

FALL 2015

# The News Media **AND THE LAW**

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THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

## **Privacy vs. News**

**How do  
courts  
decide?**



# The News Media & The Law

## Fall 2015

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**Editor** Bruce D. Brown

**Editor** Gregg P. Leslie

**Contributors** Hannah Bloch-Wehba, Kevin Delaney, Tom Isler, Michael Lambert, Adam Marshall, Katie Townsend, Caitlin Vogus

**Administration** Lois Lloyd

***Steering Committee***

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*Address correspondence to:*

*The News Media and The Law, 1156 15th St. NW,*

*Suite 1250, Washington, D.C. 20005*

*Telephone: (202) 795-9300*

*E-mail: [magazine@rcfp.org](mailto:magazine@rcfp.org)*

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## **The News Media & The Law**

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#### **Tracking FOIA Projects**

Need help tracking your FOIA requests? Be sure to use the Reporters Committee's iFOIA service, a free system that handles FOIA requests by email and keeps everything organized for you.

To learn more, [view our tutorial](#) or go straight to [iFOIA.org](http://iFOIA.org).

# Courts wrestle with defining newsworthiness in privacy cases

*By Michael Lambert*

What is newsworthy?

When deciding whether to publish certain content, members of the news media answer this question on a daily basis.

But when courts attempt to define newsworthiness, the inquiry can be more complicated and could dictate the outcome of many high-stakes trials.

This March, a St. Petersburg, Florida court is set to consider the news value of a video clip featuring 62-year-old former professional wrestler Hulk

Hogan having sex with Heather Cole Clem, the then-wife of Hogan's friend and radio personality Bubba the Love Sponge Clem.

Gawker, the online blog that published the 101-second video clip of the 30-minute sex tape in 2012 after receiving the tape from an anonymous source, will be flanked opposite Hogan in court.

Hogan, who has lived his life in the public eye and has been outspoken about his sex life in a book and radio appearances, claims the release of the clip of the sex tape violated his privacy. After initially suing Gawker for copyright infringement in Florida federal court, Hogan later brought suit in Florida state court for \$100 million in damages, asserting a claim of publication of private facts.

Under the theory of publication of private facts, Hogan, whose real name is Terry Bollea, alleges Gawker's release of the video clip without his consent disclosed highly offensive private facts about himself. However, Gawker insists the video was newsworthy — a bar to private-fact claims under the First Amendment.

Thus, the question underlying the private-facts claim is whether Hogan's sex tape is of a "legitimate public concern." If the court concludes the publication of the video was newsworthy, the publication of private facts claim against Gawker will be dismissed.

Reporters should know that courts often assess newsworthiness differently than a



AP Photo

The privacy suit brought by wrestler Hulk Hogan against Gawker will examine whether a videotape was newsworthy.

journalist would in deciding whether to publish an article.

The standard to define newsworthiness and which party has the burden of proof varies state-by-state. In some states, plaintiffs bringing a publication of private facts claim must show the information disclosed was not newsworthy, but in other states, the defendant must raise newsworthiness as a defense. Some courts deem publishers to have a constitutional privilege to publish truthful information about newsworthy occurrences.

Generally, courts have taken an expansive view of newsworthiness, giving deference to the news media in order to encourage speech. In *Shulman v. Group W Productions, Inc.*, the California Supreme Court wrote in 1998 that “liability for disclosure of private facts is limited ‘to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment.’”

Although there is no streamlined test across the country to determine what is a legitimate public concern, various courts have opined on the subject and provided guidance for reporters.

Some questions a court may ask in deciding newsworthiness:

*Does the information relate to any matter of political, social, or other concern to the community?*

In *Snyder v. Phelps*, the U.S. Supreme Court considered a claim of emotional distress stemming from protests at a military funeral. Although the case did not involve a publication of private facts claim, the Court discussed what it considers newsworthy. In *Snyder*, the Court in 2011 found that speech is considered a matter of public concern when it can be “fairly considered as relating to any matter of political, social, or other concern to the community” or when it “is a subject of general interest and of value and concern to the public.”

The Court in *Snyder* also wrote that the provocative nature of speech should not factor into the question of newsworthiness, writing that a “statement’s arguably ‘inappropriate or controversial character . . . is irrelevant to the question whether it deals with a matter of public concern.’”

In *Shulman v. Group W Productions, Inc.*, the California Supreme Court considered whether the broadcasting of video of a victim at an accident scene and inside an emergency helicopter was newsworthy. The California Supreme Court considered three main factors in ultimately concluding the broadcast was newsworthy: the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety.

*What is the social value of publishing the information?*

Courts generally find social value in topics such as crimes, accidents, deaths, fires, police activity, entertainment events, and activities of public officials;

therefore, they are typically considered newsworthy.

For example, in *Cinel v. Connick*, the U.S. Court of Appeals for the Fifth Circuit in 1994 considered whether the broadcasting by local and national television stations of excerpts of a homemade videotape showing a Catholic priest having sex with a minor was a legitimate public concern. The Court found the video was newsworthy because it related to the guilt or innocence of criminal conduct by a community leader and concerned the Church's public response to the conduct.

When reporting on crimes or other public events, reporters should rely on public records, such as police reports, birth certificates, or records of judicial proceedings, whenever possible. Because these records are public, reporting on information found in them will likely shield reporters against a publication of private facts claim.

*How far did the publication intrude into the private life of the subject?*

The extent to which someone's privacy is invaded could affect a court's finding of newsworthiness. The more significant the privacy interest a reporter breached, the more likely a court will find the publication of the information is not newsworthy.

Although there is no clear standard to determine how much of a privacy invasion is too much, the U.S. Court of Appeals for the Ninth Circuit wrote in the 1995 case of *Virgil v. Time, Inc.*, "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."

For example, in *Buller v. Pulitzer Publishing Co.*, a reporter made an appointment with a psychic without revealing she was a reporter. The reporter then published an article about the appointment, portraying the psychic as a fraud. The Missouri Court of Appeals for the Eastern District in 1984 determined that the psychic's discussions with clients were private and therefore, not newsworthy.

*What is the subject's status in the community? Did the subject voluntarily assume a position of public notoriety?*

The public status of a person can alter a court's evaluation of the newsworthiness of the publication. Courts are more likely to find information pertaining to public officials and celebrities to be newsworthy because the public has an increased interest in their lives, and if the person voluntarily chose to be a celebrity, they have affirmatively subjected themselves to the public spotlight.

In *Lee v. Penthouse International Ltd.*, the U.S. District Court for the Central District of California found in 1997 that *Penthouse* magazine was not liable for publishing intimate photos of Tommy and Pamela Anderson Lee because the pictures complemented a newsworthy article describing their celebrity lives and



careers and the photos were already published elsewhere.

The passage of time does not always reduce the status of a person when a court mulls newsworthiness. In *Sidis v. F-R Publishing Corp.*, the U.S. Court of Appeals for the Second Circuit held in 1940 that the publication of details of the adult life of a child prodigy was newsworthy even though the subject of the publication was famous when he was 11 years old. The court noted the importance that the information reported related to why he was in the public eye in the first place.

However, the mere involvement of a celebrity does not mean the news media has full rein to publish any detail about the celebrity's life. In determining in 1998 that a sex tape between Bret Michaels and Pamela Anderson was not newsworthy, the U.S. District Court for the Central District of California in *Michaels v. Internet Entertainment Group, Inc.* wrote that “even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives.”

*Is there a connection between the information disclosed and the newsworthiness of the person or event involved in the publication?*

Courts will consider the relationship between the events that brought the person into the public eye and the facts disclosed. A person can become an “involuntary public figure” when involved in an event of public importance, such as a crime or accident. When a person is thrust into the public spotlight because of a public event, facts traditionally considered not important to the public can become newsworthy if there is a connection between the facts disclosed and a matter of public interest.

For example, in *Barber v. Time, Inc.*, *Time* magazine published an article about a rare eating disorder. In the story, the reporter used information about a woman who had the disorder. In 1942, the Missouri Supreme Court ruled the eating disorder was newsworthy, but the identity of the woman was not.

In *Diaz v. Oakland Tribune, Inc.*, the California Court of Appeal for the First District determined in 1983 the fact that the first female student body president at a college was a transgender woman was not newsworthy because it was not related to her skills as student body president.

However, a year later in *Sipple v. Chronicle Publishing Co.*, the California Court of Appeal for the First District in 1984 found that the sexual orientation of a man who saved Gerald Ford’s life was of legitimate public concern because his heroism contradicted stereotypes about gay people. According to the court, the question of whether President Ford delayed publicly thanking the man because of his sexuality also made the fact newsworthy.

*What are the community standards and jury composition?*

The human element of a jury can affect outcomes when newsworthiness is in question. Jurors in various jurisdictions may have different ideas about the social value of certain news, who is considered a public figure, and the depths to which reporters should dive into private lives.

The Hogan case is an example where the makeup of the jury may be a significant factor in shaping the outcome. Although attorneys for both parties will work to weed out biased jurors during voir dire, jurors in Florida may have preconceived opinions of the former wrestler and Gawker.

Although the debate over the newsworthiness of the sex tape is a major headline going into the trial, there have been other clashes between Hogan and the press within the past year.

This summer, Florida judge Pamela Campbell ordered that jurors will view the video clip Gawker published on a television monitor during the trial, but the monitor will be facing away from the rest of the courtroom. This concerns members of the news media who fear banning the video from open court sends a message to jurors that the video is private, which is precisely the issue at the heart of the trial.

Additionally, in October, the judge ruled Hogan was entitled to a forensic inspection of Gawker computers, servers, and email and text messages in order to investigate claims Gawker employees leaked evidence of Hogan engaging in a racist rant. The judge also denied Gawker's motion to unseal discovery in the case.

Both Hogan and Gawker have much riding on the case, with the former wrestler seeking \$100 million in damages. Such a large judgment could put Gawker out of business, but a large damage award would likely be appealed and potentially reduced.

Although the case will merely demonstrate one court's view of what is newsworthy in 2016, arguments from both parties and the ultimate conclusion should be of note for reporters. With an internationally known plaintiff on one side seeking \$100 million and an online publication testing the limits of its right to publish on the other, the Hogan trial itself will be newsworthy by any standard.

# When does the public get public records?

*Halfway through the federal government's pilot release to one, release to all FOIA program, where do things stand?*

By Adam Marshall

In early July, the Reporters Committee [reported](#) that several federal agencies had launched a pilot “release to one, release to all” program for records processed under the Freedom of Information Act. Throughout the six-month pilot, seven agencies or components thereof are posting records online as they are processed in connection with individual FOIA requests. Three months in, questions remain about how it is working and what an ideal system might look like in the future.



Dep't of Justice Photo

Melanie Ann Pustay, director of the Office of Information Policy at the Department of Justice, is overseeing the pilot program.

