

SUMMER 2016

The News Media AND THE LAW

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS



The Candidates:
Openness, Access and
the First Amendment

The News Media & The Law

Summer 2016

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Published by

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ISSN: 0149-0737

The News Media & The Law

Summer 2016

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

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Clinton historically wary of the press

By Luis Ferre Sadurni

In March, Democratic presidential candidate Hillary Clinton [told CNBC](#) that she has been “the most transparent public official in modern times, as far as I know.” Some observers may disagree.

As Election Day nears, there are questions about how accessible a Clinton administration would be to the press and, ultimately, to the American public. Longtime political observers have chronicled Clinton’s turbulent relationship with the media, portraying her as private and controlling of information, and questioning her commitment to real transparency.

Journalists covering the campaign have grown frustrated with Clinton’s inaccessibility, specifically highlighting the [more than 250 days](#) since she held a formal press conference on Dec. 4, 2015 [in Iowa](#). Further, according to Dan Merica of CNN, in 2016 Clinton had held only [11 press gaggles](#), or informal interactions with the media, through the end of July. She held another aboard her campaign plane in early September.

The Clinton campaign, however, [points](#) out that she has given hundreds of one-on-one interviews to reporters during the campaign. Clinton pollster [Joel Benenson told](#) ABC News during the Democratic National Convention, “She has answered hundreds, if not thousands, of questions from reporters in one-on-one interviews. . . . We’ll have a press conference when we want to have a press conference. There’s no problem with that. But the American people hear from her directly every day. They



AP Photo/Matt Rourke

Hillary Clinton at a campaign stop in Rochester, N.Y. in January 2016.

get to ask her questions every day. And she answers questions from journalists.”

Media columnist Margaret Sullivan of *The Washington Post* [wrote](#) that although it is probably a smart strategic move for Clinton to avoid press conferences, Clinton owes it to the electorate to speak publicly and answer tough questions. “So, yes, the smart play might be to continue to stonewall. Or continue to offer the carefully selected interviews she’s been doing,” Sullivan wrote. “That’s safe. But it’s not right.”

The Clinton campaign did not respond a request for comment on the story.

Media reporters note that press conferences provide an unscripted, high-pressure setting that allows journalists to ask tough questions.

“It’s important to see how the candidate reacts in a setting like that,” *Politico* media reporter Hadas Gold said. “It’s really tough having dozens of people in front of you asking questions, all trying to nail you down on something. . . . It’s a much different environment than a one-on-one interview where you have more control over the situation.”

David Cuillier, director of the Journalism School at the University of Arizona and a former president of the Society of Professional Journalists, pointed out that press conferences can expose a candidate to political vulnerabilities.

“All it takes is one slip of the tongue, one off-hand comment, and all of a sudden you’re down a couple of percentage points in the polls,” Cuillier said, adding that nevertheless, press conferences are “an avenue for people to learn about their presidential candidates.”

Clinton’s apparent aversion to press conferences, critics note, highlights her private nature, her tendency to control information, and her political strategy. Many media reporters don’t expect to see a shift in Clinton’s press accessibility should she win the presidency.

“It does let us know how she is going to be if she is elected,” Sullivan told the Reporters Committee. “I don’t think that she is going to, all of a sudden, turn around and say a lot of things that are going to get her into trouble. I think that she is going to be opaque and guarded.”

None of this should be surprising to those who have watched Clinton’s past interactions with the news media.

“I think Hillary Clinton has kept the media at bay for decades, going back to Whitewater and the scandals of the 1990s,” said Michael

Calderone, senior media reporter of The Huffington Post. “It isn’t new for her to keep the media back.”

As first lady, Clinton ran up against transparency advocates when the Health Care Reform Task Force she chaired failed to disclose records and meet publicly under the Federal Advisory Committee Act. The Reporters Committee and other media organizations filed an amicus brief seeking access, which was granted in 1994 after a [federal judge ruled](#) the task force’s meetings and records be open. Sanctions were later levied against the administration by a federal judge for “misconduct” in responding to the open government action.

The Bill Clinton administration was peppered with the years-long Whitewater investigation, and political and personal scandals that resulted in what has been called a generally [“toxic” relationship](#) with the White House press corps.

As senator from New York, Clinton pushed for legislation that would make government more transparent. During her eight years in the Senate, Clinton co-sponsored at least three unsuccessful bills that would have made government more open, including one to ensure [greater transparency](#) in the federal contracting process.

During the 2008 presidential primaries, Clinton responded to a Sunshine Week questionnaire about open government issues. “There should be a presumption of openness, and I would instruct my Attorney General to press all agencies to release information if disclosure would do no harm,” she wrote.

But Clinton’s wariness of the news media continued into her tenure at the State Department, although a [Politico history](#) of her relationship with the media noted Clinton had a more relaxed relationship with the State Department press corps.

When the *The New York Times* [revealed](#) that she had used a private email server for official communications as secretary of state, Clinton came under fire for a perceived lack of transparency, among other things. Although Clinton asked the State Department to release her work-related e-mails, critics raised questions over the deletion of nearly [31,000 personal emails](#). The FBI cleared her of any wrongdoing in the matter in early July.

“I think one of the big concerns of reporters, if they’re considering a Clinton presidency, is how much access they’re going to get,” Calderone

said. "I think the email controversy shows how reluctant she is to cede any control over information. Even if what Hillary Clinton did wasn't illegal, it certainly wasn't transparent."

When it comes to her tax returns, Clinton boasts [a consistent record](#) of making her records public. Although disclosing tax returns is not required by law, Clinton and her husband have made public nearly four decades of tax returns.

But some journalists are concerned that press accessibility and government transparency will be an uphill battle for news media no matter who is elected president.

"I totally predict that whoever is in the White House, it's going to be a tough four years for the press and the public," Cuillier said. "I don't see the federal government, the executive branch opening up when January comes around."

Trump's record troubles First Amendment advocates

By *Sophie Murguia*

In some ways, Donald Trump may be one of the most accessible presidential candidates in recent history. But his record on press freedom and transparency has raised serious alarm among journalists and open government advocates.

The Republican nominee frequently holds press conferences and gives one-on-one interviews, and he has enjoyed his ability to get free media attention. In an interview with Bloomberg, Trump said he had “no reason” to meet his original \$1 billion fundraising goal because he was receiving so much free media.

“I just don’t think I need nearly as much money as other people need because I get so much publicity,” [Trump told Bloomberg](#). “I get so many invitations to be on television. I get so many interviews, if I want them.” A [June report](#) from the research group mediaQuant found that Trump had received free media worth almost \$3.5 billion in the past year, compared to just over \$1.4 billion for Hillary Clinton.

At the same time, Trump has revoked press credentials from media organizations whose coverage he characterizes as unfair, promised to make it easier to sue journalists for libel and broken with longstanding tradition by refusing to release his tax returns. (His campaign reportedly [reinstated the credentials](#) in early September for about a dozen organizations that had been banned.)

In a [recent article for *The Atlantic*](#), political journalist Ron Fournier



AP Photo/Mary Altaffer, File
Donald Trump at a campaign stop at Briarcliff Manor, N.Y. in June 2016.

called Trump “the least transparent presidential candidate in modern history,” citing Trump’s [history of making false claims](#) as well as his vagueness on policy positions and his hostility toward the press.

