

The News Media AND THE LAW

PUBLISHED BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

SUMMER 2013

The Administration and the news media

*New media subpoena guidelines
and support for a shield law
signal promise*



The News Media & The Law

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Published by

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of the Press. Published four times a year.*

*Price: \$7.50 per issue. Address correspondence to:
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ISSN: 0149-0737

We'll soon see if the Attorney General is serious about reporters' rights

The last few months have been momentous for journalism and media law.

The announcement in May that the Department of Justice had subpoenaed the telephone toll records of Associated Press offices and cell phones followed by the revelation of a search warrant for a Fox News reporter's email sparked an immediate response from the news media.

And the administration heard the uproar. Attorney General Eric Holder admitted that the incidents were handled poorly, and President Obama called on Holder to report back to him by mid-July on how he would change things.

Holder seems to have taken the issue seriously. In his "Report on Review of News Media Policies," Holder said that "the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure. The Department's policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution."

Ostensibly, this was a reiteration of existing policy. But the implementation of federal guidelines is always in the details, as even the most broad-minded language can be useless if it is interpreted narrowly when the Department is confronted with an actual case.

And one of the first tests of how Holder will act under this new policy should come almost immediately. Soon after the report was released, the U.S. Court of Appeals in Richmond (4th Cir.) overturned a district court judge's quashing of a subpoena to reporter James Risen in the unauthorized disclosure case against CIA officer Jeffrey Sterling.

The court was emphatic: "we hold that there is no First Amendment or federal common-law privilege that protects Risen from having to respond to the government's subpoena and give what evidence he has of the criminal conduct at issue." Even if there were a privilege, the court held, it would have been overcome in this case.

But the Fourth Circuit's rejection of a privilege is not the end of the case. The court made clear that it sees nothing in the law that requires it to recognize any right of a reporter to keep a source confidential. But the Department of Justice — going back to the original adoption of the subpoena guidelines in 1970 — does recognize that reporters have an interest at stake. While Justice hasn't gone so far as recognizing a legal privilege, it has declared: "Because freedom of the press can be

no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."

A coalition of media organizations led by the Reporters Committee has now joined Risen's counsel in asking Holder to rescind the subpoena. (You can find it on our web site at www.rcfp.org/attorney-general-guidelines)

"At this stage in the case, the question before the Department is more one of policy than law, and from that perspective the court proceedings below support withdrawal of the subpoena despite the outcome in the Fourth Circuit," the coalition wrote. The letter pointed out Holder's promise of a subpoena as a "last resort," and noted that the Risen subpoena was not such a case. As the federal district court judge had pointed out, there is plenty of other evidence against Sterling.

Justice is not required to do anything, since its policy concerns the approval of subpoenas before they are issued. The Risen subpoena was issued more than two years ago, and has been litigated ever since.

But if the Attorney General is serious about this new commitment to respecting the First Amendment and journalism, withdrawing this subpoena is the right thing to do.

Media groups continue push for stronger protections

By Jeff Zalesin

AP Photo by Mark Lennihan

Editorial employees work at the headquarters of The Associated Press in New York. The Justice Department secretly obtained the wire service's telephone records from April and May of 2012.

Journalists and their lawyers went into crisis mode this summer, pushing for reforms as revelations of government intrusion into reporters' records made national headlines.



First came the disclosure of the Department of Justice's secret subpoena of Associated Press phone records. Next, there was the news that the FBI acquired a court's permission to search Fox News reporter James Rosen's e-mail account by suggesting that he helped to commit a crime. And the First Amendment community was hardly comforted to learn of the National Security Agency surveillance programs leaked by former contractor Edward Snowden — programs that are raising new concerns about journalists' ability to keep reporting activities off the record.

Media interest groups have used these stories to push government authorities to create a safer legal environment for confidential newsgathering. Now that reporter's privilege bills are being considered in both houses of Congress and Attorney General Eric Holder has published a report recommending new Justice Department guidelines on journalist subpoenas, it looks like the strategy may be working.

Yet, the conventional wisdom in media circles holds that more must be done to protect reporters and their sources. And some say that if journalists truly want to ward off government overreach, they must aim higher than an updated Justice Department rulebook and a federal shield law.

New Justice Department guidelines on the way

AP Photo by Charles Dharapak

Gary Pruitt, president and chief executive officer of The Associated Press, speaks at the National Press Club about the subpoena of the AP's phone records.

Journalists and First Amendment lawyers have greeted Holder's July 12 report

with mostly positive reviews, saying they are glad to see the Justice Department adopt stronger safeguards for reporters' rights.

Media lawyer George Freeman of Jenner & Block, who previously worked for decades as counsel at *The New York Times*, called the policy revisions "long overdue" in light of the technological changes that have transformed newsgathering since the current guidelines were written in 1980. Unlike the old guidelines, he said, the new ones will explicitly cover journalists' e-mail messages.

"As we saw in the AP example and the Rosen example and so on, it needed some toughening up in general," Freeman said of the department's set of rules on journalist subpoenas. "Obviously, it was the push-back to those two examples which gave rise to those changes."

The report calls for a new presumption that news organizations will receive advance notice when their records are subpoenaed, unless the Attorney General determines that providing such a heads-up would have dangerous consequences or would compromise the investigation. This change appears to be a reaction to the backlash over the AP subpoena, which was concealed from the news organization for months.

Meanwhile, the report raises new procedural hurdles for prosecutors who want to search journalists' materials, and it states that the Justice Department will not use the Privacy Protection Act's "suspect exception" unless the journalist being targeted is "the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities."

The suspect exception is the provision of the PPA that allows prosecutors to access the records of journalists who are suspected of crimes. The FBI used it in 2010 to search Rosen's e-mail account, labeling him as a probable "co-conspirator" in an unauthorized disclosure allegedly committed by State Department analyst Stephen Kim, *The Washington Post* revealed in May.

Holder also promises in the report to establish a News Media Dialogue Group with annual meetings to include both journalists and department lawyers.

Barbara Wall, senior associate general counsel at Gannett Co., said journalists and media lawyers should welcome the opportunity to exchange ideas with the Justice Department.

"I think it can be a useful opportunity to raise issues that maybe are not so serious that they require coalitions to address, but rather the ongoing tensions that



are inevitable in the relationship between the department of justice and reporters,” she said.

For now, the next step will be for the Justice Department to produce updated policy statement for the Code of Federal Regulations, said media lawyer Kurt Wimmer, who represents the Newspaper Association of America. The department will probably handle this task internally, without outside input, he added.

The Newspaper Association was one of more than 50 media organizations that joined a coalition led by the Reporters Committee for Freedom of the Press in calling for policy changes in response to the AP investigation.

After the Justice Department published its report, the Reporters Committee said in a statement that Holder’s recommendations were a sign of progress but further changes were still necessary.

“The proposal announced by the Attorney General today adopts several improvements to the existing guidelines and would provide additional protections to working journalists,” the statement reads. “We continue to believe that an impartial judge should be involved when there is a demand for a reporter’s records because so many important rights hinge on the ability to test the government’s need for records before they are seized.”

In other words: Justice Department guidelines are no substitute for a federal reporter’s privilege.

Toward a federal shield law

In both the House and the Senate, lawmakers are considering versions of the Free Flow of Information Act of 2013. These bills, like similar proposals that died in past sessions of Congress, would grant journalists a qualified privilege to protect their newsgathering documents and the identities of their confidential sources. A federal subpoena demanding that a reporter turn over records or testify in court would be subject to judicial review.

Wimmer said that even if the Justice Department updates its internal rules as promised, journalists will still need a federal shield law. Without one, he said, reporters are at risk of finding themselves unable to vindicate their rights.

“If the department doesn’t follow its guidelines, you don’t have any recourse,” he said. “A subpoena issued that doesn’t follow the guidelines is still a valid subpoena.”

Wall added another reason to keep pressing for a shield law in the wake of Holder’s report: the Justice Department is not alone in targeting journalists with federal subpoenas. Particularly in federal civil trials involving private litigants, she said, the Free Flow of Information Act could protect journalists from demands that have nothing to do with the Justice Department.

When the Senate returns from its August recess, the Judiciary Committee is expected to mark up and vote on a version of the shield bill that incorporates some

of the Justice Department's ideas on protecting journalists. This bill, as amended on Aug. 1 in response to Holder's report, would put federal judges in charge of deciding how long the Justice Department can wait before informing journalists that their records have been subpoenaed, the latest possible deadline being 90 days after the subpoena is served.

The amended bill would also protect a broad range of reporting-related documents held by third parties, including business records like credit card bills as well as communication records.

Congress's last effort to enact a federal reporter's privilege failed in 2010, after shield bills passed the House and cleared the Senate Judiciary Committee. The proposal died in the Senate after WikiLeaks released thousands of classified diplomatic cables, outraging government officials and raising concerns that WikiLeaks could claim protection under a shield law.

Freeman, who lobbied for the shield law in 2009 and 2010, said that the negotiations back then focused on two major questions: who should be considered a journalist for purposes of legal protection, and under what conditions the government should be able to demand reporters' information for national security reasons.

The current Senate bill, which Sen. Charles Schumer (D-N.Y.) introduced in May at the White House's urging, contains a national security exception carried over verbatim from the 2010 bill. This language would allow courts to enforce subpoenas to journalists if the information being sought would help the government to prevent a terrorist attack. The House bill contains a somewhat narrower national security exception.

Freeman said that if this year's Senate bill were amended to make the national security exception broader than the one from 2010, there would "begin to be very good arguments" against passing the bill.

"The question really is, for someone like *The New York Times* or *The Washington Post* or the major networks, is a shield law worth it if your national security exceptions are so great that they don't really yield much protection? I think that's the thing to look at, frankly," he said.

Judith Miller, a Fox News commentator and former *New York Times* reporter who was jailed in 2005 after refusing to comply with a subpoena, said she supports reporter's privilege legislation but is pessimistic about its impact on national security journalism.

"I think that it'll be very useful in privacy cases, in civil cases, in non-national security criminal cases, but not so much in national security," she said of the proposed law.

Miller talked about the Obama administration's endorsement of shield legislation in a tone more suspicious than admiring. If the president is willing to

support a shield law, she said, that may be because he knows it won't stop the government from spying on journalists.

NSA — The big question mark

What if the government no longer had to depend on traditional subpoenas to access information about reporters' communications with confidential sources?

As the London-based *Guardian* churned out articles this summer about federal surveillance programs leaked by Snowden, more and more First Amendment advocates began to worry that this scenario might already exist.

Miller said that reporters, even more than other Americans, should be alarmed by the scope of Washington's spying power.

"Journalists should pay attention to it because our sources are being chilled and have been chilled and will be chilled by the government's enormous ability to collect information about us and our conversations and our communications with potential sources, whether or not there is a shield law," she said.

Reuters reported in August that a special unit of the Drug Enforcement Agency uses data collected by the NSA and other intelligence agencies to initiate investigations, then proceeds to "recreate" an alternative history of the investigation to cover up where the tip came from. Still, questions remain about the NSA's policies on sharing information with other agencies.

Media lawyers said they don't know whether the NSA targets journalists for special scrutiny or provides newsgathering records to prosecutors. That uncertainty, they said, is cause for concern.

"I would say that if any of these agencies give more attention to journalists than the normal person, that clearly seems to create First Amendment issues and seems clearly opposite to what both President Obama and Attorney General Holder have been talking about," Freeman said.

Wall said that in the short term, journalists and their lawyers should pay attention to news about the NSA but not try to monopolize the discussion. The issue of government surveillance, she said, is relevant to all Americans.

"A lot's going to happen, I think, on the subject in general," she said. "I think we should just watch those developments and keep the concerns that we have about reporters' records in mind as that process of review takes place."

Whistleblowers to journalists: protect your data

By Amy Zhang

In the modern age of electronic media, secret government surveillance and surreptitious data gathering by federal and state agencies means reporters must take extra precautions to protect their sources and notes.

At a National Press Club event on national security and leaks, known whistleblowers offered tips to reporters covering sensitive information.

Thomas Drake, a former senior executive at the National Security Agency who leaked information about the misuse of taxpayer dollars for a warrantless surveillance program, said invisibility from the government means journalists must understand contemporary encryption techniques.

“Encrypt the crap out of your life,” said Drake. “Even to this day I will not communicate with people unless they install encryption programs on their computers and on their phones. If you see my computer and how I access the Internet, it’s pretty locked-down. My entire computer is encrypted. None of the keys are available. It’s just prudent.”

After securing their data, Drake said reporters must also safeguard any information about their security systems.

“Many of the encryption systems are totally compromised. And I’ve had people ask me, ‘which system do you use?’ I don’t say what I use publicly for all the obvious reasons.” Drake said.

