported. Wal-Mart Stores, Inc., the world’s largest grocer, said in February 2010 that the eggs sold under its own label are now cage free. In an AP report on June 13, Humane Society spokeswoman Carol Rigelon said opponents of the bills were careful to avoid being critical of agriculture as an industry. “What we’re trying to do is expose things that might not otherwise be exposed and as a result make agriculture even better,” Rigelon said.

If the bans on undercover recording at agricultural facilities pass state legislatures in the future, it would not be the first time the agricultural industry has successfully lobbied politicians to pass laws that protect the industry from criticism of its food safety practices. In the mid-1990s, 13 states enacted statutes that made it easier for producers to sue critics of their food products for libel. These “food libel laws” or “veggie libel laws” authorized food producers to sue individuals who disparaged a food product with information unsupported by a reliable source. Disparagement in these types of situations is generally defined as giving false information claiming that an agricultural product is not safe for human consumption.

In a commentary for *Legal Times* in 1998, Ronald Collins, then-director of the FoodSpeak Free Speech Project and

Paul McMasters, then-First Amendment ombudsman at The Freedom Forum, argued that the “veggie libel laws” could lead to a chilling effect on anyone who wanted to speak out about food, including journalists and non-profit organizations.

The “food libel laws” have not been used often, but they gained notoriety when Texas’ food disparagement law was used in a case against The Oprah Winfrey Show in 1998. Texas feed yard owners claimed that Winfrey’s statement that she would not eat a hamburger again for fear of getting mad cow disease caused a decrease in beef sales. The feed yard owners ultimately lost the case. *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998)

### ***An Ethical Debate over Undercover Journalism***

Although some courts have protected the news media’s ability to conduct undercover investigations with hidden cameras, the practice has come under scrutiny. Media ethics experts have cautioned excessive use of hidden cameras. Bob Steele, a journalism ethics professor at DePauw University, developed a set of guidelines for news organizations to use when considering an undercover story, entitled “Deception/Hidden Cameras Checklist: When might it be appropriate to use these tactics?” The checklist, which Steele developed while he was an ethics scholar at journalism think tank the Poynter Institute, says the information should be of “profound importance” and “vital to public interest, such as revealing failure at top levels, or it must prevent profound harm to individuals.” He also cautioned that deception or hidden cameras not be used unless “all other alternatives for obtaining the same information have been exhausted,” among other factors. Steele’s checklist is available online at <http://www.poynter.org/uncategorized/744/deceptionhidden-cameras-checklist>.

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# Social Media Challenge British Privacy Injunctions

Social media like Twitter are making the enforcement of British privacy injunctions nearly impossible, forcing judges and lawmakers to grapple with how to apply old rules to a new era of media.

Privacy injunctions are rooted in the United Kingdom's Human Rights Act of 1998, which guarantees British citizens' rights by incorporating the European Convention on Human Rights (ECHR) into law, including the right to privacy

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under Article 8 and the right to freedom of expression under Article 10. Article 12 of the Human Rights Act states that a publication cannot be "restrain[ed] ... before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed." Privacy injunction applicants — frequently celebrities — claim their individual right to privacy will be violated if certain information is published about them and, in some cases, that mere public knowledge of the existence of the injunction would also violate their right to privacy. Accordingly U.K. courts must struggle to balance the ECHR and Human Rights Act's protections of both privacy and freedom of expression.

British courts have developed two ways to stop the publication of information about individuals who seek injunctions. The first type of injunction is called an "anonymised order," which prohibits reporting private information or identifying the applicant, but does not prohibit reporting the fact of the order. The second type of injunction is known as a "super-injunction" because it prohibits reporting even the existence of the injunction. Publishing these details could result in the publisher being held in contempt of court.

According to a May 9, 2011 report in *Metro*, a daily newspaper published by Associated Newspapers Ltd, the term "super-injunction" was coined by *Guardian* editor Alan Rusbridger, after the newspaper was banned from reporting information from an internal report by an oil trader about the dumping of toxic waste. Twitter users and

bloggers helped reveal that Trafigura, an energy company, was behind the October 2009 gag order against *The Guardian*. The newspaper cryptically reported October 12, 2009 that "today's published Commons order papers contain a question to be answered by a minister later this week. *The Guardian* is prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found." The story was available online for just minutes before Internet users began "tearing apart the gag," *The Guardian* reported October 13, 2009. (For more on the incident, see "Social Media Sites Assist Gagged British Newspaper," in the Fall 2009 issue of the *Silha Bulletin*.)

In a May 20, 2011 BBC "Q&A" report about super-injunctions, a tongue-in-cheek example showed how the gag orders work in practice, drawing from the real-life case of soccer star Ryan Giggs: "Taking a hypothetical case, a Premiership footballer asks the High Court to stop a kiss-and-tell story from appearing in next weekend's papers, saying that he is a victim of wrongdoing and blackmail by the other party. If the judge agrees to a super-injunction, the newspaper cannot report the allegations — and it is also prevented from saying that the footballer went to court to gag the paper. If the newspaper breaks the injunction, the editor could be prosecuted for contempt of court." In an August 17 article in the Bureau of National Affairs (BNA) Electronic Commerce & Law Report, American media lawyer Robert Corn-Revere, a partner of the firm Davis Wright Tremaine in its Washington D.C. office, wrote this "somewhat obscure phenomenon began to get significant press attention in early 2011 when London-based tabloid newspapers reported that privacy injunctions were being used increasingly to gag the press." (Corn-Revere was the 2007 *Silha* Lecturer. See "2007 *Silha* Lecture Focuses on Media Violence Regulation" in the Fall 2007 issue of the *Silha Bulletin*.)

After Giggs won an injunction in late April 2011 that barred London tabloids from reporting on his alleged extramarital affair, the banned

information was reported through Twitter. Although British newspapers remained legally gagged, fans jeered at Giggs at matches, and Member of Parliament (MP) John Hemming, a Liberal Democrat from Birmingham Yardley, used parliamentary privilege in late May to name Giggs and disclose that he had obtained an injunction, *The Washington Post* reported June 11. (Parliamentary privilege is legal immunity enjoyed by members of the British legislature, protecting politicians from civil or criminal liability for actions done or statements made related to their work.) According to a May 23 Associated Press (AP) report, Scotland's *Sunday Herald* published a "thinly censored" photo of Giggs on its front page on May 22. The newspaper blocked out Giggs' eyes and wrote under the picture that "everyone knows" it depicted the athlete "accused of using courts to keep allegations of his sexual affair secret." In an accompanying editorial, the *Herald* called it "unsustainable" for newspapers not to be able to report on information that was widely available online. "The issue is one of freedom of information and of a growing argument in favor of more restrictive privacy laws," the paper said.

*The Washington Post* story also said Giggs was using the London court system to bring suits against the anonymous Twitter users who defied the court order and posted the information about his affair. Although the details of the suits are unknown, a May 20 Bloomberg report said Twitter and some of its users were sued by an entity known as "CTB" in London, according to a court filing it obtained. The story said the document contained no other information about the initials CTB, but that they were also used in a separate lawsuit involving an athlete who won an anonymity order banning the media from publishing stories about his alleged affair. According to the report, the suit was filed on May 18 in the High Court in London as *CTB v. Twitter Inc., Persons Unknown*, High Court of Justice (Queens Bench Division), HQ11X01814. James Quartermaine, a media lawyer at the London firm Charles Russell, told Bloomberg that Twitter is unlikely to cooperate and turn over the

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## Injunctions, continued from page 23

names of its users involved in reporting the information, and speculated the suit “is probably intended to deter people from breaking injunctions on the Web.” In an interview with *BusinessWeek* for a June 20 report Quartermaine said, “it could get pretty political. But any law that doesn’t get enforced quickly begins to look dodgy.” Matt Graves, a spokesman for Twitter, said in an emailed statement to *BusinessWeek* that Twitter does not comment on individual users. “In keeping with our policy, we review reports that accounts violate the Twitter Rules and Twitter terms of service,” Graves said.

Giggs was not the first public figure to have an injunction undermined by Twitter users. On May 8, 2011 a Twitter user posted a series of messages claiming a number of U.K. celebrities had obtained privacy injunctions and detailed the activities that they hoped to keep out of the public eye, according to a May 10 report in *BusinessWeek*. The posts remained accessible a day later, and some British media lawyers claimed that if action was not taken against the person who posted the information, the injunctions would look unenforceable to the media and the general public, the story said. On May 23, *The New York Times* reported that, as the existence of privacy injunctions became more widely known about, Twitter users have made it a priority to identify the people behind them on social media sites.

In its June 11 story, *The Washington Post* characterized the situation as leaving “British judges and wronged parties scrambling for ways to hold new media accountable.” According to the May 23 *New York Times* report, John Wittingdale, a Conservative Party MP from Maldon, said “you would virtually have to be living in an igloo” not to realize that the use of Twitter was “in danger of making the law look like an ass.”

*BusinessWeek* reported May 10 that Prime Minister Cameron opposed the injunctions, reasoning that Parliament and not the courts should create U.K. privacy law. On May 23, the AP reported that Cameron spoke on Britain’s ITV calling for a “time out” to “have a proper look” at the problems surrounding social media and privacy injunctions, ordering

an official parliamentary inquiry on the topic. A May 26 commentary in *The Economist* contended that part of the problem is the lack of a formal privacy law in the United Kingdom, but also said the Human Rights Law of 1998 “made things messier by enshrining two clashing principles: a strong defense of freedom of speech, and a more qualified right to the ‘respect of private life.’” According to *The Economist*, media lawyer Mark Stephens of the firm Finers Stephens Innocent argued that tabloid stories are forgotten quickly without an accompanying legal frenzy. “You take it on the chin and it’s tomorrow’s fish-and-chip paper,” he said. Stephens proposed that U.K. privacy law should more closely resemble libel law, with penalties and remedies available only after information is published. *The Economist* said Stephens’ proposal could be enhanced by a strengthened version of the now-voluntary Press Complaints Commission’s Editors’ Code of Practice, with statutory provisions that would penalize newspapers that violate privacy and tighter definitions of “public interest” and what constitutes a “public figure.” Media organizations would not like this change, *The Economist* said, because they would be concerned that bolstered privacy laws would be misused by the rich, powerful, and well-lawyered to continue to conceal their mistakes. (Stephens will present the 2011 Silha Lecture on Oct. 4, 2011. For more on the Lecture, see “Silha Lecture Features Mark Stephens, International Free Expression Advocate” on page 12 of this issue of the *Silha Bulletin*.)

In April, a committee chaired by Lord David Neuberger, who is Master of the Rolls, was created to address the impact of super injunctions on open justice. At a May 20 press conference, Neuberger released the committee’s report, stating that it “tried to achieve a procedural system which strikes a fair and proper balance” between the media’s right to freedom of expression and a person’s individual right to privacy. The report promulgated guidelines that would regulate the injunctions more heavily. In the interest of open justice, the committee recommended that super-injunctions be granted only in “very limited circumstances

and, at least normally, for very short periods of time.” The committee said the increase in number of anonymised orders and super-injunctions had raised concerns about whether all courts were handling the proceedings consistently and properly. Although the committee dealt only with procedural issues and not any substantive legal issues, *The Guardian* said in a May 20 commentary that the committee’s findings and recommendations should not be “underestimated.” *The Guardian* characterized the factual report as cutting through some of the hysteria surrounding super-injunctions, and said Neuberger “correctly delegated the substantive issues to appropriate quarters: parliament and the courts.”

According to the report, the proper approach to anonymised orders has been clarified in *JIH v. News Group Newspapers Ltd* [2011] EWCA Civ 42. In *JIH*, the Master of Rolls held that “where the court is asked to make any [privacy] order, it should only do so after scrutinizing the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.” The court also said it must consider whether there is “sufficient general, public interest in publishing a report of the proceedings which identifies a party,” which would justify the corresponding invasion of the applicant’s right to privacy. To help with consistency among courts, the committee created a model explanatory note and a model judicial order to be used in injunction proceedings. The model order states injunctions should “only be granted in an exceptional case where a reporting restriction is strictly necessary.” The model order includes sample language for both anonymised injunctions and super-injunctions. The committee did not specifically address the concerns raised by the use of technology like Twitter. The full committee report is available online at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>.