## Three months in

According to government officials interviewed by the Reporters Committee, the release policy has its origins in President Obama's 2009 [memorandum](#) on transparency, which specifically called for agencies to use “modern technology to inform citizens about what is known and done by their Government.”

The pilot comes at a time when the President, nearing the end of his second term, is facing [questions](#) from the public and the news media as to whether his administration has lived up to its promise of openness.

Dr. James Holzer, Director of the Office of Government Information Services, says that the pilot program “shows that the Obama Administration is still serious about improving public access to government information.” Melanie Ann Pustay, Director of the Office of Information Policy at the Department of Justice, which is

leading the pilot program, says that it's part of a larger "grand vision" of proactively providing government information to the public.

Over the last three months the agencies participating in the pilot have taken a variety of approaches to posting processed records. A survey of these agencies shows they've had varying levels of success: some are able to leverage already-robust FOIA systems to post records immediately, while others have made only a few PDFs available on hard-to-find pages of their websites.

On one end of the spectrum is the Environmental Protection Agency, which uses [FOIAonline](#) to release records. The system, which preceded the pilot program, is widely regarded to be the most advanced online FOIA portal in the federal government. Users can browse records requested under FOIA, often with the FOIA request itself or a summary of the request.

In response to questions from the Reporters Committee, the EPA said that there is "no delay between the time records are released by EPA in response to a FOIA request and when they are available to the public through FOIAonline. If an email account has been provided with the request, once records are released to a FOIA requester, a notification goes out to the requester informing them of the availability of the records."

The National Archives and Records Administration also uses FOIAonline to process its FOIA requests. To protect personal privacy, NARA says that it does not post "responses to requests in which individuals seek access to information about themselves," a limitation that is common among other agencies.

Two components of the Department of Homeland Security are participating in the pilot — the Privacy Office and the Science & Technology Office. Records "released to all" are posted on each component's website, though few have been made available so far. The Privacy Office's [page](#) has 17 PDFs, and was last updated on August 25th. The Science & Technology Office's [page](#) contains just three PDFs, and was last updated on September 4th. Neither includes the FOIA requests that prompted the release of the records.

One of the smaller agencies participating in the pilot, the Millennium Challenge Corporation, has an announcement on its website regarding the program but no electronic reading room or other page where documents appear. An MCC spokesperson was not available for comment before publication.



EPAphoto

The Environmental Protection Agency is participating in the "release to one, release to all" program.

The Office of the Director of National Intelligence recently revamped its [FOIA website](#) to include a collection of documents. Based on the dates appearing there, three PDFs have been publically released since August. A spokesperson for ODNI was also not available for comment. FOIA requests do not appear to be published alongside the records.

According to the Department of Defense's Open Government [website](#), "several" components are part of the release-to-one, release-to-all program. A survey of DOD components [identified](#) by FreedomInfo.org as participating in the pilot does not make clear whether documents have actually been posted under the pilot. A DOD spokesperson said that records released under the pilot would be posted to the DOD FOIA reading room, but was unable to confirm whether any records had actually been released to date.

Finally, just one component of the Justice Department — the Office of Justice Programs — is participating in the pilot. It releases records through the online [OJP FOIA Library](#) and has posted eleven PDFs to date, but no requests.

### **Too much transparency?**

When the pilot FOIA program was first announced, many journalists expressed concerns that it would negatively affect their ability to report by allowing others to swoop in on documents they fought for. "The government is now giving away your FOIA scoops", [one article](#) read. Jason Leopold, a reporter with Vice News, [told](#) the Washington Post that the program would "absolutely hurt journalists' ability to report" on documents obtained through FOIA. The title of that article, sensing the inevitable irony, asked if the new policy was "too much transparency for journalists?"

Such reactions clearly reflect an ambivalence from journalists who want transparency for the public's benefit, but who also want to get the story.

Some of these reactions prompted other journalists to question whether the news media was setting up a double standard. "How are we as journalists, who are constantly arguing for greater transparency, going to turn around and say hang on, that's too much openness for me?" says Matt Drange, a reporter for the Center for Investigative Reporting.

There's no doubt that the announcement of the program took journalists by surprise. While OIP worked with the volunteer agencies before the program was announced, it seems that few others knew about it. Neither OGIS nor the federal FOIA Advisory Committee, a partnership of FOIA professionals in both government and the private sector, were involved in the pilot program before it was announced.

Despite its sudden introduction, three months later most journalists contacted by the Reporters Committee did not seem too concerned about the new policy. Some, like Brad Heath, an investigative reporter with USA Today, say that it while could

theoretically affect some stories on the margins, overall he hasn't seen it have a huge impact.

Even Leopold seems to have changed his mind since the pilot started: "I've learned a lot more as to how this works since the project was announced," he says, and while he still has concerns, he doesn't think the policy seriously inhibits his ability to report. One of Leopold's FOIA requests to EPA, for example, was processed and posted for the public to see, but it just "sat out there and no one noticed it because it's not like EPA is putting out a press release."

Others agreed that many, if not most, FOIA requests enjoyed a measure of practical obscurity. "The vast majority of those EPA links are hidden in plain sight," says Nate Jones, the Director of the Freedom of Information Act Project at the National Security Archive and a member of the FOIA Advisory Committee.

Others pointed out that FOIA request logs, which are routinely posted online, already contain the names of reporters and the subject of their requests. Anyone who really wants to see what another reporter is up to can simply FOIA another person's FOIA request to ask for the same records.

Even if another reporter or member of the public finds a document that has been released, "the news value in it might not be obvious," according to Heath. If another reporter *does* understand the significance of a document, Drange says that most of the time "one piece of information isn't the whole story . . . even if [another person] got it right when I did, I don't think they would have, in most cases, the context that they would need to tell the story the way I could."

Nonetheless, other reporters remain skeptical of a widespread release-to-one, release-to-all policy, especially if there is no delay between the release to the initial requester and the public.

Andrew Becker, a reporter for the Center for Investigative Reporting and a member of the FOIA Advisory Committee, says there's a real "ambivalence" about the program for him.

"It's a competitive news world . . . you spend a lot of time and effort and money to get to a point . . . to say all right, now I know I need to get these records, request those records, and then that's potentially what makes the story."

"Then after all of that time and effort," Becker says, to have another news outlet come in and write the story might make it seem all "for naught."

Many reporters emphasized the importance of a delay between the requester receiving the documents and their posting for the general public. It would be hard to deny that there is an economic self-interest to such sentiments, but reporters think it ultimately benefits the public as well.

Leopold says that when he's working on a big investigative story, having exclusive time with a document is crucial. Not only does it give him time to properly analyze it, but he might also use it to identify and contact sources that can



provide additional context. That kind of work is key for providing the public with well-crafted, informative stories, which a simple document dump can't provide.

Journalists were not always aligned on what a sufficient delay would be before a document is publicly posted. One suggested a window of between a week and a month. Another suggested prioritizing document postings such that those requested by multiple people are posted immediately, while records requested by only one person are placed at the end of the posting queue.

Jones says that the government should be working with reporters to develop best practices and identify a window to prevent most scoops from happening. Pustay says that OIP has already gotten some comments from reporters requesting a lag time be built into the process. It's a concern that she is definitely aware of, but one that she's "reserving judgment on" before seeing all the comments OIP receives during the pilot program.

## **Outstanding questions**

One issue that remains radically uncertain is whether documents turned over as the result of litigation will be posted online at the same time they are given to the requester.

Journalists contacted by the Reporters Committee expressed frustration with the idea that if a news organization successfully sues for access to records, they wouldn't have an initial chance to exclusively report on them.

According to Leopold, a plaintiff in many FOIA lawsuits, there is "absolutely" a difference when it comes to litigation. "I believe that the documents I [sue for] belong to the people," he says, "but in order to get those documents, it's an investment . . . [and] for a news organization to invest in it they're going to want to have exclusivity."

FOIA cases routinely require tens of thousands of dollars in attorneys' fees (although that can often be recovered) and may take years to move through both the trial court and appellate review.

Nonetheless, Leopold said that he would still sue for records, even if they are released to everyone at the same time. He already has some experience with the issue after securing a court order requiring the rolling release of Hillary Clinton's emails, which are posted online by the State Department.

But there are certainly questions as to whether other news organizations, especially those with tight budgets, will be willing to spend the time, money, and effort to pursue lawsuits if they are not assured some initial exclusivity with the documents.

Pustay says that OIP is not focusing on how litigation interests will interact with the pilot program, partly because it has not come up and partly because only a small percentage of FOIA requests result in litigation. She does not think there would be any reason records released as a result of litigation would be treated differently

from records released in other ways.

Another issue that is going to require some working out is how to format records posted online to ensure they are compliant with accessibility standards the government is required to follow by law. Both Holzer and Pustay say there are significant obstacles to overcome and that part of the pilot program's purpose is to assess how much extra effort it will take on top of regular FOIA processing to ensure accessibility requirements are met.

Others, including Jones, say that the government's concerns over accessibility compliance are overstated. One possible solution is to process all documents to extract the text before they are posted and then allow individuals to request a more accessible form of the document if they need it. [DHS's FOIA library](#) for example, provides a phone number for anyone to call if they need additional assistance with accessing a document.

### **Assessment of the pilot program**

After the pilot concludes In January, OIP will be collecting data from the agencies and components that have been participating to assess what worked, what did not, and how much additional effort was required to post records online. Pustay says that in addition to discussing the pilot with the participating agencies, she is interested in having a dialogue with media requesters and the open government community to discuss next steps.

Those interested in submitting comments on the pilot, or with other suggestions on a release-to-one, release-to-all policy can write to [releasetoall@usdoj.gov](mailto:releasetoall@usdoj.gov).

In terms of input from other agencies, Holzer thinks that OGIS has a role to play. He says that his agency is "uniquely positioned to offer some experience and opinions on this issue" because it routinely has discussions with both government officials and FOIA requesters, including members of the media.

Ultimately, while many reporters support or are indifferent to the new policy, they also say that there are bigger problems with FOIA that should be tackled first. Chief among these is the massive backlog at agencies and the accompanying delay in getting records at all. As Heath remarked, before you can have "release to one release to all, you have to have release to one."



# Challenging classification: a third option

*Requesters turn to oversight office to gain release of improperly classified records*

By Hannah Bloch-Wehba

Last month OpenTheGovernment.org filed a [complaint](#) seeking the release of information related to the Central Intelligence Agency's Detention, Rendition, and Interrogation Program that, they argue, has been wrongfully classified. But OTG didn't follow the common route of filing a Freedom of Information Act request or lawsuit. It didn't even seek "mandatory



AP Photo

declassification review," another popular option. Instead, OTG chose a rare third route: it went directly to the Information Security Oversight Office (ISOO), an office at the National Archives and Records Administration that is responsible for oversight of the national security classification system, to challenge the application of the CIA's classification rules.

