

The cover features a photograph of Attorney General Eric Holder in a dark suit, looking back over his shoulder. The background consists of blue curtains with a white eagle emblem. A red banner at the top left contains the title and publisher information. The main title is in a large, white, serif font. The subtitle is in a smaller, white, serif font. The main headline is in a large, white, serif font. The sub-headline is in a smaller, white, italicized serif font. The name of the subject is in a small, white, sans-serif font at the bottom right.

# The News Media AND THE LAW

PUBLISHED BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

SPRING 2013

## Is Justice turning its back on journalists?

*Subpoenas,  
search warrants  
for reporters' records  
raise alarms*

Attorney General Eric Holder

# The News Media & The Law

## Spring 2013

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## AP subpoena, Fox News search warrant demonstrate need for a federal shield law

Attorney General Eric Holder has been working overtime lately to deal with the firestorm created by two run-ins between the Department of Justice and journalists.

The department's own disclosure that it had subpoenaed the telephone records of the Associated Press and the subsequent news that federal investigators in 2010 had obtained a search warrant to read the email of a Fox News reporter were both stunning developments. The scope of these actions were literally unprecedented, whether measured by the number of AP phone lines involved (20) and the span of time (2 months), or by the fact that a reporter was branded a criminal so Justice could sift through his email account.

Since then, Holder has been meeting with journalists in small groups to discuss the issue, and he owes President Obama a report on the incidents by mid-July. Hopefully, these meetings will lead to a reworking of the Attorney General's guidelines (28 C.F.R. § 50.10) that lay out rules for interacting with the news media in a federal investigation. But that's just a start.

What the incidents have laid bare is that regardless of what those regulations say, ultimately the interpretation and implementation of the rules cannot remain in the hands of those who are seeking the evidence in the first place. Currently, the application of the rules begins and ends with federal investigators. And their interpretation is suspect; they have read narrow language broadly to apply an exception to the notice requirement, and they have branded a reporter an "aider and abettor and/or co-conspirator" of a crime under the Espionage Act to get around a federal law that protects the news media from search warrants. Holder has tried to ease this news by saying that the department won't actually prosecute a journalist under this theory, but that just shows the weakness of their judgment – say something's a crime to get around a protective law, but don't really treat it as a crime itself.

As we wrote in a letter to Holder joined by 51 other media organizations, "the scope of this action calls into question the very integrity of Department of Justice policies toward the press and its ability to balance, on its own, its police powers against the First Amendment rights of the news media and the public's interest in reporting on all manner of government conduct, including matters touching on national security which lie at the heart of this case."

So any real solution to this problem must come from those who make the laws that Justice has to follow – Congress. We need a federal shield law that requires

prosecutors and investigators to convince a judge that there is a compelling justification for the information, that any reasonable alternatives have been tried first, and that notice has been given to the media so that their First Amendment interests can be defended.

Such a law would not be ideal by any means – a “qualified” privilege will never give the type of protection that we believe journalists deserve under the First Amendment. But it will at least let us avoid a situation like we’ve seen in these two episodes, where the government writes its own regulations and then avoids them by finding exceptions. Judges are not perfect in defending the First Amendment interest that let journalists inform the public about what its government is up to. But they are certainly better than leaving the determinations to prosecutors.



## Journalism advocates calling for federal legislation in wake of phone records, email seizures

By Jack Komperda

AP Photo/CBS by Chris Usher

Gary Pruitt, the President and CEO of the Associated Press, discusses the leak investigation that led to his reporters' phone records being subpoenaed by the Justice Department on CBS's "Face the Nation" in May.

Years after the Wikileaks scandal killed a federal reporter's shield law bill wending its way through Congress, a recent Justice Department maneuver to obtain journalist records is reigniting hope that a federal reporter's privilege could become reality.

And some media organizations believe the U.S. Department of Justice's bold move to subpoena two months' worth of telephone records of reporters and editors at the Associated Press could lead to the passage of not only a federal reporter shield law but also federal anti-SLAPP legislation.

"Both issues clearly arise from the need in having a vibrant democracy," said Marc Goldowitz, director of the California Anti-SLAPP Project, a law firm and policy organization that is among several groups pushing for federal legislation known as "anti-SLAPP" laws. Short for "strategic lawsuits against public participation," such measures provide mechanisms for courts to quickly dispose of meritless suits filed in order to silence critics asserting their speech rights.

"Coupling the two issues is the most natural thing to do," Goldowitz said of pushing for both a federal reporter shield law and anti-SLAPP legislation. "I really do think there is a good possibility that in this session Congress can enact and the President could sign a bill to enact a federal shield law. And it can be done together with an anti-SLAPP law."

Three lawmakers announced in May plans to revive legislation establishing a federal reporter shield law.

Obama Administration officials asked Sen. Charles Schumer (D-N.Y.) to reintroduce the *Free Flow of Information Act*, a previously stalled measure designed to protect reporters from punishment for refusing to identify confidential sources.

Schumer introduced a similar bill in 2009, but it stalled in the Senate amid the



controversy over WikiLeaks, a website that disclosed thousands of secret government documents related to the war on terror. Schumer reintroduced the version of the Senate bill that was approved by the Judiciary Committee that year.

Rep. John Conyers, Jr. (D-Mich.), the ranking Democrat on the House Judiciary Committee, also announced plans to reintroduce a version of the reporter shield law that passed the House in 2009. And Rep. Ted Poe (R-Texas) introduced his own variant of the *Free Flow of Information Act* that would place limits on the ability of government officials to compel members of the media to disclose information.

“I think the public is a little bit more nervous this time around the power of government to surveil its citizens,” said Peter Scheer, executive director of the First Amendment Coalition. “We’re all a little more sensitive now to how much companies like Google and Apple know about us in terms of where we are throughout the day, and we know that the government has access to a great deal of that information. That concern maybe has shifted the center of gravity on these issues.”

## **The long effort to enact a reporter shield law**

Efforts to enact a federal shield law date back to 2007, when the House of Representatives passed a version of the bill in a bipartisan vote. A Senate version of the shield law bill was passed by the Judiciary Committee in 2009, but the legislation was never brought to the Senate floor.

Efforts to pass the law effectively died after *Wikileaks’* publication of 75,000 Afghanistan war documents, despite efforts by Schumer and Sen. Dianne Feinstein (D-Calif.) in drafting an amendment to exclude such websites from the pending legislation.

For now, 40 states, along with the District of Columbia, have enacted state reporter shield laws providing a variety of protection. In April, Hawaii legislators were unable to agree on legislation to extend the state’s temporary shield law, which is set to expire at the end of June.

But supporters are hopeful that Congress can come together this time around to enact a federal shield law.

The House and Senate versions of the 2009 bills reintroduced by Rep. Conyers and Sen. Schumer are different and rife with exceptions. Although both provide a qualified privilege to reporters and both would apply in both criminal and civil contexts, the two proposals vary greatly on what information would fall under its purview and who could call on the shield for protections.

When it comes to confidential sources, the House version provides near absolute protection, with exceptions only for breaches of national security, potential imminent death or significant bodily harm, and release of trade secrets. The protection for all work product, both confidential and non-confidential, is subject to a qualified balancing test. A court can compel the production of the material if it’s



found to be critical to a criminal investigation or successful to the completion of a civil case.

By contrast, the reintroduced Senate bill specifically states that non-confidential work product is not protected. And in regards to confidential sources, the protection is qualified, with exceptions for criminal or tortuous conduct, the prevention of death, kidnapping or substantial bodily injury, and national security.

Supporters of a federal shield law say the legislation would provide, at the very least, a more transparent process to any compelled disclosure of such information than the secret Department of Justice subpoenas issued to retrieve the Associated Press phone records.

Under the Justice Department's internal guidelines, attorneys are required to follow a specific procedure when issuing subpoenas to members of the news media. Department personnel is directed to take all reasonable efforts to obtain information from alternative means of investigation before considering issuing a subpoena to the media. The department is also required, under the guidelines, to negotiate with media organizations in advance of issuing the subpoenas unless doing so would pose a substantial threat to the integrity of the investigation.

In criminal cases, there should be reasonable grounds under the department guidelines to believe a federal crime has occurred and the information sought is essential to the investigation. And the subpoena must be narrowly drawn and directed at the relevant information regarding a limited subject matter and covering a reasonably limited time period.

“The AP case really shows that the Department of Justice voluntary guidelines really don't work,” said Paul Boyle, the senior vice president of public policy at the Newspaper Association of America, which has lobbied heavily in favor of a federal shield law. “This case was a fishing expedition to discourage leaking, and it has the impact to chill communication between government and the press. And it's the public that ends up suffering.”

### **Federal anti-SLAPP efforts**

Just as with the reporter's privilege, a patchwork of state laws provide varying degrees of protection allowing targets of meritless libel suits to quickly dispose of cases. Twenty-eight states and the District of Columbia have enacted such laws, but the scope of the protected activity varies widely from state to state. Generally, the laws give SLAPP defendants the ability to ask the court to dismiss claims infringing on petition or free-speech rights.

In December 2009, Rep. Steve Cohen (D-Tenn.), introduced The Citizen Participation Act of 2009. Under the proposed law, individuals engaging in petition activity — defined as statements made before or submitted to a legislative, executive or judicial proceeding or activity encouraging others to make or submit such statements - without knowledge of or reckless disregard for the falsity of any

statements they make - are immune from liability.

Moreover, the act protects statements made in a place open to the public or a public forum in connection with an issue of public interest. Such statements include any information or opinions related to health or safety, environmental, economic or community well-being, the government, a public figure or a good, product or service in the marketplace.

Under the federal anti-SLAPP bill, a defendant who is sued in state court and who believes he is immune from liability under the measure or entitled to its protections may remove the case from state court to the federal trial court in that area.

This removal provision is especially important in light of several recent cases which call into question whether state anti-SLAPP laws can be applied in federal court cases.

In April, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit argued in a concurring opinion filed in *Makaeff v. Trump University* that the appeals court made a “big mistake” by ruling 14 years ago that California’s state anti-SLAPP law should apply to cases in federal court. He urged the entire Ninth Circuit to reconsider the issue and confine the anti-SLAPP law to litigation in state court.

“Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations,” Kozinski said of the appeals court’s 1999 decision in *Newsham v. Lockheed Missiles and Space Co.*, in which the court held that sections of California’s anti-SLAPP statute do not conflict directly with the Federal Rules of Civil Procedure and thus are applicable in federal diversity actions.

Kozinski said in his concurring opinion that while the Ninth Circuit is bound by its decision in *Newsham*, “if this or another case were taken en banc, we could take a fresh look at the question. I believe we should.”

Judge Rosemary Collyer for the U.S. District Court in Washington, D.C., however, found no problem in applying the D.C. Anti-SLAPP Act in a defamation suit concerning a blog item written by *Esquire Magazine* which made satirical comments about a book questioning whether President Barack Obama was a natural-born citizen.

A May 2011 post on *Esquire*’s politics blog contained fictional statements by publisher Joseph Farah that he would destroy the first-run print of Jerome Corsi’s book, “Where’s the Birth Certificate? The Case that Barack Obama is not Eligible to be President”, pull copies from bookstore shelves and refund the purchase price to customers after the release of Obama’s long-form birth certificate.

Judge Collyer held that because “[i]t was certainly the intent of the D.C. Council

and the effect of the law — dismissal on the merits — to have substantive consequences,” the statute applied in federal court.

The case has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit, the same court which is hearing the appeal of *Sherrod v. Breitbart*.

In 2011, former federal agricultural official Shirley Sherrod filed a defamation suit against now-deceased conservative blogger Andrew Breitbart. Lawyers for Breitbart filed a motion to dismiss the suit under the D.C. Anti-SLAPP Act, which a federal judge denied. The judge, in rejecting the application of the D.C. Anti-SLAPP Act, noted that the law did not take effect until one month after Sherrod filed the defamation suit against Breitbart.

Breitbart appealed the district court ruling to the U.S. Court of Appeals for the D.C. Circuit. In March 2013, the appeals court heard oral arguments on whether the D.C. law can be applied in federal court.

Proponents of a federal anti-SLAPP law point to such discrepancies in the lower courts as a reason why legislation is needed.

