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The News Media AND THE LAW

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Making the call

**Tweeting football star's medical info
pits privacy against publication**

The News Media & The Law

Spring 2016

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The finger and the football star

Football player challenges ESPN, reporter in medical privacy claim

By Kevin Delaney

Medical privacy and the right to publish took opposite ends of the legal field when New York Giants defensive end Jason Pierre-Paul squared off against ESPN and reporter Adam Schefter after Schefter tweeted photos of a medical report about injuries to the football player's hand.

Pierre-Paul sued ESPN and Schefter in February after Schefter tweeted images of a portion of Pierre-Paul's medical records showing that doctors amputated Pierre-Paul's right index finger four days after a July 4th fireworks injury last year. In the suit, Pierre-Paul asserts privacy claims under a Florida medical privacy law and the common law.

ESPN and Schefter fired back in April, filing a motion asking a federal district court in Florida to dismiss the lawsuit and award reasonable attorney's fees and costs under the state's strategic lawsuit against public participation (anti-SLAPP) law.

The photos, according to Schefter, backed up his reporting and ended speculation about the severity of Pierre-Paul's injury. "ESPN obtained medical charts that show Giants DE Jason Pierre-Paul had right index finger amputated today," Schefter told his 3.86 million Twitter followers.



AP Photo/Julio Cortez

Jason Pierre-Paul talks to reporters for the first time since injuring his hand in 2015.

Schefter told [SI.com](#) that he tweeted the photos out of a desire to be as accurate as possible. “[I]n a day and age in which pictures and videos tell stories and confirm facts ... this was the ultimate supporting proof,” he said. In retrospect, however, Schefter also said that “there should have been even more discussion than there was due to the sensitivity of the story.” Schefter has insisted in interviews that he did not seek the documents, but rather that they were provided to him.

Subsequently, two hospital employees were fired for inappropriately accessing the files, and a lawsuit brought by Pierre-Paul against the hospital was settled, [ESPN reported](#).

Pierre-Paul's complaint asserts ESPN and Schefter violated a section of Florida's [medical privacy law](#) that prohibits a “third party to whom [medical] information is disclosed” from “further disclosing any information in the medical record without the expressed written consent of the patient or the patient’s legal representative.”

ESPN and Schefter, in their motion to dismiss, argue that statute applies only to third parties specifically listed in the law, who have the “right to obtain medical records from a health care provider.” Examples “include attorneys and litigants in medical-related lawsuits...[and] public health authorities such as poison control centers....”

ESPN and Schefter's motion further notes that the statute does not apply to the general public. If the law were interpreted otherwise, “any person who happens to learn some medical information by chatting with a Florida physician at a cocktail party would become a lawbreaker if they repeated the conversation to anyone else,” the motion states.

Pierre-Paul’s broad interpretation of the Florida medical privacy law “would violate the First Amendment by prohibiting the publication of truthful information relating to a matter of public concern,” ESPN and Schefter's motion argues, citing U.S. Supreme Court cases including [Florida Star v. B.J.F.](#) and [Bartnicki v. Vopper](#).

Enrique Armijo, a professor of First Amendment law at the Elon University School of Law, said that a First Amendment problem would be created if the Florida medical privacy law was used to punish a journalist who lawfully received a medical record.

“That is *Bartnicki v. Vopper*. That is other cases that basically say that if a journalist acquires a record not unlawfully then the First Amendment protects the journalist from being punished for obtaining and

disseminating that information,” Armijo said.

Lucas A. Powe Jr., a professor of sports and constitutional law at the University of Texas School of Law, added: “The [U.S. Supreme] Court has never gone all the way and said that the publication of truthful information is always protected. But, on the other hand, there isn’t a case of the Court sanctioning the publication of truthful information.”

In a May 5 opposition to ESPN and Schefter’s motion to dismiss, Pierre-Paul’s attorneys sought to distinguish the facts of his case from *Florida Star*, *Bartnicki* and similar cases.

Because the hospital disclosed Pierre-Paul’s medical records to Schefter in violation of Florida and federal (HIPAA) medical privacy laws, and because Schefter knew of the hospital’s illegal disclosure, Schefter “unlawfully obtained” the information and can be subject to liability for the tweet, the attorneys argued. Pierre-Paul is represented by attorneys from Meister Seelig & Fein LLP and Hinshaw & Culbertson LLP.

In a court document filed May 16, attorneys for ESPN and Schefter disputed the argument that Schefter unlawfully obtained the medical records. Decades “of First Amendment case law has consistently held that a journalist does not unlawfully obtain information by allegedly accepting it with knowledge that a source’s disclosure was illegal,” they wrote. For a journalist to have obtained information unlawfully, the journalist must have broken the law in the process of obtaining the information. ESPN and Schefter are represented by attorneys from Thomas & LoCicero PL and Levine Sullivan Koch & Schulz LLP.

In addition to the medical privacy claim, Pierre-Paul also alleges that ESPN and Schefter invaded his privacy by publicly disclosing private facts, because “publication of the chart was highly offensive to a reasonable person of ordinary sensibilities.”

Pierre-Paul’s complaint makes an important distinction between the publication of information from the medical record and publication of the record itself: “The chart, as distinguished from the amputation of plaintiff’s right index finger, was not a matter of legitimate public concern.”

This distinction, Armijo explained, is one “that more plaintiffs are going to latch onto in privacy cases.”

Armijo drew parallels between Pierre-Paul’s suit and Hulk Hogan’s case against Gawker Media, in which a jury recently awarded Hogan \$140

million in damages for invasion of privacy after Gawker published a portion of a sex tape involving Hogan.