Requestors seeking classified information usually use either the FOIA process or mandatory declassification review ([MDR](#)), a process authorized in Executive Order 13526.

Under FOIA's [national security exemption](#), records that are "(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such an executive order" are exempt from disclosure. While requestors can, and often do, argue that a requested record is not "properly classified," courts often tend to defer to agency determinations regarding classification.

MDR offers another way to request declassification, but differs from FOIA in several important respects. First, requests are required to be more specific than FOIA requests. If the requested information has been reviewed in the last two years,

an agency need not act on an MDR request. The form and timing of the MDR appeals process is significantly different from the FOIA process as well. If an agency denies an MDR request, the requestor must administratively appeal within the agency, which must act on the appeal within 180 days. If an agency fails to act on an MDR request within a year, or if it denies or fails to act on a requestor's appeal, the requestor may appeal to the Interagency Security Classification Appeals Panel (ISCAP).

There is no judicial review of either agency or ISCAP decisions regarding MDR. Nonetheless, MDR remains appealing to many requestors, both because its scope is broader than FOIA's — it covers all classified information, not just agency records — and because it is a less litigious process. For some agencies, too, the MDR backlog, while significant, may be shorter than the wait time for FOIA requests.

OTG's ISOO complaint is a relatively unusual third path toward declassification, albeit an indirect one. Under [Executive Order 13526](#), ISOO establishes standards for classification and declassification. ISOO likewise has authority to “consider and take action” on complaints regarding the implementation of those standards. As a result, says Steven Aftergood of the Federation of American Scientists' Project on Government Secrecy, ISOO complaints are not a true substitute for FOIA or MDR, but are appropriate when there is “reason to believe that an agency has violated the terms of the executive order on classification.”

ISOO complaints do differ dramatically from FOIA and MDR requests in that they challenge the propriety of the application of classification rules and standards, while requests under FOIA or MDR seek release of specific records. And while ISOO may not directly declassify information, the Director “may require the information to be declassified by the agency that originated the classification.”

OpenTheGovernment.org's complaint is not the only pending effort to gain information about the CIA's Detention, Rendition and Interrogation Program; the American Civil Liberties Union has also brought a FOIA suit [seeking release](#) of the full, 6,900-page report by the Senate Select Committee on Intelligence regarding CIA detention, torture, and detainee abuse. The United States District Court for the District of Columbia dismissed the ACLU's case in May; the ACLU has appealed the ruling.

Nor is OpenTheGovernment.org alone in utilizing the ISOO process to seek declassification. The Project on Government Secrecy has documented at [least three complaints](#) that have been filed with ISOO in addition to the one filed by OpenTheGovernment.org. Nonetheless, in no publicly documented case has ISOO directly required declassification based on a complaint from a person outside the government, raising questions about the efficacy of the process.

Still, Aftergood says, the ISOO complaint process “is a way to cast a spotlight

on bad classification processes” and work toward systemic reform of overclassification. “Getting a well-crafted external complaint can serve as leverage for ISOO,” he says, prompting an investigation into a certain agency or topic. Inquiries from ISOO may also prompt agencies to justify and even change their classification practices, remedies that are difficult to achieve through traditional FOIA litigation or through MDR. For that reason, ISOO complaints might be particularly valuable tools for obtaining a modicum of transparency from agencies regarding their classification systems--and, ultimately, for obtaining documents that were wrongfully classified.

# White Paper: Anonymous Civil Litigants

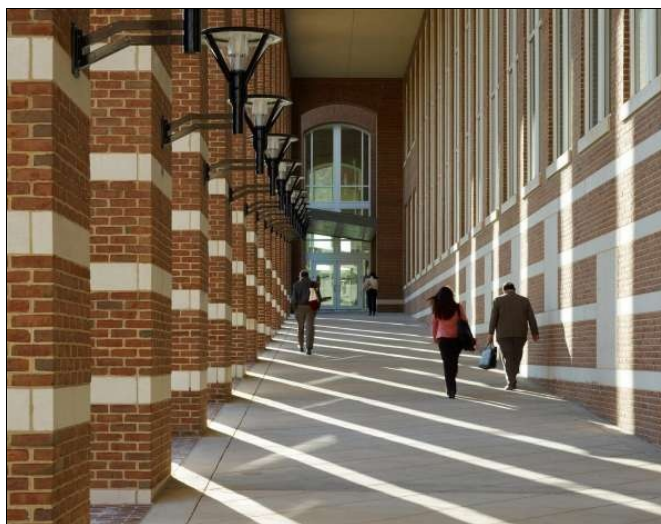
## *A Problem of Court Access*

*By Tom Isler, McCormick Foundation Legal Fellow. This is adapted from a longer "white paper" that will be available on our web site soon.*

Last June, a jury in Fairfax County, Va., awarded \$500,000 to a medical patient who alleged that, while he was undergoing a colonoscopy, two doctors disparaged and defamed him to each other and to the medical staff in the operating room. The patient, who was fully anesthetized for the procedure, never would have heard the doctors' running commentary — joking that he suffered from syphilis and tuberculosis, which he did not; ridiculing his masculinity; suggesting that doctors found him tiresome and annoying — except that he had recorded the audio of the entire operation on his cell phone because, he claimed, he thought he would have difficulty understanding or recalling post-procedure instructions and wanted to record them. The patient was awarded \$100,000 for defamation (for the comments about syphilis and tuberculosis), \$200,000 for medical malpractice, and \$200,000 in punitive damages.

The case and verdict garnered widespread media attention. *The Washington Post* even obtained and posted excerpts of the audio recording on YouTube.[\[1\]](#) But in all of the media coverage, one detail was absent: the patient's name.

In his complaint, the patient identified himself only by his initials, "D.B.," and stated that he was "commencing suit anonymously pursuant to Code of Virginia § 8.01-15.1," a provision of state law that sets out the criteria for challenging the "propriety" of maintaining "anonymous participation" in a "proceeding commenced anonymously." D.B. never sought the court's permission to proceed



Plaintiffs are often allowed to proceed anonymously in the Fairfax, Va., courts under a state law.

anonymously. He didn't file any motion to withhold his full name, and the defendants never formally challenged his anonymity. The court never entered any order, written or oral, addressing anonymity. The issue simply never came up. D.B. decided he didn't want to reveal his name, and that was that. (The lawsuit and *The Washington Post* both named the doctor, Tiffany M. Ingham.)

Throughout the country, anonymous or pseudonymous litigation<sup>[2]</sup> is generally disfavored, but courts have considerable discretion to permit it. Frequently, as in D.B.'s case, courts permit the arrangement without explanation or analysis. While some jurisdictions now have local rules or statutes that articulate a standard for pseudonymous litigation and factors for the courts to weigh, the case law related to anonymity is far less developed than doctrine concerning courtroom access or sealed documents. As recently as 2007, an appellate court in Indiana wrote that "[a]lthough anonyms have appeared in Indiana state cases, there is no reported Indiana decision where the use of anonym has been challenged. Hence, we have no specific criteria to apply." *Doe v. Town of Plainfield*, 860 N.E.2d 1204, 1206–07 (Ind. Ct. App. 2007). Federal case law is more abundant, but not all circuit courts of appeals have yet ruled on the standards governing anonymity.<sup>[3]</sup>

Reasons for this disparity may be that anonymity requests are less common than sealing or closure orders, or that litigants and the press do not challenge anonymity as much as they do other protective orders, resulting in fewer court orders and opinions. Another reason may be that, when the issue is addressed, it is frequently resolved in oral or written orders that do not end up in published reporters or searchable legal databases like Westlaw or Lexis, making the precedent harder to find.<sup>[4]</sup> And even when the issue is addressed in writing or formal opinions, the discussion is frequently without analysis.<sup>[5]</sup> Courts may simply be less focused on the issue because they do not view a litigant's identity as an important aspect of court transparency, because no courtroom is being closed to the public and no document is being sealed.

But anonymity or pseudonymity is a form of court closure, a kind of redaction or sealing that withholds from the public potentially valuable information about pending litigation, and should be treated as such by the courts. The benefits of an open and transparent court system and the press's ability to report on legal proceedings — subjecting all players to extensive scrutiny, guarding against a miscarriage of justice, giving assurance that proceedings are fair, discouraging perjury and decisions based on bias, providing context to the legal proceedings<sup>[6]</sup> — are all potentially undermined when the public and the press cannot tell who has invoked the power of public courts to resolve disputes. And when parties are permitted to litigate under pseudonyms, other secrecy tools — sealed documents, gag orders, courtroom closures — often will be employed as well, further limiting public oversight of those matters.<sup>[7]</sup>



Individuals are not the only civil litigants who request to use pseudonyms. Corporations also seek anonymity, raising different and potentially broader issues of public concern. For example, baby carrier manufacturing company ErgoBaby unsuccessfully tried to remain anonymous while suing the U.S. Consumer Product Safety Commission to keep a government safety report about one of its products out of the Commission's online database.[\[8\]](#) Anonymity raises still other questions when invoked by, or bestowed upon, a criminal defendant, whose prosecution and imprisonment may be shrouded in secrecy.[\[9\]](#)

There may well be situations where a litigant's anonymity should be maintained, for example, when there is an imminent risk of physical harm to the litigant if his or her identity is revealed, or if revealing the litigant's identity would expose him or her to criminal liability. But courts should recognize that anonymity is a form of closure, redaction or sealing, and require litigants seek permission to use a pseudonym, so that the parties themselves do not solely determine whether to withhold their identity from the public. Courts should be required to enter specific findings on the record justifying the use of a pseudonym, in recognition of the public interest in the openness of court proceedings. Anonymity should be permitted only if the litigant demonstrates a compelling need and if less restrictive measures would not protect the harm to be avoided, consistent with First Amendment principles.

### Overview of case law regarding pseudonymous litigation

It is difficult to quantify how prevalent pseudonymous litigation is, because courts employ an endless array of pseudonyms beyond the popular monikers "John Doe" or "Jane Roe." There are many variations on the "Doe" theme: Boe, Coe, Foe, Hoe, Koe, Loe, Moe, Noe, Poe, Soe, Voe, Woe, and Zoe.[\[10\]](#) Some pseudonyms are descriptive ("Pseudonym Taxpayer," "Patient A"),[\[11\]](#) while others are more evocative ("Jane Endangered," "Unwitting Victim").[\[12\]](#) Still others fail to announce their fiction: "Alfred Little," "David Becker."[\[13\]](#) And then there are litigants who proceed only by their initials.

The U.S. Supreme Court has never addressed when parties should be permitted to litigate without using their real names, although cases like *Roe v. Wade*[\[14\]](#) and,



AP Photo

Norma McCorvey, right, may be the most famous anonymous plaintiff ever; she was Jane Roe in the landmark 1973 abortion rights lawsuit *Roe v. Wade*.

more recently, *Adoptive Couple v. Baby Girl*,<sup>[15]</sup> appear to show tacit approval of the practice in certain situations.