“He has an extremely unusual love-hate relationship with the press,” said Dick Polman, a national political columnist for NewsWorks and former political reporter for the *Philadelphia Inquirer*. “He’s vindictive, but by the same token he craves the access, he craves the visibility, he craves the attention of the press more than anyone I’ve seen before.”

The Trump campaign press office did not respond to a Reporters Committee email inviting comment with a list of questions about Trump’s positions on First Amendment issues.

Politico, BuzzFeed, *The Washington Post*, The Huffington Post and Univision are among the organizations that have been refused credentials to cover the campaign — or had them revoked. Trump [suggested](#) in June that he might add *The New York Times* to the blacklist, though he didn’t follow through.

Sometimes, the bans have been announced, as was the case [in June](#) when Trump said on Facebook that he would revoke *The Washington Post*’s credentials. Trump criticized a headline on the *Post*’s website that originally read, “Donald Trump suggests President Obama was involved with Orlando shooting.” (It was later changed to [“Donald Trump seems to connect President Obama to Orlando shooting.”](#))

“Based on the incredibly inaccurate coverage and reporting of the record-setting Trump campaign, we are hereby revoking the press credentials of the phony and dishonest *Washington Post*,” [Trump’s Facebook post said](#).

At other times, reporters have been denied access to Trump events without explanation, although the bans have often come shortly after news organizations have published material that is critical or unflattering toward Trump.

The bans have not always been consistently enforced. In the weeks after the *Post*’s credentials were revoked, for example, [Trump gave interviews to Washington Post reporters](#).

Most reporters who are denied credentials simply enter events as members of the public, but there have been incidents when they were prohibited from doing that. In June, a *Politico* reporter was asked to leave a Trump rally in California. And in late July, a journalist from *The*

Washington Post was [patted down and refused entry](#) to a Mike Pence event in Wisconsin.

“Our events are open to everyone and we are looking into the alleged incident,” Pence’s spokesman Marc Lotter [told The Associated Press](#).

Hadas Gold, a media reporter for *Politico*, said that although being denied entry to events won’t prevent a good journalist from getting a story, it can make reporting more difficult.

“It delays your reporting, and if you can’t be inside the arena, you can’t gauge the audience’s reaction to the candidate,” Gold said.

In an interview with [CNN](#), Trump said that if he were elected he would not revoke credentials from any White House reporters. Still, many journalists are troubled by Trump’s media blacklist.

“This idea of singling out organizations that anger him is a terrible development, and it’s consistent with other ways that he is showing his hostility to the press,” Polman said. Polman, who has been covering presidential elections since 1988, said he has never seen another campaign withhold press credentials the way Trump’s has.

“I think it’s a very troubling sign that says he doesn’t actually understand or value the role of the press in American democracy,” said *Washington Post* media columnist Margaret Sullivan, who has [sharply criticized Trump’s media blacklist](#) in her column.

Journalists are also concerned about [comments Trump made at a rally in February](#), when he promised to change libel law so that it would be easier to sue media organizations.

“I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money,” he said.

Trump’s statement has been widely dismissed by critics who say that the president has little power to unilaterally change libel law.

There is no federal libel statute, leaving states to determine what constitutes libel. Short of convincing Congress to pass a libel statute, or bringing a case through the courts in the hope of a favorable ruling in the U.S. Supreme Court — which has limited the reach of libel law, particularly in cases involving public officials and other public figures — Trump has few options.

“A president certainly can wield an influence very indirectly, but this idea that he’s going to somehow issue an executive order about libel laws

is very unrealistic, and I think it's also bluster," Sullivan said.

"I don't think anyone can take that seriously at all," said David Cuillier, director of the University of Arizona School of Journalism and a former president of the Society of Professional Journalists. "The libel laws aren't going to change under him. But it's really the underlying message that he's sending that is more concerning — that he wants to muzzle the media."

Trump's refusal to release his tax returns has been another point of contention.

Although not legally required, it has become common practice for candidates to release their tax returns. If Trump does not release his full tax returns, he'll be the first major party nominee not to do so since Gerald Ford released only summary data during his 1976 presidential bid not to do so, [according to PunditFact](#).

Trump initially argued that he could not release his tax returns because he is undergoing a routine audit. IRS Commissioner John Koskinen, however, told C-SPAN that [there was no reason an audit would prevent a taxpayer from releasing his returns](#). In fact, President Nixon did so in 1973 and a congressional investigation ultimately found he owed nearly \$500,000 in back taxes and penalties, [which PunditFact estimates would be about \\$2.3 million today](#).

Trump has since revised his statement, claiming that ["any lawyer would tell you"](#) that it would be unwise to release tax returns while under audit.

"I think that if he were a normal taxpayer and not a candidate for president of the United States, that would be a pretty good reason not to release your tax returns," said Joseph Thorndike, a law professor and director of the Tax History Project.

But, Thorndike added, most tax lawyers would advise private citizens not to release their returns in any situation.

"The point is that the rules are different — if not legally, at least politically and morally — for candidates," Thorndike said. "I'm sure that releasing his returns while being audited would be unpleasant for him and might make the audit harder, but that's not the point."

Thorndike said that releasing Trump's tax returns "would essentially allow the whole country to join in his audit" by opening up his taxes to a wider level of scrutiny.

Trump told AP that there is ["nothing to learn"](#) from his tax returns, and

that the public probably isn't interested.

Many political scientists and tax experts disagree. Thorndike said that candidates' tax returns can reveal information about their taxable income, how their businesses operate, charitable donations, potential financial conflicts of interest and effective tax rate.

Meena Bose, a political science professor who directs Hofstra University's Peter S. Kalikow Center for the Study of the American Presidency, said it's possible that Trump's tax returns won't turn up anything noteworthy.

"At the same time, for a presidential candidate who has not held elected office previously, there is some interest in his business dealings and his argument that his ability to make deals qualifies him for the presidency," Bose said.

Some news organizations, including *The [Washington Post](#)* and *[Vanity Fair](#)*, have attempted to reconstruct through public documents what may be in Trump's tax returns, but without the tax returns, that picture is incomplete.

Thorndike said it is difficult to speculate about what Trump's tax returns may contain, but "we shouldn't have to speculate."

"We have a right to expect transparency from our candidates, even if it's not legally required," Thorndike said.

Pence's transparency record provokes mixed reactions

By Sophie Murguia

Although Mike Pence has won praise for championing a proposed federal shield law to protect journalists' sources, the Indiana governor's overall First Amendment record is mixed.

When he was in the U.S. House of Representatives, Pence several times was one of the two leading sponsors of the [Free Flow of Information Act](#), a bill to protect

reporters from being compelled to reveal confidential sources or information. While 39 states and the District of Columbia have shield laws, there is no such protection on the federal level.

The push for a federal shield law has been unsuccessful to date, but Pence's advocacy for freedom of the press earned him bipartisan admiration.

"He was a terrific champion for reporters and their rights to maintain the confidentiality of sources, and I think that history needs to be noted," said Rick Boucher, a former Democratic congressman from Virginia who co-sponsored the bill with Pence. Boucher, now a partner at Sidley Austin LLP in Washington, is a friend of Tim Kaine and a Hillary Clinton supporter, and described Pence's work on the bill as "a sterling effort."