“If federal anti-SLAPP legislation were enacted, there would be no confusion about whether or not a state anti-SLAPP law is procedural or substantive,” said Evan Mascagni of the Public Participation Project, a Berkeley, Calif.-based lobbying group pushing for a federal anti-SLAPP law. “And, thus, whether or not it should apply in federal court.”

## Bloggers fight for status as journalists

*With buzz about a federal shield law, bloggers want protection, too*

By Nicole Lozare

KC Johnson

When a sheriff's deputy walked up to Robert David "KC" Johnson's home in Maine, the history professor and blogger knew it was "not a good thing."

The deputy served Johnson, who wrote a blog and co-authored a book about the 2006 Duke University lacrosse rape scandal, his first subpoena. Duke lawyers wanted *all* correspondence that the blogger had with anyone affiliated with the school and the lacrosse case.

"The subpoena would have covered hundreds of sources for the blog. Somewhere between 85 and 90 percent of posts were covered," Johnson said. "Essentially, what they wanted were my sources for more than 1,000 posts for over 4.5 years."

Johnson — panicked and frightened — asked his journalist friends what they do when they get a subpoena.

Their responses were the same. Never received one, but see in-house counsel immediately.

"I didn't have 'in-house counsel' to turn to," he said. "And I'm not independently wealthy."

AP Photo by Gerry Broome

Reporters shout questions at Durham County District Attorney Mike Nifong, right, after a community forum to discuss the rape allegations against the Duke lacrosse team at North Carolina Central University in Durham, N.C.

Bloggers like Johnson, Tina Renna and Crystal Cox and a growing number of their fellow non-traditional journalists share a similar story.

All believed they were operating as journalists when they conducted interviews,



examined records, and wrote stories for their online readers.

When these bloggers received subpoenas — and minus any access to in-house counsel — they immediately researched their situation and found that, thankfully, all had shield laws in their respective states: Maine, New Jersey, Virginia and Oregon.

The shield law, which varies in the 39 states and the District of Columbia that have a version of it, protects journalists from subpoenas forcing them to testify, hand over their notebooks or identify their confidential sources.

But these bloggers quickly learned that they didn't automatically qualify for the shield law. More often than not, the bloggers found themselves spending hours in court proving their journalist status.

And each day, thousands of new blogs — some with journalistic intentions — are born in an era when the federal government is trying to keep a tighter leash on journalists and leaks.

With a stronger call for a federal shield law after the U.S. Department of Justice announced it secretly subpoenaed and acquired the Associated Press' phone records, some bloggers want to make sure that they, too, can stand under the umbrella of protection afforded more traditional journalists.

## **A win for bloggers**

The latest case involves New Jersey watchdog and blogger Tina Renna who was subpoenaed by a Union County prosecutor to give up her confidential source in a story wherein she accused 16 local officials of misusing county generators in the aftermath of Hurricane Sandy.

In April, Union Superior Court Judge Karen Cassidy ruled that Renna was indeed a journalist and qualified under New Jersey's shield law.

Renna passed a three-part test that determines whether someone qualifies as a journalist and should receive protection under the shield law, according to the judge.

Cassidy considered the three factors: whether Renna had a connection to news media, whether her purpose was to gather or disseminate news, and whether she obtained her information through "professional newsgathering activities."

"These original posts are arguably newsworthy and constitute 'news' under the Statute," Cassidy wrote in her opinion. "In addition, her method of talking to sources, attending freeholder meetings, and using Open Public Records Act requests . . . is sufficiently similar to the methods used by traditional news media entities."





In an interview, Renna said she fought the subpoena not just for herself but to set a precedent on behalf of other bloggers.

“Us citizen journalists out here, we’re just trying to shine a light on government and trying to do the best we can. Doesn’t mean we should not be protected,” she said. “We’re doing the same job.”

## **Guilty in the act of committing journalism**

The question, said blogger Waldo Jaquith of Virginia, is not whether someone is a journalist.

“It’s irrelevant,” he said. “The bigger question is: was someone committing an act of journalism at that time?”

In January 2009, the Charlottesville resident was subpoenaed for the identifying information of everyone who posted comments to a blog post he wrote about a defamation suit brought on by a chicken farmer against the local newspaper. The broad subpoena also sought the IP addresses for *every viewer of the post*, the names and/or IP addresses for everyone who commented on the article, the time and date of every comment and all computer logs generated in connection with the article. It also asked for all e-mail and other written communications Jaquith received having anything to do with the chicken farmer, the lawsuit or the article.

Jaquith believed he was acting as a journalist at that time and spent many hours researching how to prove it in court. Eventually the chicken farmer settled the defamation suit and Jaquith’s subpoena was withdrawn.

Not much has changed since then.

In a more recent case, a trial court jury ruled against blogger Crystal Cox, who was sued for libel by Obsidian Finance Group and the company’s senior principal, Kevin Padrick, in response to writings Cox had posted to her blog, *obsidianfinancesucks.com*. The trial court jury ruled in favor of Padrick and Obsidian and returned a \$2.5 million verdict in their favor. Cox moved for a new trial, which was denied. Her case is on appeal.

In a friend-of-the-court brief, the Reporters Committee asked the U.S. Court of Appeals (9th Cir.) to review how trial courts evaluate who is a member of the news media for purposes of libel law, which in some states leads to a requirement of a higher standard of proof, which benefits journalists.

“In addressing the question of who qualifies as a member of the news media, the lower court adopted several restrictive criteria that do not take into account the fast-evolving nature of the journalism profession and that severely limited the class of individuals who can take advantage of the increased First Amendment protections that limit the law of defamation,” the Reporters Committee brief argued. “The determination of whether a particular person qualifies for such protections cannot be based on what a journalist’s job traditionally has been; rather, any test must be closely matched to the constitutionally protected function journalists perform.”

Cox considers herself a journalist, but prefers the term “investigative blogger.”

“I was acting as a journalist so I should be protected under the same laws as journalists are protected,” she said in an interview.

“I am getting a story. I am reading documents. Tips are coming to me. I am interviewing people. I am reading depositions,” she said. “That’s what I would expect from a good journalist.”

Jaquith said in an interview this spring that the distinction between bloggers and journalists “looks increasingly foolish with the passage of time.”

“There are perfectly respectable, well-known, credentialed reporters who write for blogs,” he said. “I mean, so much of *The Washington Post* now is by blogs.”

Is it the medium of publishing that defines someone as a blogger and not a journalist?

If so, then there’s the case of FoxNews.com reporter Jana Winter, who was subpoenaed in the trial of James Holmes, the accused shooter in the Colorado movie theater massacre in July 2012.

The defense wanted to know the identity of her confidential source in her exclusive story about Holmes’ notebook, which contained disturbing images and details of the mass murder.

Winter’s plight gained a lot of momentum the days leading up to her scheduled day in court. At the last minute, a new judge deferred ruling on the issue as he had not yet decided if the notebook would be admissible at trial.

Even though Winter writes exclusively for the Fox website, the question was never “is she a journalist?”

The question was whether the shield law in New York — where she lived and worked — applied or if it was Colorado — where Holmes trial was held.

A New York trial court decided that Colorado state court would be the best venue to determine whether Winter could assert a privilege and did not consider New York’s strong reporter’s privilege law in issuing the out-of-state subpoena. Her lawyers are now appealing the decision in New York, claiming that the court failed to consider in its decision the state’s strong public policy protecting New York journalists against compelled disclosure of information.

## **Intimidating bloggers**

Bloggers often operate independently. And as such, they may likely be more intimidated by a subpoena compared to Winter who is backed by a news corporation.

Johnson believed that when Duke University lawyers subpoenaed him for the correspondence, it was “retaliatory” in nature.

“Duke was never able to give a reason as to why stuff from me and a deposition would be helpful for their case,” said Johnson.

Johnson founded a blog and co-authored a book about the fallout from the

spring 2006 off-campus house party where a stripper accused several lacrosse players of rape. All charges against the players were eventually dropped due to inconsistencies in the stripper's story. In February, Duke settled a lawsuit filed by 38 former lacrosse players, but a separate suit is still pending.

Johnson wrote regularly about the case and even traveled to Durham on his "own dime" to cover court hearings.

"When people think of bloggers, they just think of someone in front of a computer," he said. "I was definitely engaging in newsgathering activity."

Last July, the university subpoenaed Johnson for all correspondence he had with anyone affiliated with Duke and the lacrosse case, including administrators, players and alumni. Johnson filed a motion to quash the subpoenas, but a U.S. magistrate only narrowed the subpoenas, allowing the university to demand exchanges between Johnson and the 2006 team members and their attorneys.

The Reporters Committee filed a friend-of-the-court brief with several Maine news organizations seeking a reaffirmation of a journalist's right to protect his confidential sources.

"The magistrate's narrow interpretation of the law and the decision to uphold the subpoena misapplied the precedent for the reporters' privilege in the First Circuit," said Gregg P. Leslie, Reporters Committee legal defense director. "Beyond the importance of ensuring that journalists are free to work independently of the judicial process, upholding these subpoenas would have a very real chilling effect on reporting about important controversies."

In March, Duke lawyers dropped the subpoenas before U.S. District Judge D. Brock Hornby could rule on whether a lower court's decision to enforce the subpoenas should be overturned in Maine, where the Johnson lives. A lawsuit against the university stemming from the lacrosse case was also settled two days prior, making a portion of the subpoenas moot.

"I was in a very exposed position in that I had done a lot of reporting and had a lot of exchanges with sources that had given me information in confidence," Johnson said in an interview right after the subpoena was dropped. "They would have never given me information without my assurance, and yet when I got the subpoena I was totally exposed because I had no institutional backing."

## **What bloggers can do**

New Jersey media law attorney Jeffrey Pollock thinks bloggers shouldn't wait for a federal shield law. Instead, Pollock - from a lawyer's point of view - suggests bloggers act proactively.

"Enunciate on your blog 'I am an investigative reporter'," he said. "If that's where you want to go, call yourself a reporter and say that you intend to share news."

Pollock also suggests for bloggers to write at the top of their notes "Privileged

and confidential. Protected by the journalist privilege.”

While he isn't optimistic about a federal shield law, he does believe that bloggers must be given protection.

When asked if the term “blogger” should be included if legislators wrote a federal shield law, Pollock disagreed.

“Well, who knows what next big form it will take?” he said. “Could be (reporting) on YouTube or Twittering.”

## Drone journalism begins slow take off

### *Ethical, legal issues abound as drones contemplated for newsgathering*

By Lilly Chapa

AP Photo by Britta Pedersen

Drones can be used to do many things. In this instance, this remote controlled helicopter in Berlin is supposed to apply artificial DNA to cables of a telecommunications company in order to prevent thefts of copper.

The word “drone” conjures up visions of huge military aircraft dropping bombs overseas, or of tiny machines flitting through buildings, spying on the occupants inside.

Imagining a time when more than 30,000 of these unmanned vehicles will fill U.S. skies sounds like a scene from a science fiction novel but will soon be reality.

And using drones for journalism might sound even more far-fetched, but it’s already happening.

In February, the Obama Administration passed a law requiring the Federal Aviation Administration (FAA) to prepare the skies - and the courts - for commercial drones by 2015, and journalists already are working to integrate drone use into everyday reporting.

The University of Nebraska-Lincoln and the University of Missouri have integrated drone research into their journalism programs. A small but growing number of journalists are joining the Professional Society of Drone Journalists, which has established an ethics code emphasizing the importance of “newsworthiness, safety and sanctity” of public spaces in drone reporting.

Drone journalism advocates are already facing legal, ethical and societal roadblocks. Four states have passed laws restricting drone use, and 39 more are considering similar legislation.

Some proposed legislation — such as a bill in Missouri — specifically addresses journalists, barring them from flying unmanned aerial vehicles (UAVs) over areas without permission from landowners. Drone supporters such as Matthew





Waite, the director of the Nebraska drone journalism program, are concerned that this kind of legislation raises First Amendment questions.

While Waite said there are some valid privacy concerns, the legislation could gravely impact drone journalism. He said restrictions on when, where and how drones are used could even cross over into traditional journalism by limiting reporters' and photographers' access to privately owned areas.