According to Armijo, “Hogan made the successful argument at the trial level ... that even if there was a public interest in his private sex life, and he essentially conceded that because he had gone on Howard Stern and talked about it ... there is no public interest in the actual video that Gawker had distributed on its website.

“Jason Pierre-Paul is making basically the same argument,” Armijo said. “It is the idea that even if there is a public interest in the injury, something that he has to concede because of the enormous public interest in the National Football League ... there is no interest in his actual medical report.”

In the motion to dismiss, ESPN and Schefter assert that Pierre-Paul’s claim for the publication of private facts must fail because Schefter’s tweet related to a newsworthy matter of public concern. Under Florida law, when a party publishes information relating to a matter of public concern, liability cannot be imposed for the publication of private facts.

According to the motion, Pierre-Paul’s proposition that the information in his medical records is “a matter of public concern” but “an actual picture of the same information embodied in a document is not” is unsupported. The photos in the tweet “amount to no more than photographs of words on a piece of paper and a computer screen stating that plaintiff’s finger had been amputated.”

The opposition to the motion to dismiss countered that the photos included in the tweet revealed more than the amputation. According to Pierre-Paul, the tweet also included information disclosing that he had a skin graft and relating to an “elbow retraction” for a different patient.

According to Powe, plaintiffs have a steep battle when bringing a right of privacy claim. “The right of privacy is much beloved, but not by courts,” he said. “I think that especially true of somebody who is a public figure like Pierre-Paul is.”

Armijo, however, questioned whether the First Amendment will always provide blanket protection to journalists who report on matters of public concern.

“I think that the First Amendment is only going to stand up so tall [in invasion of privacy cases involving celebrities] when the material being shown is related to, but perhaps superfluous to, the issue that is actually the

matter of public concern,” he said.

Litigation frustration

Editors tell Knight Foundation of challenges to pursuing First Amendment cases

By Sophie Murguia

Leading editors are worried that the news industry's ability to fight for First Amendment rights in court is waning, a [recent report](#) found.

In a survey of top editors from print and online newspapers, 65 percent said that news organizations are in a weaker position than they were 10 years ago to pursue freedom of expression cases. While the editors expressed more confidence in their own publications' ability to take on legal cases, they tended to be more pessimistic about the state of the industry as a whole.

The report was released April 21 by the Knight Foundation in association with the American Society of News Editors, Associated Press Media Editors and the Reporters Committee for Freedom of the Press. Although not a scientific poll, the survey of 66 editors offers a glimpse into the mindset of industry leaders.

The Knight Foundation also announced on the same day a \$200,000 grant to the Reporters Committee to help expand the [Knight Litigation Project](#), which provides legal aid to journalists and news organizations pursuing newsgathering and First Amendment cases.

Economic constraints are often a formidable obstacle to journalists who want to pursue these cases. Of those who thought that the news industry's ability to pursue legal action was declining, nearly nine in 10 cited money as the reason.



A majority of the editors, who were mostly from large newspapers, said that their own organizations hadn't backed away from pursuing any legal cases due to lack of resources. But economic pressures could pose more of a problem for smaller organizations looking to litigate First Amendment cases.

"The digital disruption has uprooted the traditional business model for journalism, making it harder for newsrooms to pursue First Amendment cases and ensure the rights that it protects are upheld," said Shazna Nessa, Knight Foundation's director of journalism, in a press release.

Of the 27 percent of respondents who described money as an obstacle for their own organization, several said that Freedom of Information Act requests posed a particular challenge — whether because the fees were prohibitive or because challenging denied requests would require a costly court battle.

Some editors also pointed to a decrease in watchdog journalism throughout the industry as a reason journalists may be pursuing fewer cases.

"News organizations may be increasingly pursuing stories that are less likely to result in legal issues," the report said.

First Amendment cases are also posing unprecedented challenges for journalists in the digital age. Most of the editors agreed that new technology has left open many questions about First Amendment law.

Large news organizations seem to be holding their ground in the face of these challenges: A majority of the editors engaged in some legal activity over the two-year period from 2014-2015. Seventy-one percent of editors said that their ability to defend themselves against lawsuits or government subpoenas was the same as it was 10 years ago. Editors who had to defend themselves in court during the past two years most commonly faced subpoenas for unpublished materials, as well as libel lawsuits. Some also fought court orders that aimed to prevent digital content distribution.

Large newspapers are also continuing to proactively challenge restrictions on freedom of expression, but 44 percent of editors said their organizations were less able than 10 years ago to pursue these cases. Those who did most commonly went to court to seek access to information, including public records, sealed court records and trial materials.

The vast majority of editors used private law firms or in-house counsel to take on their legal cases. Only a handful used *pro bono* services, with 6 percent using the *pro bono* services of a private law firm and an additional 6 percent using a law school or nonprofit.

The report's authors acknowledged that the opinions of these top editors may not necessarily represent the entire industry. But the survey suggests a growing concern among leading news organizations that the industry may be in danger of losing the ability to vigorously pursue First Amendment cases in court.

"While not a scientific sample, this quick poll shows the need for a great deal more study and understanding of the changing First Amendment landscape," the report concluded.

Eric Newton, a consultant to the Knight Foundation who co-authored the report, said that after the results were published, some journalists were unsurprised to learn that editors are worried about newspapers' ability to take on First Amendment cases.

"Others used the report to promote creative solutions that are currently under-used by the industry, especially the growing trend of nonprofits helping with legal work," Newton said in an email.

"It is hopeful, a parallel trend to the increase in nonprofit journalism," he added.