Cato Institute Research Fellow Julian Sanchez, an expert on civil liberties and the media, suggested whistleblowers looking for a journalist to confide in should look for a reporter who has a background in technology or security. Whistleblowers, he said, worry less about finding reporters who can keep a secret and more about finding reporters with the *means* to keep that secret.

“If you’re a whistleblower, you may have a sense of who has the integrity to protect their sources, but you have no way of knowing who has the technical savvy to effectively use the tools necessary to engage in secure communication,” said Sanchez.

Telecom whistleblower and computer expert Babak Pasdar said reporters must also take time to learn about the electric communication system. In 2008, Pasdar discovered a mysterious circuit that channeled Verizon customer communications information to the federal government. He said his interviews with reporters would have been smoother if they possessed prior knowledge of the mechanics.

“My disclosure was a very technical disclosure. Understanding what this stuff means from a technology perspective, or at least having the resources to do that, is

important,” Pashar said.

While encrypting each exchange and all information can seem difficult and cumbersome, whistleblower and attorney Jesselyn Radack said the process was, in fact, very straightforward. Radack helped disclose ethics violations within the Federal Bureau of Investigation more than a decade ago.

“I think there are a lot of situations when you want confidentiality between a lawyer and a client, or between the journalist and the source. I’m very technologically challenged, and I can attest to the fact that it’s incredibly easy,” said Radack. “I urge other reporters and lawyers to take part.”

Fourth Circuit deals blow to First Amendment in Risen decision

New York Times reporter must testify about confidential source in CIA espionage case

By Nicole Lozare

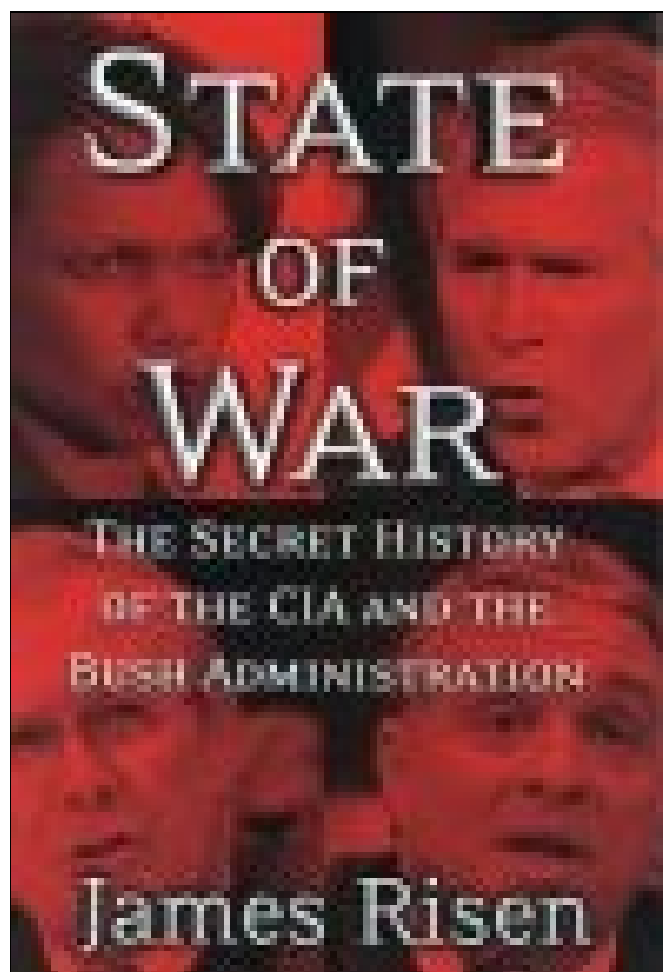
There is a natural tension between the press and the American government that has always existed. But in July, a federal appeals court issued a ruling that tipped that balance off.

On July 19, a federal appeals court declared that journalists do not enjoy a privileged status that protected them from testifying in court.

In its decision, the Fourth Circuit overturned a federal district court's ruling and ordered *New York Times* reporter James Risen to testify about his confidential source — believed to be former CIA officer Jeffrey Sterling, who the government believes violated the Espionage Act when he allegedly talked to Risen about classified material.

Before the month ended, a military judge found a 25-year-old Army private guilty of multiple counts of violating the Espionage Act for sharing military secrets on the antisecrecy website WikiLeaks. However, Army Pfc. Bradley Manning was acquitted of aiding the enemy — an even more grievous charge that also carried serious implications for journalists.

All this came soon after the news broke this spring that federal investigators — armed with a court-sanctioned order — secretly collected telephone records of The Associated Press as well as the e-mail messages of a Fox News reporter in their hunt for leakers. Investigators labeled Fox News reporter James Rosen a “co-



conspirator” so they could acquire the warrants needed to search his e-mail in their hunt for accused leaker State Department analyst Stephen Kim.

James Risen

And in between the court rulings and the news of the subpoenas, Attorney General Eric Holder was holding meetings with media lawyers and news organizations including the Reporters Committee for Freedom of the Press. Holder, ordered by President Barack Obama to look into its policies on the handling of media subpoenas, produced a set of recommendations to overhaul the Justice Department’s guidelines for seeking journalists’ notes and records.

“I think the pressures and tensions are increasing at every level,” said Jay Rosen, journalism professor at New York University and author of PressThink.org. “The pressure on leakers and the journalists who deal with them, the momentum for a shield law, the stakes for the surveillance state, the importance of national security reporters, the stakes for the portion of the public that wants to know what it’s government is doing — all are on the rise.”

A handful of senators amended the latest version of the Free Flow of Information Act of 2013 which incorporated Holder’s recommendations. The Act was in its latest reincarnation but bolstered this time by a bit of public outrage and the support of both Holder and President Obama’s administration.

But even with all the shuffling about by the different parties involved, the U.S. Court of Appeals in Richmond, Va. (4th Cir.) ruling on Rosen between the Justice Department and the press.

Even though a federal district judge ordered in 2011 that Risen was protected by the reporters privilege, the higher court in July disagreed.

“There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment or other such



non-legitimate motive, even though the reporter promised confidentiality to his source,” the Fourth Circuit stated in the 118-page opinion.

The decision overturned the court order of U.S. District Judge Leonie Brinkema in Alexandria, Va., that Risen was indeed protected by the reporter’s privilege and would not have to testify in the trial of former CIA official Jeffrey Sterling, who is charged with violating the Espionage Act.

Judge Roger Gregory, one of three judges on the Court of Appeals decision, disagreed with his two other colleagues and said that their decision to compel a reporter to reveal his sources was “contrary to the will and wisdom of our Founders.”

“Under the majority’s articulation of the reporter’s privilege, or lack thereof, absent a showing of bad faith by the government, a reporter can always be compelled against her will to reveal her confidential sources in a criminal trial,” wrote Gregory. “The majority exalts the interests of the government while unduly trampling those of the press, and in doing so, severely impinges on the press and the free flow of information in our society.”

The Fourth Circuit ruling

In a 2-1 vote, the Fourth Circuit said it believed Risen’s testimony was essential to prosecuting Sterling and that journalists were not exempt from testifying in criminal proceedings.

In its opinion, the Court cited the landmark 1972 *Branzburg v. Hayes* case, in which the Supreme Court ruled that journalists did not have any special status that exempted them from giving testimony before a court.

“The First Amendment claim in *Branzburg* was grounded in the same argument offered by Risen — that the absence of such a qualified privilege would chill the future newsgathering abilities of the press, to the detriment of the free flow of information to the public,” according to the opinion.

“So long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement, the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding. The reporter must appear and give testimony just as every other citizen must.”

According to the court, the government had no other recourse but to seek Risen’s testimony and his confirmation that it was indeed Sterling who leaked him classified information about a failed operation to disable Iran’s nuclear program that was published in the two-time Pulitzer Prize winner’s 2006 book “State of War.”

“Indeed, (Risen) can provide the only first-hand account of the commission of a most serious crime indicted by the grand jury — the illegal disclosure of classified, national security information by one who was entrusted to protect national security, but who is charged with having endangered it instead,” the opinion stated. “The subpoena for Risen’s testimony was not issued in bad faith or for the purposes of

harassment . . . Rather, the government seeks to compel evidence that Risen alone possesses — evidence that goes to the heart of the prosecution.”

The next step

Risen’s lawyers have asked the Justice Department to drop its subpoena against the reporter based on Holder’s recommendations to President Obama. Holder said that subpoenas against the press must be treated as an “extraordinary measure” that should be used “as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a success investigation or prosecution.”

“We urge you to apply those principles to this case,” Risen’s lawyer, David N. Kelley, wrote in his letter. “In particular, we urge that the ‘last resort’ and ‘essentiality’ requirements of the DOJ’s new Guidelines cannot possibly be said to have been met in this case.”

“One thing is clear. Reporters are invariably the ‘only eyewitness’ to the ‘crime’ of speaking with them. If the DOJ takes this approach, the new Guidelines will be a quickly forgotten promise.”

Some media watchers say there may be a perfect blend right now of high public interest in the fates of whistleblowers Manning and Snowden, and the renewed fight for a federal shield law to propel a challenge to Branzburg in the Supreme Court using Risen’s case.

Rosen said it’s hard to predict what will happen.

“But the logic is there for a review by the Supreme Court,” the media critic said. “I think that’s all we can say.”

Soldier gets 35-year sentence in prison for releasing documents

By Nicole Lozare

AP Photo

Army Pfc. Bradley Manning

It wasn't just the media. Those who publicly disclosed government documents took a massive hit this summer, too.

The 25-year-old Army private accused of leaking information to WikiLeaks will spend up to 35 years in a military prison, unless he is released early on parole.

Army Capt. Joe Morrow, the prosecutor in the court-martial said in a Fort Meade, Md., courtroom in August that Army Pfc. Bradley Manning deserved to serve the majority of his life in prison for violating the Espionage Act, according to news reports.

In February, the Oklahoma native pleaded guilty to 10 criminal counts relating to the release of the secret documents. The information he released included videos of airstrikes in Iraq and Afghanistan that resulted in civilian casualties, classified information about detainees held in Guantanamo Bay, and roughly 250,000 cables from American diplomats stationed around the world. A military judge in July found him guilty of multiple counts of violating the Espionage Act.

In a statement released in August, Manning apologized for hurting his country and asked a military judge for the chance to go to college and become a productive citizen.

"I am sorry that my actions hurt people," Manning said. "I'm sorry that they hurt the United States."

The soldier's apologetic tone was a complete turnaround from a previous



statement he gave the court in February.

“We were obsessed with capturing and killing human targets on lists and ignoring goals and missions,” Manning publicly stated in February. “I believed if the public, particularly the American public, could see this it could spark a debate on the military and our foreign policy in general [that] might cause society to reconsider the need to engage in counter-terrorism while ignoring the human situation of the people we engaged with every day.” -- *Nicole Lozare*

A closer look at the "Bag Men" defamation lawsuit

In the claim against the controversial New York Post, false implication will be hard to prove

By Amy Zhang

According to two amateur runners from Massachusetts, it took only a picture and two words published on the front page of the New York Post to damage their reputations.

The April 18 *Post* cover photo showed two friends carrying bags and standing at the finish line of the 2013 Boston Marathon with the words "BAG MEN" above their heads. But police said there was no connection between the men and the two bombs that killed three and injured more than 260 people on April 15.

The *Post*'s cover and inside story prompted immediate public backlash that pushed a top editor to publicly declare that the paper had published facts, nothing more. Two months later, the runners sued the paper for defamation.

But media lawyers say that if the *Post* can show it didn't make any provably false statements, then the paper could leave the courthouse unscathed.

Unnecessary victims

AP Photo by Rodrique Ngowi

Salah Eddin Barhoum is seen with a sports trophy and the bag he used while watching the Boston Marathon. Barhoum, one of two men whose photograph appeared on the front page of the New York Post in connection with the bombings, filed a libel lawsuit against the newspaper.

In the breaking news cycle that followed the two explosions at the finish line of the Boston Marathon, many initial reports were inaccurate. News outlets reported errors like the existence of other undetonated devices near the site of the twin



explosions, police apprehension of suspects and a high probability of a related attack. Users of Internet sites like Reddit and 4Chan pulled out their magnifying glass, sifted through hundreds of online photos and snagged innocent people in their dragnets.

The string of erroneous accounts prompted the FBI to issue a statement two days after the bombs exploded warning media organizations to “exercise caution” and verify information with appropriate official channels before publishing.

On the same day, widespread reporting revealed that police had verified the suspects used backpacks to carry two pressure cooker bombs containing nails and shrapnel.