"In 15 years, the things UAVs will be used for will be boring," Waite said. "We'll have four or five of them sitting on the roof of the local news organization. A scanner call will go out for a bad accident and instead of sending a reporter to drive out and see if it's anything they'll just fly over it, snap a picture and make a decision."

## Paving the way

Waite first stumbled across drones when he attended a digital mapping conference in the summer of 2011. He walked past a display that showed a four-foot-wide airplane with a camera zig-zagging across a field, taking thousands of pictures in an area an operator hundreds of feet below had programmed. The operator took a memory stick from the aircraft, plugged it into the computer and within minutes produced a high-resolution image of the area.

Immediately, Waite had what he called "a thunderclap moment."

"I thought, well, there's every hurricane I've ever covered, every tornado I've ever covered, every flood, every wildfire, every disaster — we could have that (photo) out and within a matter of hours we could really improve the perspective and understanding of a natural disaster," said Waite, who formerly worked for the *St. Petersburg Times*, now the *Tampa Bay Times*, and PolitiFact.

Waite said he ran up to the salesman at the booth and handed him his wallet. The salesman laughed, handed his wallet back to him informed him that those drones ran about \$65,000 each and were illegal in the United States.

Waite returned to The University of Nebraska-Lincoln and began researching drone use in the United States. "I wasn't ready to let my dream die yet," he said.

He learned that it is illegal to use drones for commercial purposes — including journalism — but flying them as a hobby was acceptable. When he learned that the FAA would allow the operation of commercial drones by 2015, Waite approached the dean about drone journalism.

"I said, 'hey, I think this is going to be a thing one day, and we ought to start talking about it,'" Waite said. "Not only are there technical and regulatory issues that journalists have never dealt with before on this scale, but new ethical and legal questions. This gap in time between now and when it's legal is an opportunity for us to discuss those things before we have to go out and do it for real."

In November 2011, the university started its drone journalism lab to "pave the way for the unknown," Waite said. The school does not offer a course and there is

no curriculum yet, because the subject is so new.

Three students now get research credit for their efforts in the lab. Participants work in a tool-filled room and have built four drones from scratch. Students have reported on drought in Nebraska by taking aerial video and collecting water samples with the UAVs. Waite also keeps up a blog about the lab and general drone issues.

There are two goals of the program, Waite said. One is to document the technical aspects of operating drones: what can be done with the equipment and what kind of training is needed to fly them. The other goal is exploring the ethics of drone journalism.

“What are the legal questions that traditional reporting hasn’t dealt with?” Waite said. “What are the regulatory issues? What kind of certification will be required by the FAA?”

## **Legal and ethical issues**

Under the 2012 FAA Modernization and Reform Act, the FAA has been charged with fully integrating commercial drones into U.S. airspace by 2015. The act does not require the FAA to address the privacy concerns involved with commercial drones, and the agency has stated that it does not have the authority to make or enforce privacy-related rules.

Advocacy groups and lawmakers are left to address the issue.

“I think in 15 years we will all wonder what all the fuss was about,” Waite said. “But, rest assured, in the intervening 15 years, there’s going to be a whole lot of fuss.”

Thirty-nine states are considering legislation restricting drone use. Four states and several cities have already passed drone laws, most of which are in place to protect residents from “unwarranted surveillance.” These require law enforcement officials to be granted a warrant before using drones in investigations.

Other proposed laws might affect journalists more directly and could even overlap into other forms of newsgathering unrelated to drones, Waite said. Texas legislators have proposed a bill to ban aerial photography from remote vehicles, and privacy groups have petitioned for every drone flight to require FAA approval — a clear example of a prior restraint, Waite said.

According to the Reporters Committee for Freedom of the Press’ First Amendment Handbook, prior restraint is when a government agency restricts what content can be published. If the FAA denied a reporter’s request to fly a drone because of the subject being covered, it could be unconstitutional.

Scott Pham, the director of the University of Missouri Drone Journalism Program, said the FAA’s silence on drone use is creating confusion.

“Are states able to regulate this kind of thing?” Pham said. “This is why we have a Federal Aviation Administration. Airspace is federal. I don’t know how states get

to decide these things just because they pass a law — it's just something we've accepted. Would it hold up in court? I have no idea.”

Missouri's drone journalism program began in January and is a collaboration among the journalism school, the information technology department and local NPR affiliate KBIA. Engineering and journalism graduate students are working together to build the drones, and students have already produced two stories that have been aired on KBIA.

The drone program is being threatened by a bill that, in some ways, seems to be targeting the program, Pham said.

“Because of the need to protect Missourians from invasions of privacy in the state . . . this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety,” the bill states.

The bill, which Pham calls “anti-free speech, anti-journalism and all together backward,” explicitly addresses journalists and limits drone flights to airspace where the owner of the property below has given consent.

“No person, group of persons, entity, or organization, including, but not limited to, journalists, reporters, or news organizations, shall use a drone or other unmanned aircraft to conduct surveillance of any individual or property owned by an individual or business without the consent of that individual or property owner,” the bill states.

Pham said the program already abides by those rules and does not “conduct surveillance” but instead gathers data and footage.

“So much of [the bill] hinges on the word ‘surveillance,’ and while there might be legal subtleties to this word that I don't understand, it's hard for me to see if any of the work we do is ‘surveillance,’” Pham said.

Republican Rep. Casey Guernsey, who sponsored the bill, said he is concerned that drones will allow the government to spy on citizens, according to news reports. Guernsey told the *Gateway Journalism Review* that he also is opposed to drone journalism.

“If they want to learn about it, that's perfectly fine,” Guernsey said about the university's drone journalism program. “If we are moving into an age of news agencies using drones to collect information on private citizens, I'm definitely concerned about that.”

Matthew Schroyer, the founder of the Professional Society of Drone Journalists, said lawmakers are overreacting to critics' fear of drones. The models journalists would use are too big to hover surreptitiously outside windows, he said.

“Some privacy concerns are appropriate and some are not really based on the capabilities of the aircraft but are more a product of fear for how they've been used in the military,” Schroyer said.

Schroyer acknowledged that drones can invade privacy if put in the wrong

hands. That is why PSDJ has created a Code of Ethics, he said.

Drones should only be used if there are no other means of investigating a potential story, and privacy laws and traditional journalism ethics should be followed when reporting with a UAV, according to the Code of Ethics. The Code also addresses the more technical part of drone journalism. Because journalists and photographers will be the ones operating the UAVs, they should be trained to operate drones safely and abide by airspace regulations.

“We always ask the question, is this newsworthy? Is there any other way to get these photos other than using unmanned aircraft?” Schroyer said. “Nobody on our website thinks bikini shots are worthwhile pursuits of journalism.”

## **The future of drone journalism**

Waite said that after he saw that first drone at the convention, he started seeing “drone journalism” popping up across America.

“It wasn’t journalists using them, but it was people doing things that looked a lot like journalism,” he said.

In 2011, a Texas hobbyist flew a remote controlled airplane with a camera over the Columbia Packing Co. meatpacking plant and saw that the company was illegally dumping pig blood into the Trinity River, which runs through Dallas. The hobbyist turned the images over to environmental regulators and the company was prosecuted and shut down.

U.S. military drones were also used to measure radiation levels at the Fukushima nuclear plant in Japan after it was destroyed by the 2011 tsunami. Drones were able to collect data and provide the first peek into the destroyed plant.

Waite said this kind of environmental, agricultural and meteorological research is what many journalists will do with drones. In fact, Missouri’s drone journalism program has been doing just that. They’ve produced stories on prairie fires and the migration patterns of snow geese, using aerial footage and data collected by the drone.

Drones will not replace helicopters because they have such a short battery life, but they could do many things news stations currently use helicopters for, Waite said.

“The morning traffic copter is a horrid waste of money when you think that a helicopter is \$4 million,” Waite said. “You have a pilot, insurance, fuel, maintenance and many hundreds of thousands of dollars a year to operate it, and for a fraction of that cost I could build you a multi rotor with a camera that could be programmed to fly every ten minutes on the hour to shoot traffic.”

Schroyer said the mapping and data-collecting capabilities of drones will make them powerful tools for journalists, but UAVs can offer journalists something even more valuable, especially in war zones: safety.

Schroyer started DroneJournalism.org in 2011 after coming across a do-it-

yourself drone website and learning about the machines. Around the time he started the blog, British freelance photojournalist Tim Hetherington was killed by shrapnel from a mortar in Libya.

“That brought awareness to the fact that he was someone covering a very important thing and risked his life,” Schroyer said. “Tim left a big hole in the community and it awakened people to the fact that it’s a dangerous job. Anything you can do to put distance between yourself and that danger is a good thing.”

The affordability, safety and high-tech ability to collect images and data make drones a powerful tool that every newsroom should be using, Waite said. However, he said, getting to that point will be difficult.

“Drone journalism is on the cusp of being a thing — but we’re on the wrong side of the cusp,” Waite said. “We’re on the uphill side. We see the top but we just have to get there.”

State-by-state legislation on drones

Nearly 40 states have introduced some sort of legislation that would regulate how law enforcement officials can use drones. Most of the legislation would require police to obtain a probable cause warrant before using a drone in an investigation.

Some proposed bills include exemptions for felonies, drug crimes and human smuggling, and some ban weaponizing drones. Others make aerial photography illegal or require operators to get landowner permission before flying drones over certain areas.

Commercial drone use is not squarely addressed in any legislation because it will not be legal until 2015. But one bill in Missouri requires journalists to get consent from landowners before flying drones over their property.

Many of these proposed laws limit the rights of drone operators without solving the privacy issues they claim to address, said Scott Pham, director of the Missouri Drone Journalism Program.

### **States that have enacted drone legislation:**

Florida, Idaho, Montana, Virginia

### **States whose bills have passed through the House or Senate:**

Alabama, Arizona, Illinois, Missouri, Oregon, Tennessee

### **States whose legislators have introduced drone legislation:**

Arkansas, California, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia

### **States that have created drone task forces:**

Alaska, Indiana



## **States where drone legislation was proposed, but not addressed during the legislative session:**

New Hampshire, New Mexico, North Dakota, Oklahoma, Washington, Wyoming  
The other 11 states and Washington, D.C. have not introduced any drone legislation.

## **Drones by the numbers**

- 31 — states that have active drone legislation
  - 4 — states that have laws on drones (Florida, Virginia, Idaho and Montana)
  - 30,000 — number of commercial drones in the air by 2015 (FAA estimate)
  - 70,000 — number of jobs generated by commercial drone use (FAA estimate)
  - 15 to 45 minutes — the amount of time most drones can last in the air
  - \$300 to \$5 million — the price range of a drone
  - 1,428 — number of drone permits the FAA has issued since 2007
  - 327 — number of active drone permits in the United States
  - 35 percent — proportion of drone permits believed to be held by the Pentagon
  - 25 — number of members of the Professional Society of Drone Journalists
  - 76 — number of countries that have drones
- *Lilly Chapa*

## **What exactly is a drone?**

Technically, any aircraft that is controlled remotely is an unmanned aerial vehicle (UAV), or drone. Most modern drones are controlled by Global Positioning System-based commands programmed through a computer. Drones can cost anywhere from \$300 to \$5 million and can be as small as a dinner plate or as large as a Cessna. They can be equipped with a variety of tools, including cameras, GPS trackers, infrared sensors and weapons.

Eighty-one public entities have applied to the Federal Aviation Administration for the special license required to fly drones. The bulk of the applicants are from universities, NASA, environmental groups and police departments. The FAA has established guidelines for drones. For example, it's illegal to fly drones above 400 feet, beyond line of sight or over populated areas.

The relatively low cost and precision of drones make them excellent tools for any journalist, said Matthew Schroyer, who founded the Professional Society of Drone Journalists in 2011. A kit of a drone that can take high-resolution pictures can cost as low as \$1,000 — a fraction of the cost of a news helicopter.

The drones most likely to be used for newsgathering will have a 20 minute battery life and are susceptible to wind and rain, Schroyer said. They are a far cry from the heavy-duty Predator drones used to fire missiles in Afghanistan, he said.

“The word ‘drone’ has come to mean a weapon of war,” Schroyer said. “We’re trying to get away from that and change the conversation.”