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# Journalist Murders: Bailey Killers Convicted; More Charges in Politkovskaya Case

The cases of two prominent journalists murdered in 2006 and 2007 continued to move forward in the summer of 2011. Two men were convicted June 9 in connection with the 2007 murder of *Oakland (Calif.) Post*

## ENDANGERED JOURNALISTS

editor Chauncey Bailey, while police in Moscow announced two major arrests related to the 2006 murder of Russian journalist Anna Politkovskaya.

### **Two Convicted for Murder of Chauncey Bailey**

On June 9, 2011, a unanimous jury found two men guilty of the Aug. 2, 2007 murder of Bailey. Oakland's KTVU-TV reported on June 9 that Bailey, who was shot and killed on his way to work at the *Oakland Post* the morning of Aug. 2, 2007, was the first American journalist killed in the United States for covering a story in more than 10 years. Before his death, Bailey had been reporting on the financial troubles of Your Black Muslim Bakery, a 40-year-old community organization that promoted self-empowerment and became an important institution in Oakland's black community. KTVU-TV reported that in recent years, the organization's reputation became tainted by connections to crime. According to The Chauncey Bailey Project, a team of Bay Area reporters and editors formed to investigate Bailey's death and continue his investigative work, authorities arrested 19-year-old Devaughndre Broussard on Aug. 3, 2007. Broussard said he killed Bailey to prevent him from exposing the problems plaguing Your Black Muslim Bakery, where Broussard worked. A few days later, however, Broussard recanted his confession and told police the bakery's CEO, Yusuf Bey IV, told him Allah wanted him to take the blame for others responsible for the murder, the project reported.

Bey was found guilty of three counts of murder for ordering the deaths of Bailey and two other men, KTVU-TV reported. The jury also convicted co-defendant Antoine Mackey in the

murders of Bailey and one of the men. Broussard, who was charged as the gunman, agreed to testify against Bey and Mackey in exchange for a plea deal that resulted in 25 years in prison for the three murders. In addition to the charges related to the Bailey killing, Bey and Mackey were charged with the July 8, 2007 murder of Odell Roberson and the July 12, 2007 murder of Michael Wills. On August 26, Bey and Mackey were sentenced to life in prison without parole for the three murders. Broussard was sentenced to 25 years on August 12.

The convictions of the three men were a victory for The Chauncey Bailey Project, which formed in August 2007 as an effort to finish Bailey's work and make sure those involved in his murder were brought to justice. According to the group's website, its goal is to make the statement that "you can't kill a story by killing a journalist." The project's collection of stories can be read at <http://www.chaunceybaileyproject.org/>. The project is led by Dori Maynard, president and CEO of the Robert C. Maynard Institute for Journalism Education in Oakland, and Sandy Close, executive editor of New America Media in San Francisco. Other participants include Bay Area News Group newspapers the *Oakland Tribune* and the *Contra Costa Times*; the *San Francisco Bay Guardian*; the Bay Area Association of Black Journalists; KQED Public Radio; KTVU-TV; the Center for Investigative Reporting; and the journalism schools at the University of California-Berkeley, San Francisco State University, and San Jose State University. Organizations including the John S. and James L. Knight Foundation and the Sigma Delta Chi Foundation, among others, helped to fund the project. On its website, The Chauncey Bailey Project quoted Bailey's friend and *Oakland Tribune* editor Martin Reynolds, who called Bailey "so synonymous with Oakland that he was Oakland. Everybody knew Chauncey and knew they could go to him. He was a good guy with a great sense of humor." According to KTVU-TV, in an interview outside the courthouse following the June 9 verdict, Bailey's cousin, Wendy Ashley-Johnson, said, "justice has finally

been done. Now Chauncey can rest. This chapter is over." The Chauncey Bailey Project reported that although Your Black Muslim Bakery was once a symbol of African-American empowerment and defiance in Oakland, it was also a polygamist cult in which founder Yusuf Bey fathered more than 40 children with at least 14 women. Bey's political and street power once led him to campaign unsuccessfully for Oakland mayor, the project reported. The bakery became home to dozens of ex-convicts who took Bey's name, and at the time of Bey's death from colon cancer in 2003 he faced statutory rape and child abuse charges involving children as young as 10, the project reported. After a violent power struggle to succeed his leadership, Yusuf Bey's son Yusuf Bey IV eventually gained control of the organization, the story said. On the day of Bailey's shooting, The Chauncey Bailey Project reported, Yusuf Bey IV was facing nine separate criminal cases involving incidents over a two and a half year time span.

### **Suspects Arrested in Murder of Politkovskaya**

Moscow police arrested one man in May that they accused of the 2006 murder of Russian journalist Anna Politkovskaya and another in August that they accused of helping to organize the killing. On May 31, BBC News reported that the suspected gunman, Rustam Makhmudov, was arrested in Chechnya at his parents' home. According to The Committee to Protect Journalists (CPJ), Russian press reports said the alleged gunman was indicted in Moscow on June 2. On August 24, Agence France-Presse (AFP) reported that police investigators announced the arrest of retired police lieutenant colonel Dmitry Pavlyuchenkov, who they suspected of taking cash in exchange for organizing the murder and obtaining the murder weapon.

Politkovskaya was found murdered in the lobby of her Moscow apartment building on October 7, 2006. The circumstances of Politkovskaya's murder led to speculation that it was a contract killing in retaliation for

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# School Privacy Law Changes Could Challenge Media

## *New Rules Would Grant Schools Greater Discretion over Directory Information*

In April 2011, the United States Department of Education announced proposed revisions to the Family Educational Rights and Privacy Act (FERPA), which governs the confidentiality of students' education records. The potential changes

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to "directory information" procedures that currently govern access to basic student information like names, addresses, and phone numbers have raised some concern among First Amendment advocates that this information, commonly used in reporting, will be more difficult to obtain. Other less controversial changes will expand government use of education data for research purposes.

According to an April 7, 2011 U.S. Department of Education press release, the department has proposed a series of initiatives to help continue to protect student privacy while "clarifying that states have the flexibility to share school data that are necessary to judge the effectiveness of government investments in education." The department said FERPA clarifications are needed because differing interpretations of the law have complicated "valid and necessary" disclosures of information and have also sometimes resulted in decreased privacy protections for students. "Data should only be shared with the right people for the right reasons," said U.S. Secretary of Education Arne Duncan in the press release. "We need common-sense rules that strengthen privacy protections and allow for meaningful uses of data."

FERPA, also known as the Buckley Amendment, 20 U.S.C. 1232 *et seq.*, was passed in 1974 and generally requires that a school obtain written consent

from a student or parent before releasing any information from the student's "education record." Federal funds may be denied to schools that fail to follow the FERPA regulations, which appear at 34 C.F.R. 99.1. Access may be permitted if the requesting party is a qualified school official, law enforcement agent, or other party listed in C.F.R. 99.1. FERPA defines "education record" as information that is "directly related to a student" and "maintained by an educational agency or by a party acting for the agency or institution." In January 2009, the United States Department of Education modified FERPA, expanding what constitutes a confidential "education record." The term "personally identifiable information" now includes not only information such as a student's name, address, and social security number, but also any "other information that, alone or in combination, is linked or linkable to a specific student that

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## **Murders**, continued from page 25

reporting on stories that were often critical of Russian government officials and policies targeting Chechnya. She worked as a special correspondent for independent Moscow newspaper *Novaya Gazeta*. Makhmudov was wanted on an Interpol warrant since shortly after the Politkovskaya murder, CPJ reported, and reportedly fled Russia for elsewhere in Europe in late 2007 after obtaining a fraudulent passport.

According to a June 2 CPJ report, The Investigative Committee of the Russian Federation, the agency that deals with the country's most severe crimes, announced on its website that Makhmudov was charged with four separate counts, including murder and illegal appropriation of firearms, as well as kidnapping and extortion charges that are unrelated to the Politkovskaya case. Makhmudov's brothers Dzhibrail and Ibragim were accused of acting as lookouts and getaway drivers for the gunman, while former police officer Sergei Khadzhikurbanov was accused of providing logistical support. All three

men were tried and acquitted for lack of evidence in February of 2009. AFP reported August 24 that Pavlyuchenkov was a witness in the 2009 trial. Russia's Supreme Court overturned the acquittals on June 25, 2009, ordering a retrial.

AFP reported that the Pavlyuchenkov was arrested on Aug. 23, 2011, and *Novaya Gazeta* was first to report it later that day. A statement from Investigative Committee spokesman Vladimir Markin to Russian news agencies alleged that Pavlyuchenkov agreed to organize the killing of Politkovskaya "in exchange for a monetary award," according to the August 24 AFP report. Markin said that Pavlyuchenkov is suspected of hiring the Makhmudov brothers to murder Politkovskaya as well as obtaining the pistol allegedly used by Rustam Makhmudov. Markin said Pavlyuchenkov told the brothers where Politkovskaya lived and identified her car, allowing them to trail her and confirm her routine before carrying out the murder, AFP reported.

Markin also said that investigators had information on the alleged mastermind of the killing, the individual who would have given orders to Pavlyuchenkov and who has never been identified or arrested, but Markin said it was "premature" to share any further details about the investigation, AFP reported.

The *Silha Bulletin* has covered the Politkovskaya case extensively. For more, see "Russia: Politkovskaya Murder Trial to be Reheard; Prominent Activist and Reporter Killed" in the Summer 2009 issue; "Accused Politkovskaya Conspirators Acquitted" in the Winter 2009 issue; "Charges Filed in the Politkovskaya Murder, Killer Still At Large" in the Summer 2008 issue; "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 issue; and "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 issue.

— HOLLY MILLER  
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would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty,” and “information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” (See “FERPA Expanded: Critics Call New Rules ‘Irrational’” in the Fall 2009 issue of the *Silha Bulletin*).

The Education Department’s newest proposed clarifications include a plan to alter the rules about how schools disclose “directory information.” Directory information includes basic information like a student’s name, year in school, major, awards, and sports played. Directory information does not qualify as an “education record” under FERPA, and schools can choose to provide access to this information without students’ consent if they have given public notice to parents and students about what information they will make available and provide a procedure for students or parents to notify the school that they do not want their information to be included. According to a May 23 Student Press Law Center (SPLC) blog post by SPLC Executive Director Frank LoMonte, journalists often use directory information to locate sources for news stories. The practice is especially common at the college level, where the directories are often searchable online. LoMonte said the easily accessible information can be “a particular asset when dealing with a reticent institution.”

Under the proposed changes, schools would be authorized to allow selective disclosure of directory information to “specific parties” or for “specific purposes.” LoMonte expressed concern about the broad terms of the proposed changes. “Who, you might ask, are the ‘specific parties’ who would qualify to see the student directory? And what ‘specific purposes’ would justify granting or withholding access to this information?” The Department of Education proposed provision does not address these questions and it does not provide a framework for how schools should make those determinations.

The SPLC submitted comments during the Education Department’s 45-day public comment period. The May 23

blog post said SPLC’s first concern was if schools can selectively disclose the information, many schools may no longer put their student directories online, which LoMonte called “a significant step backward.” SPLC’s second concern was the amount of discretion schools would have to choose which “specific parties” would be eligible to receive the directory information. According to the Education Department press release, the proposed change is meant to assist schools in implementing directory information policies that limit access to the data by marketers or criminals. LoMonte’s blog post predicted that this flexibility could turn into “another retaliation tool,” if, for example, the student newspaper writes a piece not favored by the administration and thus loses its directory access. The problem could extend to all journalists. “The idea that directory information could be disclosed for ‘limited purposes’ should buckle the knees of any decent education journalist,” LoMonte wrote.

Other proposed revisions are less controversial. One change would broaden the number of government employees, agencies, and contractors who can obtain student data for accountability purposes and studies, without the consent of a parent or the student. According to an April 11 post on the National Association of Independent Colleges and Universities (NAICU) website, the changes are likely to remove barriers to conducting research linking education records with data maintained for pre-school, health and human services, labor, and other potential areas. Groups affiliated with the Data Quality Campaign (DQC), “a national, collaborative effort to encourage and support state policymakers to improve the availability of and use of high-quality education data,” have argued FERPA has hindered the effectiveness of statewide data systems. “Lack of clarification around FERPA has created an unfortunate game of ‘telephone,’ in which different players have received, understood, and passed along different versions of what they have heard about FERPA,” said Aimee Guidera, executive director of DQC, in a press release. “We hope these regulations will provide the clear answers states need to move ahead to support ... data use for continuous improvement and protect the privacy,

security, and confidentiality of student-level data.”