Other resources:

[Fellowships](#)

Anatomy of a Brief: Mendez v. City of Gardena

The fight over access to video of police shootings is nothing new. The news media have always wanted to see the best evidence when there's a public controversy, and as more and more police departments integrate dash cams and body cams into their operations, video evidence becomes increasingly important.

The fight took an unusual turn in a Ninth Circuit case recently. In *Mendez v. City of Gardena*, a federal district judge found that the news media had a right to see the video in a case involving the shooting death of a (wrongly identified, it turned out) suspect in a bicycle theft case. The lawsuit seeking access was brought by the Los Angeles Times, The Associated Press, and Bloomberg. The judge ruled that the right of access was so clear that there was no valid reason to stay his finding, and so [the video was released](#). On appeal, the City of Gardena has asked the Ninth Circuit to rule that the release of such information should always be stayed pending appeal.

In the [amicus brief](#), the Reporters Committee, joined by 26 other news organizations, argued that the current standard is appropriate:

The district court in this case correctly followed U.S. Supreme Court precedent in applying a four-part test to determine whether to grant the City's request for a stay that examined: (1) the likelihood that the City would succeed on the merits on appeal, (2) the possibility of irreparable injury to the parties requesting the stay, (3) the possibility of substantial injury to others, and (4) the public's interests in secrecy and disclosure. Order at 13. In short, before rejecting the City's request for a post-dismissal stay of its unsealing order, the district court considered the interests of all parties, including the City, other interested persons, and the public at large. *Id.*

An automatic-stay regime in cases like this one would upend the flexible nature of this equitable remedy, converting a stay from a remedy available only through the exercise of a court's measured discretion into a predetermined outcome that disregards the competing interests at stake. See *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."). It would also undermine a key feature of this equitable remedy: a judge's discretion in issuing a stay must necessarily be concerned with how such a stay would affect the public.

In examining the four factors, the brief emphasized that the public's interest was properly given weight:

The fundamental interest in public access to court records and proceedings springs from the fact that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). First Amendment freedoms "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575 (plurality opinion). In short, access allows journalists and ordinary citizens to keep a "watchful eye on the workings of public agencies." *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted); see also *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.").

Furthermore, an automatic stay of release would ill serve the public.

An automatic stay would fail to account for the paramount importance of open and transparent government in our constitutional system. That is, an automatic stay would impede not

only the judiciary's role as "guardian of the free press," but also the press's role as "guardian of the public interest." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). "The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them." *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring). This case concerns not only a public matter, but a public matter that is particularly relevant at this moment in our history. As the City itself states, "The simple fact is that our communities have been rocked by violence over the last several months as incomplete and evocative videos have been released, often before the entire facts of the case are known." Appellant's Opening Brief at 20. Thus, it is the press's role and duty to encourage discussion on the issue of officer-civilian relations and related topics, and disseminating information on these issues is part and parcel of this duty.

Somewhat surprisingly, the City also argued that it should have been able to keep the videos sealed and unavailable to the public because such secrecy was a motivation for it to settle the case.

The City argues that it paid "a premium"—namely, the \$4.7 million settlement figure—to keep the videos confidential. Appellant's Opening Brief at 7; Order at 12. But, as the district court recognized, this sort of consideration does not constitute a compelling reason justifying confidentiality. "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d at 1179 (quoting *Nixon v. Warner Commc'ns, Inc.* 435 U.S. 589, 598 (1978)). Getting one's money's worth from a bargain purposely designed to use public money to avoid public accountability cannot possibly be treated as a compelling interest under this standard.

The city, the amicus brief argued, benefitted from improper secrecy already, and was properly denied the chance to maintain the secrecy in a case of great public interest:

The City also ignores the fact that the videos remained under seal, without the City demonstrating that such sealing was justified, far longer than they should have. There are two standards that a court may invoke in determining whether sealing a court record is warranted. During discovery, the relevant standard is whether “good cause” exists to seal the information; this is done by “balancing the needs for discovery against the need for confidentiality.” *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (internal quotation marks omitted). “When discovery material is filed with the court, however, its status changes.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003). The new standard — a much higher burden for the party seeking confidentiality — is the “compelling reasons” standard applied by the district court in this case. *Pintos*, 605 F.3d at 678; see Order at 11.

Thus, once the sealed material is filed with the court, it can remain sealed only by satisfying the higher burden. See *Kamakana*, 447 F.3d at 1180 (“[A] ‘good cause’ showing alone will not suffice to fulfill the ‘compelling reasons’ standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments.”). The district court considered this issue thoroughly when the media organizations sought to have the disputed videos released. Critically, the dashcam footage first entered the record in late January 2015 as part of the plaintiffs’ opposition to the defendants’ motion for summary judgment. Order at 6. This is the point at which the higher standard to justify sealing arose.

The appeal has been fully briefed, and will be argued in the next few months.

Courtroom camera pilot program grounded

Federal courts' ban on video images will continue

By Michael Lambert

A pilot program that put cameras in 14 federal trial courts for four years has ended with a decision to maintain the ban on video recordings of proceedings, despite reports that participating judges and attorneys were in favor of it.

The federal judiciary lifted its long-time ban on cameras in 14 of 94 U.S. district courts, allowing the recording and online publication of civil proceedings as part of a camera pilot program from July 2011 to July 2015.

After completion of the program, nearly three-fourths of participating judges and participating attorneys responded that they were in favor of video recording proceedings, according to a Federal Judicial Center [Report](#) analyzing the program. Additionally, nearly two-thirds of judges polled, including those who participated and those who did not, said they would allow video recordings if the judiciary permitted them.