The drones used by hobbyists and universities are built from scratch and programmed manually, often with guidance from drone communities such as the website [DIYDrones.com](http://DIYDrones.com). Matthew Waite, the director of the University of Nebraska-Lincoln drone journalism program, said drone kits are becoming more popular and that \$300 novelty drones can even be purchased at retail stores. The tricky part, he said, is learning how to fly them.

“You will crash, you will break it and you will be replacing parts pretty quickly,” Waite said.

## Questions linger over impact of *McBurney v. Young* decision

*Supreme Court decision is seen as major setback to public records access, but impact of decision could be limited*

By Aaron Mackey

AP Photo/South Bend Tribune James Boshier

U.S. Supreme Court Chief Justice John Roberts appeared critical of both sides during oral arguments but ultimately upheld Virginia's citizenship requirement.

When the U.S. Supreme Court handed down its unanimous decision in *McBurney v. Young* in April, open government advocates had little to be excited about.

Not only had the Court upheld a provision of the Virginia Freedom of Information Act that allows the state to ignore records requests from non-residents, it had also definitively rejected arguments that the U.S. Constitution grants citizens a right to access government records.

The Court's ruling also meant that a handful of other states across the country with citizenship requirements in their open records laws - including Alabama, Arkansas, New Hampshire, New Jersey and Tennessee - could also continue to bar out-of-state requesters from accessing public records.

Yet despite the outcome, open government advocates and attorneys who worked on the case appeared mixed on the potential impact the decision would have on other states' public records laws.

On the one hand, some fear that the 9-0 ruling in favor of Virginia could embolden some state lawmakers to restrict access to records in the era of tight state budgets.

At the same time, others said that the decision is unlikely to lead states to implement restrictions similar to Virginia's, meaning that the impact of *McBurney* may ultimately be limited to states that have similar restrictions on the books and actually enforce them.



And for non-resident media companies, the presence of a limited exemption for media who broadcast or circulate in Virginia likely means that agencies will continue to process their requests.

But regardless of the impact *McBurney* has on state public record laws in the future, open government advocates all seemed to agree that the decision was a serious setback for the transparency movement for at least two reasons.

First, the court failed to understand the political and economic value of government information. Second, the court's opinion also took a dim view of how, in the digital age, the importance of state government information does not stop at state lines.

### **Court: No constitutional right of access**

The Supreme Court's decision ends a constitutional challenge brought by plaintiffs Mark J. *McBurney* and Roger W. Hurlbert, who argued that the citizenship restriction in Virginia's public records law violated the Privileges and Immunities and Dormant Commerce Clauses of the U.S. Constitution.

Generally, the Dormant Commerce Clause has been interpreted to prevent states creating economic regulations that hamper national commerce. The Privileges and Immunities Clause, on the other hand, has been interpreted to protect non-residents from state laws that discriminate against out-of-state residents.

*McBurney*, a Rhode Island resident, sought records from Virginia's Division of Child Support Enforcement related to its collection of child support payments from his ex-wife. Hurlbert, a California businessman, sought real estate tax records from a Virginia county as part of his data collection business. The pair filed suit after Virginia denied both requests on the grounds that neither *McBurney* nor Hurlbert was a Virginia citizen.

Both a federal district court and the U.S. Court of Appeals in Richmond, Va. (4th Cir.) ruled that Virginia's citizenship requirement was constitutional. In contrast, in the 2006 decision in *Lee v. Minner* the U.S. Court of Appeals in Philadelphia (3rd Cir.) struck down a citizenship requirement in Delaware's public records law, finding that it did violate the Privileges and Immunities Clause.

During oral arguments in *McBurney*, Supreme Court justices grilled both sides, expressing skepticism of whether the law violated the U.S. Constitution while also pressing Virginia to justify its decision to discriminate against non-residents. In particular, Chief Justice John Roberts seemed to reject Virginia's central argument that processing non-resident requests cost the taxpayers additional money.

"You've got to maintain and generate the database anyway for Virginia citizens who are going to ask for [public information]," he said. "This is not an added cost."

Despite the animated back-and-forth during the arguments, the Court issued a unanimous opinion that the state's restriction did not unconstitutionally discriminate against the plaintiffs or interfere with their business dealings.

Specifically, the Court ruled that the ability of citizens to access government information is not a fundamental right protected by the Privileges and Immunities Clause of the Constitution because it did not materially interfere with the plaintiff's ability to own or transfer property, access Virginia courts, pursue a profession or access public information.

"We cannot agree that the Privileges and Immunities Clause covers this broad right," Justice Samuel Alito wrote for the court. "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."

Deepak Gupta, *McBurney* and Hurlbert's attorney, said he was mystified by the decision, particularly given how the court failed to understand the ways in which information flows across state lines.

"These laws are hard to justify and most states have abandoned citizens-only policies because they are out of step with the modern information economy," he said.

### **Decision's immediate impact unclear**

Although the Supreme Court's decision was a setback for the plaintiffs and for open government advocates, opinions are mixed as to what the impact of *McBurney* might be, particularly for states that do not presently discriminate against non-resident requesters.

Anne Weismann, chief counsel for Citizens for Responsibility and Ethics in Washington, which advocates on many state and federal open government issues, said the decision could be very harmful in states that are feeling the economic pinch as they try to balance their budgets. Lawmakers in those states may believe that they can cut costs by prohibiting non-residents from filing records requests.

"I would think that if a state starts to feel that it doesn't have the resources to handle the requests, it's one way to trim that down," Weismann said.

If states do move to adopt restrictions similar to Virginia, it will make it harder for news organizations and other requesters to get comprehensive information from multiple states, either to understand trends or compare certain government activities, said Amy Bennett, assistant director at [OpenTheGovernment.org](http://OpenTheGovernment.org), an organization that advocates for increased access to government information.

"If you're trying to make informed decisions even about how things are working in different states, you need to have consistent access," she said.

CREW and [OpenTheGovernment.org](http://OpenTheGovernment.org) signed on to a friend-of-the-court brief in the case, arguing in support of *McBurney* and Hurlbert. The Reporters Committee, along with 53 other media organizations, filed a separate friend-of-the-court brief in support of the plaintiffs.

At the same time, attorneys who represented the plaintiffs in *McBurney* downplayed the potential impact of the decision, saying that they did not expect

additional states to bar non-citizens from making public records requests.

Brian Wolfman, co-director of the Institute for Public Representation and a visiting professor at Georgetown Law who also represented *McBurney* and Hurlbert, said that of the six states that have citizenship requirements in their public records laws, only about half actually enforce them. The other states have either eliminated the requirement by amending their laws, as Delaware did recently, or have opinions from the state's Attorney General instructing agencies to process requests from non-citizens.

According to Gupta, the decision is unlikely to cause many states to institute restrictions similar to Virginia because even though states may do so without violating the Constitution, it still discriminates against non-residents in a way that may make lawmakers hesitate, Gupta said. This is because even though the Supreme Court's *McBurney* decision overturns the Third Circuit's opinion in *Lee v. Minner*, that case had the effect of discouraging other states from using their public records laws to discriminate against non-residents.

At the same time, the *McBurney* decision means that a similar challenge to Tennessee's citizenship requirement will be dismissed by the U.S. Court of Appeals in Cincinnati (6th Cir.). Edmund J. Schmidt III, the attorney for the plaintiff in the case of *Jones v. City of Memphis*, had asked the court to stay his client's appeal while the Supreme Court decided *McBurney*.

Schmidt's client was seeking information from the city to help small businesses and individuals receive aid from their local government. Now that the Supreme Court has ruled in favor of Virginia, Schmidt said he expects the appellate court to uphold the trial court's decision to dismiss the case.

Schmidt said he was disappointed that the Supreme Court failed to understand how states can discriminate against individuals and small businesses who are non-residents while large businesses with locations in multiple states can claim citizenship and avoid the restrictions.

"A publicly traded corporation would not have the problem that *McBurney* and my client have," he said.

## **Virginia may amend law**

Even in Virginia, the fallout from the *McBurney* decision may not change how many state and local government agencies respond to public records requests from non-citizens.

Despite Virginia's ardent defense of the citizenship requirement, many agencies either do not ask requesters to prove they are citizens before processing requests or voluntarily comply with out-of-state requests, said Maria Everett, executive director of the Virginia Freedom of Information Advisory Council. The government agency issues advisory opinions on a wide range of issues associated with Virginia's open records laws.



While *McBurney* was being litigated in the Fourth Circuit, the advisory council surveyed state agencies and learned that many voluntarily provide records to non-citizen requesters. The council then issued guidance to state agencies recommending that agencies honor requests from non-citizens though agencies did not have to comply with VFOIA's response deadlines. The guidance also said that agencies could collect fees from non-residents in advance of providing them with records.

And after the *McBurney* decision, the council's advice remains the same, Everett said, as the council reiterated on its website that agencies should still comply with non-resident requests. The rationale from the council is that because non-residents can simply find a citizen to file the same request, it just creates additional work for governments.

"The way we say it is, 'You can do this once or you can do this twice,'" she said. "We understand that the issue for government is cost, and our advice has been to always that you can get the money up front and that solves your issue for nonpayment and then you provide the records in a reasonable time."

Additionally, media based outside of Virginia but broadcast or circulate within the state are not barred from making requests because the statute contains an exception for traditional media. The statute, however, does not address whether online media would qualify for the exception.

And the *McBurney* decision might ultimately become a moot point if Virginia lawmakers move to amend VFOIA and remove the citizenship requirement. A bill introduced by Delegate Mark L. Keam (D-Fairfax) during the 2013 legislative session would have done just that, though action on it was stalled pending the outcome of *McBurney* at the Supreme Court. Lawmakers then adjourned for the year prior to the Court's decision.

Whether the bill will be pushed through the 2014 legislature is unclear. Messages left with Keam were not returned.

Megan Rhyne, executive director of the Virginia Coalition for Open Government, said that although the legislature is not in session, a subcommittee discussed the bill during a meeting in late May.

And even if lawmakers feel as though the Court's decision emboldens them to not act, Rhyne said she hopes that the legislature will see that the restriction is unnecessary and amend the law accordingly.

"As the justices pointed out, this is pretty much a pointless restriction," she said. "It can be easily evaded and it won't save time or money to deny out-of-state requests."

## Courts lock up public databases

### *Copyright, other proprietary concerns used to withhold public records*

By Aaron Mackey

AP Photo by Will Shilling

Ohio Supreme Court Justice Paul Pfeifer said that requesters were being forced to pay for a government's decision to use systems that make retrieving public data more difficult.

The next time you request a public database, prepare to pay up.

That's the message courts are sending to reporters and members of the public who regularly request copies of government databases as agencies are increasingly citing the proprietary nature of the software used in connection with such data to either make requesters pay large sums or cut off public access to the data entirely.

Two recent state supreme court decisions — and a similar case argued before California's highest court in May — highlight how federal copyright laws and proprietary software used by state and local agencies and software developers are thwarting access to certain kinds of data.

Although the cases themselves dealt with geographic information systems data, commonly known as GIS data, transparency advocates worry that public agencies' increasing use of private software and other proprietary systems to manage public data may close off access to broad categories of government records or require requesters to pay thousands of dollars to access the data.

By requiring requesters to pay high prices to access government data and sign licensing agreements that limit the use of it, agencies are effectively closing off access to public information, said Lisa Siegel, counsel for the Connecticut Freedom of Information Commission, who recently argued for access to copyrighted data in the state.



“It’s effectively access denied,” she said. “More than that, it puts control of access in the hands of the private party, rather than a public agency that is using those records.”

### **Conn. court cites copyright to withhold data**

In *Pictometry International Corporation v. Freedom of Information Commission*, the Connecticut Supreme Court ruled in January that images and mapping software provided by private companies who claim copyright in the material put limits on whether governments can release such computer data under the state open records law.

The court ruled that mapping data maintained by the state’s Department of Environmental Protection was exempt from disclosure under the state’s public records law because a private entity had a copyright in the images used by the state.

The case began when Stephen Whitaker asked the agency for mapping and imaging data of the state, which the state obtained under an agreement with Pictometry. The agency refused to release the records, arguing that an exemption in the Connecticut Freedom of Information Act that allows agencies to withhold records pursuant to a federal law was applicable because the requested information was subject to the federal Copyright Act.