The Education Department proposed two other revisions. The first would allow states to enter into research agreements on behalf of their districts to measure the success of specific programs, such as kindergarten prep programs. The second would allow high school administrators to share information on student achievement to track how their graduates perform in college. The Education Department plans to release the final version of the rules by the end of 2011. Along with the proposed revisions, the department announced three initiatives related to its goal of safeguarding student privacy: hiring a Chief Privacy Officer, establishing a Privacy Technical Assistance Center to provide resources for the education community concerning student data, and releasing a new series of technical briefs to provide guidelines and best practices of data security and privacy protections.

### ***News Organizations Continue to Fight FERPA Roadblocks***

News organizations continue to have difficulty getting basic information about students from educational institutions that cite FERPA as the reason for denying requests, but some courts have refused to apply FERPA to basic directory information like names, addresses, majors, and other general data in recent cases. However, if the proposed revisions to the directory information provisions are implemented, schools may have more leeway in refusing to provide this data under FERPA.

A 2009 *Chicago Tribune* series called “Clout Goes to College” was based on general student statistics and reported that unqualified applicants were being granted admission to the University of Illinois through the backing of university trustees and legislators. The initial stories relied on 1,800 pages of documents released by the university following a public records request, but the *Tribune* also sought high school grade-point averages and ACT test scores of the “clout list” applicants. The newspaper requested the information be released without names or identifying information in order to comply with



FERPA, but the university refused. (See “College Sports Programs Cite FERPA in Withholding Information” in the Fall 2009 issue of the *Silha Bulletin*). In December 2009 the *Tribune* also requested parents’ names, addresses of students who received special consideration because of their connections, and other related information, according to a March 9 *Tribune* report. The university again refused to release the information under FERPA.

On Jan. 27, 2011 the *Chicago Tribune* sued the University of Illinois Board of Trustees under Illinois-open records law in both state court and the U.S. District Court for the Northern District of Illinois. Illinois open-records law allows institutions to deny access to “information specifically prohibited from disclosure by federal or state law or rules and regulations adopted under federal or state law.” The university argued FERPA is such a regulation. On March 9, 2011, Federal District Judge John Gottschall held that the university improperly denied access to the admissions records and that a university may not use federal laws to withhold admissions records. The university called it a “setback for the privacy rights of young adults applying for admission to public universities in Illinois and nationwide,” according to a March 10 Associated Press (AP) story. *Chicago Tribune* editor Gerould Kern said in an interview for the newspaper’s March 9 coverage of the decision that he was pleased with the result. FERPA “should not be used as a means to thwart citizens’ rightful access to information about the way our public institutions operate,” he said. “We hope the University of Illinois will comply with the ruling and release the information.” The state case is continuing, the *Tribune* reported.

On April 12, the University of Illinois announced it would appeal the district court decision to the 7th Circuit U.S. Court of Appeals. “We take seriously the special trust placed in our institution when applicants, students and their families share the details of their lives with us,” University of Illinois President Michael Hogan said in an April 12 press release. “We are compelled to safeguard this private information both to honor

this trust and to ensure the continued federal funding support for students from all backgrounds at our campuses, as well as the important work of our faculty.” According to a May 10 University of Illinois press release, the university won a stay of Gottschall’s court order as it moves forward with the appeal.

University athletic departments also continue to cite FERPA in denying journalists information related to athletes and athletic programs. On April 15, *The News and Observer* of Raleigh, N.C., and seven other media outlets brought a lawsuit under the state

“[FERPA] should not be used as a means to thwart citizens’ rightful access to information about the way our public institutions operate.”

— Gerould Kern  
Editor, *Chicago Tribune*

public records law against University of North Carolina-Chapel Hill Athletics Director Richard Baddour after requests for information including names and phone numbers of football players and copies of parking tickets were denied under FERPA. North Carolina public records law states “the general rule in the American political system must be that the affairs of government be subject to public scrutiny.” On May 12, a state superior court judge held the records requested are not protected by FERPA because the information did not meet the definition of an “education record” under the law. On June 15 the SPLC reported that the North Carolina Court of Appeals decided the court-ordered disclosure of records could not be delayed while it considered the case. The disclosure of the records led to a *News and Observer* story about hundreds of parking tickets issued to UNC football players totaling more than \$13,000 in fines.

In August, The Ohio State University released documents related to a National Collegiate Athletic Association (NCAA) investigation into its highly regarded football program after cable sports network ESPN sued the university in the Supreme Court of Ohio. On April 20, an ESPN producer requested internal and

external documents between the NCAA and Ohio State and its representatives related to an investigation of head coach Jim Tressel and five football players for rules violations. The university denied access to the records, claiming they were protected by FERPA. On July 11, ESPN filed a complaint for writ of mandamus — a court order that compels a government entity to take an action as prescribed by the order — against the university, alleging that the school violated state public records laws. Under Ohio law, a party who has been denied access to records can “proceed with

a mandamus action” in the Ohio Supreme Court.

On August 12, Ohio State student newspaper *The Lantern* reported that the university sent ESPN and other news outlets the records listed in

ESPN’s complaint. According to *The Lantern*, the university sent a letter accompanying the documents which said, “consistent with our long working relationship and many telephone conversations, we viewed the process of responding to several of those requests as ongoing. The university was unaware that ESPN thought otherwise.”

#### **Disclosure of Private Information Appropriate during an Emergency**

In June 2011, the Department of Education released a guide for schools about how to address FERPA privacy issues during emergency situations. The guide, “Addressing Emergencies on Campus,” uses as examples the 2007 shootings at Virginia Tech and the January 2011 shootings of U.S. Rep. Gabrielle Giffords (D-Ariz.), federal district judge John Roll, and others in Tucson. In each situation, the gunmen were college students and their schools had pertinent information about the individuals, the guide said. “A school official may determine that it is necessary to disclose personally identifiable information from a student’s education records to appropriate parties in order to address a health or safety emergency,” the guide said. This

# Student Speech: Off-Campus, Online and in Trouble

## Courts Disagree over Whether First Amendment Allows Punishment

**A**mong several federal appeals court rulings on student speech in the spring and summer of 2011 were five involving high school students punished for off-campus, online speech. The issue appears increasingly likely to reach the U.S. Supreme Court to resolve an apparent split among several circuits and to address confusion about whether the Supreme Court's standards for censoring or punishing student speech should extend off campus. The 2nd, 3rd, 4th, and 8th Circuit U.S. Courts of Appeals issued conflicting opinions, underscoring that courts disagree over whether students can be punished for online, off-campus speech without violating their First Amendment rights.

### STUDENT FREE SPEECH

#### Doninger v. Niehoff

On April 25, 2011, the 2nd Circuit U.S. Court of Appeals ruled that public school officials in Burlington, Conn. were entitled to “qualified immunity” — a doctrine which shields government officials against liability for reasonable mistakes that infringe the rights of others — when they prohibited student Avery Doninger from running for senior class secretary and from wearing a homemade printed T-shirt at a school assembly as punishment for her off-campus Internet speech. The court ruled that “the asserted First Amendment right at issue was not clearly established.” *Doninger v.*

*Niehoff*, 642 F.3d 334 (2nd Cir. April 25, 2011)

According to the 2nd Circuit's April 25 opinion, the case arose in spring 2007, after Doninger, then a junior and student council member at Lewis Mills High School, had a disagreement with principal Karissa Niehoff and district superintendent Paula Schwartz over the scheduling of an annual battle of the bands event known as Jamfest. After administrators informed the student council that Jamfest would have to be postponed or its location moved for a third time that school year because of a scheduling conflict, Doninger and several other student council members composed and sent a mass email to students and their parents reporting that Jamfest could not be held in the school auditorium. The email requested support for holding the event as scheduled, and encouraged recipients to contact Niehoff and Schwartz to voice concerns. Later that night, Doninger posted a message on her publicly available blog in which she made references to “douchebags in central office,” republished the text of the mass email sent earlier in the day, and encouraged readers to continue to contact school officials in order to “piss [them] off more.” The following day, administrators and student council members decided on a new Jamfest date and Schwartz admonished the students for appealing directly to the public when they disapproved of her decision, asking them to send another email announcing that the scheduling conflict had been resolved.

Niehoff became aware of Doninger's blog post on May 7, 2007 and confronted Doninger about it on May 17. Niehoff asked Doninger to withdraw as a

candidate for senior class secretary for the following school year, and when Doninger declined, said she would not allow her to appear on the ballot. Niehoff testified that she took this action because she felt that the blog post failed to demonstrate “good citizenship” as required by student officers' guidelines set out in the Lewis Mills student handbook, which Doninger had signed. Niehoff also said she believed Doninger was “acting as a class officer at the time that she created the blog.” On May 25, 2007, before a school assembly at which candidates for student council were scheduled to give speeches, Doninger and several other students were told they would not be allowed to wear T-shirts they had made bearing slogans like “Team Avery” and “Vote for Avery.”

The 2nd Circuit has addressed the *Doninger* case before. In an earlier suit, Doninger's mother Lauren had sued Niehoff and Schwartz on behalf of her daughter, who had not yet reached the age of majority, asking the U.S. District Court for the District of Connecticut for a preliminary injunction to require the school to either rerun the election and allow Doninger to participate or grant Doninger “the same title, honors, and obligations as the student elected to the position, including the privilege of speaking as a class officer at graduation.” Both the District Court and the 2nd Circuit denied Lauren Doninger's motion for preliminary injunction. *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008) (For more on the earlier version of the case, see “2nd Circuit Rules School Can Punish Teen for Online Criticism of Administrators” in the Summer 2008 issue of the *Silha Bulletin*.)

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exception to consent is limited to the emergency time period and “generally does not allow for a blanket release of personally identifiable information from a student's education records.” The guide names law enforcement officials, public health officials, trained medical personnel, and parents as the types of “appropriate parties” who should typically receive information.

Journalists are not mentioned. A full copy of the guide can be viewed at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>.

According to a June 30 SPLC blog post by SPLC Executive Director Frank LoMonte, the report is probably a response to the colleges in Virginia and Arizona which “may have held back from sharing life-saving information with

law enforcement for fear of violating students' privacy rights.” According to LoMonte's blog post, Pima Community College in Arizona, for example, could have “taken more aggressive action to sound the alarm” about Tucson shooter Jared Loughner's “disturbing behavior” at school.

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After Avery Doninger graduated from high school, she became the suit's plaintiff, and rather than an injunction, which was mooted by her graduation, she asked for damages under 42 U.S.C. § 1983 (the federal Civil Rights Act), claiming that her rights to freedom of speech under the First Amendment and the equal protection clause of the Fourteenth Amendment were violated. In 2009, the District Court granted the administrators' motion for summary judgment on qualified immunity for refusing to allow Doninger to participate in the election, but not their refusal to allow her to wear or display her "Team Avery" T-shirt.

On April 25, 2011 the 2nd Circuit affirmed the lower court in part and reversed it in part, granting qualified immunity to the administrators for punishing Doninger for the blog post and refusing to allow the T-shirts.

In the unanimous three-judge panel opinion, Judge Debra Ann Livingston explained that under 2nd Circuit case law, a government official is protected by qualified immunity if his or her "conduct did not violate a clearly established constitutional right or if it was objectively reasonable for the [official] to believe that his conduct did not violate such a right." A right is "clearly established," Livingston continued, if it is "defined with reasonable clarity," recognized by the U.S. Supreme Court or the 2nd Circuit, and "a reasonable defendant would have understood that his conduct was unlawful."

The court concluded that the law is not sufficiently clear on the question of whether off-campus speech can be subject to school punishment for Niehoff or Schwartz to be aware that punishing Doninger would violate her First Amendment rights, and, moreover, that the administrators' actions were reasonable given that there was "foreseeable disruption to the school's work and discipline" created by the blog post and the T-shirts.