U.S. Supreme Court Chief Justice John Roberts is chair of the Judicial Conference.

However, the [Judicial Conference of the United States](#), the policy-setting body of the federal judiciary chaired by U.S. Supreme Court Chief Justice John Roberts, decided in March to [maintain](#) its ban on cameras in federal trial courts after the Committee on Court Administration and Case Management did not recommend any changes to the Conference's policy.

"Ultimately ... the cameras pilot program did not produce sufficient or persuasive evidence of a benefit to the judiciary to justify the negative effect upon witnesses and/or the significant equipment and personnel costs associated with video recordings of district court civil proceedings," the Committee [concluded](#).

Although cameras will remain banned in federal trial courts, three participating courts from the pilot programs — the district courts for the Northern District of California, Guam and the Western District of Washington — will continue allowing cameras under the same terms of the pilot program "to provide longer term data and information to the Committee on Court Administration and Case Management," the Judicial Conference explained.

The Judicial Conference's decision means the news media will have to limit their reporting on federal trial courts to observations inside the courtroom, constricting the ways in which the press can portray the judicial system to the public, according to Sonja West, a media law professor at the University of Georgia School of Law.

"There's a certain amount of information that cameras provide that journalists can't convey to the public such as body language, tone of voice and facial expressions. Having audio and video would pass on those matters to the viewers themselves," West explained.

Gabe Roth, executive director of Fix the Court, an advocacy group supporting greater judicial transparency, called the conclusion of the camera program without a change in policy "a real missed opportunity for the public and federal judiciary to finally start supporting modern expectations of transparency."

Roth said the 245-page FJC Report conflicts with the findings of the Committee and the Judicial Conference decision.

In recommending no change in the camera policy, the Committee cited the negative effects of cameras on witnesses and attorneys. But the FJC Report found that two-thirds of judges believe cameras have little or no effect in motivating witnesses to be truthful, and more than half of judges

think video recording has little or no effect in making witnesses nervous.

“Video recording in my court has been a total non-event — I do not believe it has impacted any aspect of our proceedings,” said one judge.

The Committee further cited concerns about attorneys pandering to cameras. However, one attorney who participated in the program said the cameras were hidden and largely unnoticeable during proceedings. “I could detect no noticeable difference in courtroom decorum and the demeanor of the parties and the lawyers,” the attorney noted in the FJC Report.

In refusing to recommend a modification to the camera ban, the Committee stressed worries about the \$989,526 cost of the equipment, labor and video hosting. However, this amount represents less than 0.01 percent of the \$6.78 billion federal judiciary [budget](#).

“It’s a convenient excuse,” Roth said. “The costs of cameras and equipment are going down each year, and the individuals who work for the federal judiciary that know how to use the technology are getting younger. It’s a weak reason from both a monetary perspective and a hiring perspective.”

The Committee also attributed its decision to a “low level of interest in recording proceedings,” noting that only 158 proceedings were recorded and published on the judiciary’s [website](#), only 33 of 198 judges in participating courts recorded a proceeding, and the recordings were only viewed 21,530 times in 2014.

But Roth, joined by judges participating in the program, believe these reduced numbers stem from design flaws in the pilot program. For example, judges participated in the program on a volunteer basis, and each recorded proceeding required the consent from all parties.

“As I anticipated [at the outset of the program], the provision giving the parties the right to decline to have a proceeding recorded greatly diminished, if not eliminated, the potential value of the pilot,” one participating judge wrote in the Report.

The future of cameras in federal courts remains uncertain after the most recent failed pilot program.

The federal judiciary previously tested cameras in courts between 1991 and 1994 by allowing video recording in the U.S. Court of Appeals for the Second and Ninth Circuits and six U.S. District Courts. Although the Committee recommended authorizing the recording and broadcasting of

civil proceedings after the initial pilot program, a majority of the Judicial Conference voted to maintain the ban in U.S. District Courts.

The blanket prohibition on recording judicial proceedings was amended to allow the courts of appeals to decide for themselves whether to permit recordings. The Second and Ninth Circuits decided to do so while the remaining courts of appeals did not. The blanket ban still remains on federal trial courts. The Second and Ninth Circuits are currently the only federal appeal courts to allow recordings of proceedings. The Ninth Circuit even publishes its proceedings on its [website](#) and [YouTube channel](#).

But the remaining 12 federal appeals courts, including the U.S. Supreme Court, ban all outside recording devices. The Supreme Court bans recordings devices from the public but records audio of its oral arguments and [publishes](#) the recordings at the end of each argument week.

Members of Congress have introduced legislation permitting cameras in federal courts. Recent attempts include the [Eyes on the Courts Act of 2015](#) in the House of Representatives and the [Sunshine in the Courtroom Act of 2015](#) in the Senate, but neither have advanced past the committee stage.

West explained that advancing technology, rather than pilot programs or legislation, may ultimately soften the judiciary's stance on recording devices.

"At some point the technology is going to be too ubiquitous," West said. "Cameras will be in peoples' glasses or shirts, and it'll be too difficult to find. [The judiciary] will realize it is better off having a formal program where they have control over the cameras."

But until a change occurs, cameras will remain banned, journalists will continue being restricted to traditional newsgathering techniques, and the cloud will persist over sunshine in the federal courts.

Impersonating the news media

Reporters Committee, AP use FOIA to get info on FBI guidelines on when it's okay, and when it isn't

By Hannah Bloch-Wehba

The FBI recently released documents, apparently for the first time, that set out the rules and procedures the agency must follow when it impersonates the media during undercover investigations. The documents were released in response to a FOIA [lawsuit](#) filed last August by the Reporters Committee for Freedom of the Press and The Associated Press.