"Pence is properly seen in that singular context as a friend of the press and the First Amendment," said Gerry Lanosga, an assistant professor at Indiana University's Media School and president of the Indiana Coalition for Open Government. However, Lanosga said Pence's record as governor is "more complicated."



AP Photo/Nati Harnik

Mike Pence speaks at a campaign stop in Council Bluffs, Iowa in August 2016.

Pence's office not respond to Reporters Committee questions about Pence's views on First Amendment issues.

As governor, Pence was praised by open government advocates for [signing a 2013 bill](#) that increased transparency in Indiana's economic development agency, Lanosga said. Pence also [vetoed a bill last year](#) that would have allowed Indiana state agencies to charge a search fee for public records requests.

"The cost of public records should never be a barrier to the public's right to know," [Pence said on Twitter](#) after vetoing the bill.

But First Amendment groups have also been critical of actions Pence has taken as governor. In April, the Pence administration was criticized for arguing that an Indiana Supreme Court ruling [could justify withholding access to email](#) and other documents requested under the state's public records law. The ruling addressed email held by Indiana's General Assembly, [but Pence claimed that it should also apply to the governor's office](#).

Last year, journalists reacted with alarm when Pence's communications office [attempted to create a state-run news service](#) called "Just IN." The website would have contained news stories about the Pence administration written by his communications staff. Although Pence's office argued that it would be essentially a new website for putting out press releases, media organizations worried that the outlet would compete with or try to replace independent news sources. Pence abandoned the plan in response to the backlash.

"I think it's very problematic, given the Trump campaign's willingness to ban news organizations, or to increasingly go to more friendly outlets like Fox News, when you have a running mate who was considering starting what was seen as a state-run news outlet," said Michael Calderone, The Huffington Post's senior media reporter.

But Calderone said journalists have also seen some potentially encouraging signs from Pence as a nominee. In an [interview with radio host Hugh Hewitt in July](#), Pence suggested that the Trump campaign could lift its ban on certain media outlets.

"I fully expect in the next 100 days, we're going to continue to be available to the media, whether they're fair or unfair," Pence told Hewitt. However, since that interview, reporters from Trump's disfavored media outlets have continued to see their press credentials denied.

Even if Pence proves to be a strong advocate for media access, some journalists are skeptical that he can do much to change his running mate's mind.

"I think he has some influence, but it's ultimately up to Donald Trump," said *Politico* media reporter Hadas Gold.

Kaine emails reveal little more than a careful governor

By Luis Ferre Sadurni

Email issues may be causing headaches for Hillary Clinton, but a look through the more than 145,000 email records publicly [available online](#) from Democratic vice presidential candidate Tim Kaine's term as governor of Virginia show little more than a politician who is media conscious, careful even of language in internal memos lest they be leaked



AP Photo/Gerald Herbert, File

Tim Kaine at a campaign stop in New Orleans in August 2016.

to the press, and who worked closely with press representatives on amendments to the state Freedom of Information Act.

The email messages — part of more than 1.3 million records still being processed by the Library of Virginia — also provide some insight into Sen. Kaine's reluctance to release his full travel schedule when he served as chairman of the Democratic National Committee during his last year as governor.

Shortly after becoming chairman of the DNC in January 2009, [critics questioned](#) whether Kaine's travels as DNC chairman were affecting his work as governor. While his office made public a daily schedule, including official trips he took as governor, it did not include Kaine's travel for the DNC.

“In the political press it received quite a bit of attention, but I don't know that it was an all-dominating scandal or anything,” said Megan Rhyne, executive director of the Virginia Coalition for Open Government.

Kaine's office e-mail reveals denials to at least three FOIA requests for his travel records from *The Associated Press*, Judicial Watch, and the

Republican Party of Virginia.

[Two legal memos](#) prepared for one of Kaine's top counselors argued that Kaine's travel schedules were exempt from state FOIA because they were "[working papers](#) . . . for his personal and deliberative use."

After continued pressure, Kaine's office [released](#) a summary of his travels at the end of every month, but didn't make distinctions between DNC and state travels.

In a June 2009 [email](#) to Jay Timmons, president of the National Association of Manufacturers and Kaine's close friend, the then-governor confided that he would only publish his public schedule because it was "the right practice."

"I have told the press that I am glad to talk to them about what I am doing and my schedule whenever they ask me," Kaine wrote. "I do 5-10 press availabilities a week where I take any questions and have never refused to answer an inquiry about my schedule or anything else. For some reason, that has not been sufficient. You know the challenges!"

Neither his Senate office or campaign responded to the Reporters Committee's questions regarding Kaine's stance on transparency issues.

The Virginia Tech University shooting in 2007 and its aftermath presented yet another moment when Kaine's administration faced pressure navigating the state's FOIA. After a legal settlement between victims' families and the university, more than 20,000 related documents were released to the *Richmond Times-Dispatch* after a FOIA request.

But in a July 20, 2008, [front-page story](#), the *Times-Dispatch* revealed that the university withheld many more documents from reporters. "The university told the reporters that exemptions to the FOIA allowed it to keep secret many of the most important documents surrounding the event," the article reported.

In an [email](#) that morning to his counsel Lawrence Roberts, Kaine wrote "There's a front-page article in the RTD today about Tech withholding information concerning the April 07 shooting. Are they not following FOIA? Should we intervene?"

Roberts replied, "I am sure that FOIA exemptions cover most of what has not been turned over to the media. That being said, it may not be possible to survive a constant drumbeat of the media complaining about access."

Additional correspondence between Kaine staffers reveals his office

worked closely with the Virginia Press Association (VPA) to update the state FOIA in 2008. The Virginia FOIA undergoes changes almost on a yearly basis, according to Rhyne.

In crafting the legislative language for a new FOIA exemption, Kaine's staffers communicated with First Amendment lawyers and VPA leadership to ensure the new exemption would be interpreted in the narrowest sense. The [amendment](#) included an exemption for records involving Base Realignment And Closure (BRAC) planning.

"I'd like to make sure our remarks do not contain anything that VPA would take issue with," wrote Kaine's Senior Advisor Marc Follmer in an [email](#). The new FOIA language [was codified](#) into law later in 2008.

Like many politicians, Kaine was mindful of the media, taking measures to avoid controversial leaks. In an early 2008 [email](#), Kaine asked his communications director to revise the draft of a memo written to the state's Democratic legislative leadership.

Kaine wrote, "Since it could wind up in a reporter's hands, I would love it if you could read it quickly just to make sure it's kosher."

What the FOIA reform act means to you

By Adam Marshall

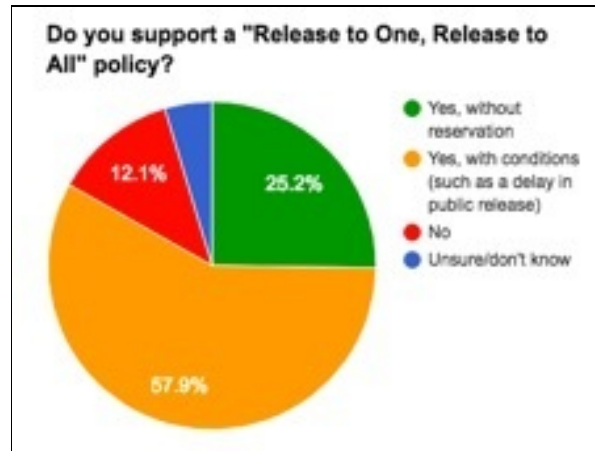
In late June, President Obama signed the [FOIA Improvement Act of 2016](#), bringing important changes to the 50-year old federal transparency law. The measure brings some changes to the FOIA process, notably in exemptions, that will affect requests filed after the law was signed June 30.