The court refuted Doninger's argument that the U.S. Supreme Court and 2nd Circuit have clearly established that off-campus speech could not be the subject of school discipline. To the contrary, Livingston wrote, the "Supreme Court has yet to speak on the scope of a school's authority to regulate

expression that, like Avery's, does not occur on school grounds or at a school-sponsored event." According to the court, Doninger argued that a "bright-line principle" should apply which strictly limits the regulation of off-campus speech to circumstances that, under the U.S. Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) "will

In *Doninger v. Niehoff*, the court ruled that school administrators could claim qualified immunity because their decision to punish Doninger was "objectively reasonable," meaning that another official "of reasonable competence" might have made the same choice in similar circumstances.

materially and substantially disrupt the work and discipline of the school." Livingston wrote that "Doninger has identified no case — and we are aware of none" that upheld the principle. Instead, the court cited its own 2007 decision in *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007), which applied *Tinker* as well as the U.S. Supreme Court's most recent student speech case, *Morse v. Frederick*, 551 U.S. 393 (2007), to a case involving an eighth grader who sent instant messages bearing "a crudely drawn icon depicting one of his teachers being shot in the head," with text below calling for the teacher to be killed. The student's punishment was upheld. "Where the icon's off-campus display posed a reasonably foreseeable risk that it would come to the attention of school authorities and ... materially and substantially disrupt the work and discipline of the school, the student's suspension for this display did not run afoul of the First Amendment," Livingston wrote. (For more on *Morse v. Frederick*, see "In *Morse v. Frederick*, Court Places Limits on Student Expression" in the Summer 2007 issue of the *Silha Bulletin*.)

The court ruled that Niehoff and Schwartz could claim qualified immunity because their decision to punish Doninger was "objectively

reasonable," meaning that another official "of reasonable competence" might have made the same choice in similar circumstances. The court said that according to the undisputed facts of the case, the blog post had created a disturbance by forcing officials to respond to phone calls and emails from students and parents, and to meet with students during class time to resolve

the issue. Moreover, the punishment was reasonable, the court ruled, because it extended only to Doninger's role as a class officer. "It was not unreasonable for Niehoff to conclude that Doninger, by posting an incendiary blog post in the midst of an ongoing school controversy, had demonstrated her

unwillingness properly to carry out this role," Livingston wrote.

Although there was a question as to whether Niehoff was motivated by the offensiveness of the blog post or its likelihood to cause a disturbance, the court ruled that, under existing case law, the question of her intent in punishing Doninger was irrelevant. Under *Crawford-El v. Britton*, 523 U.S. 574 (1998), the court said, "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was ... improperly motivated," nor does 2nd Circuit precedent under *Tinker* require an inquiry into the intent of school officials who punish students for speech.

As for the T-shirts, the 2nd Circuit reversed the District Court, finding that Niehoff and Schwartz were entitled to a claim of qualified immunity in refusing to allow students to wear them. "We agree that a reasonable fact-finder could conclude that Defendants were mistaken in assessing the likely impact of the t-shirts and thus the permissibility of prohibiting them pursuant to *Tinker*," Livingston wrote, "however, we conclude that any such mistake was reasonable." Because the administrators' decision was reasonable, qualified immunity should be extended, the court ruled. "The law governing restrictions on student speech



can be difficult and confusing, even for lawyers, law professors, and judges,” Livingston wrote, adding, “‘School principals,’ as the Supreme Court has recently noted, ‘have a difficult job.’”

### **Layshock v. Hermitage School District; J.S. v. Blue Mountain School District**

On June 13, 2011, the 3rd Circuit U.S. Court of Appeals decided two cases involving students who were punished for off-campus online speech, ruling that suspending the students violated their First Amendment rights. Two separate 3rd Circuit panels had reached differing conclusions in the factually similar cases in February 2010, leading 3rd Circuit Chief Judge Anthony J. Scirica to vacate both decisions on April 9, 2010. (For more on the 3rd Circuit panel decisions, see “3rd Circuit Issues Conflicting Rulings on Student Internet Speech” in the Winter/Spring 2010 issue of the *Silha Bulletin*.) The entire 3rd Circuit reheard the cases on June 3, 2010.

Both cases involved Pennsylvania students who used off-campus home computers and the website MySpace to create fake and vulgar online profiles of their school principals. *Layshock v. Hermitage School District* arose after Hickory High School senior Justin Layshock used his grandmother’s home computer in December 2005 to create a fake MySpace profile of Hickory High Principal Eric Trosch. Layshock included a photograph of Trosch from the school district’s website and wrote that Trosch said he was a “big steroid freak” and a “big whore” who smoked a “big blunt.” The Hermitage School District of Hermitage, Pa., suspended Layshock for 10 days. Initially, he was also prohibited from participating in all extracurricular activities for the rest of the school year, including his graduation ceremony, and placed in an alternative education program typically reserved for students with behavioral and attendance problems, but the school district later eliminated all but the suspension. Layshock’s parents filed suit under 42 U.S.C. § 1983 in U.S. District Court for the Western District of Pennsylvania, claiming Layshock’s First Amendment rights were violated. The District Court entered summary judgment in favor of Layshock, and the 3rd Circuit panel, in its

vacated Feb. 4, 2010 decision, affirmed, finding that Layshock’s suspension violated his First Amendment rights and saying that “it would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child’s home and control his/her actions there to the same extent that they can control that child when

“We do not think that the First Amendment can tolerate the School District stretching its authority into Justin’s grandmother’s home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.”

— Chief Judge Theodore McKee  
3rd Circuit U.S. Court of Appeals  
*Layshock v. Hermitage School District*

he/she participates in school sponsored activities.”

*J.S. v. Blue Mountain School District* involved two Blue Mountain Middle School eighth graders — identified in the opinion as J.S. and K.L. — who used home computers in March 2007 to create a MySpace page that described their principal, James McGonigle, as a sex addict and pedophile. The profile did not identify McGonigle by name, but included his photograph from the school district’s website and listed his interests as “being a tight ass,” “f\*\*\*ing in my office,” and “hitting on students and their parents.” Administrators at the Orwigsburg, Pa., school suspended the students for 10 days. J.S.’s parents filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Middle District of Pennsylvania. The District Court upheld the punishment, and the Circuit Court panel affirmed. In its Feb. 4, 2010 ruling, which was also vacated, the court applied a *Tinker* analysis, saying that although the profile did not substantially disrupt school activity, the suspensions could be upheld because “the profile presented a reasonable possibility of a future disruption” if McGonigle did not punish its creators.

In two opinions issued on June 13, 2011, the 3rd Circuit ruled unanimously

in favor of Justin Layshock and 8 to 6 in favor of the Blue Mountain student. In the *Layshock* case, the court applied the *Tinker* standard, and in the majority opinion written by Chief Judge Theodore McKee, ruled that “because the School District concedes that Justin’s profile did not cause disruption in the school, we do not think that the First Amendment

can tolerate the School District stretching its authority into Justin’s grandmother’s home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.” *Layshock v. Hermitage School District*, No. 07-4465, 2011 U.S. App. LEXIS 11994 (3rd Cir., June 13, 2011)

The court disagreed with the school district’s reasoning that rather than apply the *Tinker* standard, it should use U.S. Supreme Court’s 1986 ruling in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) as guidance. In *Fraser*, the court ruled that a school could punish a student’s “lewd, indecent, [and] offensive” speech, delivered at a school assembly, even if it did not create a substantial disruption, because the First Amendment does not prevent schools from encouraging the “fundamental values of habits and manners of civility” and punishing students who do not abide by them. However, the 3rd Circuit highlighted a distinction the Supreme Court made in *Morse v. Frederick* between offensive speech on campus and off campus: “had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.” Even assuming that Layshock’s profile was “unquestionably vulgar, lewd and offensive,” as the school district argued it was, the 3rd Circuit said that following the reasoning of *Morse v. Frederick*, the *Fraser* standard for such speech does not apply to off-campus speech such as Layshock’s.

The court also said its decisions in *Layshock* and *Blue Mountain* were

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distinguishable from the 2nd Circuit's 2008 decision in *Doninger* because in *Doninger* there was more evidence that the student's off-campus online speech was likely to cause a disruption at school, and because the school's punishment was more narrowly targeted at Doninger's role as class secretary. However, the court also suggested that it might disagree with the 2nd Circuit's holding, stating in *Layshock* that "in citing *Doninger*, we do not suggest that we agree with that Court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there."

The court's decision in *J.S. v. Blue Mountain School District* relied on reasoning substantially similar to the *Layshock* opinion, following the *Tinker* standard. However, the judges differed in their opinions about whether school officials had "reason to anticipate" a substantial disruption of the school, leading six to dissent. In the majority opinion, Judge Michael Chagares wrote that "because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District's actions violated J.S.'s First Amendment free speech rights." The Blue Mountain School District, like Hermitage, argued that it could punish J.S. under *Fraser* because the profile was "lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District." The court disagreed, however, saying that the argument "fails at the outset because *Fraser* does not apply to off-campus speech." *J.S. v. Blue Mountain School District*, No. 08-4138, 2011 U.S. App. LEXIS 11947 (3rd Cir. June 13, 2011)

The majority said that the punishment did not meet the *Tinker* standard because the profile, "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did." However, the dissenters argued that the profile's references to improper behavior such as "f\*\*\*ing in my office," "hitting on students and their parents," and the site's web address, <http://www.myspace.com/kidsrockmybed>, were sufficiently likely

to cause a disruption because they could lead the school district to investigate Principal McGonigle, undermined the school's authority, and could induce psychological harm for McGonigle and his wife, Debra Frain, a school counselor who was also targeted by the profile.

Although the 3rd Circuit found that the U.S. Supreme Court's *Fraser* standard does not apply to students' off campus speech, the court did not directly address the broader question of whether the *Tinker* standard should apply to off-campus speech. However, four judges concurred in the *Blue Mountain* decision specifically to argue that it could not, and that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." If *Tinker* applied to off-campus speech, Judge D. Brooks Smith wrote, it could essentially lead to punishment for any student who engages in any speech, anywhere, any time — including political or religious speech — that results in a disruption at school. This could chill student speech off campus, and could even mean that the rule would extend to adults. "Adults often say things that give rise to disruptions in public schools. ... Of course, the prospect of using *Tinker* to silence such speakers is absurd. But the absurdity stems not from applying *Tinker* to off-campus speech uttered by adults and students alike, but from the antecedent step of extending *Tinker* beyond the public school setting to which it is so firmly moored," Smith wrote.

In a concurrence to *Layshock*, however, two of the dissenters in the *Blue Mountain* case argued that focusing on whether a speaker is on campus or off campus "obscures [the] central dilemma, which is how to balance the need for order in our public schools with respect for free speech." Judge Kent Jordan wrote that there is no need to consider whether an interpretation of *Tinker* that included off-campus speech would chill student or adult speech because that standard applies only to speech that has "a reasonable nexus to school." Drawing an analogy to Justice Oliver Wendell Holmes' statement in *Schenck v. United States*, 249 U.S. 47 (1919) that the First Amendment "would not protect a man in falsely shouting fire in a theatre and

causing a panic," Jordan wrote, "it is hard to see how words that may cause pandemonium in a public school would be protected by the First Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary."

Lawyers representing Avery Doninger and Blue Mountain School District announced plans to seek U.S. Supreme Court review of their cases. The First Amendment Center reported July 29 that Doninger filed a petition for certiorari arguing that the case "presents important and compelling first amendment issues which impact millions of students and thousands of school officials." The petition highlights the difference between the *Doninger*, *Layshock*, and *Blue Mountain* cases, adding that "the lack of guidance by this Court to address students' internet speech, or indeed any kind of off-campus speech, combined with school officials' inflated fears of school violence, have resulted in improper punishment of many students for otherwise protected off-campus speech."

The Pottsville, Pa. *Republican Herald* reported on June 24 that the Blue Mountain School District authorized its law firm on June 23 to prepare an appeal to the U.S. Supreme Court in *J.S. v. Blue Mountain School District*. The district has until September 13 to do so.

### **Kowalski v. Berkeley Co. Schools**

On July 27, 2011 a three-judge panel of the 4th Circuit U.S. Court of Appeals ruled that administrators at Musselman High School in Berkeley County, W.Va., did not violate the First Amendment rights of senior Kara Kowalski when they suspended her for five days for creating a MySpace page that ridiculed a fellow student. Kowalski was punished when administrators learned of her online group, "S.A.S.H." or "Students Against Sluts Herpes," which encouraged students to post comments and images about a particular student who they claimed had herpes.