The newly released documents include what appears to be the agency's [Field Guide for Undercover and Sensitive Operations \(FGUSO\)](#), which to the Reporters Committee's knowledge has not previously been published. (Asked about this, the FBI said it cannot provide an additional comment on the FOIA release.) This field guide sets out guidance for agents conducting undercover investigations, including online covert investigations and sensitive investigations.

The [lawsuit](#) sought answers to three basic questions: What are the FBI's rules regarding impersonation of the media on the internet? How often, and under what circumstances, do FBI agents pose as members of the news media during criminal investigations? And did the FBI follow its own rules in a 2007 investigation in which, as the agency has confirmed, it impersonated AP to deliver malware to the computer of a juvenile



suspected of making anonymous bomb threats to his Seattle-area high school?

The Seattle investigation was revealed in 2014, when Christopher Soghoian, a technologist at the American Civil Liberties Union, reviewed documents previously released to the Electronic Frontier Foundation under FOIA and [found](#) that the FBI had drafted a fake AP article as a cover for transmitting malware to a Timberline High School student suspected of emailing bomb threats to his school.

Shortly thereafter, FBI Director James Comey sent a [letter to the editor](#) of *The New York Times* confirming not only that the FBI had drafted a fake AP news article for purposes of sending malware to the suspect, but also that an “online undercover officer portrayed himself as an employee of The Associated Press, and asked if the suspect would be willing to review a draft article about the threats and attacks, to be sure that the anonymous suspect was portrayed fairly.”

The Reporters Committee and AP each filed FOIA requests seeking information about the policies, practices, and circumstances surrounding the agency’s impersonation of the media, both in the Timberline case and as a general matter.

In February, six months after the Reporters Committee and AP filed suit, the FBI produced some documents responsive to some of the FOIA requests. Among other things, the FBI produced portions of documents setting out internal guidelines for investigations, like the Timberline operation, that implicate “sensitive circumstances.” These documents described the internal review processes that agents are required to follow before they may impersonate the news media.

The FBI referenced the [Attorney General’s Guidelines on FBI Undercover Operations \(AGG-UCO\)](#), which describe a complex set of requirements for approving undercover operations involving 15 categories of “sensitive circumstances,” including situations involving “untrue representations” concerning third parties, or activities that create a significant risk that a person will enter into a confidential relationship with an undercover operative posing as a member of the news media.

When sensitive circumstances exist, a Special Agent in Charge must seek approval, in writing, from FBI Headquarters. The AGG-UCO also require a “letter from the appropriate Federal prosecutor indicating that he or she has reviewed the proposed operation, including the sensitive

circumstances reasonably expected to occur, [and] agrees with the proposal and its legality.” The application must be reviewed by FBI Headquarters, sent to the Undercover Review Committee, and approved by a high-ranking FBI official.

The FBI also produced portions of what appears to be its [Field Guide for Undercover and Sensitive Operations \(FGUSO\)](#), its manual for implementing the AGG-UCO. The FGUSO, which appears to be previously unpublished, notes that the mere existence of sensitive circumstances involving “privileged relationships,” such as those between reporters and sources, requires review by the Undercover Review Committee.

This document, the title of which the FBI has not provided, indicates that the evaluation and approval process that the Undercover Review Committee undertakes for operations involving sensitive circumstances is “extensive.”

The production of the FGUSO clarifies what had appeared to be a disjunction between the AGG-UCO, which regulates undercover operations involving “sensitive circumstances,” and the FBI’s Domestic Investigations and Operations Guide (DIOG), which regulates “sensitive investigative matters” (SIMs). A SIM, as defined in the DIOG, may “involv[e] the activities of a domestic public official or domestic political candidate ... a religious or domestic political organization or individual prominent in such an organization, or the news media.” But the DIOG makes clear that the SIM designation “is intended to focus on the behaviors and/or activities of the subject, target, or subject matter” of the investigation, and does not necessarily apply to the tactics used. Similarly, the heightened approval requirements the DIOG sets out for SIMs are distinct from the review and approval requirements for undercover operations involving “sensitive circumstances.”

The review processes for operations involving “sensitive circumstances” appear to be intended to guard against exactly the type of damage that was done in the Timberline case. As AP Senior Vice President and General Counsel Karen Kaiser [pointed out](#), the Timberline suspect “could easily have reposted this story to social networks, distributing to thousands of people, under our name, what was essentially a piece of government disinformation.”

Among other things, when the Undercover Review Committee

considers a “sensitive circumstance” such as impersonation of the news media, it must “weigh[] the risks and benefits of the operation,” including the risks of reputational damage, interference with confidential relationships, and “the suitability of government participation in the type of activity that is expected to occur.” Had the Seattle field office sought approval in the 2007 Timberline case, the Undercover Review Committee may have recognized that the government’s unnecessary appropriation of a news organization’s name raises special concerns for the credibility of an independent press.

The documents further show that the FBI failed to follow its own rules when agents impersonated the AP during the 2007 case. After the impersonation became public, an [FBI analysis](#) determined that the non-compliance was reasonable, raising questions about the efficacy of the guidelines altogether. On Oct. 31, 2014, when outrage regarding the FBI’s impersonation of AP was at its highest, the Cyber Division prepared a “Situation Action Background” document offering an after-the-fact analysis of the 2007 Timberline investigation.