The developing information and an FBI e-mail message obtained by the *New York Post* prompted the newspaper to emblazon “BAG MEN” in bold block-letters over an enlarged picture of the two young men on its April 18 cover. “Feds seek this duo pictured at Boston Marathon,” a lower subhead wrote. In the photo, Salaheddin Barhoum, 16, and Yassine Zaimi, 24, stand near the finish line, each shouldering a backpack.

In a small box on the bottom left-hand corner, the only clarification provided, the *Post* wrote that FBI officials were circulating photos of the two men in e-mail messages.

“There is no direct evidence linking them to the crime, but authorities want to identify them,” the *Post* wrote in smaller type.

The day before, local police officers had exonerated Zaimi and Barhoum after both voluntarily entered local police stations when they separately found their faces floating on crowd sourcing Internet sites.

On June 5, Zaimi and Barhoum filed a complaint in Massachusetts Suffolk Superior Court, suing the *Post* for defamation, infliction of emotional distress and invasion of privacy.

Proving libel: a plaintiff’s burden

The *Post*’s actions brought on a torrent of backlash. The “Bag Men” cover and story were called a “new low” and “appalling” by media critics. *Washington Post* media critic Erik Wemple appealed to Zaimi and Barhoum in his April 22 blog post: “Young men, please sue the *New York Post*.”

Many media lawyers and law professors who have represented plaintiffs and publications have said that the *Post*’s work was undoubtedly “poor journalism.” But



the jump from scandalous to libelous is not always close.

“There’s a big difference between using information to entertain and libeling,” said Alan Behr, an intellectual-property lawyer. “You’ve got to show that what was said was untrue and that there was damage.”

After Zaimi and Barhoum’s submission to the court in early June, the *Post* has yet to respond. The two sued on three counts of libel *per se*, one count each for the *Post*’s cover, print article and online counterpart. Each component contained false information and held the men up to “scorn, hatred, ridicule, or contempt in the minds of a considerable and respectable segment of their communities,” the complaint said.

Generally, libel *per se* occurs when a newspaper wrongly connects an identifiable person with something so egregious, reputational injury is presumed. A falsehood like saying a person has a loathsome disease, committed fraud, or committed a heinous crime allows plaintiffs to bypass proof of harm in the fight for monetary damages.

The uphill climb begins in a case like this, experts say, when the plaintiffs have to prove that while the facts individually are true, the statements were defamatory by implication. In other words, the paper juxtaposed a series of facts that, when combined, imply a libelous and false connection between them.

“Imagine a case where a newspaper reports ‘John Smith was seen last night walking into a hotel with Jane Doe, a woman who is not his wife. The hotel is in a district known for prostitution,’” said Jeffrey Pyle, a partner at Boston-based law firm Prince Lobel Tye LLP. “All those statements could be true, yet together they are defamatory.”

Responding to requests for an interview, the *New York Post* forwarded the same statement made by *Post* editor-in-chief Col Allan in April in response to intense backlash for its reporting: “The image was e-mailed to law enforcement agencies yesterday afternoon seeking information about these men, as our story reported. We did not identify them as suspects.”

Allan said that all the factual statements were obtained from FBI e-mail messages, and therefore true and protected by the First Amendment.

“[The *Post*] never said that [Zaimi and Barhoum] were suspects, arrested, indicted, convicted, or sentenced. Certainly they didn’t say they were guilty,” said Behr. “The statements themselves are a lot more mild than what they implied.”

But Clay Calvert, a media law professor at the University of Florida, said the courts have shown that accuracy isn’t an absolute defense. Judges will look at how a “reasonable reader actually reads” in order to assess falsity and defamation by implication. To Calvert, the cover is the *Post*’s greatest liability.

“The sensational use of ‘Bag Men’ in the headline, that is the danger. That creates the potential liability,” said Calvert. “It has a meaning that many people can

associate with the mob. ‘Bag Men’ suggests involvement in criminal activity.”

Referring to the disclaimer on the cover, Calvert added: “And many readers wouldn’t look to the left-hand corner box with the very tiny font.”

In a similar case, *Kaelin v. Globe*, the U.S. Court of Appeals in San Francisco (9th Cir.) found that the headline “COPS THINK KATO DID IT” in the *National Examiner* tabloid was defamatory because it implied that Kaelin was the killer in the O.J. Simpson trial. The paper’s subhead and interior article 17 pages in clarified that the Globe meant police think Kaelin committed perjury, not murder.

“How would a reasonable reader consider that headline?” said Calvert. “The mere fact that the subhead and inside story clarified for the reader was not enough to protect the *National Examiner*.”

In the *Post*’s case, Calvert says a reader passing the paper on his way to the subway would only see headline and photo, but fail to read the article on the sixth page. Taken holistically, the cover unambiguously implied that Zaimi and Barhoum were suspects, he noted, especially after widespread reporting revealed that the suspects had carried bombs in backpacks.

Fault and a defense on “uncharted ground”

In determining fault, jurisdiction matters.

While the case was filed in a Massachusetts county court and the location of the bombings, marathon, and residence of the victims all fall in Massachusetts, the *Post*’s headquarters and primary area of circulation in New York could move the court to apply New York law over that of Massachusetts.

The burden of proof falls on Barhoum and Zaimi to show that a publication acted negligently. States like New York require a higher burden on private-figure litigants when the story concerns a matter of public importance.

In judging whether a newspaper acted negligently, the court looks at a reporter’s news gathering techniques and his sources to find whether a reporter failed to take reasonable steps to ascertain that its statements were false and defamatory.

While the plaintiff’s attorneys did not respond to requests for a comment, Howard Cooper of Boston’s Todd & Weld LLP said that the threshold is easier reached in Massachusetts.

“I think the *Post* should have a very hard time here,” said Cooper. “If the *Post* had done a little bit of homework before this screaming headline, they probably could have figured it out . . . It defies explanation why the *Post* didn’t try to contact them before they plastered their faces on the front page.”

But George Freeman, the former assistant general counsel at the *New York Times*, said the case is very different in New York, which generally upholds relatively robust freedoms for the media.

According to the U.S. Court of Appeals in New York City (2nd Cir.) in the 1975 case *Chapadeau v. Utica*, plaintiffs are required to prove a newspaper acted with

“gross irresponsibility,” a higher bar than the more common “negligence” standard in Massachusetts that requires plaintiffs prove a reporter did not exercise “reasonable care” in verifying his facts.

Put another way, as long as the publisher accurately reported at least one authoritative source, he would not be deemed grossly irresponsible even if his ultimate reporting turned out to be incorrect. The *Post*’s silver bullet source is cited in its article as “an e-mail obtained by The *Post*” and “distributed among law-enforcement officials.”

If the newspaper can produce the e-mail message, said Freeman, New York precedents like *Doe v. New York Daily News* that have protected verbal interviews between reporters and police officers will offer the *Post* strong arguments for protection.

“The case might really hinge on whether New York law or Massachusetts law applies. Massachusetts is where the *Post* was sued and that’s where the plaintiffs live, but the reporting was done in New York,” Freeman said.

The case would break new ground in New York where courts will have to decide whether e-mail messages sent among law enforcement officers are in fact official reports, he added.

“It is the most uncharted and novel issue the case presents. And I think the *Post* would have a good chance of getting out of it,” Freeman said.

Defamation in an age of instantaneous news and resilient reputations

While the plaintiffs wait for a response from the *Post* and any new updates, some media law practitioners see a trend for defamation lawsuits in an environment of hyperspeed information transmission that has the potential to alleviate harm caused by erroneous publication, making it harder to win libel cases.

“Libel has been slowly leaving our jurisprudence since before the American Revolution with the Zenger trial of 1735,” said Behr. “The internet and other technologies just make so much information available to so many people that courts are stepping back, letting the marketplace sort itself out.”

To Behr, the time when people passionately struggled to prove their honor and integrity is quickly fading, and reputation is becoming more “malleable.”

“Consequentiality becomes limited, because what does reputation mean anymore?” asked Behr. “Look, Eliot Spitzer is running for office again. Martha Stewart (is back) too. These people recovered from much greater falls. To what extent can you show that there is lifelong or transitory damage?”

At the same time, Behr said the forward pressure on journalists to scoop the news has created a propensity for errors like the *Post*’s. Cooper agreed.

“The danger in the media, especially in the midst of a horrific event, is to seek out the sensational and be the first to publish it,” said Cooper. “In an age of instant global communication, what can a journalist do? We all support publication of the

truth. But sensationalism isn't the truth. Innuendo isn't the truth. It's more important to get it right than to get it first.

Zaimi and Barhoum's case may seem consequential now, but in the end it's the larger picture that matters.

"These two young men, I'm sure they'll recover and go on and lead good lives and *The Post* will go on to do other things, and this will be rather transitory," said Behr. "The more consequential issue is what does reputation mean today, and how should the legal system evolve to protect it? That's a big question mark."

Experts share prepublication tips to avoid lawsuits

By Amy Zhang

The ultimate self-imposed safety net for journalists is a proper examination of an article before actually publishing it. A thorough read for signs of libel can prevent inordinate harm to another's reputation and avoid lengthy and expensive defamation lawsuits.

Here are some tips for reporters who don't have access to legal experts for a prepublication review process.

Erik Wemple, blogger for *The Washington Post*:

Wemple tells reporters to look for legal issues in their stories from different perspectives, and not only through the main character or primary source.

"The problem is that oftentimes reporters are only thinking of one person. Let's say they're writing a profile, and he's a public figure. And the reporter says that nothing we've said about this person cannot be substantiated. What they're often missing is the peripheral people involved. A lawyer sees the full scope of exposure that a story may have."

Dave Heller, Media Law Resource Center staff attorney:

Heller asks journalists to be mindful of accuracy when reporting information sourced from law enforcement. When editing, journalists must understand how to balance the pressure of instantaneous news and faithful reporting.

"If you want to focus on how to report on the law enforcement and fast-moving criminal investigations . . . make sure that what you report is accurate. But there will be times when you accurately report information from the police that turns out to be incorrect. That's an editorial judgement about waiting versus informing the public."

Jeffrey Pyle, partner and First Amendment lawyer at Boston-based firm Prince Lobel Tye LLP:

Pyle says disclaimers are a good idea, but only when they are a prominent part of your piece. The tricky part is incorporating it well.

"If you're going to include cautionary language, you should put it in the headline. But that's not how many newspapers work, and it would be very cumbersome to have disclaimers in every headline and every story."

Some anxiety is always healthy too.

"One has to think defensively. In fact, one has to have almost a morbid sense of fear about what can happen. You have to exaggerate in your own mind the potential threats. . . . Put oneself in the mind of a dispassionate judge who isn't potentially a fan of the press, and think about what kind of statements might really rub that judge the wrong way. And then consider, is there a way to make clear to a reasonable

reader exactly what it is you're saying? And don't do so in fine print."

Military courts continue to stymie public access

Reporters struggle to obtain access to timely records related to Guantanamo, courts-martial

By Aaron Mackey

AP Photo by LM Otero

Reporters are escorted to the courthouse for the court-martial of Maj. Nidal Malik Hasan, who is charged with murder and attempted murder for the 2009 attack that left 13 people dead at Fort Hood, Texas.



Covering court proceedings at the

Military Commissions in Guantanamo is like covering a court like no other.

Carol Rosenberg, a *Miami Herald* reporter and veteran at covering Guantanamo, said reporters often will not have timely access to basic court documents that provide background and important context about what the lawyers are discussing in court. And then there is the ever-present possibility that officials can cut off the court's audio feed to the viewing room used by reporters at any moment, a process necessary to protect classified information but that often occurs without further explanation, according to Rosenberg.

Moreover, reporters will often be excluded from certain proceedings and will never learn basic information about what occurred, as with one recent example where the name of the hearing itself was considered so secret that the court schedule merely said "classified."

With those obstacles, coupled with delays in obtaining court transcripts, reporters often don't fully understand what is occurring, making reporting on the proceedings — and public understanding of what's occurring at Guantanamo — incredibly difficult, Rosenberg said.

"You would be hearing court arguments about filings that you're not allowed to see," she said. "There are a lot of people with their finger on the (audio delay) button or their hand on the redacting pen."

AP Photo by Bill Gorman

Reporters covering the military commissions at Guantanamo Bay, Cuba, say they struggle to gain access to court documents that in civilian courts are presumed open.

Despite government providing some access to the military commission based in Guantanamo Bay, Cuba — granted only after lengthy legal battles led by reporters and media organizations that resulted in the military creating media access rules for the base — basic transparency for the court remains elusive.