Although both the Connecticut Freedom of Information Commission, which enforces provisions of the state’s open records law, and a lower court agreed with Whitaker that the data was subject to disclosure, the Supreme Court ultimately upheld the agency’s refusal to release the records in a unanimous decision.

In upholding the agency’s refusal to release the records, the Supreme Court ruled that the federal Copyright Act preempted the disclosure requirements of the state public records law. In other words, the federal protections for the copyrighted material overruled the state’s command that the records must be disclosed.

The court also relied on a number of cases from other states that similarly ruled that copyright law could impose certain restrictions on copyrighted public records.

Siegel said that the case sets the state’s public records law back because it prevents public agencies from providing copies of records to requesters where it is subject to a private party’s copyright.

“This case could have a wide-ranging impact because it stands for the fact that the private third party can control the copying of these public records,” she said.

The case is also problematic because if the records are not subject to disclosure under the Freedom of Information Act, the only way a person interested in seeing the data can obtain it is to pay a license fee that many requesters simply cannot afford, Siegel said.

“They were going to charge him \$25 per image where the rate under the (Freedom of Information Act) would have charged him 25 cents,” she said, referring to Whitaker.

The court's decision affords businesses who provide materials to the government an additional form of protection, Siegel said. Many state records laws including Connecticut's, already contain exceptions that allow businesses to withhold confidential business information they submit to agencies. Now businesses will be able to withhold non-confidential information if it is copyrighted, Siegel said.

Given how easy it is to copyright a work and the fact that private companies regularly provide a great deal of data to governments, Siegel said she worries that the decision will likely be applied to other government data as more agencies rely on private vendors to store and collect government information in databases.

"That's really the new future in public records because there's just so much data out there," she said. "How do you control access to that? How do you charge for that? How do they redact?"

### **Copyrighted software is 'inextricably intertwined' with public records**

The Ohio Supreme Court handed down a similar ruling this March in *Gambill v. Opperman*. The court ruled that an agency properly denied Robert Gambill access to Scioto County's property mapping and imaging data because the county was not required under the law to separate the raw government data from the private, copyrighted software used by the county.

The court also ruled that although the county was not required to separate the records under the law, Gambill could obtain the data if he paid \$2,000. That figure was the amount the county estimated it would cost it to extract the underlying data from the software.

"The engineer's office cannot separate the requested raw data from the exempt Esri software files," the court wrote in its per curiam opinion. "Therefore, consistent with other cases in which nonexempt materials are inextricably intertwined with exempt materials, the nonexempt records are not subject to disclosure under (the Ohio records law) insofar as they are inseparable."

Justice Paul Pfeifer wrote an animated dissent in the case, arguing that requesters were being forced to pay for a government's decision to use systems that make retrieving public data more difficult.

"The county engineer in this case has intertwined public records with proprietary software and expects citizens seeking public records to pay an exorbitant price to untie the knot," Pfeifer wrote.

The ruling, Pfeifer wrote, harms public records requesters because they expect to pay reasonable fees for copying the records, not \$2,000. He also expressed concern about the court sanctioning efforts by agencies to withhold public records by using private software systems.

"This case encourages public entities desiring secrecy to hide public records within a software lockbox and require individual citizens to provide the golden key

to unlock it,” he wrote.

## **California set to decide whether public data is part of proprietary software**

Attorneys argued a similar question before the California Supreme Court in May in *Sierra Club v. Superior Court of the State of California, Orange County*.

At issue in that case is whether GIS data is subject to disclosure under the California Public Records Act (CPRA). The conflict lies in a provision of the law that allows agencies to withhold computer mapping systems, including computer software developed by a public agency.

The Sierra Club is seeking access to county property map data, which provides details on the geographic boundaries of all land parcels in the county. The county offers to sell the database to the public for a fee, which can cost more than \$10,000. Additionally, requesters have to agree to limits on how they use and distribute the information.

The county withheld the database under the CPRA, arguing that it could not separate the computer program from the database because the record was part of a computer mapping system that is exempt from disclosure.

Both a trial and appellate court ruled that the database could not be separated from the software and could therefore be properly withheld under the CPRA.

Rachel Matteo-Boehm, an attorney at Bryan Cave LLP who wrote a friend-of-the-court brief in the case on behalf of media parties, including the Reporters Committee for Freedom of the Press, said the case has big implications for requesters seeking access to data.

If the Supreme Court were to uphold the lower court’s ruling, it would mean that requesters seeking access to the data would have to pay thousands of dollars and also comply with restrictions on how they could use the data.

“It would basically say, ‘We have open records but only for those who can afford to pay,’” she said. “You just can’t effectively observe the government unless you can be on somewhat equal footing with the government on access to information.”

And allowing the government to attach strings to how requesters use the data in the form of licenses governing the access and use of particular databases would run counter to the CPRA, which does not allow agencies to inquire about the purpose of a request, Matteo-Boehm said.

Governments may be increasingly unwilling to provide data because they have invested a large amounts of time or energy into building and maintaining a computer system, Matteo-Boehm said. Also, agencies may sign agreements with vendors that put limitations on how agencies can disclose particular information, perhaps not realizing the potential conflict with public records laws’ disclosure requirements.

But Matteo-Boehm, who also litigated a similar case in another California appellate court, said using the complexities of the interplay between government data and the proprietary software systems used to analyze the data to withhold public records is a red herring.

“Software and data are distinct,” she said. “When you get into these sophisticated computer databases, I think it feels more complicated, but there is absolutely a distinction.”



## How I got the story: Alexandra Zayas

*Pulitzer Prize finalist shares how she used records to uncover decades of abuse at a number of children's homes in Florida*

Alexandra Zayas

The investigation began with an e-mail tip to the *Tampa Bay Times* about possible abuse at a religious-based boarding school in the Florida Panhandle. The e-mail was forwarded around until it reached general assignment reporter Alexandra Zayas in the newspaper's Tampa bureau. What Zayas soon found out: a number of unlicensed Christian children's homes in Florida operated under a religious exemption in the law that freed the schools of state supervision. Using records and extensive interviews, Zayas was able to prove that — for years — children were beaten, shackled and degraded at some of these homes. Months after the report was published, Zayas' three-part series "In God's Name" is still emitting waves of change in Florida. A piece of legislation in response to some of the problems



brought up in the series has passed the Florida Legislature and is headed to the governor. One home with evidence of longtime abuse to children closed down four months after the series ran in October. Zayas, a finalist for this year's Pulitzer Prize and winner of the Selden Ring Award for Investigative Reporting, talked to Managing Editor Nicole Lozare about how she used records to detail the abuse and how those same records helped her get both sides of the story.

To read Zayas' report, go to [www.tampabay.com/faccca/](http://www.tampabay.com/faccca/).

### **So it started with an e-mail tip, right?**

It was one tip about alleged abuse at a boot camp in Bonifay. My editor asked a

very good question: who regulates places like this? And I found out about the Florida Association of Christian Child Caring Agencies (FACCCA). I learned about this whole religious exemption that was created 30 years ago and it wasn't really on people's radars back then and certainly not now. But it allowed places to operate without licenses — without regular inspections from the state but inspections with (FACCCA), which was run mostly by the people who were heads of the schools who were policing themselves.

### **Before this series, how familiar were you with Florida's public records laws and what records you can get?**

I was pretty familiar through my experience as a court reporter. I knew that Florida's public records laws are very good and very open. So I assumed that a lot of stuff would be available to me. I also knew that the Florida Department of Children and Families (DCF) documents were closed. I knew going in that I would not be able to look at detailed abuse investigations.

Tampa Bay Times photo by Kathleen Flynn

A 14-year-old eats soggy vegetables swimming in vinegar and spices as punishment at Southeastern Military Academy. Alexandra Zayas, left, reported on the harsh punishments at the unlicensed children's homes.

### **Did you have difficulty getting records for this because your story involved juveniles?**

I didn't expect to get child abuse investigation records and I didn't. But I didn't know that they could give me summaries of their investigations. For example, I couldn't get the actual investigative report but I could get a one-line summary of the year, the finding and the type of abuse that they found. I would see some red flags right away.



### **So that was kind of the first nugget for you?**

Yes, it was a good little road map. I had no problem getting the police reports with juveniles' names redacted. Same thing with lawsuits. But I was able to see the

parents' names in some cases. If I was able to find parents, I was able to find the kid. What was not public were the inspections of these places. Had it been a state regulated home, the state's child protection officials would have been able to provide me with inspection records.

### **How responsive was DCF with your requests? How promptly did they respond?**

Extremely promptly. I had a public information officer (PIO) who I was corresponding with several times a day. I don't think they knew how labored things would be on their end at first. First, I asked for all the homes regulated by FACCCA. Then I started realizing that there was something here, so I said let's go back 5 years. Then the investigation spread out. It wasn't just about FACCCA anymore. I discovered some places that lost FACCCA accreditation but were operating with no oversight at all.

Tampa Bay Times photo by Kathleen Flynn

Students at Marvelous Grace Girls Academy in Northwest Florida are expected to strictly follow fundamentalist Christian ideals. According to Zayas' report, the school does not have a state license, does not have a religious exemption through FACCCA and is not accredited as a boarding school.



### **Tell me a bit about how important that relationship was with the PIO? Did you officially file your records requests with the state agency or would all the requests go through her?**

I did it all in writing. We sent hundreds of e-mails back and forth. Because there were so many requests and they had access to stuff there was no way I could get otherwise, it was extremely important for them to be responsive and It was also important for me to have everything in writing because there were so many requests and it was important to keep track of it. And the requests keep coming. I'm keeping tabs on some of these homes that DCF is keeping tabs on. I'm checking in constantly. This week, have you done anything new? Have you filed any lawsuits? Do we have any new abuse reports?

### **Do you recommend for reporters starting a big project like this to give a heads up to PIOs who they will be working with regularly?**

It depends on the project. I wasn't investigating them and transparency is

important. They knew where I was coming from so that we could be on the same page about what (the newspaper) needed. We had lengthy conversations throughout the process. I wasn't interviewing her, we were just talking logistics. For example, what can I get, what can't I get.

### **I noticed that one of the schools changed names. Did you have problems tracking them when they changed names?**

Well, they didn't change addresses. But sometimes it was hard because I had to go to each individual police department and get individual police records. So you couldn't just ask them to search one name. Or sometimes it would be the same name but a spelling was off or something like that. So you would have to have them run different names. I found out early on, not only do the names change but some schools call themselves different things at the same time.

### **What were the schools' or FACCCA's legal responsibility to respond to records requests?**

We actually had a debate about that. At one point, our lawyer sent them a letter saying we believe FACCCA was performing a government function. If they were acting as a regulator in place of the government, we believed that we were entitled to these records. They sent us back a letter saying they did not believe that they were. We did not pursue it further, but it's still not out of the question.

### **Did you have any problems with the fact that these were nonprofits or religious institutions? Did you know what you had access too?**

I knew I would have access to (tax records). Because they were private organizations, that was my biggest roadblock. But I also knew there were other ways to look into places. There were health inspections, fire marshal inspections, lawsuits. So I was able to go around some of these roadblocks.

### **Were there some things you could not write because you could not support it with records?**

One of the problems is that many of the kids did not have access to phones so they could not contact DCF. Many of their stories were not corroborated by paper. You would find a school that would have a few abuse summaries. But you talk to the residents and nine of them would tell you the exact same story of when the preacher's wife beat this girl with a curtain rod and you hear the story from the girl who was beat with the curtain rod. You hear it from the two girls who were forced to hold her down. If we have multiple people corroborating the same event in great detail we're going to go with that too. There are some things we had document support for and some things where we had multiple sources supporting it.

### **I also saw that you would go through forums and try to get access to**

## **former students that way. Can you tell me about that?**

There were Facebook survivor groups that had formed and I would put out my request. “Hey I’m writing about this place and I’m interested to hear your stories.” Also, if I found that someone had listed one of these homes or schools (in their profile), I would try to contact them. I would find friends who they had in common and I would sort of triangulate. I would make my own makeshift roster for some of these homes where they didn’t have survivor groups.