Among the law's biggest changes are new limits on FOIA exemptions.

First, the “foreseeable harm” standard has been codified into law. This means that even if a requested record falls within one of FOIA’s nine exemptions, the agency still has to release it unless it reasonably foresees that disclosure would harm an interest protected by an exemption or if disclosure is prohibited by law.

Journalists who file an administrative appeal over a withheld document can and should challenge an agency’s failure to comply with the foreseeable harm standard. The [legislative history](#) of the 2016 amendments makes clear that agencies must determine whether the release of “particular documents,” not simply generic categories of records, will cause foreseeable harm. More detailed guidance on the scope and requirement of the new standard will have to be decided by future litigation.

Second, there is now a 25-year sunset on the deliberative process privilege, which is part of Exemption 5. If the records requested were created 25 years (or more) before the date of the request, agencies cannot



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percentage of journalists who support a release to one, release to all FOIA policy

rely on the deliberative process privilege to withhold them.

The new law also made changes in how records are requested and released.

The federal government must create a consolidated online request portal that allows anyone to submit a FOIA request to any agency from a single website. There is no deadline for the creation of such a portal, however, and it is [unlikely to be operational](#) any time soon. (Meanwhile, independent resources, such as the Reporters Committee's [iFOIA](#) portal, can be used to send FOIA requests to almost every federal agency.)

More federal records are required to be proactively disclosed under the amendments. An agency must make available online those records it determines have or are likely to become the subject of requests. How that determination will be made is not yet clear.

Agencies are also required to put records online that “have been requested three or more times” which likely means records that have been requested and released three or more times.

The executive branch is also going beyond the “rule of three” requirement with a “release to one, release to all” policy, which would post publicly online all records released under FOIA.

The Reporters Committee recently conducted a [survey](#) of journalists on the public release policy. Preliminary results show overwhelming approval from journalists on the policy, as long as there is a delay between the time the records are released to the requester and when they are posted online. The complete survey results will be available in a report to be released in the coming weeks.

Additional changes to administrative appeals, fees, and dispute resolution also can be found in the new regulations.

Journalists and other requesters now have at least 90 calendar days to file administrative appeals. Previously, there was no statutory deadline for when such appeals needed to be filed, and agency regulations varied greatly.

There are only minor fee changes to take into account for those who qualify as a “representative of the news media.” Ordinarily, an agency cannot charge such requesters any fees if it fails to make a determination for a request within 20 working days (except in certain circumstances). Under the 2016 amendments, agencies can charge duplication fees if they fail to meet the 20-day deadline if three requirements are met: (1) “unusual

circumstances apply”; (2) more than 5,000 pages are necessary to respond to the request; and (3) the agency provides timely notice of the unusual circumstances and discusses with the requester how they can limit the scope of the request. This change should not affect requests where a fee waiver has been granted.

When providing a requester with a “determination,” agencies are also now required to inform them about the dispute resolution services offered by the FOIA Public Liaison of the agency and the [Office of Governmental Services](#) (OGIS). OGIS’s independence was strengthened by the 2016 amendments, which observers expect will lead to better oversight and administration of FOIA across the federal government.

For those who want to take a deeper dive into the specifics of the amendments, a [redline](#) of FOIA incorporating the amendments has been published online by the Department of Justice.

Anatomy of a brief: Reporters Committee supports challenges to "ag-gag" statutes

By Michael Lambert

In June, the Reporters Committee filed friend-of-the-court briefs in two federal courts asserting a similar argument — laws criminalizing the recording of agricultural production facilities, known as “ag-gag” statutes, are unconstitutional under the First Amendment.

Numerous states have enacted “ag-gag” laws in recent years that punish those who make audio or video recordings at agricultural facilities without the consent of the facility owner. Although the particular language of each statute varies from state-to-state, the laws effectively ban undercover reporting on the agricultural industry and gag speech critical of agricultural practices. In turn, the public’s ability to learn about potentially dangerous and unethical conditions at agricultural facilities is stifled.

Idaho enacted an “ag-gag” law in 2014 that created the misdemeanor crime of “interference with agricultural production” to knowingly make an audio or video recording of an agricultural production facility’s operation without the owner’s express consent. After a number of organizations, including the Animal Legal Defense Fund (ALDF), challenged the law, the U.S. District Court for the District of Idaho struck down Idaho’s “ag-gag” law as unconstitutional in 2015 under the First and Fourteenth Amendments, becoming the first court to invalidate an “ag-gag” law. This summer, the Reporters Committee and 22 media organizations filed an amicus brief with the U.S. Court of Appeals for the Ninth Circuit in [Animal Legal Defense Fund v. Wasden](#) in support of the plaintiffs seeking to uphold the trial court’s decision.

Similarly, Utah passed its own “ag-gag” law in 2012 that criminalized “agricultural operation interference,” defined as knowingly or

intentionally recording an image or sound from an agricultural operation without consent from the owner. Soon after the law's enactment, Utah prosecutors charged Amy Meyer, a Utah activist, with violating the law after she attempted to document slaughterhouse abuses from public property. Meyer was the first person in the country prosecuted under an "ag-gag" statute. Although the government ultimately dropped the charges against Meyer, she joined ALDF and other organizations in challenging the law in Utah federal court. In June, the Reporters Committee and 17 media organizations filed an amicus brief with the U.S. District Court for the District of Utah in [*Animal Legal Defense Fund v. Herbert*](#) in support of ALDF and other plaintiffs' motion for summary judgment, which asks the court to declare the law unconstitutional.

In both cases, the Reporters Committee argued that the "ag-gag" laws are unconstitutional under the First Amendment because they deter future investigations into the agriculture industry, suppress speech on a matter of public concern in which the public has a right to know, and are content-based restrictions on speech that do not survive strict scrutiny.

Previous investigations by journalists, organizations, and whistleblowers have successfully unveiled injustices in agricultural production practices. For example, Upton Sinclair's famous exposé on Chicago's slaughterhouses, *The Jungle*, is credited with aiding passage of the Pure Food and Drug Act and the Meat Inspection Act. The Reporters Committee argued in its brief that "ag-gag" laws prevent future enterprise journalistic endeavors that seek to report on health and safety concerns in agriculture, topics of the utmost public interest. By criminalizing audio and video recordings at agriculture facilities, the "ag-gag" statutes weaken food safety while stifling free speech.

Journalistic scrutiny of agricultural production facilities can only lead to better food safety. Silencing the speech of journalists and the whistleblowers who act as their sources with the threat of criminal conviction leaves a federal inspection system fraught with its own problems as the lone watchdog over the food the public consumes. [The] statute should be struck down because the government must not discourage journalists from providing the same searching examination of the food industry that has resulted in safer food to the nation for over 100 years.