At the same time, access to basic military court-martial proceedings against U.S. military personnel, including that of recently convicted Army Pfc. Bradley Manning, remains similarly opaque after the military's highest court, the U.S. Court of Appeals for the Armed Forces, in April denied a group of journalists a right of access to court filings in his court-martial.

In that case, the court determined that military courts lacked jurisdiction to entertain challenges brought by journalists or the public seeking to open up court-martial records and proceedings. The consequence of the decision means that journalists would have to file a separate challenge in civilian federal courts or try to obtain the documents under the federal Freedom of Information Act.

But reporters and media attorneys say that FOIA is an imperfect tool to use when trying to access court-martial records because the inherent delay built into the process makes getting timely access to records nearly impossible.

And because the Judge Advocate Generals (JAG) possess the court records, rather than a centralized clerk's office, officials often process such requests with an eye toward using FOIA's exemptions rather than seeing whether the documents must be disclosed under recognized common law or First Amendment rights of access to court records.

"In the Manning case, someone was redacting things like the name of the judge" under FOIA, said Eugene R. Fidell, who teaches military justice at Yale Law School and has also represented a number of media organizations seeking access to military court records. "This is not a serious way to conduct public business in this day and age."

The obstacles to accessing and covering military court proceedings — be it basic hearings of military personnel or the ongoing trials against those detained in Guantanamo — remain high even after concerted efforts by the media to make them more transparent. The only way to ensure greater access, reporters and media lawyers said, is for journalist to continue to push for more openness and for media organizations to either bring legal challenges seeking access to the proceedings or call on Congress to restructure military courts to allow for better access.

"The Pentagon has figured out how to create a certain degree of illusory

transparency,” Rosenberg said. “You do need reporters banging on the door and showing the judge that we disapprove of closure.”

Guantanamo courts still difficult to cover

Rosenberg, who has been covering Guantanamo for more than a decade, said that because the government can cut off access to the commission’s proceedings in so many different ways, she is constantly assessing whether to challenge secrecy and closures.

Reporters have been pushing for years for greater access to Guantanamo, particularly the commission’s trials of accused terrorists, resulting in the Pentagon creating access rules that allow reporters to challenge decisions to close proceedings.

One of the biggest developments was the creation of an online docketing system where reporters and the public can access Guantanamo commission records, said David Schulz, a media lawyer who has led efforts to gain greater access to Guantanamo.

But even with the increased access, problems persist, Rosenberg said. The biggest problem with the docket is that a document will only be posted publicly after various U.S. intelligence and defense agencies are given 15 business days to review the files and redact anything they believe would harm national security.

That makes gaining timely access to information difficult, especially as reporters are preparing to cover a particular hearing or proceeding, Rosenberg said.

“These are fundamental, constitutional issues and for reporters to do their best they need to read in and then get background,” she said.

And even when reporters can get access to documents or view proceedings, officials still take steps that appear to contradict the transparency media organizations have fought for, Rosenberg said.

For example, Rosenberg recently reported that in documents posted on the docket, officials redacted the name of a retired Navy Captain who acts as a victim’s advocate for the survivors and family members of victims of terrorist attacks and also sometimes appears as a witness at the proceedings.

The irony is that the woman, ret. Capt. Karen Loftus, was profiled in *The New York Post* and also regularly introduces herself to the media when she is escorting victims of al-Qaida attacks around Guantanamo.

“There are these bizarre redactions that are at odds with this notion of transparency,” Rosenberg said.

Covering the proceedings live also creates additional hurdles, Rosenberg said, as in addition to cutting off the audio feed from the courtroom, officials can also close the proceedings entirely.

Schulz said that any court closure is supposed to be narrowly tailored to prevent

a particular harm and still afford the greatest public access to the proceedings as possible.

But in practice, Rosenberg said, that's not always the case as the court can go in and out of public session on a whim, which can make it difficult to challenge the secrecy.

Although the commission will provide a transcript of the closed proceedings, it is often redacted and is not given to the public until at least five days after the proceeding, Rosenberg said.

"All of these things in combination make it a court like no other," she said.

Rosenberg recently did have some success obtaining documents detailing the list of 46 Guantanamo prisoners who are being held without trial because officials believe that they are too dangerous to be released but cannot be prosecuted.

With the help of students from Yale University's Media Freedom and Information Access Clinic, Rosenberg filed a federal FOIA lawsuit after officials failed to produce documents in response to her request. Officials turned the list over to shortly before they were scheduled to update a judge on the status of the request.

"Frequently, the only way to be taken seriously is to file suit," Rosenberg said. "These students held their feet to the fire and it was brilliant."

Journalists hindered in access to courts-martial

Although reporters were able to successfully assert some of their access rights to the military commissions in Guantanamo, the U.S. Court of Appeals for the Armed Forces this spring dealt a blow to efforts to create similar access to court-martial proceedings.

The divided court ruled in April that it only had the power to review matters relating to the "findings and sentence" of a particular court-martial. This meant that the court did not have the jurisdiction to entertain a challenge brought by media organizations seeking access to the Manning court-martial proceedings.

In ruling that it could not even consider a challenge brought by journalists or the public to open up court-martial proceedings, the appellate court said that the only way the public could vindicate its rights of access would be to file a separate lawsuit in a traditional federal court.

The military court's ruling creates a bizarre situation where journalists will have to ask a federal judge to enforce a right of access into the courtroom of a military judge, said Gary D. Solis, an adjunct law professor at Georgetown and George Washington universities and retired U.S. Marine Corps JAG. In essence, the civilian judge would be telling the military judge how to conduct its own trial as it relates to providing public access.

The ruling also had practical consequences for reporters covering the Bradley Manning court-martial, as they had to rely on FOIA to gain access to court records, which made contemporaneous reporting about the trial difficult, Solis said.

“You are in brave new world without a road map,” Solis said of trying to cover the trial without timely access to records. “You have to try and ascertain what’s going on as it’s going on and you don’t have access to any of the usual guideposts and legal landmarks.”

Early on in the coverage of the Manning trial, there was no central website that contained the court documents. Eventually, the military uploaded the files to an online FOIA reading room.

When the records of the Manning trial were finally released under FOIA, there were curious redactions similar in many ways to those made in the Guantanamo military commission, Solis said. That included redacting the name of the presiding judge, U.S. Army Col. Denise Lind, despite the fact that media and public present in the courtroom could see her name placard.

Solis said that what is needed is a concerted effort by members of the news media to bring lawsuits in federal courts demanding access or to change the law so that they can have access to courts-martial just as they do to civilian courts.

“Nobody has been willing to make this a significant issue,” Solis said. “Nobody is fighting for the public’s interest in achieving a modicum of transparency.”

The Reporters Committee for Freedom of the Press filed a friend-of-the-court brief in support of media access in the Manning case and called on Congress to revisit the issue and increase transparency in military courts in the wake of the military court’s ruling.

Reporters Committee Executive Director Bruce Brown said in a statement at the time that “it is time that Congress mandates that military courts themselves handle their own records, and create a process to allow timely access, just like every civilian court in the country has always done.”

FOIA not the answer to accessing court-martial records

Both Solis and Fidell agreed that no matter how journalists attempt to pursue access to military court-martial proceedings, using FOIA to obtain documents is unworkable.

“FOIA is not an effective means for getting current information or near current information on any court-martial because the initial delay is sufficient in and of itself to defeat your goal,” Solis said.

The main problem in obtaining court-martial records is that the delayed response built into the FOIA process — where agencies have 20 days to respond to requests for information — means that by the time a reporter gets records, the case has already been resolved, Solis said.

“By that time, the sentence has been announced and the accused has been led away to the brig,” he said.

Solis said that he has filed multiple FOIA requests for documents related to courts-martial that have long since concluded and has been forced to wait weeks

before obtaining the records.

Additionally, because the requests for court-martial records are processed under FOIA, officials approach the records with an eye toward redacting information under one of the statute's exemptions, Fidell said. That creates a situation where evidence, testimony, or comments made by the lawyers or judge in an open court can be subsequently redacted.

"The idea that any piece of information that is expounded in a courtroom can thereafter be redacted is goofy," Fidell said.

And an Air Force policy announced late last year instructs officials processing FOIA requests to consider whether the Privacy Act, which protects personally identifying information contained within a system of records, would prohibit release of court-martial records.

According to the policy, certain court-martial records would not be released under FOIA unless the individual who is identified in the records consents.

Jennifer McDermott, a staff writer who covers the military for *The Day* in New London, Conn., said that she has been relatively successful in obtaining records in the few courts-martial she has covered at the nearby naval base.

McDermott, however, does not rely on FOIA to obtain court-martial documents. Instead, she uses her relationships with officials working in Public Affairs Offices of military bases to obtain records on particular proceedings she is interested in covering.

"What I've tried to do mostly is in-person interviews and hoping that people will give me what I need at the time," she said. "You kind of take it on yourself to look at the court docket, see what's coming up and then ask questions about it."

Although Solis said he was encouraged to hear that some reporters are able to more easily access military court records based on their relationships with military officials, it highlights a larger problem because it means that there is no uniform policy for ensuring that every member of the press or public can obtain the same records in a timely fashion.

Fidell said that the problem of obtaining timely access to court-martial records originates with the military's inability to recognize that such proceedings should be treated like civilian trials and not like a government record subject to FOIA.

"That's a category error," Fidell said. "These are court records."

But by inhibiting timely access to records of courts-martial, officials are doing more than making it more difficult for journalists to cover military justice, Fidell said.

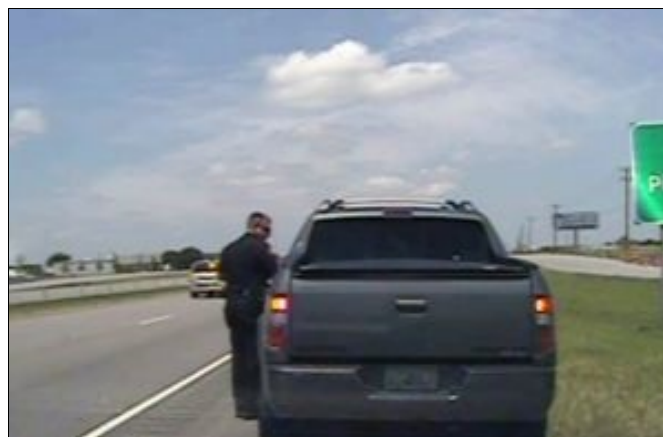
"The military justice system is very important to national defense and public confidence in the system is very important," he said. "I can't think of a better way to thwart public confidence than by not exerting yourself in the direction of transparency."

Transparency advocates fight for access to police dash-cam footage

By Jeff Zalesin

AP Photo provided by City of Forney Police Department

National media sought this image, taken from dash-cam video provided by the City of Forney Police Department, of a police officer speaking with George Zimmerman, the neighborhood watch volunteer acquitted by a Florida jury of charges in the fatal shooting of a black teenager, after he was pulled over for speeding in Texas in July.



Burlington Deputy Police Chief Andi Higbee faces a drunk driving charge in Vermont. But Higbee's lawyer, Brooks McArthur, has told reporters his client was not impaired and there was no good reason for the state police to pull him over in the early hours of July 21.

Under Vermont's public records law, this dispute should be easy to resolve: recordings made by police cruiser dashboard cameras, like the one that was rolling the night of Higbee's arrest, are presumed to be public records. Yet, when the *Burlington Free Press* requested a copy of the video, the authorities told them they couldn't have it because the Vermont Public Records Act exempts criminal investigation records that would impair someone's right to a fair trial.

Veteran *Free Press* reporter Mike Donoghue eventually received the video directly from McArthur, not the police.

But Donoghue certainly won't be the last journalist to clash with law enforcement officials over the public's right to access "dash-cam" recordings.

From statutory exemptions to administrative delays and three-figure processing fees, frustrated dash-cam video requesters have constantly met with roadblocks. And while some states are moving toward greater dash-cam transparency, it is too early to tell whether others will follow.

AP Photo by Jeff Baenen

Derryl M. Jenkins, of Brooklyn Center, Minn., is shown with squad car dash-cam video of his beating by police officers after a traffic stop in north Minneapolis in 2009.

According to Jay Zager, a former Florida police officer now working as a defense expert witness in drunk driving cases around the country, there is “no continuity throughout the U.S.” on the right to view dash-cam videos.

Open government advocates are working in state legislatures and courts to make it harder for police departments to withhold dash-cam videos. But they are encountering resistance, as some argue that the media’s ability to use police recordings must be kept in check.



Suing for videos

When police departments refuse to turn over dash-cam videos and administrative appeals prove fruitless, journalists and other requesters face a choice: abandon the public records request, or take the matter to a court.