The Circuit Court affirmed the lower court's grant of summary judgment to the school district, ruling that Kowalski's "targeted attack on a classmate ... was sufficiently connected to the school environment as to implicate the

School District's recognized authority to discipline speech which 'materially interfere[es] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others'" under the *Tinker* standard. *Kowalski v. Berkeley Co. Schools*, No. 10-1098, 2011 U.S. App. LEXIS 15419 (4th Cir. July 27, 2011)

Citing the U.S. Supreme Court's ruling in *Morse*, which held that school administrators can punish on-campus student speech when the speech advocates illegal drug use because it is within administrators' responsibility to protect students from those messages, Judge Paul Niemeyer wrote for the unanimous panel that "schools have a duty to protect students from harassment and bullying in the school environment." He added, "far from being a situation where school authorities suppress speech on political and social issues based on disagreement with the viewpoint expressed, school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."

The court said that it did not need to reach the question of whether, because Kowalski's speech "originate[d] outside the schoolhouse gate," the school could punish her. "We are satisfied that the nexus of Kowalski's speech to [the school's] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as trustees of the student body's well-being," Niemeyer wrote. Because the MySpace group Kowalski created was "targeted" and "defamatory" in nature, the court said, it created a likelihood of disruption that it called "actual or nascent." The court cited the fact that the targeted student missed school to avoid further abuse and said that, "had the school not intervened, the potential for continuing harassment of [the student] as well as other students was real."

Niemeyer concluded the opinion by chiding Kowalski for her bullying and for suing her school for suspending her. "Rather than respond constructively to the school's efforts to bring order and provide a lesson following the incident, Kowalski has rejected those efforts and sued school authorities," Niemeyer

wrote. "Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment."

#### **D.J.M v. Hannibal Public School District #60**

On August 1, 2011, the 8th Circuit U.S. Court of Appeals ruled that Hannibal, Mo. public school administrators did not violate the First Amendment rights of a

"School administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."

— Judge Paul Niemeyer  
4th Circuit U.S. Court of Appeals  
*Kowalski v. Berkeley Co. Schools*

student they suspended for using online instant messages to discuss bringing a gun to school and shooting students. The court ruled that the messages constituted a "true threat" and that the punishment was reasonable under the Supreme Court's ruling in *Tinker*.

The case arose in fall 2006, after Dylan J. Mardis, a student at Hannibal High School, conversed via online instant message with a schoolmate, Carly Moore, about bringing a gun to school and shooting other students because Mardis was angry about having been spurned by a student in whom he had a romantic interest. In the chat, Mardis and Moore discussed which people Mardis would "have to get rid of," naming which students "would go" or "would be going" [sic]. According to Moore's later email to Hannibal High School Principal Darin Powell, Mardis also named a friend that had a "357 magnum" that he thought he could use, said he "wanted Hannibal to be known for something," and that he intended to kill himself after shooting the other students. In a later chat, Mardis said "anyways I'm not going to do that[.] not anytime soon i feel better than i did earlier today." Moore shared the instant messages with an adult she knew and later with Powell after she became concerned about what Mardis had said.

School district officials contacted the police, who went to Mardis' house, interviewed him, and took him into custody. He spent more than a month in juvenile detention and at a psychiatric hospital. After Mardis was placed in juvenile detention, school administrators suspended him for the remainder of the school year. Mardis' parents appealed the suspension to the school board, which upheld it, and then sued the school district in U.S. District Court for the Eastern District of Missouri under

42 U.S.C. § 1983, which granted summary judgment to the school district.

In affirming the District Court's ruling, the 8th Circuit applied both a "true threat" analysis, following *Watts v. United States*, 394 U.S. 705 (1969), where a criminal conviction for

threatening the president was reversed because the court did not consider the statement to be a true threat, as well as the "substantial disruption" analysis under *Tinker*. Judge Diana Murphy, in writing for the three-judge panel, observed that although no Supreme Court case has dealt with "a situation where the First Amendment question arose from school discipline exercised in response to student threats of violence or for conduct outside of school," lower courts have addressed such cases, applying the "true threats" and *Tinker* standards. *D.J.M v. Hannibal Public School District #60*, No. 10-1428, No. 10-1579, 2011 U.S. App. LEXIS 15799 (8th Cir. Aug. 1, 2011)

In its "true threat" analysis, the court applied a standard derived from a 2002 8th Circuit case, *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002), under which it said the school did not violate Mardis' First Amendment rights by calling the police and suspending him if he intended to communicate the statements at issue to another person and if a "reasonable recipient" of the statements "would have interpreted [them] as a serious expression of an intent to harm or cause injury to another."

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## Student Speech, continued from page 33

Mardis argued that his statements could not be considered true threats because Moore did not appear to take them seriously (she typed “lol,” shorthand for “laughing out loud”), and because Mardis did not communicate them directly to any of the potential targets, had no history of violence, and said he would not act “anytime soon.” The court disagreed, however, finding “no genuine dispute of material fact regarding whether his speech could be reasonably understood as a true threat” because he specifically identified targets in “hate-filled” language, “expressed access to weapons,” admitted in later psychiatric evaluation to being depressed, and stated that he wanted Hannibal “to be known for something.” Murphy also wrote that “the reaction of those who read his messages” — Moore had contacted both a trusted adult and the school principal, who in turn contacted the police; after which a juvenile court judge ordered a psychiatric evaluation — “is evidence that his statements were understood as true threats.” Under the true threat test, Murphy wrote, “the First Amendment did not require the District to wait and see whether D.J.M.’s talk about taking a gun to school and shooting certain students would be carried out.”

In the court’s application of the *Tinker* standard, Murphy observed that although “school officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech,” the situation is different “when a report is brought to them about a student threatening to shoot specific students at school.” The court noted that, in *Tinker*, the U.S. Supreme Court “explained that ‘in class or out of it,’ conduct by a student which ‘might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities’ is not ‘immunized by the First Amendment.’” The school district said that after Mardis’ statements became known about in the community, parents and students contacted administrators with concerns and questions about safety and asking about a rumored “hit list.” School officials spent “considerable time dealing with these concerns and ensuring that appropriate safety measures were in place,” Murphy wrote. Therefore, the

court concluded, “it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”

In an August 1, 2011 story on the Student Press Law Center (SPLC) website, SPLC Executive Director Frank LoMonte said the court went beyond the

“The First Amendment did not require the District to wait and see whether D.J.M.’s talk about taking a gun to school and shooting certain students would be carried out.”

— Judge Diana Murphy  
8th Circuit U.S. Court of Appeals  
*D.J.M v. Hannibal Public School District #60*

law it needed to consider in its decision, and that “the much more complex and delicate *Tinker* issue ... doesn’t appear to have gotten adequate consideration.” LoMonte said, “once the court realized that the case could be fully decided on the basis of the true threat standard, that’s where they should have stopped.”

### ***Minnesota Appeals Court Rules College Student Can be Punished for Facebook Posts***

On July 11, 2011, a Minnesota state appeals court ruled that University of Minnesota mortuary science student Amanda Tatro’s First Amendment rights were not violated when the university punished her for posts on her Facebook page that it considered “threatening, harassing, or assaultive” and in violation of various university policies.

In one of her Facebook posts in November and December of 2009, Tatro said that she wanted to “stab a certain someone in the throat with a trocar” — a trocar is a sharp instrument used during embalming to aspirate fluids and gases out of the body — and that she might “spend the evening updating my ‘Death List #5’ and making friends with the crematory guy.” In another post she said, “Give me room, lots of aggression to be taken out with a trocar.” In another she said she “gets to play, I mean dissect, Bernie today.” Bernie was the name Tatro

had assigned to the cadaver on which she was working. She later posted that she “realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. [...] Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.”

According to the court’s opinion, another mortuary science student reported concerns about Tatro’s

Facebook posts to the program’s director, who on December 14 met with other faculty, filed a report with university police, and suspended Tatro from class. University police concluded that no crime had been committed, and Tatro was allowed to return to class. But the

university’s Office for Student Conduct and Academic Integrity submitted a formal complaint against Tatro on December 29, alleging violations of the university’s student-conduct code. After conducting a hearing, the Campus Committee on Student Behavior issued a written decision April 2, 2010 finding Tatro guilty of the rule violations, giving her a failing grade in her anatomy-laboratory class, requiring her to enroll in a clinical ethics course, requiring her to write a letter to mortuary science department faculty addressing the issue of respect within the department and profession, and requiring her to complete a psychiatric evaluation. Tatro was also placed on academic probation for the remainder of her undergraduate career. Tatro appealed to a provost’s appeal committee, which upheld the sanctions and issued a final decision emphasizing that Tatro’s Facebook posts “were disrespectful, unprofessional, and reasonably interpreted as threatening.”

Tatro sued the university in state court, challenging its authority to punish her over the Facebook posts and claiming that it violated her First Amendment right to freedom of speech. She asked the court to reverse the committee’s decision and instruct the university to dismiss all charges, remove her from probation, expunge the record of discipline from her academic file, and

restore her passing grade in the anatomy-laboratory course. She also said her posts did not constitute a “true threat” as defined by *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002) and the court should reverse the punishment under that analysis, since it was the appropriate standard to apply to a university.

The court ruled that Tatro’s punishment did not violate her First Amendment rights because her Facebook posts “materially and substantially disrupt[ed] the work and discipline of the university.” Writing for a unanimous three-judge panel which also included Judge Jill Halbrooks and Judge Natalie Hudson, Judge Louise Bjorkman said that “in a long line of cases, beginning with *Tinker*, the Supreme Court has held that schools may limit or discipline student expression if school officials ‘reasonably conclude that it will materially and substantially disrupt the work and discipline of the school.’” The court concluded that because students and faculty “expressed concern that Tatro’s post discussing a ‘Death List’ and wanting to ‘stab’ someone constituted real threats of physical violence, prompting a police investigation,” the posts created a material and substantial disruption of the university. The court also noted that Tatro’s posts about “Bernie” reached family members and other participants in the university’s program for donating cadavers, prompting them to contact the school with concerns about “the professionalism of the program in general — a program that relies heavily on the faith and confidence of donors and their families to provide necessary laboratory experiences for medical and mortuary-science students.” *Tatro v. University of Minnesota*, A10-1440, 2011 Minn. App. LEXIS 87 (Minn. St. App., July 11, 2011)

As to whether the U.S. Supreme Court’s rulings on student speech in public high schools could be extended to a public university, Bjorkman wrote, “we discern no practical reasons for such a distinction and note that other courts have acknowledged *Tinker*’s broad applicability to public-education institutions.” Bjorkman cited *DeJohn v. Temple University*, 537 F.3d 301 (3rd Cir. 2008) a case in which the 3rd

Circuit U.S. Court of Appeals applied a *Tinker* analysis in striking down Temple University’s sexual harassment policy. The 3rd Circuit ruled the policy was unconstitutionally overbroad because it extended beyond speech that the university reasonably believed would cause a material disruption. Bjorkman wrote, “we observe, as the Third Circuit did in *DeJohn*, that what constitutes

“We observe ... that what constitutes a substantial disruption in a primary school may look very different in a university. But these differences do not *per se* remove the *Tinker* line of cases from the analysis.”

— Judge Louise Bjorkman  
Minnesota Court of Appeals  
*Tatro v. University of Minnesota*

a substantial disruption in a primary school may look very different in a university. But these differences do not *per se* remove the *Tinker* line of cases from the analysis.”

Tatro also contended that because her Facebook posts were not created on campus and were not related to a university-sponsored activity, she should not be subject to school discipline for them. The court dismissed this argument, however, because the university’s student conduct code “expressly authorizes the university to apply the code to students whose alleged off-campus conduct has an adverse effect on a substantial university interest and indicates potential danger or threat to the student or others.”

The court did not apply the true threat analysis. “We decline to depart from the standard set forth in *Tinker* and its progeny,” Bjorkman wrote. “As the university observes, this is not a criminal case. ... And most courts hold that student expression need not reach the true-threat threshold before a public school may take appropriate disciplinary action in the interest of protecting the work and safety of its community.”

In a July 12 *City Pages* story, Tatro’s lawyer, Jordan Kushner, expressed concern about the possibility of a broad impact for the court’s ruling. “If someone decides to tell a joke on Facebook ... that

uses violence as a metaphor, then I guess a university or college can discipline them,” Kushner said. “If some sensitive person from the university — and there are a lot of sensitive people in academia — reads it and feels threatened, then that person can conceivably be kicked out of school.” University of Minnesota General Counsel Mark Rotenberg told *City Pages* that the university has a responsibility

to protect students and staff, and would be “utterly derelict” if it ignored statements like the ones Tatro posted.