The Reporters Committee stressed that the First Amendment protects the creation of audio and video recordings. Accordingly, restricting journalists and their sources from scrutinizing the agricultural industry through recordings restricts speech of public concern and speech that the public has a right to receive from entering the marketplace of ideas.

[The “ag-gag” statute] squarely suppresses speech relating to topics of universal importance — the safety of employees and the public food supply, the treatment of animals, and the impact of the agriculture industry on the environment. . . . [The states'] attempt to gag these areas of substantial public interest violates the First Amendment’s commitment to encouraging speech on matters of public concern.

...

The U.S. Supreme Court has found that the public has a heightened and independent First Amendment right to receive information, independent of the speech interests of journalists and other advocates. “[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

The Reporters Committee also argued that “ag-gag” statutes are content-based restrictions that are not narrowly tailored to serve compelling state interests. Thus, the laws are unconstitutional under the First Amendment.

Content-based restrictions on speech are presumptively unconstitutional under the First Amendment. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). Governments are prohibited from restricting speech based on its content because content-based laws threaten to “manipulate the public debate through coercion rather than persuasion,” *Turner Broad. Sys. Inc.*

v. *FCC*, 512 U.S. 622, 641 (1994), and permit governments to “drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1982). Content-based laws are only constitutional if they survive strict scrutiny, which requires the laws to be narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The U.S. Supreme Court, in *Reed*, defined content-based regulations as “those that target speech based on its communicative content” and those that define regulated speech “by particular subject matter” or “by its function or purpose.” *Id.* at 2227. Using this definition, the Reporters Committee wrote that the Utah and Idaho “ag-gag” statutes were content-based restrictions because they both regulate speech “by particular subject matter” — “conduct of an agricultural production facility’s operations” in Idaho and “agriculture operations” in Utah.

Further, both states asserted protecting private property rights and preventing trespass and fraud as justifications for enacting the laws. However, neither of these interests are compelling. Privacy rights of agriculture facilities are already compromised by federal government inspectors who consistently visit the premises, observe operations, and test meat products. Trespass and fraud are already addressed by current trespass and fraud laws sufficient to account for these concerns.

Regardless of the state interests asserted, both laws are not narrowly tailored to be the least restrictive means of achieving those interests because they both criminalize a number of constitutionally protected newsgathering activities.

Ultimately, the Reporters Committee concluded that the laws are unconstitutional under the First Amendment as content-based restrictions not narrowly tailored to serve a compelling state interest.

The right of access to juror names and addresses

By Kevin Delaney

Since before the nation's founding, the idea that the identities of jurors would be known not just to the parties before a court but also to the community at large has been a fundamental principle of the American judicial system. "When the colonists imported the jury system to America," a Massachusetts trial court recognized, "they brought with them a system in which a defendant in all types of criminal trials traditionally had been tried by individuals whom the defendant knew or, at least was highly likely to know."[\[1\]](#) A different court similarly pointed out that the jury selection for the British soldiers on trial for committing the Boston Massacre "was open to the public, and the identities of the jurors who acquitted the soldiers were known to the community."[\[2\]](#)

It was not until 1977, more than 200 years after the signing of the Declaration of Independence, that the first fully anonymous jury in the nation's history was empaneled.[\[3\]](#) The case was *United States v. Barnes* — a criminal trial where the leader of a large drug trafficking network, Leroy ("Nicky") Barnes, and 14 co-defendants were tried for conspiracy as well as violating narcotics and firearms laws. The U.S. Court of Appeals for the Second Circuit upheld the use of the anonymous jury, finding the step was necessary because the jurors' fear of retaliation would have hindered the deliberative process.[\[4\]](#)

Despite their overall rarity in American history, "nameless juries have progressed from a judicial fluke to a well-established departure from ordinary procedure, and a measure which some authorities argue seriously should be ordinary procedure."[\[5\]](#) Today, every federal judicial circuit, excluding the 10th Circuit, has approved of the use of anonymous juries.[\[6\]](#) This past summer, for instance, a federal judge in Brooklyn ordered the empanelment of an anonymous jury in the criminal trial of an al Qaeda terrorist who threatened to kill prosecutors and court staff.[\[7\]](#)

More troubling is the practice of trial courts in Los Angeles County of withholding juror names in the majority of criminal cases.[\[8\]](#) Even in situations where courts decide to disclose the identities of jurors to the parties, they may refuse to disclose such information to members of the news media.[\[9\]](#)

The use of anonymous juries undoubtedly raises important questions concerning a defendant's Sixth Amendment right to a fair trial.[\[10\]](#) Their use, however, also raises important questions for journalists who cover the courts. Jurors in high profile cases are often a fundamental part of the story. Even though journalists, as a matter of ethics, typically refrain from interviewing jurors during a trial, journalists routinely make post-verdict requests for interviews. These interviews can enlighten the judicial process for readers and viewers, often shedding light on why a particular juror voted as he or she did.[\[11\]](#) Moreover, although journalists typically avoid naming jurors before and after a verdict is entered, journalists occasionally feel it is necessary to name jurors when serving as "watchdogs" of the democratic process. For instance, as the United States Court of Appeals for the Seventh Circuit recently noted, a press investigation into the jury in the corruption trial of former Illinois Governor George Ryan revealed that several jurors "had lied on their questionnaires and had disqualifying convictions or otherwise might have been subject to challenge for cause."[\[12\]](#)

This white paper will evaluate the use of anonymous juries and the news media's qualified First Amendment and common law rights of access to juror names and addresses. As will be displayed below, both the First Amendment and common law provide strong, albeit qualified, rights of access to this information. With anonymity becoming increasingly common, this issue will take on added importance for members of the news media.

Anonymous Juries

Although the term has an intuitive meaning, courts have struggled with defining what exactly constitutes an anonymous jury.[\[13\]](#) One court has asserted that the term means only "that the court does not disclose juror names to the parties."[\[14\]](#) Another court, in providing a definition that best serves the readers of this white paper, concluded, "A jury generally is considered to be 'anonymous' when a trial court has withheld certain

biographical information about the jurors either from the public, or the parties, or both.”[\[15\]](#) The biographical information typically withheld includes jurors’ and their spouses’ names, addresses, and places of employment.[\[16\]](#)

Generally, a court will not “order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected.”[\[17\]](#) Courts usually hold that some combination of the five following factors will show that the jury is in need of protection:

(1) the defendant’s involvement in organized crime, (2) the defendant’s participation in a group with the capacity to harm jurors, (3) the defendant’s past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation or harassment.[\[18\]](#)

Moreover, at least one federal statute would seemingly permit the use of anonymous juries. The Jury Selection and Service Act states that each district court shall put into operation a written plan for the random selection of jurors that fixes “the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public.” [\[19\]](#) That Act also states, however, that judges may keep the names of jurors “confidential in any case where the interests of justice so require.”[\[20\]](#)