KOMO-TV, an ABC affiliate station in Seattle, has opted to pursue its video request as high as the Washington Supreme Court. After the case bypassed the appellate court and went straight from the trial level to the state’s highest court, journalists are waiting for the final word on whether the Seattle Police Department must hand over a series of videos.

Seattle’s police force has been widely accused of using excessive force and conducting racial profiling. A U.S. Department of Justice 2011 report found that the police department engaged in a “pattern or practice of constitutional violations regarding the use of force that result from structural problems, as well as serious concerns about biased policing,” based partly on evidence gleaned from dash-cam videos.

The history of bad law enforcement in Seattle makes it all the more important for dash-cam videos to be treated as open records, said Judith Endejan, a lawyer for KOMO.

“As incident after incident came forward, it was clear that seeing these dash-cam videos was really an important tool for reporters and the public to see what SPD is up to,” she said.

At the trial court, Judge Jim Rogers ruled that the police department violated the public-records law by failing to give KOMO a list of videos, but accepted the department’s broad interpretation of a state statute that prohibits releasing certain police recordings “until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.” The police department argued that under this law, it can withhold its videos — even the ones with no connection to a pending lawsuit — until a three-year statute of limitations has

expired.

Endejan said this ruling posed a “Catch-22,” because the department’s stated policy at the time of the station’s request was to destroy its videos three years after filming. The department’s lawyer told the Supreme Court at oral argument that the video retention period has been extended, but Endejan said the policy is still unclear.

While Washington journalists cross their fingers for a favorable ruling on Seattle police recordings, open government advocates in Oklahoma are applauding a May court decision that expands access to dash-cam videos.

In *Ward & Lee PLC v. City of Claremore*, the Oklahoma Court of Civil Appeals overturned a lower court’s ruling and held that dash-cam video documenting Richard Stangland’s arrest for alleged D.U.I. “constitutes a public record subject to inspection under the Open Records Act.”

“Appellees’ argument — and the trial court’s holding — that the video is exempt because it could be used as evidence in a subsequent criminal prosecution is without legal support,” Judge Robert D. Bell wrote in an opinion released May 31. “There is no such exemption enumerated in the Act.”

Bell is not the first judge to rule that dash-cam videos must be released. In 2010, for example, Utah District Judge Denise Lindberg ordered a state agency to release the recording of former Utah Senate Majority Leader Sheldon Killpack being arrested on suspicion of drunk driving. The Department of Public Safety argued that releasing the video to the media would endanger Killpack’s right to a fair trial, but the judge rejected that reasoning.

The Oklahoma case, unlike its predecessor in Utah, did not originate with public-records requests by reporters. Josh Lee, a lawyer for Stangland, requested the dash-cam video as part of his client’s defense. But Lee said that the ruling set a good precedent for the media and the public as well as criminal defendants.

Yet, he added, there is a danger that the ruling could come under legislative attack.

“My fear, quite frankly, is that the district attorney’s offices are all going to get together and go lobby the state legislature to get a change and exempt dash cameras from being accessible through open records,” he said. “I think that that’s not if, but when.”

Legislation goes both ways

Legislative backlash to dash-cam transparency is not unheard of. It happened in Florida in 2011, after journalists requested a video of two Tampa police officers slain on duty.

“Even though the family objected to the release of that video, there was no statutory exemption, and the judge essentially said his hands were tied,” said Patricia Gleason, special counsel for open government to the Florida Attorney General.

The judge allowed reporters to view the video in a screening at the State

Attorney's Office.

According to Gleason, the Florida legislature responded by amending the open records law to make videos and other recordings confidential if they show the killing of a person.

In an open letter, Wakulla County Sheriff David Harvey thanked state lawmakers for their "efforts to eliminate this unnecessary part of the Florida Public Records."

"We recently investigated a double homicide in the county where one of the stabbing victims made a 911 call to my office seeking assistance. The media has requested a copy of this gruesome recording without really realizing what is contained on the recordings," he wrote. "I feel like making the recordings public to our local television stations would have a devastating effect on the family members who survive the two men who died that early morning."

A majority in the Florida legislature agreed that privacy should trump transparency in cases where the recording shows the end of a life. Yet, legislative action on dash cams does not always mean less transparency. Vermont, for example, amended its public records law in May to narrow the exemption for criminal investigation records.

The legislative change came in response to the Vermont Supreme Court's 2012 decision in *Galloway v. Town of Hartford*, a modest victory for open government advocates. Seeking access to records about Wayne Burwell, a black man who was violently taken from his house by the police, investigative journalist Anne Galloway argued that the Vermont high court should read the Public Records Act the way federal courts have read the federal Freedom of Information Act, allowing the authorities to withhold criminal investigation records only if they can show that a specific harm would result from disclosure.

Instead, the court issued a narrower decision in favor of Galloway, founder of VTDigger.org, rejecting the town's argument that Burwell was not technically arrested and ruling that the requested records were public because they reflected "the initial arrest of a person." As for the question of whether to adopt the federal standard for access to investigation records, Justice Marilyn Skoglund wrote, "We leave that issue to the Legislature."

The legislature, in turn, amended the Public Records Act to enumerate the specific circumstances where investigation records are not public, and explicitly directed the state courts to follow federal Freedom of Information Act case law in interpreting the provision.

Donoghue said that compared to the new investigative-records exemption, the old one was broad and ambiguously worded.

Now, he said, "at least there's some chance to get a criminal case file at some point, depending on what you're requesting and when you're requesting it."

Wrangling over dash-cam requests

While legislatures and courts tinker with the legal basis for dash-cam transparency, journalists and other members of the public continue to face frequent difficulties in requesting videos.

Some police departments have shown that they are willing to cooperate with journalists' requests for recordings. In Arkansas, for example, the Jonesboro Police Department granted requests by media organizations including The Associated Press for dash-cam video from the night last summer when 21-year-old Chavis Carter was found dead in a police car. Although the video did not clarify whether the suspect shot himself, the pro-transparency blog "The Art of Access" praised the release as an example of a public records law "working just as it should."

But not every dash-cam video request ends the way reporters hope it will. For instance, local officials in Las Cruces, N.M., declined to let journalists access footage of the Dec. 17, 2011 police shooting that left alleged gang member Robert Montes dead. City Clerk Esther Martinez wrote in a denial letter that any recordings of the incident would be "confidential law enforcement records" and therefore exempt from disclosure, according to the *Albuquerque Journal*.

Lawyers, like journalists, say they often encounter resistance to their requests for dash-cam recordings.

"Even despite freedom of the press and First Amendment issues, we are really seeing some resistance by the officers and from the agencies," said Jeremy Brehmer, a California criminal defense attorney who has used dash-cam videos as evidence.

Some police departments don't respond promptly to requests, while others ask requesters to pay over \$100 per hour for an officer to retrieve videos, Brehmer said.

"It seems to be more resistant than other areas of the law, for some reason," he added. "I think it's kind of the code of the officers, that they kind of want to look out for themselves."

But Zager, the retired Florida police officer, said he believes that the public should have access to dash-cam videos, with a few exceptions. Footage showing juveniles and identifying victims of sex crimes should be exempt, and videos involved in criminal investigations should be withheld until the investigation is over, he said.

"You don't want a videotape released when an investigation is ongoing, because somebody could gain access to it and spoil the investigation," he added.

Donoghue said that some of the dash-cam videos he has obtained provide evidence to support the police officer's side of the story. Such videos, he said, have led to some changes of heart in police departments.

"I have heard several chiefs through the years who were initially opposed to videos in cruisers," he said. "They have become big fans of video in cruisers,

because so many times it has led to police officers being exonerated of claims made by the general public.”

Of course, Lee said, police departments want the public to see dash-cam videos that reflect well on the officers. But when it comes to videos that might be useful to the accused, the police change their position, he said.

“They want to have total control over what they release, when they release it, and who they release it to,” he said.

"Ag-gag" efforts face setbacks in 2013

Coalition files lawsuit in Utah to invalidate ag-gag statute

By Jeff Zalesin

AP Photo/The Herald Journal by Jennifer Meyers

Lane Jensen, of Eph C. Jensen Livestock Co., leads a flock of 1,800 sheep Mantua, Utah. A coalition of journalists and animal-rights activists are suing to invalidate Utah's ag-gag statute.

For years, opponents of so-called ag-gag legislation across the country have been saying that it is unconstitutional to pass laws aimed at restricting hidden-camera reporting on factory farms.

Soon, they'll tell it to a federal judge in Utah.

A coalition of journalists and animal-rights activists, led by the Animal Legal Defense Fund and People for the Ethical Treatment of Animals, have filed a lawsuit to invalidate Utah's ag-gag statute, which makes it a crime to photograph an agricultural operation without the owner's consent or to gain agricultural employment under false pretenses.

"In essence, the law criminalizes undercover investigations and videography at slaughterhouses, factory farms, and other agricultural operations, thus 'gagging' speech that is critical of industrial animal agriculture," their complaint states. "In doing so, the statute violates the First Amendment, the Supremacy Clause, and the Fourteenth Amendment of the United States Constitution."

If the court agrees, it would be a significant victory for the whistleblower-rights lobby. Measures hostile to undercover exposés on farms have failed this year in state legislatures across the country.

AP Photo provided by Humane Society of the United States

In this 2010 video image a Hallmark Meat Packing slaughter plant worker is shown attempting to force a "downed" cow onto its feet by ramming it with the blades of a forklift in Chino, Calif. The ag-gag bill, opposed by the California Newspaper Publishers Association, failed to pass in the state this year.

As Amanda Hitt of the Government Accountability Project put it, the pro-transparency fighters have been "winning the boxing match."



But ag-gag is not down for the count just yet, as laws remain in force in several states and proponents of unsuccessful bills plan to try again. And if a bill proposed in North Carolina is any indication, future bills may not be limited solely to agriculture.

A year of setbacks for ag-gag

According to Matthew Dominguez, a policy expert at the Humane Society of the United States, six states have passed some variety of ag-gag law since Kansas became the first in 1990. If supporters of the movement had their way, that total would have more than doubled in 2013.

Instead, opponents of the restrictive law have had their most accomplished year to date. All of the year's ag-gag proposals were withdrawn, vetoed or stalled.

Meanwhile, the ag-gag movement was soaked with a wave of negative publicity, including editorials in *The New York Times* and the *Los Angeles Times* as well as a biting segment on *The Daily Show with Jon Stewart* and countless blog posts.

One particularly blogged-about incident was the case of Amy Meyer, a Utah animal-rights activist who became the first person charged with violating an ag-gag law after she filmed a slaughterhouse from the street. The story went viral after journalist Will Potter, now one of the plaintiffs in the Utah lawsuit, wrote about it on his website, GreenIsTheNewRed.com.

The prosecutor dropped the charge just before trial, concluding that Meyer did not break the law because she was standing on public property. The timing of the announcement prompted speculation about whether the Utah authorities were caving to public pressure.

Meyer, also one of the Utah plaintiffs, suggested in an interview that her case might have influenced Tennessee Gov. Bill Haslam, a Republican, who vetoed his state's ag-gag bill in May.

"It was such an utter failure that maybe he realized that this is the kind of controversy that he could be stepping into if they allow this law to happen in Tennessee," Meyer said.

Both houses of the Tennessee legislature this year approved a bill requiring investigators to turn over images and videos of animal abuse to the authorities within 48 hours or by the end of the next business day.

Proponents argued that this rule would help to prevent animal cruelty by allowing officers to investigate it quickly.

"They're not prohibiting you from speaking up but rather mandating that you do so," said Animal Agriculture Alliance spokeswoman Emily Meredith of quick-



reporting laws, which have been proposed in several states and enacted in Missouri.

But detractors said that these laws are veiled attempts to choke off the investigative reporting process, which invariably takes more than two days.

While Haslam was considering whether to sign the bill into law, Tennessee Attorney General Robert E. Cooper issued a non-binding opinion concluding that the measure was “constitutionally suspect under the First Amendment.” He wrote that the bill was “underinclusive relative to the governmental interest in preventing cruelty to livestock,” and he suggested that it might impose “an impermissible prior restraint” or “an unconstitutional burden on news gathering.”

In a footnote, he added that it was unclear whether the bill could be reconciled with Tennessee’s shield law, which protects journalists’ newsgathering materials.

When Haslam announced that he would veto the bill, he cited Cooper’s concerns about its constitutionality and its effect on the shield law. He did not mention country star Carrie Underwood, who in April tweeted, “If Gov. Bill Haslam signs this, he needs to expect me at his front door.”

‘All eyes are on Utah’

Haslam’s veto was a major victory for ag-gag opponents, but a federal court ruling striking down the Utah statute would be much more significant.