Courts generally reject a categorical approach to anonymity and instead weigh the circumstances of each case.<sup>[16]</sup> Courts tend to allow the use of pseudonyms when the interests favoring anonymity outweigh the public interest in disclosure. Although some courts, including the Third Circuit, consider the “magnitude of the *public interest* in maintaining the confidentiality of the litigant’s identity,” *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011) (emphasis added), more federal circuit courts ask whether “the *plaintiff’s* interest in anonymity” outweighs “the public interest in disclosure and any prejudice to the defendant.” *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (citing cases from the Fifth, Ninth, Tenth and Eleventh Circuits) (emphasis added).

In practice, courts often grant anonymity “when identification creates a risk of retaliatory physical or mental harm,” “when anonymity is necessary ‘to preserve privacy in a matter of sensitive and highly personal nature,’ or “when the anonymous party is ‘compelled to admit [his or her] intention to engage in illegal conduct, thereby risking criminal prosecution.’” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). Some federal circuit courts have attempted to identify more specific factors to assess the strength of the litigant’s need for anonymity and the likelihood and severity of harm that would result from disclosure.<sup>[17]</sup> But even within this framework, courts’ discretion is broad.

Anonymity is most prevalent in cases involving juveniles or victims of sex crimes. Many states have statutes or court rules specifically addressing anonymity in these subcategories.<sup>[18]</sup> Pseudonyms are also frequently requested and granted in matters involving reproductive rights (such as abortion), mental illness, or other cases in which the litigant must disclose conduct or a medical condition or an immutable characteristic that carries significant social stigma.<sup>[19]</sup>

Courts generally refuse to grant anonymity when the litigant seeks only to prevent unwanted publicity, personal embarrassment or economic harm.<sup>[20]</sup> But others have held that “an adequate threat of personal embarrassment and social stigmatization” is proper grounds for granting anonymity. *See Jane Roes 1-2 v. SFBSC Mgmt., LLC*, --- F. Supp. 3d ---, No. 14-3616, 2015 WL 163570, at \*3 (N.D. Cal. Jan. 12, 2015) (allowing two exotic dancers to use pseudonyms in a Fair Labor Standards Act class action lawsuit against a nightclub operator).

Although many courts speak of permitting pseudonyms only in “exceptional circumstances,”<sup>[21]</sup> in practice, courts tend to conduct simple balancing tests to resolve disputes about pseudonyms.

Unfortunately, those balancing exercises tend to systemically undervalue the somewhat abstract benefits of court transparency in favor of more immediate, concrete harms alleged by litigants. *See Doe v. Hartford Life & Accident Ins. Co.*,

237 F.R.D. 545, 551 (D.N.J. 2006) (discounting the public interest in openness because “this interest exists in some respect in all litigation and does not outweigh the strength of the factors in favor of Plaintiff’s use of a pseudonym”). A better approach would be to require compelling reasons for anonymity. Under such a system, courts would still have discretion to grant anonymity in appropriate cases, but would resolve issues in favor of openness when litigants do not have substantial privacy interests to protect and who merely seek to avoid publicity, notoriety, or embarrassment.

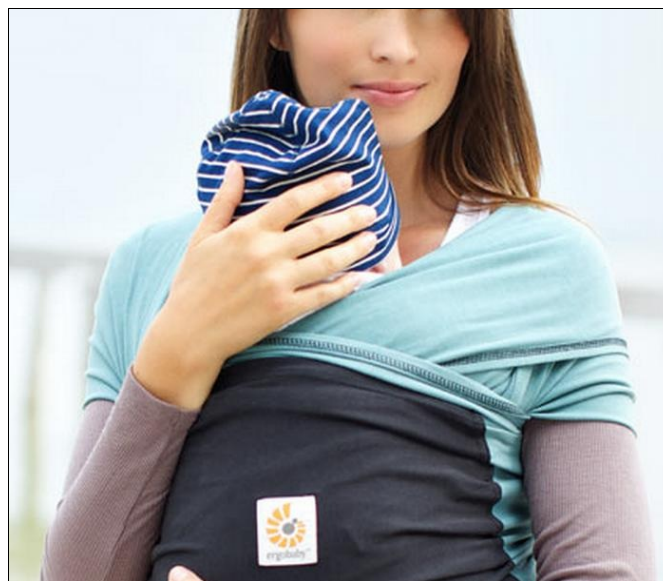
## Making the case for disclosure

Journalists who find themselves covering a proceeding with an anonymous litigant and who want to challenge the use of a pseudonym, may want to seek to intervene or more informally invite the court to review the use of pseudonyms. The following are arguments that could be made against anonymity.

*Disclosure is the default;* pseudonyms are disfavored. Most courts have rules that require parties to provide their names on complaints and court filings. Notably, according to the Federal Rules of Civil Procedure, in federal court the “title of the complaint must name all the parties . . . .” Fed. R.

Civ. P. 10(a). A presumption of disclosure should be the starting point for anonymity analysis, and those seeking to use a pseudonym should have to justify any departure from the normal procedure. *See, e.g., Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (noting the presumption against anonymity). Granting anonymity to litigants is actively “disfavored.” *See, e.g., Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.).

*Pseudonymity is a form of court closure, sealing or redaction.* Permitting anonymity has the effect of shutting the public out of the courtroom for any discussion of the litigant’s identity, or placing a litigant’s name under seal in every document filed, or redacting every reference to a litigant’s name, all of which implicate the First Amendment and common law rights of access to civil proceedings and documents.<sup>[22]</sup> Although some courts resist this analogy, because the public is not physically barred from the courtroom or denied access to any court documents, access cases turn on access to *information* and the ability to scrutinize



Ergobaby, a manufacturer of baby carriers, fought to keep its name anonymous as it sued the Consumer Product Safety Commission over a report about one of its products.



the judicial process, not on gaining physical entry to a courtroom or access to pieces of paper or digital files. Withholding names of litigants denies access to information and inhibits the public's ability to scrutinize the judicial process. Invoking this familiar and established doctrine may help to underscore the public interests at stake and the effect pseudonyms have on the public's understanding of a lawsuit. It may also signal to the court the need to justify any order granting anonymity.

*Pseudonymity should be analyzed under a First Amendment standard.* Withholding a litigant's identity should be subject to the U.S. Supreme Court's First Amendment test for denying public access to court proceedings or records, which requires "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. Co. v. Superior Court*, 487 U.S. 1, 9 (1986) ("*Press-Enterprise II*").<sup>[23]</sup> The Supreme Court employs an "experience and logic test" to determine whether a First Amendment right of access attaches by asking "whether the place and process" at issue "have historically been open to the press and general public," as well as "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8.

- *Historically, litigants' names have been public.* Both experience and logic dictate that the public have presumptive access to litigants' names. The use of pseudonyms in litigation "is without precedent in English or early American common law, when the pseudonym 'John Doe' was used only to designate a defendant in the pleadings until his real name could be ascertained or to designate the fictitious plaintiff in the action of ejectment." Steinman, *supra*, at 18. In fact, only within the last 50 years has the practice of suing anonymously, or proceeding as an identified, pseudonymous defendant, become more common. *See id.* at 1 n.2 ("federal decisions concerning Doe plaintiffs or known Doe defendants are rare prior to 1969"). Because "historically both civil and criminal trials have been presumptively open," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), and because the use of pseudonymity is a modern invention, a presumptive right of access to litigants' identities enjoys the favorable judgment of experience.

- *Access to litigants' names helps the judiciary functions properly.* Access to a litigant's identity helps the press fulfill its beneficial role that the courts have described in access cases. Openness, generally, gives assurance that the court is fulfilling its public duty appropriately. Transparency also discourages perjury and bias, and heightens public respect for the judiciary. The benefits of public scrutiny are more limited when the public does not have access to a litigant's name, because pseudonymity makes it more difficult for the press or the public to root out perjury or bias.<sup>[24]</sup> Knowledge that court documents and proceedings are open to the public should encourage truthfulness and discourage frivolous lawsuits or unsupportable

claims or assertions. In addition, disclosure of a litigant's identity may be necessary to conduct jury selection properly.[\[25\]](#)

*The common law standard for court closures and sealing should prevent the use of pseudonyms in many cases.* Courts do not analyze all sealing or redaction requests under a First Amendment standard. Instead, some requests are analyzed under a less rigorous common law standard, which effectively requires a balancing of interests. Many existing tests for the use of pseudonyms also adopt this kind of balancing test. By invoking the benefits of openness from court access and sealing cases, one can argue that public benefits in openness outweigh private desire for anonymity. Challengers also may ask the court to look not at the private need for anonymity but the societal interest in permitting the litigant to proceed under a pseudonym. Only in the face of compelling, countervailing societal needs should the presumption of openness be overcome.

*Pseudonymity denies the public valuable information about the use of public courts.* Although a legal case may not turn on the particular identity of a litigant, that information may be central to the public's broader understanding of the case, the law, and the functioning of the judiciary. Anonymity greatly hinders, for example, a journalist's ability to research the litigant's background, including business interests or political interests. Anonymity also prohibits journalists from identifying family members, friends, employers, coworkers, classmates and other acquaintances who may help the journalist put a given dispute in context. Knowing a litigant's identity may help illuminate such details as the motivation for suing; his or her relationships with defendants, other trial participants, or the court; or the litigant's credibility, among other things. Such information may be instrumental to the public's understanding of how the legal system works and to advocate for changes in the law — even if the information does not make a legal difference in a particular lawsuit.

*The public has a right to know who is using the public court system.* Courts are funded with public money, and litigants who invoke the power of the courts are seeking a public benefit. One tradeoff for receiving that public benefit should be disclosure of one's identity.[\[26\]](#) This rationale is particularly strong when litigants are challenging democratically enacted laws, because the public has an interest in knowing who seeks to disrupt the legal status quo.

Critics of this “waiver” rationale argue that forcing plaintiffs to reveal their identity may discourage them from filing suit at all, effectively precluding them from vindicating their own rights. But surely a stringent standard for permitting the use of pseudonyms would still permit courts enough discretion to permit anonymity when absolutely essential to a plaintiff's ability to vindicate their own legal rights (after all, the public has an interest in allowing individuals to pursue enforcement of their rights), while making it more difficult for plaintiffs who merely wish to avoid publicity, criticism, or embarrassment.

*Openness may discourage frivolous or harassing lawsuits.* Disclosure and public scrutiny may simultaneously discourage plaintiffs from bringing frivolous, harassing or unnecessary suits.