SPLC Executive Director Frank LoMonte, in a July 13 story on the SPLC website, called the court’s application of the *Tinker* standard “worrisome.” LoMonte said, “it’s not at all

certain to think that *Tinker* is the correct legal standard here and, in fact, there’s good reason to think it’s not the correct standard.” On August 1, Kushner told the *Bulletin* he planned to appeal the case to the Minnesota Supreme Court.

### ***Second Circuit: High School Can Censor ‘Lewd’ Cartoon in Student Newspaper***

On May 18, 2011, a three-judge panel of the 2nd Circuit U.S. Court of Appeals ruled that school administrators in Ithaca, N. Y. did not violate the First Amendment rights of student journalists when they censored the publication and distribution of a cartoon depicting stick figures engaged in various sex acts. The court based its ruling on a finding that the student newspaper, where students first tried to publish the cartoon, was a “limited public forum,” and that when students later tried to distribute the cartoon in an independent publication created off campus, the school could prevent them from doing so under *Fraser*.

Student editors of the Ithaca High School student newspaper, *The Tattler*, tried to include the cartoon — which depicted a “Health 101” class with a teacher pointing to a chalkboard showing the stick figures in a variety of sexual poses and carrying the announcement:

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“Test on Monday” — in two successive issues in January and February of 2005. The first time the cartoon accompanied a story by a former student titled “Alumni Advice: Sex is fun!” The second time it accompanied a more serious story examining the school’s approach to teaching sex education.

*The Tattler’s* adviser rejected both the cartoon and “Sex is fun” story for the January issue, but approved the more serious story — without the cartoon — for the February issue. The following month, student editors included the cartoon in a publication called *The March Issue*, which they financed and produced independently of the school, but Ithaca City School District (ICSD) Superintendent Judith Pastel refused to allow *The March Issue* to be distributed on school grounds.

The students sued the school district, Pastel, and Ithaca High School Principal Joseph Wilson in June of 2005, claiming that the censorship of the cartoon violated their First Amendment rights. The U.S. District Court for the Northern District of New York granted summary judgment in favor of the school district and officials, and the 2nd Circuit affirmed. *R.O. v. Ithaca City School District*, 645 F.3d 533 (2nd Cir. May 18, 2011)

Writing for the unanimous three-judge panel, Judge Jose Cabranes defined *The Tattler* as a “limited public forum,” as opposed to a “traditional” or “designated public forum,” such as a public sidewalk or town square where the government can almost never censor speech, or a “non-public forum,” where the government may censor speech as long as it does so in a way that is not based on a speaker’s viewpoint. *The Tattler* was “precisely” a “limited public forum,” Cabranes explained, because “the state open[ed] a non-public forum but limit[ed] the expressive activity to certain kinds of speakers or to the discussion of certain subjects.” Cabranes wrote that “while ICSD apparently opened the newspaper to some — or even many — types of

speech, there is no evidence that the school permitted ‘indiscriminate use by the general public,’ as is required to create a traditional public forum or designated public forum.” Cabranes wrote that “in a limited public forum, the government may restrict speech in a way that is viewpoint-neutral and reasonable in light of the forum’s purpose.”

The court ruled that because the cartoon was “unquestionably lewd,” the school could censor it in *The Tattler* without violating students’ First Amendment rights following the U.S. Supreme Court’s ruling on “lewd, indecent, [and] offensive” student speech in *Fraser*. Moreover, the court said, because *The Tattler* was a school-sponsored publication, the school has broad authority to regulate its content under the U.S. Supreme Court’s decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, a school principal removed two stories from a Missouri student newspaper about pregnancy and divorce because he believed the stories dealt with issues too mature for the newspaper’s reading audience and because he believed they did not meet journalistic standards of professional ethics. The Supreme Court ruled in favor of the principal, finding that public school administrators can censor school-sponsored student speech when they can show a legitimate pedagogical purpose for doing so and when the forum has not been established, by policy or practice, as an open forum for student expression.

As to the censorship of the cartoon in the independently produced *March Issue*, the Circuit Court disagreed with the lower court’s finding that the school could censor it under *Tinker’s* “material and substantial disruption” standard. Instead, Cabranes wrote, “we need not reach the question of whether ICSD’s conduct was lawful under *Tinker*, because its conduct was lawful under *Fraser*. Although the Supreme Court has not clarified the extent to which the *Fraser* doctrine applies in contexts

beyond the facts of that case ... we have not interpreted *Fraser* as limited either to regulation of school-sponsored speech or to the spoken word.”

SPLC Executive Director Frank LoMonte said the court misapplied *Fraser* as well as the limited public forum doctrine. In a May 18 SPLC press release, LoMonte said neither *The Tattler* nor *The March Issue* should be subject to a *Fraser* analysis. “The *Fraser* ‘lewd speech’ standard grew out of a mandatory school assembly before a captive audience, and it should have nothing to do with an independently produced and independently financed student newspaper that readers can pick up or discard at their own choice,” LoMonte said. He added that the Supreme Court’s reasoning in *Fraser* was partly based on the idea that schools should be able to “disassociate” themselves from lewd or offensive student speech when it might otherwise be considered school-sponsored. *The March Issue* “was very clearly unaffiliated with the school,” LoMonte said.

In a May 22 post on the SPLC blog, LoMonte also said the 2nd Circuit “entirely skipped” a step in the limited public forum analysis, based on its own ruling in the 2002 case *Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation*, 311 F.3d 534 (2nd Cir. 2002), which requires the court to apply a heightened standard of First Amendment protection — strict scrutiny — if the speech “falls within the designated category for which the forum has been opened.” In effect, LoMonte said, the court applied the same standard to a limited public forum that it would apply to a non-public forum. LoMonte said the case should “be heard, and reversed, by the full Second Circuit.” He observed that it is rare for a case to be granted a hearing by a full Circuit Court, “but then, it is rare that judges misstate binding legal precedent quite this obviously.”

– PATRICK FILE  
SILHA BULLETIN EDITOR



# Update: Colorado Prosecutor Violated Student Editor's Rights with Criminal Libel Search Warrant

## *Latest Decision in Long-Running Howling Pig Case*

**A** deputy district attorney violated Thomas Mink's Fourth Amendment right to be free of unreasonable search and seizure when she authorized Greeley, Colo. police to search his house and seize his computer pursuant to a criminal libel complaint, according to a federal district court ruling on June 3, 2011.

### CRIMINAL LIBEL

The ruling is the latest in an eight-year legal saga arising out of Mink's publication of an online and print newsletter called *The Howling Pig*, which he launched in 2003 while he was a student at the University of Northern Colorado (UNC). He wrote that he intended the newsletter to be "a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo," and "a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody." The site is online at <http://webpace.webring.com/people/jt/thehowlingpig/>.

At *The Howling Pig*, Mink wrote irreverent editor's notes under the pseudonym "Junius Puke" alongside an altered photo of then-UNC economics professor Junius Peake. In November 2003, Peake contacted the Greeley police claiming to be the victim of criminal libel by *The Howling Pig*. Under Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105, it is a class 6 felony to knowingly publish any statement tending to "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Peake said he was criminally libeled by the website's use of his photograph and statements that Puke "gambled in tech stocks" in the 1990s and wore glasses to avoid being recognized by his colleagues on Wall Street where "he managed to luck out and ride the

tech bubble of the nineties like a \$20 whore and make a fortune," as well as by opinions and articles about UNC, Greeley, and Northern Colorado that Peake said could be attributed to him. After a police detective researched the website and determined that Mink was its author, he submitted a search warrant affidavit for Mink's residence and property, including his computer, to then-Deputy District Attorney Susan Knox, who read and approved it. A magistrate judge later approved the warrant.

In executing the warrant on Dec. 12, 2003, police searched the house Mink shared with his mother, who was not home at the time, and confiscated the computer they shared and some of his writings. Mink also claimed police told him he was in "big trouble" and warned him that resuming publication of *The Howling Pig* would "only make things worse" for him. In early 2004, however, a federal district court ordered his possessions returned, and the district attorney's office said it planned to close the file after deciding it could not constitutionally prosecute Mink under the libel statute.

Mink proceeded with a lawsuit against the Colorado attorney general, the local district attorney, and Knox, claiming his constitutional rights had been violated under the Fourth Amendment by the search and seizure and under the First Amendment by the "imminent threat" of being charged with criminal libel. He also challenged the constitutionality of the Colorado criminal libel statute. In fall 2004, the District Court dismissed Mink's suit in its entirety, finding that he lacked standing to challenge the constitutionality of the statute and that his claims against Knox were barred by the doctrine of absolute prosecutorial immunity. In April 2007, the 10th Circuit U.S. Court of Appeals declined to rule on Mink's constitutionality claims, finding that because the district attorney had decided not to prosecute Mink and had closed the file, Mink no longer had standing to sue. However, the Circuit Court sent the case back to the District Court on the question of Knox's

prosecutorial immunity, ruling that although prosecutors receive absolute immunity when working in their role as advocates, that immunity does not extend to their role as administrators or investigative officers. Because the court found Knox was acting in the latter capacity when she approved the search warrant, it instructed the lower court to consider Knox's claims of qualified immunity. *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007)

The Silha Center, together with the Student Press Law Center, filed an amicus brief in Mink's appeal to the 10th Circuit. (The brief is available on the Silha Center website at <http://www.silha.umn.edu/resources/>. For more on the case up to the 2007 ruling, see "Tenth Circuit Declines to Strike Down Colorado's Criminal Libel Law After Finding Student's Challenge Moot" in the Spring 2007 issue of the *Silha Bulletin* and "Silha Center Joins Student Press Law Center in Amicus Brief" in the Winter 2005 issue.)

In 2008, the District Court granted Knox's motion to dismiss based on qualified immunity, but the 10th Circuit reversed on appeal in July 2010, concluding that Mink had plausibly alleged that Knox violated his clearly established constitutional rights. *Mink v. Suthers*, 613 F.3d 995 (10th Cir. 2010) In the June 3, 2011 ruling, Judge Lewis Babcock of the U.S. District Court for the District of Colorado addressed Mink's motion for summary judgment under 42 U.S.C. § 1983 and Knox's cross-motion for summary judgment claiming she was entitled to qualified immunity. Following much of the reasoning in the 10th Circuit's July 2010 opinion, Babcock ruled that pursuant to the doctrine of qualified immunity, Mink had established that Knox's actions violated his constitutional right to be free from unreasonable search and seizure, a right which was "clearly established such that a reasonable person in [Knox's] position would have known that their conduct violated the law." *Mink v. Knox*, No. 84-cv-08023-LTB-CBS, 2011 U.S. Dist. LEXIS 59380 (D. Colo. June 3, 2011)

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# Ninth Circuit Overturns Conviction for Threat against Obama

## Court Finds Federal Statute Does Not Apply to Incitement

**O**n July 19, 2011, the 9th Circuit U.S. Court of Appeals reversed the conviction of a man charged with making online threats against the life of a major presidential candidate, finding that the First Amendment protected his racist, violence-tinged rants about then-candidate Barack Obama.

### FREEDOM OF SPEECH

The case arose after Walter Bagdasarian, who the court described as “an especially unpleasant fellow,” made several comments on a Yahoo! Finance message board early on the morning of Oct. 22, 2008 that alarmed other message board users and prompted one user to alert the U.S. Secret Service. The two particular comments that led to the charges were “Re: Obama fk the

nigger, he will have a .50 cal in the head soon,” posted at 1:15 a.m., and “shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? long term???? never in history, except sambos,” at about 1:35 a.m. According to the opinion, a retired Air Force officer reported the “shoot the nig” comment to the Secret Service’s field office in Los Angeles, providing it with Bagdasarian’s username: “californiaradial” and the URL address for the message board.

Yahoo! provided the Secret Service with the subscriber information for the email address californiaradial@yahoo.com as well as the account’s Internet Protocol history, which allowed investigators to identify Bagdasarian as the user who posted the comments. Two Secret Service agents visited Bagdasarian’s home in La Mesa, Calif., on Nov. 21, 2008, where he admitted to posting the comments and also that he owned firearms. Executing a search warrant a few days later, agents found a .50 caliber muzzle-loading rifle and ammunition among Bagdasarian’s six guns, as well as email messages from the day of the election with the subject

line “Re: And so it begins” and discussing “shoot[ing] the nigga’s car.”