The Cyber Division concluded that “[a]lthough an argument can be made the reported impersonation of a fictitious member of the media constituted a ‘sensitive circumstance’” that would have required review by FBIHQ, the Undercover Review Committee, and approval by a high-ranking FBI official, the FBI’s failure to observe its own guidelines was not unreasonable.

The Cyber Division’s conclusion raised more questions than it answered. If the FBI’s failure to observe its guidelines was reasonable in the Timberline case, when, if ever, does the agency follow the review and approval process set out in the FGUSO and AGG-UCO?

In the FOIA requests, the Reporters Committee and AP each sought information about other investigations, separate from Timberline, in which the FBI has similarly usurped the identity of an individual or organizational member of the news media in order to deliver malware to a criminal suspect. None was produced.

The Reporters Committee and AP have argued in their ongoing case that these omissions reflect the inadequacy of the FBI’s search for records in response to their FOIA requests. Further, the lack of records pertaining to investigations other than the Timberline case raises concerns about whether the FBI frequently disregards its internal processes for such

operations.

The Cyber Division's conclusion is additionally troubling because the type of tool at issue in the Timberline case is widely used by agents seeking to locate anonymous criminal suspects. Because the Timberline suspect had obscured his internet protocol address, the FBI sought to deliver a type of data extraction software called a "Computer and Internet Protocol Address Verifier" (CIPAV) designed to extract the computer's true IP address and locate the suspect.

The FBI is increasingly using so-called "hacking tools" and "network investigative techniques" like the CIPAV in criminal investigations, but has [reportedly](#) maintained no "central and complete listing" of the instances in which they have been deployed.

The Department of Justice also wants to make it easier to use hacking tools, and proposed an amendment to Federal Rule of Criminal Procedure 41, which concerns the issuance of search warrants, that would ease requirements for so-called "hacking warrants." (The [amendment](#) has been [approved](#) by the Judicial Conference and the Supreme Court, but has not yet taken effect; two federal district court judges have recently suppressed evidence gleaned from hacking warrants on [jurisdictional grounds](#).)

The apparent frequency with which the FBI seeks hacking warrants has raised additional questions about the agency's methods and the appropriate form of judicial oversight. At the very least, the FBI's production of the FGUSO confirms at least some of the FBI's relevant review processes for undercover operations involving sensitive circumstances such as media impersonation. But the agency's apparent conclusion that those review processes may "reasonably" be disregarded in situations like the Timberline case signals that the FBI's internal procedures may be less robust than they appear.

Reporters Committee attorneys are representing The Associated Press as well as the Reporters Committee as plaintiffs in this matter. Kaiser is a member of the Reporters Committee's Steering Committee.

Champions of First Amendment honored

Reporters Committee dinner fetes four with Freedom of the Press Awards

By Debra Gersh Hernandez

The Reporters Committee for Freedom of the Press hosted its 2016 Freedom of the Press Awards Dinner at The Pierre in New York City on May 17, honoring Eve Burton and the Office of General Counsel at Hearst, and Alberto Ibarguen and Eric Newton of the John S. and James L. Knight Foundation. Tom Brokaw, NBC

News special correspondent, received the Fred Graham Distinguished Service Award.

"NBC Nightly News" and "Dateline" Anchor Lester Holt was the host.

Lee C. Bollinger of Columbia University and Tim Armstrong of AOL Inc. served as dinner chairs. Reporters Committee Chairman Pierre Thomas of ABC News and Executive Director Bruce D. Brown welcomed attendees during dinner remarks.

Attended by nearly 500 journalists, media lawyers and other supporters of the First Amendment, the evening featured a series of awards to individuals whose work has exemplified the highest ideals of protecting and practicing press freedom. (The entire program can be viewed on the [Reporters Committee YouTube channel](#), and a gallery of photos and live drawings is on the [Reporters Committee website](#).)

The event also was host to a [silent auction](#) of more than 20 original



Jared Siskin/Patrick McMullan Co.

Tom Brokaw receives the Fred Graham Distinguished Service Award from Lester Holt.

works donated by leading cartoonists, as well as live drawings by New Yorker/editorial cartoonist [Liza Donnelly](#).

Holt introduced Brokaw and anchored a special NBC News video tribute before presenting Brokaw with the Fred Graham Distinguished Service Award.

"We've all benefitted from seasoned veterans in our newsrooms who have seen and covered so much, who share their knowledge, they offer their counsel, and who know what it is that's so vital about what we do and why journalism matters. And they keep our journalistic compass pointed in the right direction," Holt said. "We have a name for that person at NBC News. We call him Tom Brokaw, and every newsroom would be lucky to have one."

Brokaw noted, "I'm privileged to be a part of this honor. But it's more than just one night. This work goes on day in and day out. It goes on beginning with the excellence of the work that we do. Work we can defend. Work that upholds the great traditions of American journalism.

"The Founding Fathers gave us the First Amendment — the *First* Amendment. And they did that with good reason," Brokaw continued. "Because they knew the future of this country would depend on the free flow of information and the exchange of ideas. Everyone in this room is a part of that, and it's been my privilege to spend most of my life doing just that." ([Watch the Brokaw presentation and remarks here.](#))



Jared Siskin/Patrick McMullan Co.

Mark Fainaru-Wada (left) and Lance Williams present the 2016 Freedom of the Press Award to Eve Burton.

"We have some very brave reporters in this room tonight, and some very brave editors. But let's take a moment to thank a woman who allows us to be brave by giving us the power, the weaponry, the strategy and, above all, the legal and moral standing to fight the good fight," said Hearst Executive Vice Chairman Frank A. Bennack Jr. in a video tribute to Burton.