*Openness promotes the appearance and reality of fairness in the courts.* The public is more apt to believe that courts are performing their duties responsibly when key facts, such as a litigant's identity, are not hidden from view. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

*Litigants should not be permitted to reverse the default presumption of openness.* Many litigants seeking anonymity attempt to flip the framework of the analysis by arguing that disclosure is not necessary for the lawsuit to progress or that there is little or no public interest in ascertaining the plaintiff's identity. These arguments obfuscate the fact that the court system has a default preference for openness, and those seeking anonymity must justify any departure from that practice. By focusing on whether the particular defendant or the public has compelling reasons for disclosure, litigants sidestep the main issue of whether there is a strong private or societal interest in anonymity that outweighs the recognized interests in openness.

*Litigants may lack compelling reasons for pseudonymity.* Mere embarrassment or a desire to avoid publicity should not be sufficient to justify anonymity. Neither should the mere presence of sensitive information, or general or conclusory assertions of a threat or risk of physical or pecuniary harm. Many plaintiffs might prefer anonymity, but they should demonstrate a sufficiently compelling need, and courts should document that need with specific findings. If the court system permitted anonymity whenever a litigant could avoid embarrassment, humiliation, or ridicule, anonymity likely would be rampant, in each instance making it harder for the public and press to monitor court proceedings and accept the work of the courts as unbiased and trustworthy.

*Less restrictive means may be available to prevent the perceived risk.* In many cases, narrowly tailored sealing or redaction will be able to protect truly sensitive and highly personal data, or other information comprising the basis for the anonymity request.

## **Conclusion**

The use of pseudonyms has been consistently permitted in litigation without the proper level of attention from the courts, given that anonymity is a form of court closure, sealing or redaction. Courts should require litigants seeking to proceed under a pseudonym to justify the need to depart from the normal practice of disclosure, and should grant or deny its use after making specific findings on the record that a compelling interest outweighs the public interest in disclosure, and that less restrictive alternatives would not prevent the harm to be avoided.

The news media, whose newsgathering stands to improve with disclosure, should be attentive to the casual, unjustified use of pseudonyms, and place pressure on the courts to justify secrecy. Requiring litigants and courts to walk through these procedural steps, and paying close attention to the validity of claims for the need for anonymity, should reduce unnecessary anonymity while permitting it in justified cases.

## Endnotes:

[1] See The Washington Post, *Audio: Anesthesiologist trashes sedated patient*, YouTube (June 24 2015), <https://youtu.be/Kar52idHgho>.

[2] These terms are used mostly interchangeably throughout this paper to refer to litigation being brought or defended by known individuals identified in court papers only by a pseudonym or by their initials, rather than their full names. The use of “John Doe” or other pseudonyms in litigation to refer to individuals who have not yet been identified is outside the scope of this paper. It likewise does not address anonymous juries (examined by the Reporters Committee in a previous paper, available at <https://www.rcfp.org/secret-justice-anonymous-juries>) or the subcategory of anonymous parties defending anonymous speech online (see <https://www.rcfp.org/category/tags/anonymous-speech>), or the issue of criminal prosecutions against known, pseudonymous defendants.

[3] The First, Eighth, D.C., and Federal Circuits do not appear to have addressed this issue.

[4] See, e.g., Order, *Doe v. Corr. Corp. of Am.*, No. 3:15-cv-68 (M.D. Tenn. Jan. 27, 2015), ECF No. 11 (placing the words “ORDER: Motion granted,” with the magistrate judge’s signature, in the upper-right-hand margin of Plaintiff’s Motion for Protective Order); Order, *Patient A v. Vt. Agency of Human Servs.*, No. 5:14-cv-206-GWC (D. Vt. Oct. 27, 2014), ECF No. 3 (granting the plaintiff’s motion to proceed under a pseudonym in a text order on the docket, without analysis).

[5] See, e.g., *United States v. Doe*, Nos. 13-50614 & 14-50015, 2015 WL 3483962, at \*1 n.1 (9th Cir. Jun. 3, 2015) (stating “[w]e grant defendant appellant’s motion to refer to him by a pseudonym in this disposition,” without further analysis); see also Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 Hastings L.J. 1, 43 n.179 (1985) (“In the vast majority of pertinent cases the courts have allowed, and perhaps sometimes disallowed, pseudonymity without analysis and consideration of the competing interests in access. If analysis was done, it was not reflected in published opinions.”)

[6] See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (describing benefits of openness); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (same).

[7] See, for example, the case of *Dwyer v. United States*, No. 14-4387 (2d Cir.

Feb. 26, 2015), in which a reporter is challenging extensive secrecy in a criminal case against a John Doe defendant. The Reporters Committee submitted an amicus brief in support of the reporter's appeal, which is available at <http://rcfp.org/x?rfn>. As of this writing, the matter is still pending.

[8] See *Company Doe v. Public Citizen*, 749 F.3d 246, 254 (4th Cir. 2014); Alison Frankel, *How 'Company Doe' — now revealed as ErgoBaby — triggered 1st Amendment case*, Reuters, May 8, 2014, available at <http://goo.gl/fjvwVg>, archived at <https://perma.cc/6ASW-AG39>.

[9] See *United States v. Doe*, 778 F.3d 814, 817 n.1 (9th Cir. 2015) (granting defendant's motion for pseudonymity because "the defendant may face 'a risk of serious bodily harm if his role on behalf of the Government were disclosed to other inmates'").

[10] See, e.g., *Foe v. Cuomo*, 892 F.2d 196 (2d Cir. 1989) (using pseudonyms Frank Foe, Walter Woe and Wilma Woe).

[11] See *Pseudonym Taxpayer v. Miller*, 497 F. Supp. 78 (D.N.J. 1980); *Patient A v. Vt. Agency of Human Servs.*, No. 5:14-cv-206-GWC, 2015 WL 589367 (D. Vt. Feb. 11, 2015).

[12] See *Jane Endangered v. Louisville/Jefferson Cnty. Metro Gov't Dep't of Inspections*, No. 3:06CV-250-S, 2007 WL 509695 (W.D. Ky. Feb. 12, 2007) (using pseudonyms "Jane Endangered" and "Jane Imperiled"); *Unwitting Victim v. C.S.*, 47 P.3d 392 (Kan. 2002).

[13] See *Deer Consumer. Prods., Inc. v. Little*, 938 N.Y.S.2d 767 (N.Y. Sup. Ct. 2012); *In re State v. Becker*, No. 0809008237, 2009 WL 2424659 (Del. Fam. Ct. Jun. 25, 2009).

[14] 410 U.S. 113 (1973).

[15] 133 S. Ct. 2552 (2013).

[16] See, e.g., *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) ("We advance no hard and fast formula for ascertaining whether a party may sue anonymously."); *Doe v. Howe*, 607 S.E.2d 354, 356 (S.C. Ct. App. 2004) ("We believe the better practice is one which avoids a rigid, formulaic approach, thereby allowing the trial courts a degree of flexibility in this fact-sensitive area.").

[17] The Third Circuit, for example, has identified nine factors:

(1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at



the price of being publicly identified; . . . (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives. . . . [(7)] the universal level of public interest in access to the identities of litigants; [(8)] whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and [(9)] whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

*Megless*, 654 F.3d at 409. *See also Does I thru XXIII*, 214 F.3d at 1068 (identifying several factors); *Sealed Plaintiff*, 537 F.3d at 190 (collecting factors from federal case law).

[18] *See, e.g.*, California Rules of Court, rule 8.401 (providing for anonymity of juveniles in court proceedings); Fla. Stat. § 92.56(3) (permitting pseudonyms for certain categories of victims of crimes against children or certain sexual offenses); Tex. Civ. Prac. & Rem. Code § 30.013(c)(3) (providing for pseudonyms for sexual abuse of a minor).

[19] The privacy organization Without My Consent has a useful round-up of case law, court rules, and statutes from around the country related to pseudonymous litigation on its website, <http://www.withoutmyconsent.org/50state>. The group approaches pseudonymity from a different perspective than I do. It describes itself as “seeking to combat online invasions of privacy” and “empower[ing] individuals to stand up for their privacy rights and inspire meaningful debate about the internet, accountability, free speech, and the serious problem of online invasions of privacy.” *Who We Are*, Without My Consent, <http://www.withoutmyconsent.org/who-we-are> (last visited Aug. 19, 2015), *archived at* <http://perma.cc/78MS-E63K>.

[20] *See Megless*, 654 F.3d at 408 (“That a plaintiff may suffer embarrassment or economic harm is not enough.”); *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (“the fact that Doe may suffer some personal embarrassment, standing alone, does not require the granting of his request to proceed under a pseudonym”); *Roe v. Bernabei & Wachtel PLLC*, --- F. Supp. 3d ---, No. 14-cv-1285-TSC, 2015 WL 1733648, at \*4 (D.D.C. Mar. 26, 2015) (“Personal embarrassment is normally not a sufficient basis for permitting anonymous litigation.”) (citing cases); *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (denying anonymity when the party sought only to prevent economic harm).

[21] *See, e.g., Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.).

[22] As the U.S. Court of Appeals for the Fifth Circuit stated in *Doe v. Stegall*, “[p]ublic access to this information is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public

scrutiny of judicial proceedings.” 653 F.2d 180, 185 (5th Cir. 1981). The court acknowledged that the “equation linking the public’s right to attend trials and the public’s right to know the identity of the parties is not perfectly symmetrical,” but, “[n]evertheless, there remains a clear and strong First Amendment interest in ensuring that ‘(w)hat transpires in the courtroom is public property.’” *Id.*

[23] The *Press-Enterprise* standard was applied by the Supreme Court in criminal cases; the Court has not directly addressed whether the constitutional right applies to civil proceedings. However, the California Supreme Court noted that “every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials.” *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999).

[24] See Brett Lake, *Deputy state’s attorney gave false testimony, records show*, Carroll County Times, Apr. 25, 2012, *archived at* <http://perma.cc/HKS2-LJ5D> (reporting on evidence obtained by the newspaper that contradicted testimony given by a law enforcement officer). The deputy later lost a lawsuit against the newspaper for defamation. See Chuck Tobin & Drew Shenkman, *Report That Prosecutor Gave ‘False Testimony’ Not Actual Malice*, MLRC Media Law Letter, August 2013, *archived at* <http://perma.cc/EN6Q-Z2FB>.

[25] See *A.B.C.*, 660 A.2d at 1204 (“in order to question potential jurors on *voir dire* about their knowledge of any of the parties, including possible connection with the corporate defendant as a possible employer of a prospective juror or a juror’s family member, or even as a stockholder, the names of the parties would have to be disclosed in open court to the jurors”).

[26] Justice Scalia made an analogous point in *Doe v. Reed*, in which the Supreme Court held that disclosure of referendum signatures did not violate the First Amendment rights of the signatories. See *Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (“There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”)

# Identifying the jury

## *Journalists sometimes must fight for the right to learn jurors' names*

By Kevin Delaney

In the midst of the high-profile criminal trial of Nathaniel Fujita, a man eventually found guilty of first degree murder in the death of his former high school girlfriend, The Boston Globe made a motion for post-verdict access to the jury list from the case. The Globe's purpose in seeking the list, which would identify the names and addresses of the jurors who served in the case, was simple: to gauge whether the jurors would be willing to discuss the trial after entry of the verdict.