Appellate courts routinely refer to the empanelment of an anonymous jury as a “drastic measure” because their use “raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.”[\[21\]](#) Nonetheless, at the federal level, judges are rarely overturned for their decision to empanel an anonymous jury. It appears that reversal due to the use of an anonymous jury has occurred in only one federal case: *United States v. Sanchez*, [\[22\]](#) a case in which the United States Court of Appeals for the Fifth Circuit held there was no evidence suggesting that the defendant was involved in organized crime or that he had attempted to manipulate the judicial process. The lack of reversals derives from the reality that a trial court’s decision to empanel an

anonymous jury is subject to the deferential abuse-of-discretion standard on appeal. Every federal appellate court to consider the question has come to the conclusion that the abuse of discretion standard is appropriate.[\[23\]](#)

The qualified right of access to juror names and addresses

Despite the rise of anonymous juries, members of the news media possess the general right to challenge a court's decision to withhold juror names and addresses. [\[24\]](#) When making these challenges, the press typically asserts they have a First Amendment and common law right to the desired information. As will be displayed below, the majority of courts to consider the issue have concluded that a qualified right of access to juror names and addresses exists.[\[25\]](#)

The First Amendment right of access

In the milestone case of *Richmond Newspapers, Inc. v. Virginia*,[\[26\]](#) the U.S. Supreme Court recognized that the public and press have a qualified First Amendment right to attend criminal trials. "[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment," the Court explained, because "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."[\[27\]](#) In other words, if members of the public were not afforded access to trials, their First Amendment right to report on them would be meaningless. Since *Richmond Newspapers*, the Court has extended the qualified First Amendment right of access to the testimony of child sex offense victims,[\[28\]](#) the *voir dire* examination of prospective jurors,[\[29\]](#) and criminal pre-trial hearings.[\[30\]](#)

In *Press-Enterprise II*, the Court articulated a two-part test, referred to as the "experience and logic" test, for determining when the presumptive right of access under the First Amendment applies. Under the first part of the test, courts are instructed to ask "whether the place and process have historically been open to the press and general public."[\[31\]](#) Under the second part, courts must "consider whether public access plays a significant positive role in the functioning of the particular process in question."[\[32\]](#) If a court finds that a certain part of a proceeding passes both parts, the First Amendment right of access applies.

When addressing whether the First Amendment right of access exists, courts usually apply a *de novo* standard of review.[\[33\]](#) Thus, unlike the

abuse of discretion standard that is applied to the question of whether a trial court erred in empaneling an anonymous jury, courts evaluating the existence of the First Amendment right of access usually afford no deference to the lower court.

Although strong, the First Amendment right of access is not absolute. The Court has made clear that the right is qualified and can be overcome by a narrowly tailored overriding interest that closure is necessary to preserve a higher value.^[34] To show that an overriding interest exists, a court must make specific factual findings on the record.^[35] The U.S. Supreme Court has identified “safeguarding the physical and psychological well-being of a minor” and the accused’s right to a fair trial as potential “overriding interests” sufficient to overcome the First Amendment right of access.^[36]

Applying "experience and logic: case law evaluating the qualified First Amendment right of access

Excellent examples of cases recognizing the qualified First Amendment right of access to juror names and addresses include *United States v. Wecht*,^[37] *United States v. Doherty*,^[38] *Commonwealth v. Long*,^[39] *State ex rel. Beacon Journal Publ’g Co. v. Bond*,^[40] and *People v. Mitchell*.^[41]

On the experience prong, as evident from these opinions and others, courts typically stress the nation’s long tradition of making the names and addresses of jurors open to the public. For instance, in *United States v. Wecht*—a case in which the news media challenged a trial court’s decision to empanel an anonymous jury in the criminal case against Dr. Cyril H. Wecht, a coroner charged with using his public office for private financial gain—the United States Court of Appeals for the Third Circuit noted that it was rare for juror names to be withheld before the upsurge in the use of anonymous juries in the 1970s.^[42] The Third Circuit concluded that “[b]ecause juries have historically been selected from local populations in which most people have known each other . . . the traditional public nature of *voir dire* strongly suggests that jurors’ identities were public as well.”^[43] In *Beacon Journal*, a case in which a newspaper sought an order directing a trial court to disclose a list of juror names and addresses from a criminal case that ended in a mistrial, the Supreme Court of Ohio noted that even before the Norman Conquest trials were held in which “the

public knew the identity and residence of the participants.”[\[44\]](#) It further stated that this tradition of “access to jurors’ identities continued in the new American nation” where, “[i]n the treason trial of Aaron Burr, for example, Chief Justice John Marshall printed the names of the jurors in the court’s reported decision.”[\[45\]](#)

The outcome of the experience prong, however, can be affected by how the court frames the inquiry. In *United States v. Doherty*,[\[46\]](#) two newspapers intervened in the criminal case of multiple defendants for post-verdict access to the names and addresses of the jurors who had served. On the experience prong, instead of asking whether names and addresses of jurors have historically been open to the public, the District Court for the District of Massachusetts evaluated the tradition of press accessibility to jurors for post-verdict interviews.[\[47\]](#) Framed this way, the district court found the history of post-verdict interviews to be “scant,” but nevertheless concluded that the “broad latitude afforded to the press in gathering news” tended to favor access on the experience prong.[\[48\]](#)

On the logic prong, courts recognizing the qualified First Amendment right of access typically stress the ability of the news media to prevent juror bias and educate the public on the judicial process. The Third Circuit in *Wecht*, for instance, wrote that affording the public access to juror names will improve the fairness of the proceedings. Quoting from the First Circuit’s decision in *In re Globe Newspaper Co.*, the Third Circuit wrote:

“Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system. It is possible, for example, that suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups. It would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret.”[\[49\]](#)

To the Third Circuit, the value (or to put it differently, the logic) in affording access to juror names is in eliminating juror malfeasance. “Corruption and bias in a jury should be rooted out before a defendant has

to run the gauntlet of trial,” the Third Circuit wrote.^[50] “Public knowledge of the jurors’ identities is desirable in part because it can deter such corruption and bias.”^[51]

In *Beacon Journal*, the Supreme Court of Ohio wrote that many of the five values “served by openness in criminal proceedings” recognized by the U.S. Supreme Court in *Richmond Newspapers* were also served by affording public access to juror names.^[52] Those five values are:

- (1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial’s results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies.^[53]

The Ohio high court further recognized the value of post-trial media interviews with jurors. These interviews, the court wrote, can shed light on juror misconduct as well as on larger problems that may need to be improved by the judicial or legislative process.^[54] Similar sentiments were echoed by the district court in *Doherty*, which wrote that stories on jurors can help educate “the public as to their own duties and obligations should they be called for jury service.”^[55]

Although it is clear that many courts recognize a qualified First Amendment right of access to juror names, courts often differ on when this right of access attaches. The Third Circuit in *Wecht*, for instance, held that the right attaches “at the latest at the time of the swearing and empanelment of the jury”^[56] In contrast, citing concerns related to the defendants’ right to a fair trial and juror privacy, the district court in *Doherty* held that access to juror names and addresses would be delayed until seven days after the verdict was returned.^[57]