"We are all grateful to Eve because in the end, we are all better at what we do because she is so good at what she does for all of us, not just those of us at Hearst, but all of us who labor at the honorable task of shining

light into dark places," he said.

Mark Fainaru-Wada and Lance Williams, who were represented by Burton when the former *San Francisco Chronicle* reporters were subpoenaed for their sources in the BALCO steroids investigation, introduced Burton and presented her with the Freedom of the Press Award.

"Lance and I experienced firsthand the true force of nature that Eve is," Fainaru-Wada said. "She changed and shaped our lives in ways we're never going to be able to forget and never be able to repay."

"So now Mark and I always say to reporters: If you're jammed up, dragged into a source case, have somebody reach out to Eve Burton at Hearst," Williams said. "She has a million ideas, she is a reporter's truest friend, and it is great to be able to publicly say how much we thank you for your efforts on behalf of us and all reporters every place."

Noting that the First Amendment is a "team sport," Burton said it is "also like a muscle: It has to be exercised. As Lee Bollinger said, 'The First Amendment exists only in theory without a constituency of support.' And every single one of you here, whether you are a Pulitzer Prize-winning journalist, a cub reporter, a lawyer — those who have argued some of the most important Supreme Court cases under the First Amendment — and the executives who have supported the mission — which is expensive — have all been part of preserving free speech."

Burton also noted that it is important to have "a cultural mesh" between technology companies and established media "so that the country can speak the same language when it comes to the First Amendment." ([Watch the Burton presentation and remarks here.](#))

Alberto Ibargüen and Eric Newton of the John S. and James L. Knight Foundation were introduced by Marty Baron of *The Washington Post*, who said of the honorees, "I can think of no more devoted advocates of free expression."

"Free expression imposes an obligation on every individual who hopes to enjoy its liberties," Baron added. "The Freedom of the Press Award goes to two individuals who made that obligation their life's work."

Discussing the [Knight First Amendment Institute at Columbia University](#), announced earlier that day, Ibargüen said, "Eric and I are not the type to wring our hands and lament that the world has changed and that power seeks greater and greater control of information. Power and change have always been. We accept that challenge. But the truth is that we don't

yet fully understand the implication of our lives in the internet or know the way future generations will interpret free expression.

"So our vision is that the Knight Institute, devoted to principle and able to evolve with technology, will effectively advocate in favor of the right to know and the right to tell for freedom in a future we can't yet imagine and against the relentless enemies of free expression," Ibarguen added. "We stand for free speech, free press and for a free people." ([Watch the Knight Foundation presentation and remarks here.](#))

Both dinner chairs offered welcome remarks and congratulations to the honorees. You can watch Tim Armstrong's remarks to the crowd [here](#) and view Lee Bollinger's welcome video online [here](#).

Earlier in the evening, Holt welcomed attendees with a reminder that while we fight to protect freedom of the press in the United States, for journalists overseas — many working for U.S.-based news organizations, such as freelancer Austin Tice — "there is no court of appeal. There is no Reporters Committee. There are only beatings and intimidation and jail and sometimes death. So as we honor our exemplary defenders of press freedom tonight, let's also take a moment to remember all of our colleagues who can't come home, those who won't come home, and those we believe *will* come home." ([Watch Holt's opening remarks here.](#))

Thomas noted that, "As chairman of the Reporters Committee, I've come to appreciate the broader scope of press freedom issues affecting my colleagues, and how important it is to protect those rights.

"Unfortunately, in an age of ever-tightening budgets, our resources don't always allow for the legal costs associated with a challenge for information or access," Thomas said, adding that the 2016 dinner was the Reporters Committee's most successful. "This makes the work of the Reporters Committee increasingly more important to preserving press



Jared Siskin/Patrick McMullan Co.

Marty Baron (right) presents the 2016 Freedom of the Press Award to Alberto Ibarguen (left) and Eric Newton.

freedom in the United States — and it makes your support for our work all the more appreciated and crucial." ([Watch Thomas' welcome remarks here.](#))

Looking to the future, Brown explained that the Reporters Committee "is broadening the range of our work to meet the needs of evolving and expanding media — from non-profit investigative journalism, to documentary filmmakers, to protecting the right to know from the right to be forgotten.

"Our move into litigation over the last two years — we are now representing journalists and news organizations pro bono in access and public records cases — is already leading to some notable victories," he added. ([Watch Brown's full remarks here.](#))

Other resources:

[2016 Freedom of the Press Awards Dinner](#)

Convention coverage

Reporters Committee hotlines to help journalists covering political conventions

As it has done for the political conventions over the last 40 years, the Reporters Committee will maintain [journalist hotlines](#) during the upcoming Republican and Democratic national conventions this summer. The Republican convention will be held July 18-21 in Cleveland, and the Democrats will meet July 25-28 in Philadelphia.

The Reporters Committee hotlines are staffed by local lawyers who will be available to help if a journalist gets swept up in an arrest during protests or other convention activity. Lawyers from Levine Sullivan in Philadelphia and BakerHostetler in Cleveland will head up the hotline teams this year. Specific details, including numbers to call and information on what to do if you are arrested while covering the events, will be available on the [Reporters Committee's site](#) in early July.

The national conventions always draw a large number of protesters, and there is every reason to believe that this summer's events will be more controversial and contentious than ever.

The 2012 conventions were the [first in 20 years that did not see an arrest of a journalist](#). Police officials in both Charlotte, N.C., which hosted the Democratic convention, and in Tampa, Fla., which hosted the Republican event, had made commitments to work with journalists, including representatives of the Reporters Committee and its hotline law firms, before the events.