On July 28, 2009, Judge Marilyn Huff of the U.S. District Court for the Southern District of California found Bagdasarian guilty of two counts of violating 18 U.S.C. § 879(a)(3), which makes it a felony to “knowingly and willfully threaten to kill, kidnap, or inflict bodily harm upon ... a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate.” On appeal, however, a three-judge panel of the 9th Circuit reversed the conviction in a 2 to 1 ruling, finding that the prosecution failed to sufficiently establish beyond a reasonable doubt that Bagdasarian’s “pure speech” constituted a “true threat” against a presidential candidate and was therefore protected speech under the First Amendment. *United States v. Bagdasarian*, No. 09-50529, 2011 U.S. App. LEXIS 14684 (9th Cir. July 19, 2011)

The majority opinion by Judge Stephen Reinhardt explained that in order for an individual to be

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Babcock agreed with the 10th Circuit’s conclusion that “no reasonable reader” of *The Howling Pig* “would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe that they were statements of fact as opposed to hyperbole or parody.” The Circuit Court concluded that “no reasonable prosecutor could therefore believe that it was probable that publishing such statements constituted a crime warranting the search and seizure of Mr. Mink’s property.”

Knox argued that because her review of the affidavit did not include looking at the actual website or copies of the newsletter that were attached to the affidavit submitted by the police

detective, she should be granted immunity. “The defense of qualified immunity would be extended beyond all reason if a prosecutor could avoid liability for an unconstitutional search and seizure by not reviewing the supporting documents,” Babcock wrote. Moreover, the description of the website in the affidavit “should have alerted Ms. Knox to the fact that [the website] might constitute satire protected by the First Amendment and that she should review the actual content of the website as set forth in the attachment even if she was otherwise inexplicably not inclined to do so,” Babcock wrote.

According to the Reporters Committee for Freedom of the Press on June 3, Steve Zansberg, a Denver

media law attorney who represented a number of media organizations as *amici curiae* contesting the constitutionality of the Colorado criminal libel statute in an earlier iteration of the case, said the ruling was a victory for freedom of speech but it also should have addressed the constitutional question.

“The fact that there’s still any question for a prosecutor dealing with free speech issues shows again why the statute should be stricken from the books,” Zansberg said. “In our view, no speech of any kind should be subject to prosecution based on a statute that is facially unconstitutional.”

— PATRICK FILE  
SILHA BULLETIN EDITOR

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convicted under 18 U.S.C. § 879(a)(3), the prosecution must provide evidence beyond a reasonable doubt that meets both an “objective” and “subjective” standard. In other words, the prosecution must demonstrate both that people reading Bagdasarian’s comments understood them in context to be “a serious expression of an intent to kill or injure” Obama, as well as that Bagdasarian intended his statement to be understood as a threat.

Applying the objective standard, the court rejected the government’s argument that the fact that Bagdasarian posted the comments under a pseudonym supported a finding that a reasonable person would consider them to be a serious threat. “We grant that in some circumstances a speaker’s anonymity could influence a listener’s perception of danger,” Reinhardt wrote. “But the Government offers no support for its contention that [Bagdasarian’s comments] would be more rather than less likely to be regarded as a threat under circumstances in which the speaker’s identity is unknown.” The court also observed that the message board was a “non-violent discussion forum” of financial matters, which it argued “would tend to blunt any perception that statements made there were serious expressions of intended violence.”

The court also found the fact that several other forum users were apparently alarmed by Bagdasarian’s comments did not support a finding that a reasonable person would consider them to be a true threat. “We fail to see why the fact that several people had negative reactions to the messages should be taken to mean that they or others interpreted them as a threat,” Reinhardt wrote, adding that it was “more significant that among the numerous persons who read Bagdasarian’s messages, the record reveals only one who was sufficiently disturbed to actually notify the authorities.”

In considering whether Bagdasarian had the subjective intent that his comments be considered true threats against the life of candidate Obama, the court found that neither the fact that he owned a .50 caliber gun nor his Election Day email reference to using such a weapon to “shoot the nigga’s car” was

“sufficient to prove beyond a reasonable doubt that Bagdasarian intended to make a threat.” Reinhardt argued that because his October 22 message board comments “fail to express any intent on his part to take any action, the fact that he possessed the weapons is not sufficient to establish that he intended to threaten Obama himself.”

Moreover, the court ruled that

“Not for the first time, a loathsome individual has benefited from a robust — and correct — interpretation of the 1st Amendment.”

— *Los Angeles Times*  
July 25, 2011

because the emails “simply provide additional information ... that Bagdasarian may have believed would tend to encourage the email’s recipient to take violent action against Obama,” they did not provide support to the prosecution. The court explained that “incitement to kill or injure a presidential candidate does not qualify as an offense under § 879(a)(3).” The court based its reasoning on *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969), where the 9th Circuit found that incitement was not a punishable offense under 18 U.S.C. § 871, a statute which applies to threats against the president or successors to the presidency. The court also said it concluded that incitement is not punishable under § 879(a)(3) “on the basis of the plain language of the statute,” which does not mention incitement. Therefore, the court said, even if Bagdasarian’s comments could reasonably be interpreted as a prediction that Obama would be killed or as encouragement to others to kill him, they would not qualify as an offense that could be prosecuted under § 879(a)(3). Moreover, the court explained, even if incitement was punishable under the statute, neither Bagdasarian’s statement “shoot the nig” or that Obama “will have a 50 cal in the head soon” would satisfy the requirement under the U.S. Supreme Court’s holding in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) that, in order to remove constitutional protection from

speech that incites illegal action, the government must prove that the action will be carried out imminently, and not just “at some indefinite future time.”

Judge Kim McLane Wardlaw concurred in the majority’s reasoning insofar as it held that both an objective and subjective standard were required to uphold a prosecution under § 879(a)(3), but she dissented on the ground

that she believed the government met its burden on both standards. “There is sufficient evidence to find Mr. Bagdasarian guilty of threatening harm against then-presidential candidate Barack Obama,” Wardlaw wrote.

Wardlaw argued that the majority “fail[ed] to consider the ominous backdrop of America’s history of racial violence, the uniquely racial and violent undercurrents of the 2008 presidential election, the entirety of Mr. Bagdasarian’s postings on October 22 ... and the listeners who not only perceived the posts as threatening when they were made, but who acted on that perception.” With these contextual factors in mind, along with “our country’s collective experience with internet threats and postings that presaged tragic events” such as school shootings, a reasonable person could have objectively considered Bagdasarian’s comments to constitute threats punishable under § 879(a)(3), Wardlaw wrote.

Wardlaw also cited the case of New Jersey blogger and Internet radio host Hal Turner, who was convicted in August 2010 of threatening to kill three Chicago-based federal judges after he wrote that they “deserve to be killed” and that “their blood will replenish the tree of liberty” and would be “a small price to pay to assure freedom for millions.” Wardlaw observed that a district judge had declined to dismiss the case on the grounds that Turner’s physical distance from Chicago diminished his threat, stating that “in an era when physicians have been murdered in their places of worship; families of Judges have been slain; a Judge of the Eleventh Circuit Court of Appeals and State Court Judges

**Threat**, continued on page 40



# Legal and Ethical Issues Arise when bin Laden Dies

## News Media, Advocacy Groups Seek Documentary Evidence; Critics Discuss Coverage

The death of al-Qaida leader Osama bin Laden on May 2, 2011 quickly raised issues of access to information and ethics for media organizations seeking to report the story fully and independently.

News media organizations and advocacy groups sought access to information about the Navy SEAL raid in Abbottabad, Pakistan that resulted in bin Laden's

### MEDIA ETHICS

death, especially post-mortem photos. Government officials first indicated that they would release photos, but later reneged on that promise. Meanwhile, media analysts offered suggestions on how to handle the photos if they were released, and examined coverage of the raid and bin Laden's death.

## Media Organizations File FOIA Requests for bin Laden Raid Evidence

In a May 3 interview on "NBC Nightly News," then-CIA director Leon Panetta told anchor Brian Williams that a photo proving bin Laden's death "would be presented to the public." Panetta added, "the bottom line is that, you know, we got bin Laden and I think we have to reveal to the rest of the world the fact that we were able to get him and kill him." However, the White House said the following day that no final decision had been made regarding the release of any bin Laden death photos, and none has been released to date.

In an interview broadcast May 4, President Barack Obama told Steve Croft of CBS's "60 Minutes" he would not authorize the release of post-mortem images of bin Laden. "It is important to make sure that very graphic photos of somebody who was shot in the head are not floating around as an incitement to additional violence or as a propaganda tool," Obama said. He added, "we don't trot out this stuff as trophies. The

fact of the matter is this is somebody who was deserving of the justice he received." MSNBC reported May 5 that White House Press Secretary Jay Carney said the administration had concerns about releasing any bin Laden death images because they could be gruesome and because their release could be inflammatory.

Reuters reported May 10 that the CIA made post-mortem photos of bin Laden available to members of the Senate Intelligence Committee and Senate Armed Services Committee, who could make appointments with the CIA to view them. According to a May 12 Politico.com report, Freedom of Information Act (FOIA) requests for photos and video of bin Laden and the raid began "piling up" at the Defense Department and the CIA in the hours after bin Laden was reported killed. A May 9 report by The Atlantic Wire, a website associated with *The Atlantic* magazine, listed media organizations including The Associated Press (AP), Politico.com, Fox News, and National Public Radio (NPR) as well

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## Threat, continued from page 39

have been blown up or shot; a Federal Courthouse ripped apart by homemade explosives, all in the name of political dissent or religious fanaticism, it cannot be said that Defendant's statements are unlikely to incite imminent lawless action." *United States v. Turner*, No. 09-00650, 2009 U.S. Dist. LEXIS 131244, (E. Dist. N.Y., 2009) (For more on the Turner case see "Turner Convicted for Online Threat against Federal Judges" in the Summer 2010 issue of the *Silha Bulletin* and "Blogger White Convicted; Two Mistrials for Turner" in the Winter/Spring 2010 issue.)

In a similar case, however, on April 19, 2011, U.S. District Judge Lynn Adelman overturned a federal jury's conviction of white supremacist blogger William White, who was indicted in 2009 for "soliciting a crime of violence" against the foreman of a Chicago federal jury. Adelman ruled that the government failed to present sufficient evidence to meet either an objective or subjective standard that White's posts constituted

a solicitation to harm the juror, and that the posts were protected by the First Amendment. *United States v. White*, No. 09-2916, 2011 U.S. Dist. LEXIS 42026 (N. Dist. Ill., April 19, 2011) The April 2011 ruling was the second time Adelman addressed the *White* case. He dismissed the charge against White in July 2009, ruling that it failed to allege a solicitation and violated the First Amendment, but a three-judge panel of the 7th Circuit Court of Appeals reversed Adelman's decision in June 2010. (For more on the case, see "Blogger Charged with Inciting Attacks on Judges, Lawmakers," under the subhead "Blogger Acquitted of Soliciting Harm to Juror, Remains in Custody" in the Summer 2009 issue of the *Silha Bulletin* and "Turner Convicted for Online Threat against Federal Judges" in the Summer 2010 issue, under the subhead "Charge Reinstated against Blogger William White.")

Wardlaw's dissent also argued against the majority's finding that the fact that the message board was devoted

to financial matters tended to "blunt" a perception that they were serious. "That he posted on a financial message board does not diminish the nature of the threats," Wardlaw argued, "just as they would be no less diminished had he shouted them on the floor of the New York Stock Exchange."

In a July 25 editorial, the *Los Angeles Times* praised the ruling, saying that "not for the first time, a loathsome individual has benefited from a robust — and correct — interpretation of the 1st Amendment." Peter Scheer, executive director of the California First Amendment Coalition, told the *Times* for a July 20 article that although he thought the majority "got it right," the ruling "pushes it to the limit" and "I only feel comfortable saying that having 20-20 hindsight in knowing that the threat wasn't carried out."

— PATRICK FILE  
SILHA BULLETIN EDITOR

**bin Laden**, *continued from page 40*

as advocacy groups Judicial Watch and Citizens United as having filed FOIA requests related to the raid. Politico.com reported that then-Defense Secretary Robert Gates said he and Secretary of State Hillary Clinton recommended against releasing the photos in part because they were worried that people would use Photoshop or other technology in “outrageous” ways that could incite violence against U.S. troops.