Moreover, even courts that recognize the qualified First Amendment right of access acknowledge situations in which the right does not apply. For instance, in *In re Globe Newspaper Co.*,^[58] the First Circuit applied the First Amendment to interpret a local court rule to make available juror names and addresses after the completion of a trial “unless the presiding judge identifies specific, valid reasons necessitating confidentiality in the particular case.” Reasons necessitating confidentiality “include a credible threat of jury tampering, a risk of personal harm to individual jurors, and

other evils affecting the administration of justice, but do not include the mere personal preferences or views of the judge or jurors.”[59] The Court of Appeals of Michigan, for its part, place great weight on juror safety, writing that access to juror names and addresses can be restricted in “exceptional cases, especially organized crime trials, and trials involving an unusually violent offender”[60] Courts have also made clear that juror names can be withheld if their publication would impinge on the defendant’s right to a fair trial.[61]

Additionally, not every court has applied the experience and logic test to find a qualified First Amendment right of access. In contrast to the courts above, the Supreme Court of Delaware in *Gannett Co. v. State*[62] applied the experience and logic test to hold that the press does not have a qualified First Amendment right to require courts to announce juror names during a murder trial. The Delaware high court’s decision was affected by the conduct of journalists in an earlier prominent murder case. In that earlier case, juror names were published in an article profiling the jurors, providing readers with information on the jurors’ “hometowns, occupations, marital status, number and ages of their children, personal mannerisms and appearance.”[63] The profiles were described as “rarely flattering.”[64]

On the experience prong, the Delaware Supreme Court noted that the mere fact that juror names may be announced in court does not automatically mean the practice should be afforded constitutional protection.[65] It further acknowledged various state and federal statutes that “give trial courts broad discretion over release of jurors’ names,” which “authorize courts to keep jurors’ names confidential in the interest of justice and to limit such use *in any case in whole or in part.*”[66] According to the court, the statutes establish a historical tradition under which judges have the discretion to disclose juror names—not a historical tradition under which juror names are uniformly disclosed. On the logic prong, the court disagreed with Gannett’s assertion that the announcement of juror names allows the public and press to serve as a check on undisclosed juror bias. The *voir dire* process and preemptory challenges, the court stated, should be sufficient to ensure a fair trial without the additional help of the press.[67] The court, moreover, expressed the concern that the publication of articles about the jurors would lead to outside pressure being placed on the jurors, thereby corrupting the

fairness of the trial.[\[68\]](#)

The Common Law Right of Access

In *Nixon v. Warner Communications*,[\[69\]](#) the U.S. Supreme Court recognized a general, common law “right to inspect and copy public records and documents, including judicial records and documents.” Under this holding, the public and press possess a common law right of access to judicial records. When applying the common law right of access, courts will generally balance “the presumption of openness against the circumstances warranting sealing of the document . . .”[\[70\]](#) Thus, the First Amendment typically provides a stronger right of access than the common law because the qualified First Amendment right can be overcome only by a narrowly tailored overriding interest.

Decisions involving the common law right of access to juror names and addresses often turn on whether the list containing the names and addresses of jurors is considered a “judicial record.” In *In re Baltimore Sun Co.*,[\[71\]](#) the United States Court of Appeals for the Fourth Circuit concluded that the list was a judicial record that the common law right attaches to when the jury is seated. “After a jury has been seated,” the Fourth Circuit wrote, juror names “are just as much a part of the public record as any other part of the case, and we think so also are their addresses in order to identify them.”[\[72\]](#) The United States Court of Appeals for the Seventh Circuit in *United States v. Blagojevich*[\[73\]](#) likewise concluded that the common law presumption of access attaches to juror names. That opinion, however, primarily focused on the Jury Selection and Service Act, referenced above, which it wrote also created a presumption that juror names should be disclosed.

In *Commonwealth v. Long*,[\[74\]](#) the Supreme Court of Pennsylvania held that “a list containing the names and addresses of impaneled jurors” does not constitute a “public judicial document” to which the common law right of access attaches. According to that court, documents typically classified as public judicial documents are filed with the court and used by the judge in reaching a decision.[\[75\]](#) This standard was not met because the jury list is never entered into evidence and “is not the type of information upon which a judge bases his or her decision.”[\[76\]](#) The Court of Appeals of New York in *Newsday, Inc. v. Sise*[\[77\]](#) similarly concluded there was no common law right of access to records of juror names and addresses

because the records “have not been entered into evidence or filed in court and are, therefore, not public judicial records.”

Although the increase in the number of anonymous juries is troubling, the foregoing displays that the news media has been successful in challenging the decision of courts to withhold juror names. Indeed, it appears that the news media has been more successful at challenging anonymous juries than litigants in the actual case.

Both the First Amendment and common law provide valid arguments for members of the news media who seek to promote the right of access to juror names and addresses. When arguing the First Amendment, it is imperative that members of the news media stress the nation’s long tradition of access to juror names and addresses. Equally important is stressing the soundness behind affording such access. The opinions addressed above and others provide members of the news media with many valid arguments for why the right of access to juror names should be afforded. As Justice Harlan once wrote, “[J]urors will perform their respective functions more responsibly in an open court than in secret proceedings.”[\[78\]](#) So strong is the First Amendment right of access that it should be overcome only by a credible risk to the safety or integrity of the jury. When arguing the common law, members of the news media should emphasize that juror lists are judicial records to which the common law right of access attaches. Without such an argument in place, courts stand to bypass the common law access right altogether.

Valid arguments also exist for asserting that the access right should attach at the time of the swearing and empanelment of the jury. Courts, such as the district court in *United States v. Doherty*, that hold the access right should attach after the entry of the verdict fail to see the news media’s role in preventing juror misconduct. By affording access to juror names and addresses, members of the news media are positioned to perform further investigations into jurors’ backgrounds, potentially preventing a miscarriage of justice.

Although judges will likely remain protective of jurors’ safety and privacy, it must always be kept in mind that reasonable alternatives to secrecy exist. Members of the news media should remind judges that they have the ability to “forbid anyone to make repeated requests that a juror discuss a case after the juror’s refusal to do so and may instruct the jurors that they have no obligation to discuss the case with anyone.”[\[79\]](#) “[W]hile

privacy concerns following a publicized trial are real,” the First Circuit reflected, “these unfocused fears must be balanced against the loss of public confidence in our justice system that could arise if criminal juries very often consisted of anonymous persons.”^[80]

End notes:

^[1] *Commonwealth v. Dupont*, No. 85-981-987, 1998 Mass. Super. LEXIS 476, at *55 (Mass. Super. Ct. Aug. 24, 1998).

^[2] *Commonwealth v. Fujita*, 470 Mass. 484, 486 n.8 (2015).

^[3] Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John’s J. Legal Comment. 457 (1999).

^[4] *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979).

^[5] Abramovsky & Edelstein, *supra*, at 465.

^[6] *See, e.g., United States v. Ramírez-Rivera*, 800 F.3d 1 (1st Cir. 2015); *Barnes*, 604 F.2d at 130; *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988); *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012); *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009); *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992); *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003); *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *United States v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995); *see generally* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. Rev. 531, 570 n.1 (2010).

^[7] Lia Eustachewich, *Judge grants request for anonymous jury in al Qaeda terrorist’s trial*, New York Post (June 21, 2016, 7:08 PM), <https://nypost.com/2016/06/21/judge-grants-request-for-anonymous-jury-in-al-qaeda-terrorists-trial/>.