Dara Lovitz, a legal scholar who has criticized ag-gag laws, said that the legal impact of such a decision could spread far beyond Utah. “I think other courts would look to how Utah is handling it, so I think all eyes are on Utah right now,” she said.

Dominguez said a ruling against the law could have an influence on state legislatures as well as courts.

“It would absolutely add to the mounting opposition to these bills and hopefully persuade supporters of these types of measures not to reintroduce next year,” he said.

Meredith said her organization, which supports ag-gag legislation but prefers the term “farm protection,” is monitoring the Utah case.

According to Meredith, laws like Utah’s are not only constitutional but necessary. The problem, she said, is not that farmers have something to hide. It’s that activists have taken “disingenuous, deceptive and manipulative actions” in order to produce videos that promote a vegan agenda, sometimes compromising the safety of the food supply in the process, she said.

“If they’re getting hired for the purpose of sneaking in and trying to obtain some damaging footage of the industry, these farm families need protection from that because these groups really are seeking to destroy their way of life,” she said.

Stewart Gollan, one of the lawyers representing the plaintiffs in Utah, said his clients are not arguing that trespassing should be legal. The First Amendment problem with the ag-gag statute, he said, is that it singles out a group of people for harsher treatment under the law based on what they intend to say.

“I certainly think that the intent behind the ag-gag law was not to prevent trespass against certain kinds of businesses that are particularly subject to trespass,” he said. “I think it was to specifically prohibit the gathering of information for use in public political dialogue against a very particular industry.”

Meredith, however, drew a distinction between speech by professional journalists and speech by animal activists. She accused the latter group of peddling “a false narrative” in hopes of convincing viewers to donate to their organizations.

“They’re not doing this just to help people understand about the industry just like journalists are,” she said. “They’re doing this to pad their own pockets.”

But Potter said in an e-mail that ag-gag laws target journalists as well as animal activists.

“These laws do not exempt journalists, because journalists are seen as part of the threat to this industry,” he said.

As a reporter, Potter said, he could face prosecution for going undercover on a farm in an ag-gag state, either alone or accompanied by an activist.

“More broadly, though, ag-gag puts my sources at risk of prosecution for speaking with me or providing me their footage,” he added. “No journalist should have to choose between not reporting a story that is of national concern and putting a source in jail.”

Joshua Frank, managing editor of the political newsletter CounterPunch, said that if state legislatures can pass ag-gag laws, by the same logic they could prohibit reporters from investigating claims of child abuse at a daycare business. CounterPunch is a plaintiff in the Utah case.

“We’re hopeful that if this law is shot down, journalists will have better access to reporting on such industries, and the workplace more generally outside of agriculture,” Frank said.

Ag-gag supporters remain committed, adjust strategy

Proponents of ag-gag legislation are likely to keep up their efforts as state legislatures return from their summer recesses. Meredith said that groups affiliated with her organization will push for a new version of the Tennessee bill to be introduced.

“I think that what you’ll see when the Tennessee legislature reconvenes is that bill will be reworded and reformulated and then presented again,” she said. “I think it will pass again by an overwhelming majority in their legislature and then hopefully the governor will side with American farmers and ranchers.”

According to Hitt, agribusiness executives know that ag-gag policies are unpopular, so they have lately begun to cloak their proposals in clever disguises.

“There’s a lot of ways that this is sneaky, that this nefarious thing can ooze its way into someone’s statehouse,” she said.

For example, she said, one bill proposed this year in North Carolina does not

present itself as an ag-gag but turns out to be “a different manifestation of the same thing.”

Like many ag-gag bills, the proposed Commerce Protection Act has provisions to punish undercover investigators who falsify employment applications and fail to turn over their recordings to the authorities. But unlike those bills, this one would apply to all industries—an expansion that Hitt called “draconian.” The North Carolina Chamber of Commerce, which represents both agricultural and non-agricultural businesses, has backed the bill.

The Commerce Protection Act did not pass before the North Carolina legislature recessed for the summer, but similar bills may appear in the next few months.

“I suspect we’ll see more of that type of approach from the industry into next session,” Hitt said.

An overview of "ag-gag" laws

By Jeff Zalesin

AP Photo by Orlin Wagner

Lester Reimer harvests wheat on his farm near Lebo, Kan.

Since 1990, some state legislatures have passed laws restricting hidden-camera reporting in agricultural facilities. But the “ag-gag” movement has gathered momentum in recent years, as bills have appeared across the country.

1990: Kansas passes the Farm Animal and Field Crop and Research Facilities Protection Act, becoming America’s first ag-gag state. The law criminalizes trespassing on a livestock facility to take pictures or video “with the intent to damage the enterprise.”

1991: Montana and North Dakota pass ag-gag laws similar — but not identical — to the law in Kansas.

Montana bans recording only for those who have “the intent to commit criminal defamation.” North Dakota goes with a broader prohibition: “No person without the effective consent of the owner may . . . [e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.”

2010: State legislators in Washington fail to pass an ag-gag bill based on the model legislation circulated by the American Legislative Exchange Council. The bill would have branded some activist groups “animal rights or ecological terrorist organizations” and prohibited these groups from entering farms to take pictures or video “with the intent to commit criminal activities.”

2011: Ag-gag bills are introduced in five states (counting South Carolina, whose bill does not explicitly mention photography or videography), but none pass before the end of the year. In April, *New York Times* food columnist Mark Bittman coins the term “ag-gag.”

2012: Iowa, Missouri, South Carolina and Utah enact laws affecting undercover investigators’ ability to document agricultural practices. Iowa makes it a crime to get hired at a livestock facility under false pretenses. Missouri requires videos of



suspected animal cruelty to be turned over to the authorities within 24 hours of filming. South Carolina bans trespassing on an animal facility with intent to harm the business. Utah criminalizes recording an agricultural operation without the owner's consent and gaining agricultural employment under false pretenses.

Meanwhile, an ag-gag proposal is tabled in Illinois.

2013: Ag-gag bills fail in California, New Mexico, Nebraska, Wyoming, Indiana, Vermont, New Hampshire, Arkansas, Pennsylvania, North Carolina and, most significantly, Tennessee, where the governor vetoes the bill as "constitutionally suspect."

In February, Utah arrests Amy Meyer for allegedly violating its ag-gag statute, making her the first person ever charged with such a crime. The prosecutor drops the charge after the case receives widespread publicity.

In July, a coalition of plaintiffs including Meyer sues to invalidate Utah's ag-gag law, claiming that it violates the First and Fourteenth Amendments.

FISA court faces legal challenges to secrecy

Civil liberties groups, technology companies file briefs asking for limited transparency from secretive court

By Rob Tricchinelli

AP Photo by J. Scott Applewhite

With a chart listing thwarted acts of terrorism, Senate Judiciary Committee Chairman Sen. Patrick Leahy, D-Vt., left, and Sen. Dianne Feinstein, D-Calif., right, chair of the Senate Intelligence Committee, question top Obama administration officials on Capitol Hill about the National Security Agency's (NSA) surveillance programs.



Civil liberties groups and large technology companies have asked the Foreign Intelligence Surveillance Court, in several different cases, to roll back the secrecy that regularly shrouds all of its filings, decisions, and precedential law.

The disclosure requests come amid heightened public attention directed at the secret court, after a series of high-profile leaks and media disclosures offered a small glimpse into the secret court's inner workings. The court handles nearly all matters in secret, making it difficult for the media to fully cover and for the public to fully appreciate the scope of cases that the court handles.

Documents made public by former NSA contractor Edward Snowden show that the FISA Court had authorized the government to obtain records from telecommunications giant Verizon. The order allowed the government access to so-called metadata about every call in Verizon's network, including ones that took place only within the United States.

In most cases, when the government seeks a warrant from the court, it must allege that a target of the surveillance warrant is a "foreign power" or "the agent of a foreign power."

The FISA Court was created under the Foreign Intelligence Surveillance Act of 1978 to review warrant applications and issue warrants in national security investigations. The court's 11 judges are assigned there on a rotating basis from other federal district courts throughout the nation, and one of them must be from a

D.C. court.

AP Photo by Kin Cheung

A supporter holds a picture of Edward Snowden, a former CIA employee who leaked top-secret information about U.S. surveillance programs, outside the U.S. Consulate General in Hong Kong.

The leaked documents also revealed the existence of a separate program, known as PRISM, under which the federal government has collected information about foreigners from American communications companies.

Two such companies, Google and Microsoft, have asked the FISA Court's permission to publish "aggregate data" about the FISA requests they receive.

In a June 18 filing, Google sought permission to publish two pieces of information: "the total number of FISA requests it receives" and "the total number of users or accounts encompassed within such requests." The next day, Microsoft asked the court for permission to disclose essentially the same information about its own involvement in the PRISM program.

Some early media reports on PRISM suggested that the federal government had direct access to servers of these technology companies, an impression Google and Microsoft sought to counter with their filings.

Both companies argued that the information they seek to publish is not classified and is, therefore, protected by the First Amendment. Microsoft's brief also argued that the government's interest in secrecy of aggregate numbers was greatly lessened considering that government officials had publicly confirmed the programs' existence.

The government's response was initially due July 9, but federal attorneys twice filed for extensions of time to file, the most recent deadline as of press time was July 30.

Despite the protections at stake, both companies framed their requests narrowly. Google even noted the limited nature of its request, adding it did not want to publish "which FISA authorities the government has actually invoked to compel production of data."

These authorities could be made public in response to broader requests for FISA Court transparency, filed June 10 by the ACLU and Yale Law School's Media Freedom and Information Access Clinic.

The groups requested that the court publish its previous opinions "evaluating the



meaning, scope, and constitutionality of Section 215 of the Patriot Act.” Section 215, read together with the Foreign Intelligence Surveillance Act, provides the legal framework for the government to collect “tangible things” — such as records of technology users — if they are relevant to an “authorized investigation . . . to protect against international terrorism or clandestine intelligence activities.”

“The public has an undeniable first amendment right of access to judicial opinions interpreting the scope, meaning and constitutionality of our surveillance laws,” said Patrick Toomey, an ACLU lawyer who worked on the filing. “The public can’t consent to the government’s power to conduct surveillance without knowing what its laws mean.”

During its investigations, the government asks the FISA Court for information under Section 215’s legal standard, and the court gives a related order. The civil liberties groups have accordingly asked the FISA Court to publish the legal precedents and opinions that it uses to analyze the government’s requests for surveillance under Section 215.

After the groups filed, *The New York Times* reported on July 6 that “more than a dozen classified rulings” from the FISA Court exist, constituting a “secret body of law giving the National Security Agency the power to amass vast collections of data on Americans.”

According to the Times story, the opinions are lengthy, and they address “broad constitutional questions” and create “important judicial precedents” in the legal arena of surveillance, with “almost no public scrutiny.”

The civil liberties groups have called the lack of public oversight troubling, if the FISA Court is indeed shaping surveillance law behind closed doors. “The public cannot assess the country’s laws, the work of their legislators, or the powers conferred upon their executive officials unless they know what the courts take those laws to mean,” their brief argues.

And similar to the Microsoft and Google briefs, the groups argue that public acknowledgment by the government of the surveillance programs reduces, if not negates entirely, the government’s interest in keeping things secret. The public disclosures “eliminate any interest in continued sealing of the Court’s legal opinions,” they wrote.

In response to the ACLU brief, the government directly argues that there is no First Amendment right of the public to access the FISA Court’s opinions. Instead, any publication of the opinions must also go through the executive branch.

A FISA Court rule says that even if the court itself wants to publish a particular opinion, the court may first “direct the executive branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected.”

Although the rule says that the court “may” direct the executive branch to redact

the opinion first, the government argues in its response to the ACLU that this requirement will nearly always be triggered because the court's expertise does not lie in making declassification decisions — that expertise lies with the executive branch.

Offering what might be a glimmer of hope for transparency advocates, the government's brief observes that "the government continues to review material," including the FISA Court's opinions, "for potential declassification and release to the public, where national security will allow," and that a "declassification review process is already occurring."

The Reporters Committee, joined by 14 news organizations, filed a friend-of-the-court brief in all three cases, supporting both the disclosure of the aggregate data on the technology companies and the release of the FISA Court's legal precedents.

The Reporters Committee brief argues that the public has a "formidable First Amendment interest" in receiving information on how the FISA Court interprets the laws that created it, and that the public has a heightened interest in hearing what willing speakers — the communications companies — have to say regarding data on what FISA order have collected from them.

Two other friend-of-the-court briefs have been filed: one by another coalition of civil liberties groups, including the Electronic Frontier Foundation, in favor of Google and Microsoft's motions, and another by a group of 16 U.S. representatives from both parties in favor of the ACLU's request for publication of FISA court precedent.