The AP reported May 18 that the Defense Department had refused the wire service’s request for an expedited review of its FOIA request, which was filed less than 24 hours after bin Laden’s reported death and asked for records including contingency plans for bin Laden’s capture, reports on the performance of equipment during the mission, copies of DNA tests confirming bin Laden’s identity and video and photographs taken from the mission, including any photos made of bin Laden after he was killed.

The AP reported that it appealed the refusal for speedy review, arguing that bureaucratic delays harm the public interest and allow U.S. officials to selectively and anonymously leak details of the mission. According to the AP, the Defense Department said the AP failed to demonstrate a compelling or urgent need to review records or show that the particular value of information would be lost if it was not provided in an expedited fashion. Judicial Watch filed a lawsuit in U.S. District Court for the District of Columbia seeking to force the Justice Department and the Central Intelligence Agency (CIA) to release the post-mortem bin Laden photos. On July 27, Federal District Judge James E. Boasberg approved a briefing schedule under which the government agreed to file its motions for summary judgment explaining their rationale for withholding the material by Sept. 26, 2011. Politico.com blogger Josh Gerstein reported May 13 that Judicial Watch President Tom Fitton said in a news conference that he did not understand why the material was “being considered a state secret.” Fitton countered arguments about the release of the photos inciting violence, saying, “the inflammatory act ... was killing bin Laden.” Fitton said that releasing the photos might also help quell conspiracy

theories about whether bin Laden was actually killed, but added that he had no doubt that the al-Qaida leader was killed by U.S. soldiers in the raid. “There’s not a question of that. There is just a question of providing information required by the rule of law,” Fitton said, adding a criticism of Obama’s record on transparency: “the gaps between the president’s rhetoric and his actions, especially in this historic instance is [sic] astonishing.”

“It is important to make sure that very graphic photos of somebody who was shot in the head are not floating around as an incitement to additional violence or as a propaganda tool.”

— President Barack Obama

The May 12 Politico.com story said experts are divided on whether the groups seeking disclosure are likely to succeed. Dan Metcalfe, an American University law professor and former co-director of the Justice Department office overseeing FOIA policy, told Politico.com “there’s a much better than 50-50 chance the government would not prevail” in lawsuits over the photos. However, Alan Morrison, co-founder of Public Citizen Litigation Group and a lawyer with decades of experience in seeking access to government records, said the chances of obtaining the records are “between slim and none,” Politico.com reported. “No court is going to overturn a presidential decision on this matter,” Morrison said. The lawyers said the government could use various arguments to withhold the records, with national security being the most likely.

Under 5 U.S.C. § 552 (b)(1), FOIA’s “national security” exemption, government agencies can refuse to disclose records that are “specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such an executive order.” Steven Aftergood, an expert on government classification of documents and publisher of the blog for Secrecy

News, a publication of the Federation of American Scientists, told Politico.com he doubts that the post-mortem photos are properly classified. “To do so would require a determination that their disclosure would somehow ‘damage national security,’ which seems far-fetched,” he said.

NBC News reported that a poll conducted the week of bin Laden’s death revealed nearly two-thirds of Americans agreed with the president’s decision to

withhold the photos and only 29 percent favored releasing them.

Politico.com reported that editors seeking the photos say that they want to pursue all avenues of information about the bin Laden raid. “We have always come down on the side of

more information and transparency,” said Bill Hamilton, a Politico deputy managing editor. AP Senior Managing Editor Michael Oreskes said the AP filed its request on the morning of the raid, but did not necessarily intend to publish any photos or documents it obtained. “We have a long history of looking at complicated, difficult, literally explosive material and deciding what is and isn’t appropriate to use. We think those judgments belong in the hands of journalists in most cases,” Oreskes told Politico.com.

NPR said its FOIA request was not meant to indicate it was “at all dismissive” of the government’s concerns about national security and that it would seriously discuss publishing the photos if it obtained them, according to a May 11 story on The Atlantic Wire website. NPR Executive Editor Dick Meyer told The Atlantic Wire that it was difficult for him to see how any of the reasons Obama gave for withholding the photos would outweigh the public’s right to see them. “If the pictures were grotesque because they showed a body shot multiple times, that would also have news value wouldn’t it? That would inform us about what happened in the mission,” Meyer said, adding, “I can’t imagine [the pictures’ grotesque nature] trumping the news value of the image.” Meyer said in

**bin Laden**, *continued on page 42*

the interview that one potential reason the photos may not be released is if any of the Navy SEALs involved in the mission are identifiable.

In a May 3 report by Al Tompkins of journalism think tank the Poynter Institute, Bob Steele, a journalism ethics professor at DePauw University, said that if the bin Laden photos were released or leaked to the press, newsrooms should keep two things in mind when making decisions about how to use them: “verification and accountability.” Steele said, “we are hearing specifics that he was shot in the head and that is how he died. There is an argument by some that he was assassinated as opposed to killed in a firefight. A photo adds one more piece to a large puzzle in helping us figure out what happened.” Steele also stressed that journalists help keep government officials accountable for their actions. “No matter what one believes about the right or wrong of what took place, the administration, the CIA, and the military should be accountable for what happened,” he said.

### ***Ethics and Professionalism in bin Laden Coverage***

In a May 3 website post, Poynter reporter Adam Hochberg observed that although “most of what President Obama says is questioned by the media and the blogosphere,” most news reports appeared to readily accept the president’s timeline of events regarding the bin Laden raid. “Obama’s speeches are parsed for factual errors and exaggerated claims, his budget plans are analyzed for over-optimistic predictions and fuzzy math, and — of course — questions about his birth have swirled through cyberspace for years despite evidence debunking the conspiracy theories,” but news organizations celebrated as they reported the news of bin Laden’s death, Hochberg wrote. Headlines like “DEAD,” on HuffingtonPost.com and “We got him!” from the *Fort Worth Star-Telegram* showcased the excitement of the media. Hochberg said news organizations did not have independent sources confirming bin Laden’s death, but rather relied only on information provided by the White House and the Pentagon. In an interview with Hochberg, former CNN

White House Correspondent and now University of South Carolina College of Mass Communications and Information Studies Dean Charles Bierbauer said, “There’s a certain test of journalistic faith here. When the President of the United States comes out and says Osama bin Laden is dead, it’s such a straight declarative sentence. There’s no reason for him to say it if there were an iota of uncertainty.” Hochberg said some media organizations were more cautious

“We have a long history of looking at complicated, difficult, literally explosive material and deciding what is and isn’t appropriate to use. We think those judgments belong in the hands of journalists in most cases.”

— Michael Oreskes  
Senior Managing Editor,  
Associated Press

about reporting bin Laden’s death as fact in their initial reports. “The banner headline in [the May 2] *New York Times* print edition attributed to President Obama the claims that bin Laden had been killed. Stopping short of confirming the terrorist leader’s death, the *Times* conspicuously noted that he had been ‘reported dead.’” Other publications that explicitly noted the White House report as a source were *The Gadsen* (Ala.) *Times*, where the page one headline said, “Obama: Bin Laden is dead,” and *The Fayetteville* (N.C.) *Observer*, Hochberg said. “We got our information through Administration sources and then through the President directly, and that was reflected in our headline,” *New York Times* spokeswoman Eileen Murphy told Hochberg in an interview. She said the headlines attached to online stories became definitive as *Times* editors “became more comfortable” leaving out the White House attribution.

Liz Cox Barrett of the *Columbia Journalism Review* (CJR) compared how Fox News and CNN covered the breaking news in a May 2 post on the CJR website. Barrett looked at transcripts of reports by Fox News anchor Geraldo Rivera and CNN anchor

Wolf Blitzer, who were on the air before Obama announced in a press conference that bin Laden had been killed. Barrett observed that Rivera was willing to speculate freely with his in-studio analyst, Ret. Gen. Thomas McInerney, about what the president would say before the press conference began. CNN, Barrett wrote, was much more careful in what it reported. She said Blitzer was so cautious in his predictions about the contents of Obama’s speech that he was

“ultimately scooped by his colleague, John King.”

Poynter associate editor Mallery Jean Tenore focused on techniques used by newspaper designers to capture bin Laden’s death on newsprint in a May 6 website post. One of the most popular photos of bin Laden showed him looking

off to the side, Tenore reported. Tamara Dunn, a copy editor for *The Citizens’ Voice*, a Wilkes-Barre, Pa. newspaper, said she was confident that she would use the photo of bin Laden looking to the side for the cover. “That was the one photo that was always so striking and menacing,” she said in a phone interview with Tenore. “Whenever I think of bin Laden, I think of that photo.” Tenore observed that many newspapers also used short, bold headlines like “Payback” and “No more.” Tenore reported that *Brownsville* (Texas) *Herald* Managing Editor Ryan Henry said he looked for a headline that relayed “anger and justice” in designing the May 3 front page. He ultimately decided on “Retribution.”

CJR’s Linette Lopez reported that state-funded television throughout the world covered the news of Osama bin Laden’s death in various ways. For example, Russia’s RT network did not interrupt programming to bring viewers “the actual president, announcing his momentous news,” Lopez wrote; the news eventually appeared in a ticker on screen. Iran’s Press TV was skeptical about when bin Laden was actually killed, Lopez reported, with one interview suggesting he had been killed



years ago and that the news was only being announced to bolster Obama's popularity. CCTV, a global English language channel based in China, did not question the president's credibility and congratulated the U.S. on a "major accomplishment," Lopez reported. France 24, a government-funded channel, included social media in its coverage, Lopez wrote, by following reactions on Twitter and Facebook and using Google maps. Al-Jazeera had some of the most comprehensive coverage with eyewitness accounts of the events at the compound, its own footage, and commentary about what the death would mean, Lopez reported.

An article in the August 8 edition of *The New Yorker* magazine detailing the bin Laden raid drew criticism over its use of sources. *Washington Post* reporter Paul Farhi observed in an August 2 report that *New Yorker* freelance journalist Nicholas Schmidle did not obtain the details in his 8,000-word "Getting bin Laden" story from any of the Navy SEALs involved in the raid, but rather from others who had debriefed them after the raid. However, Farhi wrote, "a casual reader of the article wouldn't know that; neither the article nor an editor's note describes the sourcing for parts of the story. ... Schmidle, in fact, piles up so many details about some of the men, such as their thoughts at various times, that the article leaves a strong impression

that he spoke with them directly." But Schmidle and *New Yorker* Editor David Remnick dismissed criticism. In an email to *Women's Wear Daily* columnist Zeke Turner, which Turner quoted in an August 8 column, Remnick said "the piece does not say that Nick interviewed the SEALs. In all, he interviewed officials with direct access both in the military, intelligence and in the White House; some of those officials are quoted by name, some not — hardly unusual. All

11 report about the controversy, wrote that there are ways for journalists to be transparent about their sourcing without bogging down a narrative piece with attributions. Tenore cited the way the *St. Petersburg Times* handled attribution for its Pulitzer Prize-winning story, "The Girl in the Window." The story included a source box that explained that parts of the story were reconstructed from interviews and "hundreds of pages of police reports, medical records and court

documents." Tenore said *The New Yorker* could have done something similar for the bin Laden piece. Schmidle's narrative said the story was based on SEALs' "recollections," which Tenore called "an interesting way of putting it" since he had not spoken personally to any SEALs involved in the Abbottabad raid. Schmidle responded that recollections can be relayed in different ways — first hand interviews, but also transcripts

and other types of recordings and documents. "There are multiple ways to access someone's experience besides interviewing them," he said. "That's part of the challenge — and excitement — of reporting and writing narrative nonfiction."

— HOLLY MILLER  
SILHA RESEARCH ASSISTANT

"There's a certain test of journalistic faith here. When the President of the United States comes out and says Osama bin Laden is dead, it's such a straight declarative sentence. There's no reason for him to say it if there were an iota of uncertainty."

— Charles Bierbauer  
Dean, University of South Carolina College  
of Mass Communications and Information  
Studies

of these sources were known to Nick's editors and spoke extensively with two experienced *New Yorker* fact-checkers."

Turner called it "reasonable" to inquire why the story did not explicitly note that no SEALs were interviewed when it contained details of SEALs' individual thoughts. Tenore, in an August

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