After being granted the names and addresses of only two of the jurors, The Globe's motion made its way to the Supreme Judicial Court of Massachusetts. In a decision issued earlier this year, the Massachusetts high court sided with The Globe — ruling that the public has the right to learn the names of jurors who have been empanelled and rendered a verdict in criminal cases. The court specified, “Only on a judicial finding of good cause, which may include a risk of harm to the jurors or to the integrity of their service, may such a list be withheld.”

The Globe's quest for the jury list from *Commonwealth v. Fujita* raises important questions about journalists' right of access to juror names, and when that right can be outweighed by competing concerns like privacy and safety.

### **The public right of access to juror names**

According to Ken Paulson, the dean of the College of Media and Entertainment at Middle Tennessee State University and the former editor-in-chief of *USA Today*, there are benefits to allowing access to juror names.



AP Photo

Nathaniel Fujita, center, stands with his attorneys as he is sentenced in 2013.



Paulson wrote in an email: “It’s imperative that we know the identity of jury members. If convicted, a citizen loses his or her freedom, potentially for years. That process should never go unscrutinized, meaning that courtrooms should be open and the identities of jurors should be ascertainable.”

The benefits of disclosing juror names were seen during the 2006 corruption trial of former Illinois Governor George Ryan. There, the Chicago Tribune [revealed](#) that two jurors had concealed arrest records during the jury selection process. The revelations led U.S. District Court Judge Rebecca Pallmeyer to [dismiss](#) both jurors eight days into deliberations. Because a verdict had not yet been reached, however, Judge Pallmeyer was capable of replacing the jurors with [alternates](#) and narrowly avoided having to declare a mistrial.

Despite the benefits, courts often struggle with the issue of whether to disclose juror names. According to Gayle C. Sproul, a partner at the law firm Levine Sullivan Koch and Schulz, “judges are very protective of jurors” and their personal privacy. Additionally, citing the potential of jury tampering, courts often worry that disclosing juror names during proceedings will interfere with the accused’s Sixth Amendment right to a fair trial.

Nevertheless, although the Supreme Court has never directly addressed the issue, it is generally believed that journalists and the public possess the right of access to juror names. Courts have found this right by invoking federal and state statutes, local court rules, the common law, and the First Amendment.

For courts finding a common law right of access to juror names, the Supreme Court’s 1978 decision in *Nixon v. Warner Communications, Inc.*, offers relevant precedent. In *Nixon*, the Supreme Court concluded there was a general, common law right “to inspect and copy public records and documents, including judicial records and documents.”

Relying on precedent from *Nixon*, the U.S. Court of Appeals for the Fourth Circuit (covering Maryland south to South Carolina) in *In re Baltimore Sun Co.*, a case decided in 1988, found a common law right of access to juror names after the jury has been seated. The court observed: “We recognize the difficulties which may exist in highly publicized trials . . . and the pressures upon jurors. But we think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.”

Applying the same standard, however, the Supreme Court of Pennsylvania in 2007 in *Commonwealth v. Long* ruled there was no common law right of access to the names of empaneled jurors. In reaching its decision, the court concluded that such lists were not public judicial records and thus the presumption of access under *Nixon* did not apply.

In the First Amendment context, courts routinely apply what’s called the “experience and logic” test to find a qualified First Amendment right of access to

juror names. Under this two-part test, courts ask (1) whether “the place and process have historically been open to the press and general public,” and, if so, (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”

On the first prong, courts usually reference the fact that jurors have historically been known in their communities. For example, in the 2002 case of *State ex rel. Beacon Journal Publ’g Co. v. Bond*, the Supreme Court of Ohio described how during “the treason trial of Aaron Burr . . . Chief Justice John Marshall printed the names of the jurors in the court’s reported decision.” Similarly, in *Commonwealth v. Fujita*, the Supreme Judicial Court of Massachusetts discussed how “the identities of the jurors who acquitted” the British soldiers charged with the Boston Massacre “were known to the community.”

On the second prong, courts routinely cite the benefits of knowing juror names. As the U.S. Court of Appeals for the First Circuit (covering much of New England) explained in the 1990 case of *In re Globe Newspaper Co.*, “Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system.”

This view, however, is not universal. In rejecting the First Amendment right of access to juror names, the Supreme Court of Delaware in 1989 wrote in *Gannett Co. v. State*, “Announcement of jurors’ names in court promotes neither the fairness nor the perception of fairness, when the parties are provided with the jurors’ names and all proceedings are open to the public.”

And although most courts find a right of access to juror names, Sproul cautions that the right is never absolute. “These [the common law and First Amendment rights] are qualified rights,” Sproul said. “So the government, the prosecutor, or whoever it may be will have the ability to . . . make some sort of showing of a definite harm that will befall jurors if their identities are known.”

In the past, courts have cited concerns of jury safety and jury tampering as reasons for delaying, or prohibiting altogether, the release of juror names.

Mark J. Prak, a partner in the law firm Brooks Pierce echoed Sproul’s sentiment. “I think the result in any case will depend upon the facts that are actually presented in support of the notion that the juror’s names and addresses should be kept secret,” Prak said. “As a general matter, these things are open and not secret.”

Prak acknowledged, however, that there may be cases in which courts have a reason not to disclose juror names, a scenario that concerns him. “Cases in which there is a bona fide systemic reason for an argument to be made that what’s traditionally been public should now be somehow kept secret are the things that start us down the path of acquiring bad habits,” Prak said.

Another issue that arises is exactly when the right to access juror names applies.

The answer, quite frequently, differs by court. For example, citing the need to root out corruption and bias in a jury, the U.S. Court of Appeals for the Third Circuit (covering Pennsylvania, New Jersey and Delaware) wrote in a 2008 case that the right attaches no later than the swearing and empanelment of the jury. In contrast, in 1987 the United States District Court for the District of Massachusetts, referencing jurors' concerns for privacy, found the right attaches seven days after the verdict has been rendered.

## **Publishing juror names**

Of course, many jurors are willing to speak with the media after the entry of a verdict.

"An amazing number of jurors are willing to talk after a decision," Al Tompkins, a senior faculty member at The Poynter Institute, said. "They want the world to understand why they made the decision they did."

When jurors are not willing to talk, however, some question whether it is appropriate for journalists to name jurors.

Because jurors do not volunteer for their roles, many journalists question whether they should be thrust into the limelight. According to Tompkins, both before and after a verdict is rendered, most newsrooms air on the side of caution when making these decisions.

"Generally, there is a policy against publishing juror names," Tompkins said. "Among journalists, there genuinely is the feeling that there is no good, compelling reason to identify these people."

An example of when a newspaper broke with tradition occurred in 2007, when the *Connecticut Post* included on its front page a graphic that listed the names (and, in some cases, the hometown and place of business) of jurors seated in a sentencing trial. The *Connecticut Post*'s decision received attention from numerous media outlets, including a [story](#) written by Tompkins for Poynter.

MariAn Gail Brown, who wrote the story accompanying the graphic, defended the *Connecticut Post*'s decision. In an interview with Poynter Online she said: "A trial is a public event . . . I believe our story upholds our obligation to inform our readers. It's more than a little disturbing the Constitutional rights some people are so willing to toss out in the name of misguided fear."

For his part, Tompkins doesn't foreclose the possibility of publishing a juror's name. "There should be room for exceptional cases . . . where you would identify a juror without their permission given extraordinary circumstances," Tompkins said. Such a scenario, according to Tompkins, could exist where a journalist learns that a juror has been bribed, possesses some sort of conflict of interest, or lied during the *voir dire* process.

Tompkins's views on the subject are shared by attorney Mark J. Prak. Speaking on whether members of the news media should publish juror names, Prak said, "Just

because one has the right to do something, doesn't mean that one should." He added, "When journalists do things gratuitously it can have its implications on the continuation of the freedom."

# Camera access, anti-SLAPP laws introduced in Congress

*Federal bills proposed to allow cameras in Supreme Court, expand right to oppose frivolous suits*

By Michael Lambert

U.S. Supreme Court Justice Stephen Breyer fielded a bevy of questions this fall during a whirlwind media tour promoting his new book, “The Court and the World.”

Among the multitude of responses given by Breyer, he appeared to soften his once-fervent stance on cameras in the U.S. Supreme Court, at least forecasting that the court would one day allow electronic access.

“My prediction: We’ll have cameras in the oral proceedings eventually.” Breyer said Sept. 28 in an interview on MSNBC’s [Morning Joe](#).

Less than two weeks after Breyer’s comment, members of Congress commenced a plan to make Breyer’s prophecy occur sooner than expected by introducing the Eyes on the Court Act, a bipartisan bill requiring cameras to be permitted in the U.S. Supreme Court and all federal appellate courts. On the morning the bill was officially introduced, lawmakers and court transparency proponents rallied on the steps of the U.S. Supreme Court in support of the bill.

Rep. Jerrold Nadler (D-NY), along with co-sponsors Rep. Gerald E. Connolly (D-VA), Rep. Mike Quigley (D-IL), and Rep. Ted Poe (R-TX), are spearheading the bill to give the public access to Courts traditionally shielded from mass viewing.

“The Supreme Court is not some mystical, druidic priesthood that periodically deigns to review constitutional issues and hand down their wisdom from on high,” Rep. Connolly said at the rally. “It is a human institution, a co-equal branch of government, and it is long overdue that the American public has better access to their highest court.”

The Eyes on the Court Act ([H.R. 3723](#)), which has been referred to the House



MSNBC

Justice Stephen Breyer mentioned on MSNBC that he thought the Supreme Court will eventually allow cameras in the court.

Committee on the Judiciary, would allow the public and press to hold the judicial branch accountable and increase public discourse of an insulated branch of government.

Currently, all recording devices are forbidden inside the U.S. Supreme Court. However, the court releases audio recordings of oral arguments at the end of each argument week, and has released audio of arguments on the same day in exceptional circumstances.

Under the Eyes on the Court Act, live video recording of proceedings would be permitted unless the court determines the recording would violate the due process rights of a party.

The Eyes on the Court Act is the most recent attempt by Congress to allow access to court proceedings. Past efforts to pass laws allowing cameras in the court have failed to garner enough attention to advance past the committee stages.

Although the U.S. Supreme Court has always barred cameras or recording devices, many federal courts and state courts currently allow broadcasting of proceedings.

“I know cameras can be placed in a courtroom without disruption because I was one of the first judges in Texas to allow cameras to film criminal cases,” Rep. Poe said at the rally. “The American people deserve an all-access pass to watch the High Court rule on the law of the land.”