## **By the time you were done, how many records are we talking about? How did you organize your records?**

It was a lot of records. I know we paid a couple hundred dollars for reports from each police agency for each of the homes. It was more of digesting them as soon as I read them and creating little school profiles on each home in a word document saying what the key documents are, what the key interviews are. I also created a word document for each person I interviewed. I would try to boil down what they told me into a paragraph then I would put that into an interview thumbnails file that my editor was able to look. It was a constant process of digesting the information we were getting.

## **I noticed your photographer had significant access. How did you get the access to these schools that you clearly were investigating?**

At first, our requests were ignored, downplayed or brushed off. It was only until I had done a lot of reporting on allegations that I sent them e-mails detailing exactly what I knew about these places did they even take us seriously. I didn’t get into my first home until August. And reporting started in January. We didn’t visit some of the homes until October. We started publishing Oct. 28. Toward the end of it, we were gaining a lot of momentum. It took us doing some solid reporting to let these places know we have a lot information and now we need context. We need your side of it.

## **What was your reaction when places started shutting down?**

DCF started cracking down even before our story was published, which was a huge impetus to get it in the paper as soon as possible. We found out that fall that they already launched an audit of foster children that were sent to these places before our story published in response to our questions. I was more surprised about that.

## **You write very confidently, especially when you make allegations. Were you ever nervous when this came out? Did you think, ‘what if I got something wrong? What if I didn’t read the records correctly?’**

I hope reporters have that healthy fear. But yes, we fact checked it thoroughly.

We lawyered it thoroughly. I had a very good editor who was pushing me to be as pointed as possible. There were times where I would shy away from being as direct. Our edits were a constant process of sharpening the words and the language of what we wanted to say instead of trying to make it a little bit more mild with the language. Because it is scary. You're totally naked. Those are your words. That pushed me to report even harder to be able to say the things I said.

*Investigative reporting tips from Alexandra Zayas*

- One reporter's trash may be your treasure. Be the go-to person to get the forwarded tip.

- Don't settle for low-hanging fruit. Early on, I had great interviews with former residents who told stories from a decade ago. Those people were older and easier to find. But my editor pushed me to keep looking for younger residents who could give more updated accounts of life at the homes. It was much more difficult and took longer, but ultimately, the newer stories helped give the investigation the urgency it needed to make the impact that it did.

- Organization time is not wasted time. Sometimes, this means digesting your documents and notes into summaries. Sometimes, this means taking a much-needed break to organize the mountains of paper on your desk.

- Force yourself to see the full picture as it develops. My editor encouraged me, early on, to keep a list of the findings of my investigation. This allowed me to see holes in reporting and work to sharpen those bullet points with each revision.

- Keep track of nagging things you can't nail down yet. Some things didn't click until months into the investigation. Some didn't click until after publication, and made for great follow-up material.

- Keep your editor in the loop. It will buy you time. It's also helpful to have another brain thinking with you every step of the way.

- Don't make assumptions about access. Even if you think getting in is a long shot, try your hardest. You may be surprised.

- Keep thinking, stay flexible.



## U.S. Supreme Court decision keeps coalition group from challenging new international surveillance law

By Jack Komperda

AP Photo by Seth Wenig

Imam Malik Sakhawat Hussain leads prayers at the Al-Mahdi Foundation in New York. The NYPD conducted surveillance on entire Muslim neighborhoods, according to news reports.

A coalition of lawyers and journalists could not convince the U.S. Supreme Court to allow them to challenge the constitutionality of a new law expanding the federal government's authority to secretly monitor Americans' international communications with individuals suspected of acts of terrorism.

The U.S. Supreme Court's 5-4 decision in *Clapper v. Amnesty International USA* in February ultimately did not judge the constitutionality of the new monitoring powers enacted through amendments passed by Congress in 2008 to the Foreign Sovereign Immunities Act called the FISA Amendments Act of 2008.

Instead, the Court ruled that the coalition — a group of attorneys, journalists, and labor, legal, media, and human rights organizations whose work requires them to engage in sensitive telephone and e-mail communications with people outside the U.S. — did not have “standing” under Article III of the U.S. Constitution to challenge the law in court based on their ability to show it provided concrete and imminent injury to them.

Justice Samuel A. Alito, Jr., who wrote the majority opinion, concluded that the challengers' lawsuit was based upon a “highly attenuated chain of possibilities” that would have to fall into place before their communications might be at risk of eavesdropping. The opinion concluded that the alleged harms were not “certainly impending” and therefore did not give them a right to sue.

Further, the majority opinion went on to reject arguments by the coalition of challengers that they are almost certain to be monitored by the surveillance program in the future and are suffering harm because they had taken costly and burdensome measures to protect the confidentiality of their international



communications.

“Respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending,” Justice Alito wrote in the majority opinion. “We therefore hold that respondents lack Article III standing.”

And even if some of the communications of the coalition members were monitored through the program, the majority opinion stated that the surveillance may not be able to be traced back and blamed on the FISA amendments.

“Because respondents do not face a threat of certainly impending interception (under the statute) the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance,” Alito wrote.

### **Enough harm to demonstrate standing?**

At issue in the high Court’s *Clapper* decision was whether the group of challengers could demonstrate enough harm to sue the federal government over amendments to the Foreign Intelligence Surveillance Act. The amendments would allow the government to secretly monitor international communications even if one party is in the United States.

The amendments permit the federal government to engage in overseas surveillance of suspected terrorists under limited circumstances.

Such electronic surveillance is permitted only after the government has sought and obtained the consent of a special court called the Foreign Intelligence Surveillance Court — essentially, a secret spy court with powers to issue secret warrants authorizing officials to perform wiretaps and searches.

The coalition had hoped to sue to over the constitutionality of the law and obtain an injunction against such surveillance. On the same day the amendments were passed in 2008, they brought a lawsuit over the constitutionality of the broadened surveillance powers given to the government’s executive branch under the FISA amendments.

The provisions changed the procedure for the federal government’s interception and acquisition of telephone and e-mail communications between U.S. citizens and people abroad.

The FISA Amendments Act of 2008 allows the U.S. Attorney General and the Director of National Intelligence to immediately intercept communications without seeking court approval or showing cause for such interception, as long as the communication is “important to the national security of the United States,” and may be lost if not collected immediately.

It requires the government to submit a certification to the Foreign Intelligence Surveillance Court within seven days after monitoring the communication. However, that certification does not have to state whom, where or why the government is monitoring. If the surveillance court rejects the government’s

certification, officials may continue intercepting communications while an appeal of that ruling is pending.

Essentially, the amendments give “the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents,” putting a large number of journalists who frequently conduct interviews with international sources at risk of interception, according to the plaintiffs, which included weekly news magazine *The Nation*.

The Reporters Committee filed a friend-of-the-court brief in September 2012 asking the U.S. Supreme Court to allow journalists to challenge the law.

“Oftentimes, a source’s willingness to provide a journalist with truthful information about significant matters of public interest and concern is wholly dependent on an assurance that the source’s identity will not be revealed, thereby exposing him or her to retaliation,” the brief argued. “The amendments at issue, however, hamper the formation of these important journalist-source relationships by eliminating journalists’ ability to make good-faith promises of confidentiality to international sources.”

Specifically, if reporters’ communications with their sources were overheard, those sources’ identities, political activities and other sensitive information would be disclosed, exposing them to violence and retaliation by their own governments, private citizens and the U.S. government, and deterring them from providing vital information to journalists, the plaintiffs asserted.

A federal trial court in New York dismissed the case because the plaintiffs lacked legal “standing” to challenge the law. That is, the court concluded the plaintiffs failed to demonstrate that the challenged statute personally caused them a legally sufficient injury. In the court’s view, the plaintiffs’ asserted injuries — namely, the chilling interference with constitutionally protected reporter-source relations and the costly steps plaintiffs took to avoid the government monitoring — were not sufficient to allow the named plaintiffs to challenge the law.

On appeal, the U.S. Court of Appeals in New York (2nd Cir.) in March 2011 overturned the trial court’s ruling. The three-judge panel unanimously concluded the plaintiffs had provided sufficient evidence of particularized harm to demonstrate legal standing. The government’s request for reconsideration by the full Second Circuit was rejected the following September, prompting the government to appeal to the U.S. Supreme Court.

Advocates of the coalition hoping to challenge the constitutionality of the FISA amendments were upset with the U.S. Supreme Court’s reversal of the Second Circuit.

“It’s a disturbing decision,” said American Civil Liberties Union Deputy Legal Director Jameel Jaffer, who argued the case before the U.S. Supreme Court on Oct. 29. “The FISA Amendments Act is a sweeping surveillance statute with far-reaching

implications for Americans' privacy. This ruling insulates the statute from meaningful judicial review and leaves Americans' privacy rights to the mercy of the political branches."

"Justice Alito's opinion for the court seems to be based on the theory that the FISA Court may one day, in some as-yet unimagined case, subject the law to constitutional review, but that day may never come," Jaffer said in a statement. "And if it does, the proceeding will take place in a court that meets in secret, doesn't ordinarily publish its decisions, and has limited authority to consider constitutional arguments. This theory is foreign to the Constitution and inconsistent with fundamental democratic values."

Justice Stephen Breyer's dissenting opinion said that the Court should have used a standard of "probabilistic injuries" to determine standing. If that were used in this case, the dissenters said, the challengers would have met it, and their case could have gone ahead to trial.

The dissenting opinion contended that their research turned up not a single case in which the standard used by the majority — that is, that an injury must be "certainly impending" — was ever used to deny a right to sue in federal court.

"The majority cannot find support in cases that use the words 'certainly impending' to deny standing," Justice Breyer wrote in dissent. "While I do not claim to have read every standing case, I have examined quite a few, and not yet found any such case."

"The Reporters Committee agrees with Justice Breyer's dissent, which argued that the respondents showed more than a purely speculative harm to their constitutionally protected activities and did have standing to question the law," Reporters Committee Legal Defense Director Gregg P. Leslie said in a statement after the Court's opinion was released.

"Journalists need to contact sources freely — including those overseas who may be affiliated with suspected terrorist organizations," Leslie added. "The probability of having their calls intercepted is real and justified, and it would do irreparable harm to the reporter-source relationship if there were any doubt about confidentiality. Journalists need to tell the American people about these controversies, and to get to the truth they need to communicate with often questionable characters."

Little is known about how the FISA Amendments Act has been used. In response to a Freedom of Information Act lawsuit filed by the ACLU, the government revealed that every six-month review of the act had identified "compliance incidents," suggesting either an inability or an unwillingness to properly safeguard Americans' privacy rights. The government has withheld the details of those "compliance incidents," however, including statistics relating to abuses of the act.

## Pretrial publicity's limited effect on the right to a fair trial

*Trials of Boston Marathon bombing and Colorado movie shooting suspects likely to bring up debate again*

By Rob Tricchinelli

AP Photo by Steven Senne

Defense attorneys for Robel Phillipos, who is charged with lying to authorities investigating the Boston Marathon bombings face journalists in front of federal court in Boston.

When criminal cases gets media attention, trial courts may curtail the amount of pretrial publicity by imposing gag orders, restricting media reporting or closing courtrooms entirely.



The tension between pretrial publicity and conducting fair trial tests the abilities of trial courts. Defendants have important constitutional rights, but open courts are also an integral part of the American justice system.

The upcoming proceedings in the cases of alleged movie shooter James Holmes and suspected Boston marathon bomber Dzhokhar Tsarnaev are likely to attract a similar debate over the nature of pretrial publicity.

The Colorado theater shooting galvanized national attention, and the manhunt for Tsarnaev was broadcast live, with contributions from private citizens on social media. The attention it garnered as a public spectacle within Boston was unprecedented.

Trial courts have a broad array of tools at their disposal to ensure that all interests are served in cases like these, and different courts handle the issues differently.

Large jury pools rarely become completely partial because of media coverage, and the effects of publicity have very little impact on juries in practice, according to empirical studies and court opinions. Trial courts' imposition of secrecy can be an overreaching solution in these instances.

AP Photo by RJ Sangosti (The Denver Post)

Colorado theater shooting suspect James Holmes and defense attorney Tamara

Brady appear in district court in Centennial, Colo. for his arraignment.

The Constitution's Sixth Amendment gives criminal defendants the right to a trial by an impartial jury. The Constitution also provides that those trials be held in the state where the crimes were committed.

The Supreme Court has ruled that proceedings may be transferred to a different location, at a defendant's request, if local prejudices would prevent a fair trial.