The 2008 Republican convention in St. Paul, Minn., was one of the worst ever for reporters, with [at least 40 arrests](#) of journalists. Amy Goodman, host of "Democracy Now!," was arrested with two of her producers during a demonstration they were covering. They ended up settling a civil rights suit for a [reported \\$100,000](#).

Police policies a mixed bag

D.C. police release some bodycam videos as national debate over access continues

By Adam Marshall

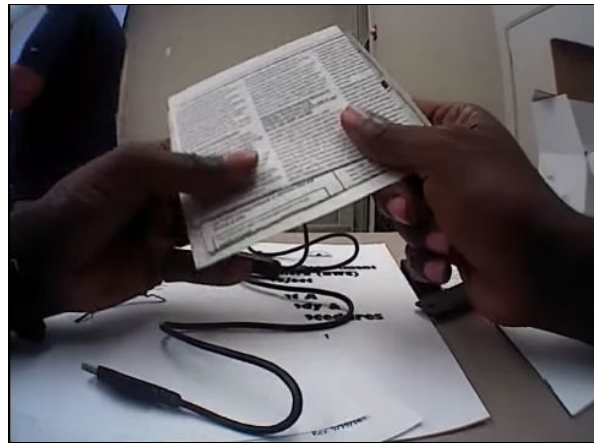
The Washington, D.C., Metropolitan Police Department recently released 12 police bodycam videos in response to a [public records request](#) from the Reporters Committee for Freedom of the Press. The release of about 23 total minutes of video comes more than five months after the Council passed a law setting forth procedures for public access to the videos.

The D.C. MPD is just one of many police departments around the country adopting this video technology and working with lawmakers, courts and the public to establish access policies. An interactive map of laws and policies around the U.S. is on the [Reporters Committee website](#).

The D.C. videos, which range from seconds to several minutes in length, were created on the first day of the agency's bodycam trial program in late 2014. Their content varies, but largely consists of officers in police vehicles on patrol and learning to use the cameras.

Notably, the face of every police officer in the videos, even those standing [on public sidewalks](#), is redacted. The MPD explained that the redactions were made under the privacy exemption to D.C.'s Freedom of Information Act.

Kevin Goldberg, president of the D.C. Open Government Coalition, told the Reporters Committee that redacting the faces of all police officers



MPD Video/YouTube

Much of the initial bodycam video released by the D.C. Metropolitan Police Department showed officers learning to use the equipment.

on the job is “troubling.”

If the MPD is “redacting the faces of police officers in a non-controversial situation, what is going to happen when we really do need to see what happened on the video?” Goldberg noted.

MPD Privacy Officer Elizabeth Lyons says the current policy is to redact the faces of law enforcement officers regardless of where they are.

“The privacy of the officers is important, and we’re protecting that under the law,” she said. “So even if they’re in the public ... sphere [the faces] will be redacted.”

She did tell the Reporters Committee, however, that there is “a discussion to be had” about those redactions.

Goldberg says there’s been a “trend around the country to protect the identities of officers, whether they be faces, names” or other things.

In February, the Virginia Senate [voted to amend](#) the state’s public records law to exempt the names of any state or local law enforcement officer from disclosure. After [concerns were raised](#) by the press and public, the bill was ultimately tabled.

Other states around the country have passed laws in response to the widespread adoption of bodycams, many of which expand the privacy provisions in their public records laws. North Dakota, for example, exempts videos “taken in a private place”, and Florida’s Sunshine law now [allows law enforcement agencies to withhold](#) videos “taken in a place that a reasonable person would expect to be private.”

Other states have gone further — in South Carolina all bodycam videos are exempt from disclosure, and Kansas recently passed a [law](#) making them presumptively unavailable.

Courts are being forced to adjudicate requests for access as well. In June, the Ohio Supreme Court will hear a case centered on whether bodycam videos can be withheld under the state’s investigatory work product exemption.

The case, *Cincinnati Enquirer v. Deters*, is the result of a request [for video of the shooting](#) of Samuel DuBose by a University of Cincinnati police officer during a traffic stop. The Reporters Committee filed an [amicus brief](#) in the case arguing that bodycam videos should be released to the public.

Lyons says that since the D.C. access law was passed, the MPD has been working through a backlog of requests, and now has three outside vendors

to do redactions. Those vendors “have been impressive with their speed”, and she hopes that in a few months the MPD will be able to fulfill smaller requests within the statutory time period of 25 business days.

Lyons also believes video redaction technology will continue to improve, and hopes that “in the next few years it will be possible to do some of the redactions in-house,” but noted that it will be a learning process for government workers using new technology.

Cost is also an issue for news media requesting access to bodycam videos. For example, in New York City, TV station NY1 [filed a public records request](#) with the NYPD for bodycam video recorded during its pilot program, only to be told that it would cost \$36,000. The station has filed a lawsuit challenging the fees, and a hearing on the matter is scheduled in June.

The MPD has not charged the Reporters Committee for the requested videos, and Lyons said current policy is that the news media will not be charged for bodycam videos.

The MPD also has posted the videos to a new [YouTube channel](#) where the public can access them for free.

The remainder of the bodycam videos requested by the Reporters Committee — including videos used for training purposes, those that have been provided to the Office of Police Complaints, and those that have been used in connection with civil or criminal proceedings — have yet to be released.

Other resources:

Report: [Access to Police Body-Worn Camera Video](#)

Release: [Reporters Committee appeals FOIA denial for video from D.C. police body cams](#)