The representatives argue that even if they or other elected officials are briefed on the content and implications of FISA Court opinions and orders, they are forbidden from discussing them in the House or Senate chamber, or with their constituents.

Other federal government officials have spoken out against the court's secrecy, including one of its former judges.

Judge James Robertson, who served on the FISA Court from 2002 to 2005, said at a recent hearing that the court's decisions are ultimately flawed because the court only hears from the government.

Recent changes to the FISA framework made the program more like "programmatic surveillance," Robertson said. "I don't think that is a judicial function."

State courts continue move toward electronic filing, docketing

Developments in Kan., Minn., N.H., and Texas highlight trend

By Rob Tricchinelli

AP Photo/The Yakima Herald-Republic by Gordon King

In this 2009 picture, Debbie Mendoza, Zillah, Wash.'s municipal court nonattorney judge, looks over the docket for the day's court.

State courts throughout the country continue to put their docketing and filing online, increasing public access and assuring the transparency and integrity of the judicial system.



Implementation of online systems is “going more smoothly over time” as courts and vendors get used to the rollouts, said Thomas Clarke, a vice president at the National Center for State Courts.

“We’ve moved into the middle game with electronic filing,” Clarke said. “It’s moved into the mainstream,” he added, to the point where technology conferences focus less on the mechanics of electronic docketing and filing and more on the finer points of implementation.

Many states offer some form of electronic docketing for public use, either electronic filing by litigants or the posting of court documents online for public viewing.

Ongoing programs in Kansas, Minnesota, New Hampshire, and Texas highlight this nationwide move toward electronic filing, allowing courts to fully utilize the potential of expanding digital technologies.

Kansas

Kansas recently received a six-figure grant from the federal government to implement electronic document filing for litigants in its state courts.

The approximately \$200,000 award will fund electronic filing pilot programs in trial courts in six of the most populated counties in Kansas, which has 105 counties.

“Electronic processing will increase productivity and reduce the task time and

expense for the benefit of all court users,” Kansas Supreme Court Chief Justice Lawton Nuss said in a press release. “This is a good deal for Kansans.”

The six counties, combined with five others in which electronic trial court filing is already available or coming online, will make up nearly two-thirds of the trial court caseload in the state, according to state supreme court statistics.

The eleven counties are home to more than 1.7 million of Kansas’ 2.8 million residents.

Johnson County, Kansas’ most populous with more than a half-million people, already has electronic filing available for some types of cases and is not among the six affected by the grant.

The grant also allows for combined filing, in which documents in similar cases spanning multiple litigants may be filed together.

The state’s supreme court initially sought a \$1.1 million appropriation from the Kansas state legislature but ultimately did not succeed, leading the court to turn to the federal government for help.

The Bureau of Justice Assistance, an arm of the U.S. Department of Justice, periodically gives money to state and local governments under its Edward Byrne Memorial Justice Assistance Grant Program.

These justice assistance grants often go to local law enforcement and state judicial programs.

The grant comes on the heels of appellate court filings being accepted online throughout the state, which was also the byproduct of federal grant money.

According to Nuss’ office, a full statewide rollout of electronic filing will cost approximately \$1 million more.

Minnesota

To mark the beginning of eCourtMN, Minnesota’s statewide conversion to electronic court records, 11 counties have moved to a paperless system but have experienced a hiccup in public access as old files are scanned and converted to an electronic format.

The *Brainerd Dispatch* reported in early July that, as part of the transition in those counties, public terminals for viewing records had become inaccessible.

The physical documents, on paper, would not be publicly accessible while they were being converted to an electronic format, according to the *Dispatch*.

A state court spokesman said that public terminals were already available in some of the 11 counties and would be back online in the rest by mid-September.

By Sept. 16, electronic filing will be mandatory in the 11 counties in civil cases and family court matters, according to the eCourtMN steering committee.

Before the pilot program, documents from a particular courthouse were only accessible at public terminals at that very courthouse. Once the pilot program marches along, documents in any court of the 11 will be viewable from any other, to

be joined by other Minnesota counties as they are swept up by eCourtMN.

Court officials have said that court documents will “eventually” be available “from any computer that has an internet connection.”

Minnesota began eCourtMN in January 2012, as its overall attempt to move from a paper-based filing system to an electronic one. Minnesota officials have estimated that, from start to finish, eCourtMN could take up to 5 years to become fully implemented throughout the state.

New Hampshire

New Hampshire’s state court system began a \$7 million electronic filing program in 2011. Small claims lawsuits in parts of the state will be among the first affected by the program, as electronic filing requirements take effect later this year.

All court actions in New Hampshire now are entirely on paper, and courts require physical copies of all filings. Although most court filings in New Hampshire are public, facilitating that access often requires locating a singular copy of a particular document, as additional electronic or paper copies do not yet exist.

The court system therefore has to completely overhaul its handling of documents to bring things online. Five outside software companies entered bids to implement the overhaul, two finalists were recently announced, and the winner is expected to be named in August.

Small claims lawsuits in Plymouth and Concord will be filed online as early as November, according to a report in *The (Nashua) Telegraph*, the first steps toward full implementation of the paperless system.

Civil filing fees in New Hampshire increased July 1 to help fund the project. Fees for original actions, such as claims and appeals, increased from \$180 to \$225. Fees for small claims and landlord-tenant disputes, among others, increased as well.

With the switch to an electronic system, courthouses will also install filing terminals to accommodate litigants without internet access.

New Hampshire officials have estimated the project will take 5 years to implement.

Texas

The second-largest state in the country will have required e-filing in civil trial-court cases by 2016, and a pilot program in a mid-sized county is an early adopter of the program.

The Texas Supreme Court in December 2012 ordered “mandatory electronic filing” for cases on different timetables according to the court level and the population of the county.

All appeals courts must accept electronic filing by January 1, 2014, along with trial courts in all counties with more than half a million people. Later deadlines are spread out every six months for more sparsely populated counties, the last coming

in July 2016 for all counties with less than 20,000 people.

The state supreme court's order was designed to standardize the state's filings. While many counties accept e-filing in some form, the order requires the state's courts use TexFile, an "e-filing portal" provided by the state's Office of Court Administration.

Gregg County accepted its first e-filings in civil cases in June, after the Office of Court Administration included the county in its plans to implement the supreme court's order.

Gregg County, in eastern Texas, contains the city of Longview and has approximately 110,000 residents, ranking 30th by population among Texas' 254 counties.

Dear Abby, need advice on censorship

Do licensing laws trump the First Amendment?

By Amy Zhang

Photo provided by Steve Cooksey

N.C. blogger Steve Cooksey was “under investigation” by the state Board of Dietetics and Nutrition for giving advice on his blog about diabetes.

North Carolinian Steve Cooksey writes a diabetes blog peppered with exclamation points and capital letters, a blog that fully encapsulates his zeal for a meal plan that he says saved his life.

“I am still a Diabetic, but my blood sugar is NORMAL!!!” Cooksey wrote in a 2010 post. “I WANT TO SHOUT IT FROM THE MOUNTAINTOPS EVERY DAY!!! But...since I don’t live near a mountaintop...I post stuff on the Internet.”

But the same passion for promoting the diet to other diabetic patients (low carbs, lots of veggies) soon slammed him against the North Carolina Board of Dietetics/Nutrition. Cooksey received a call from the board’s executive director, who warned that his blog was “under investigation” because he was committing a criminal act for practicing dietetics without a license in North Carolina. The one-on-one mentorship with readers, the sale of his “Diabetes-Support Life-Coaching” packages, and even the Dear Abby-style advice columns on his site were all problematic, according to the board.

The executive director also mailed him a 19-page printout of his blog with areas of concern marked in red. At first, Cooksey complied. Then he became angry and sued. The media soon picked up his story.

“My guess is the board thought that I would ‘roll over’ after an official reprimand,” Cooksey said of the board. “I don’t think in their wildest dreams they thought that this shit storm would occur.”

Photo provided by Ronald S. Hines

The Texas veterinary board shut down Ronald S. Hines’ paid pet care advice website.

But the North Carolina Board’s move to fix Cooksey’s actions isn’t automatically oppressive, said Marcia McCormick, a constitutional law professor at



Saint Louis University in Missouri. The government's goal when it polices certain fields is to protect the consumer.

"There are often good reasons that states do regulate these professions, especially in areas that are potentially dangerous to the public and . . . especially if you accept money," said McCormick. "Bad things can happen," such as plumbers installing faulty pipes, or surgical malpractice.

"But once boards start regulating what members of the profession can and can't say, then there are problems," McCormick added.

Jeff Rows, who represents Cooksey, said the lawsuit is one in a series of cases that could squarely determine whether, and to what extent, the First Amendment protects individualized advice. The legal tango that ensues between a censored plaintiff and a government licensing board is actually common, and almost expected. Comparing the match to "schoolyard bullying," Rows said government agencies expect compliance when reprimanding ordinary citizens without legal recourse.

Cooksey's case is one of three lawsuits in three separate judicial districts currently before the courts. In the last two years, a psychologist, veterinarian and diabetic blogger have all sued their respective states after government licensing boards requested or ordered each to stop publishing.

Together, the cases could force courts to decide if and how much government agencies can regulate advice. Does a licensing board have the right to censor advice spoken or written to a reader, friend, neighbor if the giver is not licensed by the state?

And if state agencies are censoring writers like Steve Cooksey, Ron Hines and John Rosemond, then are national columnists like Dear Abby and TV personalities like Dr. Phil and Dr. Oz breaking the law as well because they are not licensed in a particular state?

According to media lawyers, those questions involve two constitutional issues. First, the courts must decide if advice is speech protected by the Constitution, or whether it is conduct completely regulable by licensing boards. And then if it is



speech, they must decide if all advice is protected or if the state has an interest in regulating its profession to protect consumers from fraud.

“We’ve reached a tipping point,” said Paul Sherman, an attorney for the Virginia-based Institute for Justice representing Cooksey and Rosemond. “And we want to be certain that courts have the guidance they need to reach a resolution that is consistent with the First Amendment and protects the rights of Americans.”

Is advice speech or conduct?

Herein lies one of the “cutting-edge” issues that courts have left largely unexplored: are the words published by Cooksey, or Ronald S. Hines who shares advice on pet care to international readers, or John Rosemond who writes a parenting column syndicated in over 200 newspapers across the country considered speech or occupational conduct?

In other words, Sherman said, should the courts even consider free speech arguments in these cases? Whether the cases touch on First Amendment issues is important in determining the standard of review — known as the level of scrutiny — courts must apply in judging the constitutionality of a government law that censors individualized advice.

If the courts find that advice is conduct and not speech, then state boards will not need to jump as high to prove there is a legitimate governmental reason for a licensing law. The court will apply the lowest, default level of scrutiny.

But, if the courts find that the cases do in fact involve First Amendment issues, then it must apply the most stringent level of protection known as strict scrutiny. Under that standard, the government must prove there is a “compelling government interest” in limiting speech. Those types of restrictions are historically rarely upheld.

According to the boards, advice can be likened to personal assessments or counseling that could steer people into danger if the advice is wrong. In its brief to the U.S. Court of Appeals (4th Cir.), the North Carolina dietetics board said Cooksey’s efforts to steer the court’s review into “the deep waters of unrelated First Amendment principles” was unfounded.

“Professional regulations are not subject to First Amendment scrutiny simply because they regulate activities that include communications,” the board said.

Like the Texas State Board of Veterinary Medical Examiners and the Kentucky Board of Examiners of Psychology, the North Carolina board cited a concurrence written by Justice Byron White in the Supreme Court case *Lowe v. SEC*. White wrote that regulations on professions necessarily involve communication and therefore cannot be defeated solely on a free speech argument.

But some media attorneys disagree completely, and say that *advice* provided through a blog, through speaking, or through a column where no conduct follows is inherently speech.

“There’s a difference between saying, ‘I think you should have your appendix removed’ and actually removing it,” said Rowes.

At the same time, Rowes said the *Lowe* case that is often cited by the boards is “bad law” because it has no precedential value. Concurring opinions are not binding, and later cases contradict the Supreme Court’s decision.

“The conduct speech argument is routinely made by a defendant in First Amendment cases as almost a knee-jerk reaction to try to get out of a First Amendment analysis,” said Lawrence Walters, an attorney at the Florida-based Walters Law Group focusing on free speech rights.

In Cooksey’s case, the only lawsuit that has moved past the district courts, the U.S. Court of Appeals (4th Cir.) agreed with the blogger that not only is advice speech, but the state dietetics board “chilled” Cooksey’s speech when the board warned that his site was under investigation and sent the red pen review of his site.