Courts may transfer cases at their discretion, and high-profile cases have been split on granting a defendant's transfer request. The trial of Oklahoma City bomber Timothy McVeigh was moved to Denver, but transfer requests were denied in the prosecutions of the 1993 World Trade Center bombings and the prosecution of John Walker Lindh, known as the American Taliban.

In the trial of former Enron president Jeffrey Skilling, the Supreme Court framed the question fundamentally: "When does the publicity attending conduct charged as criminal dim prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence?"

The Supreme Court has overturned convictions in cases where media coverage overran the courtroom and disrupted the case, but those extreme cases are rarely applicable to ordinary coverage.

Juror exposure to news accounts of a crime, the Supreme Court has held, does not by itself deprive a defendant of due process rights. In the Skilling case, the Court said, "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*."

This built on earlier precedent where the court said, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."

## Secrecy in courts

Despite the clear holdings from the Supreme Court that pretrial publicity rarely merits secrecy, trial courts attempt to limit access and reporting on pretrial matters. Trial judges are concerned that such publicity affects defendants' right to a fair trial.

From a top-level view, the way courts deal with these concerns can vary greatly, said Jon Brusckke, a communications professor at California State University, Fullerton, who has studied pretrial publicity and co-wrote a 2005 book on the subject.

Brusckke called the courts' approach to pretrial publicity "totally incoherent,"





adding that “different circuits rule different ways and it’s very rare to see a venue changed or a jury sequestered. Courts want to avoid costs.”

This cost-avoiding can lead courts to limit the perceived effect of pretrial publicity in other ways, including outright bans on media reporting and gag orders.

The Colorado case of James Holmes touched on many of these concerns. Holmes is accused of killing 12 people and injuring 58 more after he allegedly opened fire on a crowded theater in July 2012.

When the case proceeded, Judge William Sylvester in Arapahoe County District Court ordered that no cameras or audio recordings were allowed, in a preliminary hearing during which charges were formally filed against Holmes.

Sylvester issued a sweeping gag order to limit pretrial publicity, and further prohibited the University of Colorado from disclosing any information about Holmes under Colorado open records law. The order directed toward the university was kept secret for three days before being made public.

All documents in the case were initially sealed as well, but bits and pieces of information have been unsealed over time, in response to motions for unsealing by media organizations. Sylvester eventually removed the university from the gag order, but the rest remained in force.

In February, attorneys for the city of Aurora asked Sylvester to lift or modify the balance of the gag order, arguing it was not needed anymore because details of the case had emerged in a preliminary hearing.

Sylvester denied the request, keeping limits on what police, city officials, and lawyers could say about the case. The city has accordingly denied interview requests from the media and has been unable to present to other law enforcement agencies lessons learned from its response to the shootings.

“Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved,” Sylvester’s order said.

The Holmes case is still in its pretrial phase.

## **Other cases**

Other cases in the past year that have attracted widespread public attention demonstrate the varying approaches courts take to dealing with pretrial publicity.

A protective order drew national attention in October in a Maine case where Alexis Wright was accused of running a prostitution operation out of a Zumba studio.

The order would have limited disclosure of discovery materials and restricted the attorneys’ ability to speak to the media.

The court later released the list of men charged with hiring a prostitute, but a gag order was placed on attorneys discussing the case pending the conclusion of jury selection.

Wright eventually pleaded guilty and some clients have pleaded guilty and paid fines, while investigation of other clients continues.

An Atlanta judge reacted sternly in denying prosecutors' efforts to broaden a gag order in an Atlanta Public Schools cheating case.

There, 35 public school employees were indicted in April in connection to a widespread campaign of falsifying student test results. The defendants were prevented from speaking publicly about the case, as a condition of district attorney Paul Howard lowering their bail bond amounts.

The *Atlanta Journal-Constitution* and WSB Channel 2 Action News then asked the court to lift the gag orders, calling them "inherently coercive."

"A defendant should not have to choose between their First Amendment rights or jail," Tom Clyde, an attorney for the news organizations, said in an April e-mail to the Reporters Committee.

The gag orders were entered without a hearing or presentation of evidence about the effects of pretrial publicity in the case.

As the case proceeded, Howard's office sought to expand the gag order to cover defense attorneys, but Fulton County Superior Court Judge Jerry Baxter rebuked the effort.

"Do ya'll believe in the concept of presumption of innocence?" Baxter said to the district attorney in court, according to a news report from *The Fulton County Daily Report*. "These folks have been vilified and tried in the court of public opinion and your office has pretty much led the charge."

Baxter lifted the gag order, and also objected to how the district attorney's office tied a lower bond to the defendants' public silence. "So they can either post several million dollars or agree not to talk about the case," Baxter said. "I'm striking that ... Ya'll don't want to make me mad, do you?"

Pretrial proceedings are ongoing.

A judge also denied a proposed gag order in the racially charged case of George Zimmerman, who faced second-degree murder charges in the February 2012 shooting death of Trayvon Martin.

Prosecutors first attempted to seal court records and close hearings in October 2012, which were denied by (Fla.) Circuit Judge Debra S. Nelson.

Prosecutors then sought a gag order, their second after an April 2012 effort was denied. They claimed the case had "an inordinate amount of media coverage" and it would be "difficult to find jurors who have not been influenced by media accounts of the case."

A coalition of more than a dozen media organizations opposed the order, and Nelson agreed with the media in denying the proposed gag order. The prosecutors had not shown any prejudicial effect of media coverage, Nelson's order said.

Jury selection in the Zimmerman trial is scheduled to begin June 10.

A Louisiana federal court in April denied two ex-cops' attempt to change the venue in their retrial on charges stemming from a post-Katrina deadly shooting. Despite the extensive media coverage, the judge held that thorough jury selection procedures would be adequate to identify and remove prejudice.

### **The minimal effects of publicity**

Requests to limit pretrial publicity, whether coming from a prosecutor or defendant, often argue that the broad scope of pretrial coverage means that potential jurors will draw their own conclusions about the defendant based on media coverage, not evidence vetted by and arguments made in a procedurally oriented court of law.

Although studies using mock trials have found otherwise, in practice, prior coverage of a case does not have much effect on juries, Brusckhe said. This was the major focus of his book, *Free Press Versus Fair Trials*, co-authored by William E. Loges, a communications professor at Oregon State University.

"It's not like [juries] hear a bunch of negative publicity about a defendant and that colors it," Brusckhe said.

In the Zimmerman case, Judge Nelson in particular was unpersuaded by the prejudicial publicity argument, finding no evidence or indication of "an overriding pattern of prejudicial commentary that will overcome reasonable efforts to select a fair and impartial jury."

Nelson also pointed to other alternatives, such as moving the trial, having more intensive jury selection, and giving specific instructions to jurors, once chosen, to avoid public commentary on the case.

Entrusting the jury to make a decision based on the evidence, not on publicity, is at the heart of high-profile criminal cases.

Giving a jury the first look at the evidence is beneficial, Brusckhe said, and there are obvious cases in which publicizing certain information could affect a case and sway a jury outside a courtroom. In most cases, though, "there doesn't seem to be very much reason to be afraid of this," he said.

"I would err on the side of releasing information" when publicity is contrasted with secrecy, Brusckhe said.

Brusckhe also downplays the risks associated with public exposure for a defendant accused of particularly heinous crimes. Data show that conviction rates are very high once a defendant is charged with a crime.

Many defendants have fewer resources at their disposal and cannot as frequently conduct independent investigations, but a highly publicized case could benefit a defendant, he said. With increased publicity, a potentially overworked public defender could devote more time and resources toward mounting a better defense.

"If the world is watching, anything helps the defendant."

## Impartiality persists

Jurors can come from pools that cover entire cities or metropolitan areas. To suggest that pretrial publicity entirely prevents an impartial jury from being convened literally suggests that 12 eligible people in an entire jury pool cannot be found impartial.

Researchers and the Supreme Court have concluded that big jury pools largely skirt the problem of jury bias due to publicity. Even with the explosive expansion of social media, especially on platforms like Twitter and Reddit, this is unlikely to change.

The cases with the most saturated coverage are rare. Brusckke estimates that eight or nine cases a year are a “national media splash,” and for all others, “it’s not going to be hard to find 12 people who haven’t paid attention to it.”

The proliferation of social media won’t change that, he said, pointing to media coverage in his Southern California home area. There are fewer media stories about crime than there were rapes and murders reported, and it is very rare for run-of-the-mill crimes to get media coverage. “I don’t think social media changes that much,” Brusckke said.

Brusckke cited the case of Nick Adenhardt, a pitcher for the Los Angeles Angels of Anaheim, who was killed in 2009 when a drunken driver, Andrew Thomas Gallo, crashed into the car in which Adenhardt was a passenger.

The case attracted significant local media coverage, including fan- and team-generated memorials for Adenhardt. Despite the local attention, it was “no problem to find 12 people” qualified to serve on a jury in Gallo’s murder trial, according to Brusckke.

The Supreme Court used similar analysis in Skilling’s case, observing that more than 4.5 million jury-eligible people lived in the Houston area at the time of Skilling’s trial. “Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain,” the court said.

Ironically, this was further supported by Skilling’s own survey, which found that approximately two in three potential jurors in the entire Houston area had either never heard of Skilling or had no opinion of him.

This surveyed impartiality in the Skilling case came despite the former executive’s protestations that “the community passion aroused by Enron’s collapse and the vitriolic media treatment” directed at him tainted the jury pool.

The court applied the same logic in cases in Las Vegas and the District of Columbia, where it held that a jury pool in the hundreds of thousands or millions nearly eliminated the chance of jury prejudice.

## The way forward

Thanks to the pervasiveness of the Internet, certain criminal cases attract an intimate level of coverage never before seen in the American legal landscape. Courts must vigilantly account for the new challenges that this attention causes, keeping in mind the constitutional rights of all criminal defendants.

Secrecy, however, has shown to be a questionable remedy at best. Publicity seemingly has little compromising effect on a defendant's right to a fair trial, and jury pools tend to maintain their impartiality even in the face of conclusory, incendiary coverage of defendants.

Trial courts have broad power to regulate and control the proceedings before them, and a whole host of diligent measures are available to them to preserve important constitutional rights while still conducting proceedings transparently.

## Update: cameras in the courtroom

### *Illinois and Utah welcome cameras to state courts*

By Rob Tricchinelli

AP Photo/St. Cloud Times by Jason Wachter

A judge listens to arguments in a civil case in St. Cloud, Minn. Photojournalist David Chaney of WCCO films the proceedings, which is the first time cameras have been allowed in a Stearns County courtroom for a civil case.



Cameras are rolling in an increasing number of American courthouses, as two states have added new transparency measures.

Federal courts, from the top down, are most resistant to changes, though, and Justice Sonia Sotomayor even publicly backed off her earlier stance on allowing cameras in the nation's high court.

At the state level, Illinois and Utah have opened their courts, beginning programs to bring camera coverage to trials.

"Allowance for cameras in all courtrooms is something that the Illinois Press Association has been seeking for many years," Dennis DeRossett, the association's executive director, said in a statement. "Illinois already allows cameras at the Appellate and Supreme Court level. So, it only makes sense that trial courts be included."

The Illinois plan began in January 2012, when the state Supreme Court allowed individual circuit courts to apply to the high court and request camera access.

Since then, 29 counties in 12 circuits have been approved by the high court, court spokesman Joseph Tybor said. There are 102 counties in 23 districts in the state.

The first Chicago-area murder trial to be captured on camera concluded May 14, when a jury convicted Johnny Borizov of murder and of masterminding the shooting deaths of three people.

Cameras recorded the bulk of the trial, which took four weeks in DuPage County Court. Broadcasting was put on hold for the testimony of several witnesses.

Media representatives requested two video cameras and two still cameras in the



courtroom, but Judge Daniel Guerin allowed only one of each.

Other circuits are still waiting for approval from the state supreme court, including Cook County, the largest in Illinois with more than five million residents, which applied for camera usage last year.

The first high-profile trial to be broadcast under the Illinois plan was the trial of Nicholas Sheley, who was convicted of murder in the death of an elderly man. The trial took place in Illinois' 14th Circuit, in the northwest part of the state.