^[8] Ashby Jones & Nathan Koppel, *Anonymous Ladies and Gentlemen of the Jury*, The Wall Street Journal (July 12, 2010, 12:01 AM), <http://www.wsj.com/articles/SB100014240527487047996045753574436558>

^[9] *See, e.g., Gannett Co. v. State*, 571 A.2d 735 (Del. 1990) (holding that the news media do not “have a qualified first amendment right to require announcement of jurors’ names during a highly publicized first degree murder trial, even though the parties have full access to such information”).

^[10] Keleher, *supra*, note 6 at 532 (writing that “if jurors conflate anonymity with a criminal defendant’s dangerousness, the right to a fair

trial is eviscerated”).

[11] For just one example, see Ray Sanchez, *Aaron Hernandez jury: 'Emotional toll on all of us,'* CNN (Apr. 17, 2015, 10:18 AM), <http://www.cnn.com/2015/04/16/us/aaron-hernandez-jurors-interview/>.

[12] *United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010).

[13] See Keleher, *supra* note 6, at 531 (writing that “[t]he definition of an ‘anonymous jury’ is a shifting one”); *Dinkins*, 691 F.3d at 371 (“The term ‘anonymous jury’ does not have one fixed meaning.”).

[14] *United States v. Black*, 483 F. Supp. 2d 618, 624 (N.D. Ill. 2007).

[15] *Dinkins*, 691 F.3d at 371.

[16] See *Shryock*, 342 F.3d at 970; *Ross*, 33 F.3d at 1519.

[17] *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991).

[18] *Ross*, 33 F.3d at 1520.

[19] 28 U.S.C. § 1863(b)(7).

[20] *Id.*

[21] *Ross*, 33 F.3d at 1519.

[22] 74 F.3d 562, 565 (5th Cir. 1996).

[23] *Dinkins*, 691 F.3d at 371.

[24] See, e.g., *Gannett Co.*, 565 A.2d at 899 (“[I]ntervention by the news media in a criminal proceeding, for the limited purpose of protecting their First Amendment rights, appears to be the most desirable procedure for providing a judicial resolution of those rights.”)

[25] See generally *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 156 (2002); *People v. Mitchell*, 233 Mich. App. 604, 605-06 (Mich. Ct. App. 1999).

[26] 448 U.S. 555 (1980).

[27] *Id.* at 580 (citations and internal quotation marks omitted).

[28] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

[29] *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise I*”), 464 U.S. 501(1984).

[30] *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise II*”), 478 U.S. 1 (1986); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993).

[31] *Press-Enterprise II*, 478 U.S. at 8.

[32] *Id.*

[33] *United States v. Wecht*, 537 F.3d 222, 234 (3d Cir. 2008); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir. 1989).

[34] *Press-Enterprise I*, 464 U.S. at 510.

[35] *Id.*

[36] *See Globe Newspaper Co.*, 457 U.S. at 607; *Press-Enterprise I*, 463 U.S. at 510.

[37] 537 F.3d 222.

[38] 675 F. Supp. 719 (D. Mass. 1987).

[39] 592 Pa. 42 (2007) (holding there is a qualified First Amendment right of access to juror names but not addresses).

[40] 98 Ohio St. 3d 146.

[41] 233 Mich. App. 604 (Mich. Ct. App. 1999).

[42] 537 F.3d at 224, 236.

[43] *Id.* at 235.

[44] *Beacon Journal*, 98 Ohio St. 3d at 157. Interestingly, the Supreme Court of Ohio in *Beacon Journal* also interpreted the Court's holding in *Press-Enterprise I* as requiring the First Amendment right of access to attach to juror names. *Id.* at 156. According to the Ohio high court, juror identity is a component of *voir dire*, which the Court in *Press-Enterprise I* held a qualified First Amendment right of access attaches to. This reading of *Press-Enterprise I* was rejected by the Third Circuit in *Wecht*. *See Wecht*, 537 F.3d at 234 n.24.

[45] *Id.*; *see also Long*, 592 Pa. at 59 (writing that historical practice “support[s] a conclusion that jurors’ names were generally available to the public, since the practice was to ‘call’ the jury forward”).

[46] 675 F. Supp. 719.

[47] *Id.* at 722.

[48] *Id.*

[49] *Wecht*, 537 F.3d at 238 (quoting *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. Mass. 1990)).

[50] *Id.* at 239.

[51] *Id.*

[52] *Beacon Journal*, 98 Ohio St. 3d at 158.

[53] *Id.* (citing *Richmond Newspapers*, 448 U.S. at 569-72).

[54] *Id.*

[55] *Doherty*, 675 F. Supp. at 723.

[56] *Wecht*, 537 F.3d at 239.

[57] *Doherty*, 675 F. Supp. at 725.

[58] 920 F.2d at 91.

[59] *Id.* at 97; *see also Fujita*, 470 Mass. at 486 (writing that the right of access to a list identifying the names of jurors can be withheld only “on a judicial finding of good cause, which may include a risk of harm to the jurors or to the integrity of their service . . .”).

[60] *Mitchell*, 233 Mich. App. at 629; *see also United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010) (writing at “[a]nonymous juries are permissible when the jurors’ safety would be jeopardized by public knowledge, or the defendant has attempted to bribe or intimidate witnesses or jurors”).

[61] *See generally Black*, 483 F. Supp. 2d at 630-31.

[62] 571 A.2d 735.

[63] *Id.* at 783.

[64] *Id.*

[65] *Id.* at 745.

[66] *Id.* at 748 (emphasis in original).

[67] *Id.* at 750.

[68] *Id.* at 751. This conclusion contradicts the opinion of the Third Circuit in *Wecht*, a decision in which the court stated:

The prospect that the press might publish background stories about the jurors is not a legally sufficient reason to withhold the jurors’ names from the public. Although such stories might make some jurors less willing to serve or more distracted from the case, this is a necessary cost of the openness of the judicial process.

Wecht, 537 F.3d at 240.

[69] 435 U.S. 589, 597 (1978).

[70] *Long*, 592 Pa. at 51 n.6; *but see* Lee Levine et al., *Newsgathering and the Law*, § 5.01 (4th Ed. Matthew Bender & Company 2011) (“While common law balancing is typically not perceived to be as exacting as constitutional review, the common law right has widely been construed to create a presumption of access that often rivals the standards courts traditionally apply in the First Amendment context” (citations omitted)).

[71] 841 F.2d 74, 75 (4th Cir. 1988).

[72] *Id.* Although the Fourth Circuit based its holding on the common law right of access, the court was clearly impacted by the First Amendment, noting specifically that “[w]hen the jury system grew up with juries of the vicinage, everybody knew everybody on the jury and we may take judicial notice that this is yet so in many rural communities

throughout the country.” *Id.*; see also *Fujita*, 470 Mass. at 489 (concluding that “a juror list is a court record . . .”).

[73] 612 F.3d at 563.

[74] 592 Pa. at 52.

[75] *Id.*

[76] *Id.*

[77] 71 N.Y.2d 146, 153 n.4 (1987).

[78] *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring); see also *Richmond Newspapers*, 448 U.S. at 572 (internal quotation marks omitted) (“[It] is not unrealistic even in this day to believe that public inclusion . . . hopefully promotes confidence in the fair administration of justice.”).

[79] *Beacon Journal*, 98 Ohio St. 3d at 159.

[80] *In re Globe Newspaper Co.*, 920 F.2d at 97.