The appeals court reversed and returned the case to the district court for a retrial that would include consideration of the First Amendment.

Advice and the First Amendment

If the courts decide that advice is speech and protected from licensure laws, the next big question is how far that protection reaches.

Rosemond was asked by the Kentucky psychology board in May to terminate his columns and stop calling himself a psychologist in the end tag of his columns. While Rosemond was licensed in North Carolina, he was not licensed in Kentucky where his column is syndicated, and therefore he violated Kentucky’s licensing laws, according to the board.

His case, media lawyers say, is the most egregious of the three.

“It is the extreme example of the government using occupational licensing laws to ban free speech,” said Rowes. “He’s writing a garden-variety advice column . . . and the advice column has been a staple of Anglo-American journalism for hundreds of years.”

Combined with a case in Texas where the state veterinary board shut down Hines’ website because it allegedly provided illegal paid advice to pet owners located around the world, media lawyers say the courts have split the fact patterns into three different types of advice.

First, a practitioner’s self-labeling as a licensed professional when they are not licensed in that state; second, advice provided for free; and third, advice that is obtained for a fee.

In all of its briefs, the Institute for Justice cited *Holder v. Humanitarian Law Project*, a 2010 Supreme Court case that held by a 6-3 vote that legal advice to a government-designated foreign terrorist is afforded full First Amendment protection and held to a strict scrutiny standard. If counseling for terrorists is protected, Sherman argued, then surely advice to change a person’s diet or fix a

child's temper tantrum is too, regardless of whether advisers are paid.

However, the North Carolina board argued, if the court ruled in favor of publishers, then licensing laws could be simply be circumvented by an expression argument because licensing laws don't apply to speech.

"I produce cars, and that's my expression," said William Marshall, a law professor at the University of North Carolina. "If the federal government wants to regulate, too bad."

The Institute has countered by clarifying that the plaintiffs aren't pressing the courts for all laws that restrict spoken or written advice to be ruled unconstitutional. Rather, in all cases involving advice, the government should be required to meet a necessarily high bar in justifying its regulations.

"It is the duty of an engaged judiciary to ensure that the government has met that burden," said Sherman. "The government has to meet a high burden of showing that its laws are necessary."

The key, First Amendment Center President Ken Paulson said, is creating a balancing test that courts can use to weigh the government's interest with First Amendment rights. It's a sliding bar. If advice is paid for, then the government interest of protecting consumers will hold more weight against First Amendment protections. The more specific the advice, the greater the weight of government interests.

Walters agreed, saying each state law must be considered on a case-by-case basis.

"It's really a matter of looking at any particular law," said Walters, "and evaluating whether or not there are less speech-restrictive alternatives that can be applied."

In regards to the third type of speech where Rosemond named himself a psychologist in his end tag, even though he was not licensed in Kentucky, Rows said it was the easiest issue to argue and cited the recent Supreme Court case *United States v. Alvarez*, also known as the Stolen Valor case.

"The Supreme Court said the government cannot have a monopoly on truth, which means you have a First Amendment right to lie about yourself," said Rows. "Not that the Supreme Court approved of lying about yourself, but it just said that we're not going to begin the process of allowing the government to monopolize the truth."

However, a number of media lawyers agree that it is still too early to tell what the courts will rule. But the strong precedents that favor free speech protections will ensure that publishers are not strangled by the government.

"In a worst case scenario you'll see more efforts to prosecute bloggers who share opinions about health and medicine and law," said Paulson. "I don't see it happening."

Regulating in the Internet age

The Internet, Walter said, has created a boundless platform for bloggers and columnists to reach a patient or questioner in another state, country or continent. The same regulations that previously monitored brick-and-mortar doctors, lawyers, vets, and psychologists can't be sustained.

As state licensing boards try to keep up, they end up building higher walls to contain a system that is spilling over. In Hines' case, the Texas Veterinary Licensing Act at the center of the board's defense was amended in 2005 to forbid veterinarians from establishing a doctor-patient relationship solely by electronic means. In 2006, the North Carolina dietetics board adopted an administrative rule that made practicing dietetics via electronic communication illegal for those without a license.

But the exhaustive restrictions boards are advocating for is not the solution, Walters said. And even if courts find that boards can regulate individualized advice, the practicality of government agencies monitoring the sites of all citizens unlicensed by their state is impossible.

"We need to adjust as a society," he said. "The First Amendment requires breathing space to survive."

Whether online advice will be included under the Constitution remains to be seen. For now, Rowes and Sherman are fighting for an audience before the U.S. Supreme Court.

"I think there is a chance," said Walters. "We are as a society wrestling with this issue of everyone becoming a publisher. The Supreme Court always takes a few First Amendment cases each year and I think it has what it takes to make it to the Supreme Court."

Asked & 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: I heard that the law protects my online news site from being sued for copyright infringement. Is that true?

A: Federal law provides important protections that shield website operators from copyright infringement liability, though the safeguards are limited to certain circumstances and the website must meet certain requirements. The “safe harbor” provisions of the Digital Millennium Copyright Act (DMCA) provide website operator immunity for copyright infringement when a *user* of the website uploads content that infringes another's copyright.

The DMCA's protections apply to all qualifying websites that host user content, including sites such as YouTube and news websites that allow users to upload content, such as through online comment boards.

The DMCA sets up a system by which copyright owners can request to have material they believe to be infringing removed from websites while at the same time allowing website operators to avoid potential liability for the actions of users. It is important to note, however, that the DMCA's shield from infringement liability only applies to content uploaded by third parties. In other words, the DMCA does not protect a website operator or publisher from direct copyright liability if they post infringing content. At the same time, the DMCA protects website operators from liability for linking to other websites that contain infringing material, so long as the website operator isn't aware of the infringement.

To establish protection under the DMCA's safe harbor provisions, a website operator must meet several requirements. First, the website operator must create a copyright infringement policy that tells users of the site that the website will comply with the DMCA, meaning that it will remove infringing content uploaded by a user. The policy must also discuss how users who repeatedly infringe copyrights will be terminated from using the site. The policy must be in a public place on the website where users can access it, with many website operators including it within a site's terms of service or terms of use.

Second, the website operator must designate an agent to receive notifications

from copyright holders who believe users have infringed their work. The DMCA requires website operators to register their agents with the U.S. Copyright Office, which costs \$105, and to publicly display the contact information for the agent on their website. For more information about how to register an agent with the Copyright Office, visit <http://www.copyright.gov/onlinesp/>.

Finally, to maintain the DMCA's safe harbors and avoid liability for the infringing activities of users, website operators must respond to a notice of infringing activity and remove the material from the website within a reasonable amount of time. Removing the content after reviewing the notice of alleged infringement maintains the protection of the DMCA safe harbor.

The DMCA also allows users who believe their content was improperly removed in response to a takedown notice to file a counter notice arguing why the uploaded content does not infringe copyright. Under the DMCA, the website operator is then required to notify the copyright holder who submitted the initial claim about the counter notice. The website operator must then put the removed material back on the website within 14 business days unless the copyright holder notifies the website operator that it has filed suit against the user.

Q: If a document is entered into public evidence in a criminal trial, may I ask the court to view it?

A: In 1978, the Supreme Court recognized that the public has a general right to inspect and copy judicial records and documents. In *Nixon v. Warner Communications*, the high court confirmed this right and applied it to news organizations that wanted to obtain and broadcast the Watergate tapes.

The court said this right was based in the common law, rather than the First Amendment, but federal and state courts throughout the country have affirmed this right. The U.S. Court of Appeals in New York (2nd Cir.), for example, has said that once information has been publicly presented in court, only "the most extraordinary circumstances" can justify denying non-attendees from copying the information.

The logic behind the access right is that once documents, footage, or information has been aired in open court, the rights to privacy diminish, as one of the features of a public courts system is also public evidence.

Rather than a threat to privacy, at least one federal court has said that broadcasting videotaped trial evidence to a large audience is not a threat to the judicial system but instead enhances and contributes to the public's understanding of such proceedings.

Most courts take a very permissive view toward public access to evidence in criminal trials, but there are exceptions. Some appeals courts have given wide latitude to trial judges who make decisions over whether the public and media may access court documents and evidence. In some cases where trial courts have denied access, it has been upheld on appeal as falling within a trial judge's discretion.

Courts may not deny such requests by falling back on the public's freedom of information rights, which are created entirely by statutes and do not apply to the courtroom. Judges may not require third parties to use freedom of information act requests to gain access to criminal evidence, simply because the laws governing those requests apply to agencies, not the judiciary.

Some state laws also protect the right of public access to trial records. In Rhode Island, for example, the state supreme court held that any restriction on public access must be the only reasonable alternative and narrowly tailored to privacy interests, while still allowing access to parts of the record not deemed sensitive. The trial judge restricting such access there must also give specific findings in support of such an action.

Q: Who is ultimately liable for defamatory content posted by readers in the comments section of a newspaper website?

A: Newspaper publishers are generally not responsible for libelous information posted by their readers in a comments section unless the newspaper itself exercises some sort of editorial control over that content.

Section 230 of the Communications Decency Act of 1996 provides website and Internet service providers with immunity from liability resulting from comments posted by readers and other users of the website.

However, there are ways that this protection can be lost. For example, news website operators lose the immunity protections of Section 230 if, rather than merely posting comments provided by third parties, they create the online postings, extensively edit submissions provided by readers or incorporate the comments into subsequent news stories.

For example, a federal appellate court in California held that the roommate-matching web site Roommates.com was protected from liability for comments posted by its users when it provided open fields for their "additional comments."

The site lost Section 230 immunity, however, when it provided "drop-down" menus with answers for users' responses.

Because the website operators cannot be held liable, plaintiffs often attempt to subpoena the operators to compel the disclosure of the identity of individual posters so they could file suit. States have different standards as far as how much proof a plaintiff must show to allow such disclosure, and some news organizations choose to fight such subpoenas.

In February 2012, Indiana became the most recent state to have a court adopt the so-called Dendrite test for determining when a potential defamation plaintiff may require a website to turn over the identity of an anonymous commenter.

First developed by the New Jersey Superior Court, the five-part test allows courts to grant disclosure of an anonymous poster's identity if (1) the plaintiff makes efforts to notify the anonymous poster and allow a reasonable time for him

or her to respond; (2) the plaintiff identifies the exact statements made by the poster; (3) the complaint sets forth a basic cause of action; (4) the plaintiff presents sufficient evidence for each element of the claim; and (5) the court must balance the defendant's First Amendment right of anonymous free speech against the plaintiff's need for disclosure and the strength of the plaintiff's case.

Other states, such as Virginia, have set a lower bar for plaintiffs, and ordered the release of the identities of anonymous commenters as long as the plaintiff believes in good faith that he or she has been a victim of defamation. The strength of a potential plaintiff's case can influence a publication's decision whether to fight the subpoena. Publishers should know their respective state's governing law on disclosure of online identities to determine the standards of proof a plaintiff must show in order to allow for fully informed decision-making.

"Open & Shut"

A collection of notable quotations

AP Photo by J. Scott Applewhite

"The fundamental issue behind this amendment, behind the two different definitions, is this: Should this privilege apply to anyone? To a 17-year-old who drops out of high school, buys a website for \$5 and starts a blog? Or should it apply to journalists, to reporters who have bona fide credentials?"

*-Sen. Dianne Feinstein (D-Calif.)
arguing at a Senate Judiciary*

*Committee meeting that the proposed federal shield law should cover a limited
category of journalists.*

"I wouldn't trust Durbin (or most of his Senate colleagues) to baby-sit my kid. I certainly don't trust them to decide who counts as a 'real' journalist — and, more importantly, who doesn't."

*-University of Tennessee law professor Glenn Harlan Reynolds, responding in a
July 7 blog post in the New York Post to comments made by Sen. Dick Durbin that
journalists should be better defined when enacting shield law legislation.*

"I want to find the *Press Herald* building and blow it up."

*-Maine Gov. Paul LePage when asked by a fighter jet simulator computer if he
wanted to "blow up anything?" LePage's spokesperson later said that the governor
was joking.*

AP Photo by Seth Perlman

"The media informs the public and holds government accountable. Journalists should have reasonable legal protections to do their important work. But not every blogger, tweeter or Facebook user is a "journalist." While social media allows tens of millions of people to share information publicly, it does not entitle them to special legal protections to ignore requests for



documents or information from grand juries, judges or other law enforcement personnel.”

-Sen. Dick Durbin, (D-Ill.), arguing in a piece written in the Chicago Sun-Times on June 26 that journalists should be better-defined when it comes to providing shield law protections.

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