All 50 state Supreme Courts allow some sort of camera accessibility. The U.S. Court of Appeals for the Second Circuit grants camera coverage in some proceedings, while the Ninth Circuit live streams its oral arguments [online](#).

A [pilot program](#) that brought cameras to 14 U.S. District Courts beginning in 2011 concluded this past July. During the program, the courts published the proceedings online for the public to view. The Judicial Conference is expected to consider recommendations from the pilot program at its March 2016 session.

Advocates of the Eyes on the Court Act believe Congress has the authority to mandate cameras in the Supreme Court just as the legislative branch regulates other aspects of the judiciary. For example, Congress sets the number of Supreme Court justices, determines the start and end dates of the court’s term, and approves the Federal Rules of Civil Procedure.

Even though some current Supreme Court Justices appeared open to allowing cameras in the Supreme Court at their confirmation hearings, all nine Justices now seem unified in their opposition to cameras, citing pandering to the cameras by attorneys and Justices, apprehension that cameras will ruin the dignified aura of the Court, and fear that the public will misunderstand the judicial process.

However, Gabe Roth, the executive director of Fix the Court, believes showing the public the court in action could highlight positive aspects of the court.

“Instead of nine individuals, often split five to four along partisan lines, unable

to agree on marriage or health care or voting rights, the public would see — the vast majority of time — an institution that takes its job seriously and carefully and creatively weighs the issues before it,” Roth said at the rally.

Momentum for court access has grown in recent years. A 2015 [C-SPAN poll](#) revealed 76 percent of respondents favor camera access in the Supreme Court — a 15-percent spike from 2009.

“The nine justices are fond of saying they don’t pay attention to public opinion, but there’s no question that each of them is cognizant of how popular the cameras issue is,” Roth said at the rally.

## **Federal anti-SLAPP bill introduced**

All states are not created equal when it comes to protecting members of the news media from frivolous lawsuits.

Because of inconsistent state laws and the absence of a unifying federal statute, the ability to defend against lawsuits brought to suppress speech can vary across the country.

For example, in 2013, billionaire Frank VanderSloot sued *Mother Jones* for defamation in Idaho after the magazine published an article critical of him and his company Melaleuca. *Mother Jones* spent years and more than \$2 million fighting the suit before Judge Darla Williamson granted *Mother Jones*’ motion for summary judgment this past October.

Because VanderSloot filed his lawsuit in Idaho, one of 22 states without an anti-SLAPP law, the suit likely survived longer than it would have in states with anti-SLAPP protections, thus causing *Mother Jones* to spend unnecessary resources contesting the suit.

If VanderSloot’s suit would have been brought in California, for example, *Mother Jones* could have taken advantage of the state’s anti-SLAPP law and filed a motion to strike to dismiss the claim within 30 days, avoiding the burden and costs of defending the suit. Additionally, if there had been a federal anti-SLAPP law, *Mother Jones* could have probably dispensed with it in a more expedited fashion.

A bipartisan bill introduced in May 2015 by Rep. Blake Farenthold — the SPEAK FREE Act of 2015 — seeks to solve this problem by giving defendants an avenue to quickly fight lawsuits attempting to silence their speech in federal court and across all states.

The SPEAK FREE Act of 2015 ([H.R. 2304](#)) allows defendants to quickly file a motion to dismiss meritless lawsuits brought to suppress speakers or cause immense legal fees, known as SLAPPs or strategic lawsuits against public participation.

The bill expands protections against SLAPPs in two ways: First, it gives defendants in the 22 states without anti-SLAPP laws the ability to remove state court SLAPP suits to federal court. Once in federal court, the defendant can file a motion



to dismiss the suit within 30 days. Second, the bill permits defendants sued under federal claims in federal courts to quickly combat SLAPP suits by filing a motion to dismiss within 45 days of service of the claim.

Once a defendant files a motion to dismiss, the court will determine if the defendant was exercising his free speech rights. If so, the court will dismiss the lawsuit unless the plaintiff can show the claims are likely to succeed.

Evan Mascagni, policy director of the Public Participation Project, an organization leading federal anti-SLAPP efforts, explained that the bill's objective is to advance First Amendment rights of those discussing public issues.

"The SPEAK FREE Act of 2015 would allow Americans to speak freely and give their opinion without fear of retaliation," Mascagni said. "It's important for individuals to be able to give their opinions and do so in a way that they won't be retaliated against with a meritless lawsuit."

Support for the SPEAK FREE Act of 2015 has grown in recent months. A coalition of 34 organizations sent a letter to members of the House of Representatives in June encouraging them to review the bill. Additionally, nearly 60 legal scholars penned a letter to members of Congress in September asking for swift advancement of the bill to protect the speech of all Americans in all courts.

Congress has considered various versions of federal anti-SLAPP legislation in the past, including the Citizen Participation Act of 2009, but none gained enough support to become law.

Hope for this term's version of the law stems from its bipartisan and broad support — the bill currently has 28 co-sponsors from both sides of the aisle. Also, the SPEAK FREE Act of 2015, modeled off the robust state anti-SLAPP laws in Texas and California, provides broader protections than previous federal anti-SLAPP bills.

Laura Prather, a partner at Haynes and Boone, LLP, and author of Texas' anti-SLAPP statute, said the challenge facing the SPEAK FREE Act of 2015 is getting the message out to constituents so they can push their legislators to support the bill.

"Most people probably don't know what a SLAPP is," Prather said. "The first step is to educate the public about what a SLAPP is and for them to realize the evil that it represents and the challenges it presents to our legal system."

Although the SPEAK FREE Act of 2015 would give journalists expansive protections nationwide, there are concerns the removal portion of the bill may clog up the federal judiciary. However, statistics from the California Judicial Council show that the number of anti-SLAPP cases is minimal in the grand scheme of civil filings. According to the California Judicial Counsel, there were 2,881 anti-SLAPP motions between 2005 and 2010, but that only constituted approximately 0.046 percent of total civil filings in California trial courts.

"This information is important because it shows that the number of cases



involving anti-SLAPP motions is very small in comparison to the overall number of civil cases, and yet, the number is significant enough to show that SLAPP suits are a problem,” Mascagni said.

The SPEAK FREE Act of 2015 comes at a time when courts have begun narrowing the application of state anti-SLAPP laws. In May, the Washington State Supreme Court struck down its anti-SLAPP law, finding that the law denied litigants the right to a trial by jury under the Washington Constitution.

In *Abbas v. Foreign Policy*, the U.S. Court of Appeals for the District of Columbia held in April that the D.C. anti-SLAPP law was preempted and did not apply in federal court.

# The delayed flight of the news drones

*The FAA missed its deadline to integrate drones, creating a setback for the U.S. in the global drone movement*

By Jennevieve Fong

The Federal Aviation Association missed its deadline for the integration of drones into the nation's airspace, leaving unresolved the issue of how and when the news media might be able to use drones in newsgathering.

Congress mandated this Sept. 30, 2015, deadline in the [FAA Modernization and Reform Act](#) of 2012.

According to NBC News, an FAA spokesperson stated final regulations for drones should be in place “late next spring.”

“We have been consistent in saying that we're going to move as quickly as possible,” the FAA spokesperson [said](#) to NBC News. “But the integration of unmanned aircraft into the nation's airspace is going to have to proceed on an incremental basis.”

Mickey Osterreicher, general counsel for the National Press Photographers Association, has been a strong advocate for the use of unmanned aircraft systems (UAS).

Osterreicher, part of a media coalition that includes the Reporters Committee, has been pushing the FAA to allow for safe and lawful use of drones for newsgathering purposes.

“The only problem now in 2015 is that the technology is expanding at an exponential rate,” Osterreicher said in a Journalism/Works [podcast](#). “Whereas, unfortunately, the law, at least in this respect, is bogged down in bureaucracy and is going along at the glacial pace.”

In [Section 332 of the FAA Modernization and Reform Act](#), the FAA was



An image from a drone shows damage from California wildfires in September.

instructed to create a comprehensive plan containing standards for operation and certification, requirements for the operators and pilots, a timeline for integration, airspace designation, the establishment of a certification process and the ensured safe operation of drones.

After the FAA missed several of their previous deadlines, a congressional committee flagged the problem in May 2014.

“It is uncertain when the FAA can integrate UAS into the Nation’s airspace and what will be required to achieve the goal,” the House of Appropriations Committee stated in a [report](#). “The Committee is concerned that the FAA may not be well positioned to manage effectively the introduction of UAS in the United States.”

The FAA has only managed to propose unfinalized [rules](#) for small unmanned aircraft systems (sUAS) weighing under 55 pounds and issue case-by-case exemptions for commercial operations.

“While it has provided some guidance, where before there was none, it still does not authorize news organizations to use sUAS themselves but rather rely on others to provide newsworthy images those individuals may have taken,” Osterreicher said.

The FAA had a public comment period on the sUAS proposed rulemaking in which over 4,500 comments were received. The agency is currently reviewing these comments before issuing final regulations.

Many businesses that want to use drones commercially are upset about this delay. A coalition of organizations, led by the Association for Unmanned Vehicle Systems International (AUVSI), sent a [letter](#) to FAA Administrator Michael Huerta expressing their frustration.

“In the absence of regulations, American businesses and innovators are left sitting on the sidelines or operating under a restrictive exemption process,” the coalition wrote.

Civil operations drones can obtain [Section 333 exemptions](#) on a case-by-case



USFS Photo

The U.S. Forest Service released a poster this past summer warning people not to fly drones near wildfires.

basis, but the process is difficult and slow.

“Even though the FAA has done its best to streamline and expedite the application and approval process for Section 333 exemptions, many organizations believe it is still too slow and limiting to business growth,” Osterreicher said.

There has been a sharp increase in the amount of certified drones recently: The FAA issued 1,407 exemptions as of last month for businesses in a variety of industries including aerial photography, film and television, construction and real estate.

“The increasing number of businesses applying for Section 333 exemptions demonstrates the pent-up demand for commercial UAS operations and the immediate need for a regulatory framework,” the coalition wrote.

With a pressing demand and unfinalized regulations from the FAA, some state governments have passed legislation to fill the void.

According to the AUVSI, California, Texas, and Florida have the highest population of drone operators.

California enacted [legislation](#) prohibiting public agencies from using drones, with an exception for law enforcement agencies with proper warrants. Recently, Gov. Jerry Brown vetoed numerous drone-restricting bills that outlawed flying drones over wildfires, schools, and prisons.

Earlier this month, Gov. Brown vetoed another bill that restricted flying drones lower than 350 feet over private property. He stated in his [veto message](#) this bill “could expose the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation and new causes of action.”

Texas and Florida passed drone legislation in 2013. Texas passed the [Texas Privacy Act](#), which provided guidelines and penalties for images captured by drones. Florida enacted drone [legislation](#) stating law enforcement agencies cannot gather or use evidence obtained from a drone.