In April, Utah became the 20th state to allow television cameras in trial courtrooms. The Utah Judicial Council approved the measures, which permit one camera in a courtroom, and the feed to be shared by requesting media groups.

Utah's rules apply to civil and criminal cases and also allow electronic devices, like smartphones and tablets, in the courtroom, although they may not be used to take photographs.

"We were in the bottom third of states allowing access to the courts, and as of today we are in the upper tier," said state court spokeswoman Nancy Volmer when the rules took effect.

Utah's rules allow a judge to order the camera off when certain testimony is given, such as that from a child or sexual abuse victim.

"Video recordings can help tell the story in more direct fashion," said an editorial from the Salt Lake City *Deseret News*. "Justice may be blind, but the process in which it is delivered is something the general public should be able to see."

Volmer said that several trial courts had already begun the process of allowing cameras.

While the boundaries of cameras in state courtrooms are typically defined by rules written by an individual state's highest court, a Virginia court case instead has the potential to determine how trial courts may handle cameras within the state.

A Charlottesville-based trial judge banned television stations from recording the trial of George Huguely V, who was eventually convicted of murdering his ex-girlfriend at the University of Virginia.

The broadcasters appealed the decision, arguing that Circuit Judge Edward L. Hogshire failed to consider the media's right of access to court proceedings, and it has made its way to the state's highest court.

The court granted the appeal in April and will consider the case in its June session. The ruling could ultimately determine what kind of reasoning a trial court must use before closing a courtroom to cameras.

## **Supreme Court opposition**

The notion of cameras in the U.S. Supreme Court has been approached differently. With the justices generally opposed to cameras, it seems unlikely that live video feeds from the country's highest court will be broadcast anytime soon.

Former Justice David Souter famously opined in 1996 that “the day you see a camera come into our courtroom, it’s going to roll over my dead body.”

And that sentiment is shared by the current bench. “You think it won’t affect you, your questioning,” Justice Stephen Breyer told a House hearing in April, adding that the justices might “watch a lot more carefully what [they] say” once live portrayals make their way into mainstream coverage.

Justice Anthony Kennedy told the same panel that cameras in the courtroom would create an “insidious dynamic.”

Justice Sonia Sotomayor has turned away from openness, too. After a spirited endorsement of cameras during her confirmation hearing, she went on Charlie Rose’s show in February and stated she had rethought the matter.

“I don’t think most viewers take the time to actually delve into either the briefs or the legal arguments to appreciate what the court is doing,” she said. “They speculate about, oh, the judge favors this point rather than that point. Very few of them understand what the process is, which is to play devil’s advocate.”

Elsewhere, the federal judiciary’s pilot program for cameras in courtrooms continues. The three-year program started in July 2011, encompassing 14 district courts in different states.

Analysis of and lessons from the pilot program could guide the Judicial Conference in its willingness to open more courtrooms.

Another option is Congress, but legislation to open federal courts has repeatedly stalled out in the legislative branch.

Sen. Chuck Grassley and Rep. Steve King, both Iowa Republicans, have introduced a bill in Congress that would give federal judges the option to open courtrooms to cameras and recording devices.

The House version of the bill was introduced in February and referred to a subcommittee on courts, intellectual property, and the Internet. The Senate version has seen no action since its introduction.

Grassley has repeatedly introduced the bill, going back to 1999, but it has never made it to the Senate floor. The furthest along it went was in 2009, when a version passed the Senate Judiciary Committee.

## Asked and Answered

### *The Reporters Committee attorneys discuss questions about recent issues in media law.*

*Answers are not meant to be relied upon as legal advice specific to any reader's situation, but are for informational purposes to help journalists understand how the law affects their work.*

#### **Q: Can I access a settlement agreement?**

**A:** When a civil case ends in a settlement, the parties commonly add language regarding the confidentiality of the agreement. The promise of secrecy is often an important incentive in getting one or both parties to accept the terms of a settlement.

Under these confidentiality provisions, all or part of the settlement itself may be secret, and other records and documents may be as well. The parties can then file the settlement agreement with the court and ask the court to seal it and other documents.

Some courts have rejected secret settlements, holding that settlement agreements are like private contracts and that court involvement changes the analysis. The Seventh Circuit has held that if a settlement agreement gets the endorsement of a court, it must also enter the public record of a case unless it contains trade secrets or other confidential information.

The Third Circuit has weighed in similarly, holding that “having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements.” Because the agreement was filed with the court, it becomes a judicial record, with all related rights of public access.

In state court, access to settlement agreements depends on state law. Some states, including South Carolina and Virginia, have laws that restrict parties' ability to be secret when seeking judicial approval of settlement terms.

If a party wants certain information to remain confidential in those states, the burden of proof is on that party to demonstrate why.

The circuits disagree on what level of court involvement makes a settlement agreement become a judicial record, but if a settlement agreement is not filed with the court, rights of public access are markedly less.

Drafts of settlement agreements can also be considered judicial records subject to rights of public access, and courts have been split on what degree of court involvement transforms those drafts into judicial records.

**Q: I recently heard someone referring to “exclusions” under the federal Freedom of Information Act. I thought the law contained “exemptions.” Is there a difference between the two?**

**A:** FOIA contains both exemptions and exclusions, although compared to exemptions, exclusions are rarely invoked. Requesters are more familiar with FOIA’s nine exemptions, which allow federal agencies to withhold records ranging from national security information to documents that would unjustifiably invade an individual’s privacy.

When it comes to exemptions, FOIA requires an agency to tell a requester which exemption is being used to withhold particular records or portions of records. FOIA also allows a requester to challenge an agency’s claims regarding exemptions, through administrative appeals and lawsuits.

FOIA exclusions, on the other hand, allow an agency to treat certain records as if they do not even exist, meaning that agencies can tell a requester that they did not find any records responsive to his or her request even though the agency may in fact have the sought-after records. Congress created the exclusions in 1986 to allow agencies to withhold records in three narrow situations related to law enforcement activities.

The first is when there is an active law enforcement investigation and agency officials believe that the target of the investigation does not know about it. Agency officials must also believe that disclosing that records exist would tip off the target. The agency can only claim this exclusion during the time that the actual investigation is occurring.

The second circumstance is when a requester seeks information about a criminal informant where the law enforcement agency has not publicly revealed that the individual was an informant. Although there is a FOIA exemption that allows agencies to withhold the names of informants, the rationale for this particular exclusion is that by claiming FOIA’s exemption for informants, an agency would essentially be confirming that a particular individual was an informant.

Finally, the third exclusion covers records held by the FBI concerning investigations into foreign intelligence and international terrorism where the records are themselves classified.

Challenging an exclusion can be difficult because the agency will respond to a request covering excluded records by saying that it does not have any records responsive to the request and it does not have to tell you it is using an exclusion to withhold the records. This means that a requester essentially receives a response from the agency stating that there were no records responsive to the request.

A requester can nonetheless appeal an agency’s no-records response because it would be considered adverse to the requester. When this appeal is made, a requester needs to be prepared to argue that the circumstances surrounding the potential

application of an exclusion no longer apply or that the government has waived its ability to claim a FOIA exclusion. But even as a requester challenges an agency's potential use of an exclusion, during either an administrative appeal or a lawsuit, the agency will likely not confirm whether it has used an exclusion.

Regarding the waiver argument, a court recently ruled in *Memphis Publishing Company v. FBI* that the FBI had waived its ability to claim an exclusion regarding a former confidential informant because the agency had previously released documents that identified the individual as such.

In particular, the court ruled that previously releasing documents under FOIA that disclosed a confidential informant's identity served as official confirmation (even if the disclosure was an FBI oversight) by the agency that the particular individual was an informant and therefore did not allow the FBI to claim the informant exclusion.

**Q: My state has a journalist shield law. Does that mean I'm safe in offering assurances to my confidential sources that they will not be identified by authorities seeking to uncover them?**

**A:** Not necessarily. Currently, 40 states and the District of Columbia have a reporter shield law. Hawaii's shield law is set to expire on June 30, which will bring that number down to 39. But these laws offer a vague and inconsistent patchwork of protection for journalists hoping for legal protection to back up their promises of confidentiality to their sources.

States such as Colorado, Illinois and Maryland enacted laws that provide only a qualified protection against the compelled disclosure of information based on a set of criteria.

In Colorado, for instance, to overcome a privilege claim by a reporter, the party seeking a forced disclosure of confidential information must establish: "(a) that the news information is directly relevant to a substantial issue involved in the proceedings; (b) That the news information cannot be obtained by any other reasonable means; and (c) That a strong interest of the party seeking to subpoena the news person outweighs the interests under the First Amendment to the United States Constitution of such news person in not responding to a subpoena and of the general public in receiving news information."

The level of proof required to be established by parties seeking to compel reporters to disclose confidential information depends on the state. Colorado, for instance, requires a "preponderance of the evidence" standard, which is used in most civil trials where a jury is instructed to find for the party that, on the whole, has the stronger evidence.

Maryland, in comparison, requires a "clear and convincing" standard to be met, which is a greater burden than the preponderance standard requiring a party to prove that it is highly probable or reasonably certain the qualified privilege test was

met.

In fact, the privilege laws in some states are easy for parties to overcome. For instance, in New Mexico, a reporter loses the right to keep her sources or information confidential if “disclosure [is] essential to prevent injustice.” North Dakota similarly requires disclosure if protecting the reporter from divulging a source would “cause a miscarriage of justice.”

Even states with reporter shield laws recognizing a complete privilege from compelled disclosure of confidential information differ in both the wording of the laws and the substance of the protections for journalists. For example, Alabama’s shield law provides an absolute privilege, but only for “sources of any information procured ... and published;” The Kentucky state shield law, meanwhile, shields only those sources who provided reporters with material that is ultimately published or aired.

Several news organizations, including the Society of Professional Journalists, the American Society of News Editors and the New York Times Company, have formalized ethical codes and procedures to be employed in situations where a reporter is both negotiating and honoring pledges of confidentiality. As these ethical codes make clear, pledges of confidentiality should be given only when it is clear such information is important to the public.

Given the inconsistent patchwork of protections present in state reporter shield laws and the duty to protect confidentiality agreements such ethics codes impress on journalists, such promises should not be given lightly.



## "Open & Shut"

### *A collection of notable quotations*

AP Photo by Pablo Martinez Monsivais

“... we don’t know why ‘(B)(6)’ decided to use recorded music. . .”

*-Redacted Marine Corps documents, citing the Freedom of Information Act’s privacy exemption (B)(6) in place of Beyonce’s name in response to a records request on the lip-sync controversy.*



“It is not unprecedented for the Justice Department to secretly get the numbers of reporters. What’s remarkable is the sweeping nature of this, the dragnet approach ... and that’s why you have some press watchdog groups tonight, and freedom of the press groups saying this is positively Nixonian. They have not seen a precedent for this in decades.”

*-NBC News’ Michael Isikoff said on “The Rachel Maddow Show” regarding the AP phone records subpoena.*

“We apologize for the delay in processing your request. We are unable to provide you a final determination on your request within the 20 working day statutory time frame established by the FOIA because the referred documents require a classification review. Accordingly, I find that we must invoke the additional ten working day extension provision. ... Your request has been placed in our complex queue. At this time, we are unable to provide you an approximate completion date.”

*-The Naval Criminal Investigative Service wrote in a letter to Judicial Watch apologizing for the delayed response and noting that after some confusion, it had just only received the records request the organization filed in 2002.*

“This is Big Brother come to life and a witch hunt to prevent Americans from exercising their First Amendment rights.”

*-Louisiana Gov. Bobby Jindal and Wisconsin Gov. Scott Walker wrote in a letter to President Obama concerning revelations that the IRS was targeting conservative groups.*

“Almost 50 years ago, I made a difference with just an armband. Can you imagine what a 13-year-old today can do with Facebook, Twitter, YouTube and all of the other extraordinary speech tools available in the palm of her hand? We look

forward to reminding her — and sharing real-life stories about how students today are keeping the First Amendment alive.”

*-Mary Beth Tinker, who was suspended for wearing a black armband to junior high school in 1965 to mourn Vietnam War casualties and prompted the Tinker ruling, launched a crowdsourcing campaign this spring for a bus tour supporting the First Amendment.*

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