“Unfortunately, those states have imposed laws that are specifically targeted at drone technology,” Osterreicher said. “Many news groups believe that already existing privacy laws are sufficient to address these issues and further that some of them may be constitutionally suspect and subject to successful challenge if enforced.”

Osterreicher said companies in other countries have an advantage in drone development because many American companies that would like to use drones are afraid of getting fined or being found liable for unauthorized operations.

“This country can ill afford to let [this] business go elsewhere just because we can’t get around to coming up with some commonsense, not overly burdensome regulations,” Osterreicher said in the [podcast](#).

*A version of this article appeared on our website on October 16, 2015.*

# Turning on body-worn cameras

*Police discover the obvious: bodycams only work when they're turned on*

By Soo Rin Kim

With strong financial support from the federal government, police body-worn cameras are quickly becoming an essential tool for police accountability across the country. Debates about who should get access to bodycam recordings and when are raging across the country, but what if recordings of the most critical moments don't even exist in the first place?



San Diego Police Chief Shelley Zimmerman.

Two recent incidents in San Diego prove an obvious rule — bodycams are only worthwhile when they are turned on.

When a 27-year veteran police officer was confronted with a knife-wielding suspect, he says he did not have time to hit the record button on his camera. Thus, the San Diego Police Department doesn't have bodycam footage of one of the most controversial moments of officer-involved shootings in recent months.

On April 30, Fridoon Rawshan Nehad, 42, was reported to have threatened an adult bookstore employee with a knife and “continued to advance” on Officer Neal N. Browder when he arrived at the scene. When Nehad did not comply with the officer's verbal command, he was shot and killed.

But further investigation revealed that he was actually holding a pen, not a knife.

“The guy was walking, just normal, lazical (sic), lazy walking,” a witness told a reporter for the NBC affiliate. “If he (the officer) said ‘stop’, that's all he said. He just opened the door, and said ‘stop’ and shot.”

Nehad's family told the media he had been suffering PTSD and mental illness from his time in the Afghanistan army.

Without any bodycam footage, the incident lacks its key evidence for investigation to determine if the officer really was facing an imminent danger. His family filed a \$20 million [lawsuit](#) against the city and the officer for use of excessive and unreasonable deadly force.



A week after the incident, the SDPD announced a [revision](#) to its bodycam policies on when to turn on the cameras. Police Chief Shelley Zimmerman told reporters that officers now have to turn the camera on when they get the radio call or before they arrive at the scene, not right before they make actual contact.

But the latest publicly available bodycam policy, dated July 8, 2015, show no actual wording had changed regarding when to start recording. The policy simply states that body-worn cameras “should be activated prior to actual contact with the citizen, or as soon as safely possible.”

More recently, on Oct. 20, 2015, another man was fatally shot by San Diego officers. Officer Scott Thompson and Officer Gregory Lindstrom were on traffic patrol when they spotted Lamontez Ardelbert Jones disrupting traffic. When the officers attempted to contact the suspect, he turned around and pulled what appeared to be a large caliber handgun and pointed it at the officers.

The police department [stated](#) the officers opened fire only after the suspect didn’t comply with the officers’ verbal commands to drop the weapon. Officers fired again when the suspect raised his weapon and pointed it at the officers after falling to the ground.

But investigators later revealed that what seemed like a gun was actually merely a replica.

Again, both of the officers apparently failed to turn on their body-worn cameras, making it difficult to figure out what exactly happened at the scene.

But SDPD Police Chief Shelley Zimmerman [defended](#) the officers, saying events transpired so quickly that they were not able to hit the record button.

“When our officers are facing the barrel of a handgun or some other life-threatening situation, we expect their first consideration is protecting themselves and our citizens,” Zimmerman told NBC San Diego.

In light of the recent SDPD officer-involved shootings, more than 100 community members [gathered](#) at the Jeremy Henwood Memorial Park, on Oct. 22, to protest against police violence.

Catherine Mendonça, a spokesperson for rally organizer United Against Police Terror, said without transparency and accountability the body-worn camera program is of no use. She said she is especially alarmed the officers didn’t record the incident even after the revision in the department policies.

“The magic words of ‘officer safety’ give them too much room to wiggle,” Mendonca said. ☹️ “All we’re asking is to just touch their chest.”

It’s been more than a year since the San Diego Police Department rolled out body cameras on June 30, 2014, after pilot program earlier that year. As of September 2015, 871 officers have been outfitted with the cameras, and the police department plans to increase the number to 1,000 by the end of this year.

Zimmerman [said](#) the police department is constantly revising body-worn camera



policies and that officers are still trying to get used to activating cameras. Currently, because the department storage does not allow continuous recording of body cameras, officers must manually activate a button to record video when in need.

She also said the SDPD is looking to see if there is any technology that allows automatic activation of a camera when a service weapon is drawn.

“Time is needed to train officers to turn on the camera and develop muscle memory,” Kellen Russoniello, staff attorney with the ACLU of San Diego & Imperial Counties, said in a [statement](#). “But SDPD should intervene when officers fail to follow policy and discipline officers for repeated or blatant violations of the policy.”

None of the officers involved in both the Rawshan and Jones incidents have faced any consequences for failing to turn the cameras on.

In August, a [Tuscaloosa, Ala., officer](#) failed to turn on the camera he was wearing when he fatally shot a mentally ill man who was wielding what turned out to be a spoon. The officer confronted Jeffory Tevis, after getting a call that he had engaged in self destructive behavior and had threatened a neighbor. When Tevis charged at the officer from a distance, the officer fired twice, killing Tevis.

Tuscaloosa Police Department policy on body camera states that officers should have the cameras on at “any time there’s going to be enforcement action taken.”

In Oklahoma, a body-worn camera [recording](#) of a Henryetta police officer chasing down and detaining a robbery suspect spread quickly around the Internet, leading to allegations of police brutality.

What drew most attention from the public comes in a minute into the video when an officer apparently whispers “turn it off,” to the officer wearing a bodycam. Instead of turning the camera off, the officer turns away from the scene.

Henryetta Police Chief Steve Norman [told](#) KJRH he was at the scene and the officers simply went through the standard procedure.

In Vermont, Vermont Public Radio [reported](#) that two Burlington police officers who failed to record a incident involving gun fire in August have been freed of any criminal charges.

Burlington Police Department requires the entire department to be outfitted with bodycams. But the officers turned their cameras off right before confronting James Hemingway, who was drunk and threatening to shoot them.

Chittenden County State’s Attorney T.J. Donovan said in a statement that the officers turned the camera off to stop the red lights and beeping sound that come out during recording mode to approach Hemingway discreetly.

But VPR reported that the [users’ manual](#) for the Taser AXON body camera details how to mute the sound and turn the light off.

VPR’s phone conversation with Burlington Deputy Police Chief Bruce Bovat indicated that he did not know about the functions. The Police Chief Brandon del

Pozo admitted that officers' lack of familiarity with the equipment shows a need for additional training and policy changes.

“Apparently we have a lot of work to do to make sure we have a policy that captures the type of footage we need to capture, especially during a firearms discharge,” the police chief told VPR.

At a recent [public hearing](#) on new Washington, D.C., police body-worn camera policies, open government advocates and domestic violence victim advocates unanimously voiced concern that body-worn camera itself is not going to be the solution for better relationship between the police and the community.

Adam Marshall, a legal fellow with the Reporters Committee criticized the D.C. government's secretive attitudes toward building the policies and called for open discussions from various sectors in the community.

*The Reporters Committee is [tracking bodycam policies nationwide](#), particularly with regard to public access to the footage.*

# A dancing baby redefines DMCA orders

*An appellate court's decision to require fair use considerations before ordering copyright takedowns may help and hurt journalists*

By Jennevieve Fong

The recent decision by the U.S. Court of Appeals (9th Cir.) to require copyright owners to consider "fair uses" of their work before requesting takedowns may be a double-edged sword for journalists and bloggers who work with online content.

In the eight-year-long case of [Lenz v. Universal Music Corp.](#), Universal filed a takedown notice under the Digital Millennium Copyright Act of 200 YouTube videos, including Lenz's 29-second long home video of her two sons dancing to Prince's hit song, "Let's Go Crazy." Universal [stated](#) they had "good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law."

Under representation of the Electric Frontier Foundation, Stephanie Lenz filed a [lawsuit](#) in 2007 against Universal, musical artist Prince's copyright administrator had knowingly "misrepresenting Lenz's '[Let's Go Crazy #1](#)' posting as infringing."

"[The recent] ruling sends a strong message that copyright law does not authorize thoughtless censorship of lawful speech," EFF Legal Director Corynne McSherry stated in a [press release](#). "We're pleased that the court recognized that ignoring fair use rights makes content holders liable for damages."

Journalists were always able to incorporate copyrighted work in their publications under "fair use," but this ruling secures journalists' rights to use copyrighted content without the threat of copyright holders abusing their abilities to



image from Youtube video

A video that featured a baby dancing to a Prince song led to a decision that copyright holders must consider whether an infringement is a "fair use."

take down their work.

Kathleen Lu, an associate from Fenwick and West LLP who has written on this topic, said journalists are often targeted with fraudulent takedown notices in order to censor any negative press. This is “a clear abuse of copyright law and the DMCA notice and takedown system.”

Under [Copyright Law § 107](#), the use of copyrighted works for “criticism, comment, news reporting, teaching..., scholarship, or research is not an infringement of copyright.”

“Fair use is protected by federal law,” Paul Fletcher, President of the Society of Professional Journalists, said. “Congress in 1976 laid out the requirements that have been used to protect journalists, whether online, print or broadcast, from any copyright claims.”

Fletcher said journalists who stay within traditional and very broad outlines for using others’ material should be fine.

“Since reporters engage in fair use all the time, I think it’s a very important case for them,” McSherry said. This is “very important for reporters because if Universal Music Group’s version of the world had won today, then it would’ve be possible for copyright owners to send takedown notices for even stories or reviews ... that were engaging in very fair uses like quoting texts in a review.”

However, this ruling makes it harder for journalists to protect their own copyrighted work. It creates another hurdle for writers or artists to remove unauthorized versions of their content.

Under [Copyright Law § 107](#), copyright holders must use judgement on the following factors to measure fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

Lu said journalists can validate their deliberation of fair use by noting what factors are considered before sending a takedown notice. These relevant factors may include if new use by a competitor selling the piece, if the piece was editorial or factual and if a short quote or whole article is used.

“Thus, like all copyright holders, journalists should avoid knowing material misrepresentations when sending any takedown notices,” Lu said. “In other words, senders of takedown notices should not behave irresponsibly or maliciously.”

If the copyright holder cannot show their legal determination of “fair use,” they may be liable for damages. Universal will face trial to demonstrate their consideration of “fair use” and decide if they are liable to pay Lenz.