

# The News Media AND THE LAW

WINTER 2014

## Spills & Chills

Journalists struggle to get  
complete, accurate information  
on the W.Va. chemical spill

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

## TABLE OF CONTENTS

### EDITORIAL

[Guidelines help, but we need a shield law](#)

### FREEDOM OF INFORMATION

[Spills and chills](#)

*Journalists struggle to get complete, accurate information on the West Virginia chemical spill*

### REPORTER'S PRIVILEGE

[Taking your shield with you](#)

*What the Jana Winter decision means for journalists reporting across state lines*

### PRIVACY

[The NSA's shadow](#)

*Despite court rulings and reforms, surveillance-induced chill remains*

### SECRET COURTS

[At Guantanamo, showing up counts](#)

*Having boots on the ground lets Carol Rosenberg cover the military facility like few others*

[More Reporters Committee coverage of Guantanamo](#)

[Ninth Circuit begins live video streaming en banc proceedings](#)

### LIBEL

[Bloggers and the 'institutional press'](#)

*Online writers have the same defamation protections on matters of public concern*

[Do we have a right to online anonymity?](#)

*It depends on which judge you ask*

[Libel immunity up in the air?](#)

*The U.S. Supreme Court reiterates that the New York Times "actual malice" standard requires materially false statements*

### NEWSGATHERING

[Filling in the background](#)

*Public bodies move to requiring background checks for press credentials*

*when safety is an issue*

**FROM THE HOTLINE**

[Asked and Answered](#)

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

**OPEN AND SHUT**

["Open & Shut"](#)

*A collection of notable quotations*

**Published by**

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Price: \$7.50 per issue. Address correspondence to:

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*ISSN: 0149-0737*

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# Guidelines help, but we need a shield law

## *Reporters Committee Editorial*

The Department of Justice has released its [long-anticipated updated policy](#) on obtaining information from the news media. The guidelines require, among many other things, that department officials — which includes U.S. attorneys and FBI agents — must try to negotiate with the media and then give notice before issuing a subpoena, must narrowly draw the subpoena for essential information, and, maybe most importantly, must obtain the approval of the Attorney General before issuing a subpoena.

The new guidelines are by no means perfect, but they do give additional protections to the news media. Most notably, media parties should be more likely to receive notification before their records are subpoenaed from third parties. The old guidelines allow for such notice only if the department is sure it would not compromise an investigation; the new rules say notice should be given except in rare circumstances.

And U.S. Attorneys should be much less likely under these new guidelines to try to get records from journalists by treating them as an aider, abettor or co-conspirator to the act of obtaining confidential government documents. The department did just that in the leaks investigation of Stephen Kim, who [accepted a plea deal](#) over the information related to North Korea that he released to a Fox News reporter. To obtain a search warrant for the Gmail account of the reporter, James Rosen, an FBI agent alleged that Rosen was indeed involved in the crime related to Kim's release of the information.

On the other hand, the guidelines do have weaknesses, including a fairly broad national security exception and mentions throughout to protections for "ordinary" newsgathering activities. That could work out just fine, but will every FBI agent and U.S. Attorney have their own definition of what is and is not "ordinary"? Minor changes throughout the policy suffer from the same concern — if you read them favorably, they serve journalists well, but if you read them with negative assumptions in mind, you start to wonder if a protective measure is really a hidden trap.

In any case, the guidelines have never been enforceable in court, so they do not give journalists any real protection from subpoenas. That has to come from courts, and the authority for court protection has to come from a federal shield law. The greatest benefit of the guidelines is, and has always been, that a subpoena against the news media must be carefully thought out by federal prosecutors. No prosecutor wants to risk having a subpoena rejected by the bosses in Washington. The extra hurdles to issuing a subpoena that the guidelines create may have stopped a number of subpoenas before they were ever served — we'll never really know.

The revisions have been in the works since this past May, following the protests caused by the department's [massive sweep-up of Associated Press phone records](#) in its search for the organization's source of a story about a foiled terror plot in Yemen.

The AP controversy not only led to changes in the department's internal policies, but spurred the White House and Attorney General Eric Holder to commit to [support a federal reporter's shield law](#). A bill creating such a law has [passed the Senate Judiciary Committee](#), and is expected to reach the Senate floor for a vote soon.

Ultimately, it is only the shield law that can create legally enforceable standards in court for subpoenaing journalists. We hope Congress and the President live up to their obligations to provide this protection this year.

# Spills and chills

## Journalists struggle to get complete, accurate information on the West Virginia chemical spill

By Emily Grannis

On the morning of Jan. 9, about 10,000 gallons of chemicals leaked from a storage tank into a river in Charleston, W.Va., contaminating water supplies for more than 300,000 people. More than a month later, journalists are still struggling to get information about the spill and resulting public health risk.

Ken Ward Jr., who had been covering the story for the *Charleston Gazette*, said the difficulty in getting responses from government officials began just after the spill. At a press conference on Jan. 10, Ward said, James Hoyer of the West Virginia Army National Guard announced that the Centers for Disease Control had determined that 1 part per million of the chemicals that had spilled would be safe in drinking water.

“We wanted to know where that 1 part per million number came from,” Ward said, adding that reporters could not find any existing CDC literature that mentioned a safe quantity of MCMH, one of the chemicals that leaked from the Freedom Industries plant. Ward was referred to someone in the governor’s office to answer his question. “And I waited, and I waited and I waited and I waited, and she finally called me and said no I’m not going to explain this to you, you’ll just have to trust me.”

### National groups get involved

Ward and his colleagues have continued to have trouble getting clear answers from various state and federal agencies, whether through informal interview requests or formal requests under the Freedom of Information Act. The lack of communication from the government during the crisis prompted the Society of Environmental Journalists to get involved, [asking the CDC and the Environmental Protection Agency in a Jan. 20 letter](#) to explain delays in responding to journalists.



AP Photo/Steve Helber

Leaks in storage tanks containing MCHM, 4-methylcyclohexane methanol, led to a ban on use of tap water for parts of West Virginia.

“During crises like these, it is the job of the news media to seek reliable answers for the public and hold government agencies accountable. It is a time when the government agencies responsible for health and safety need to be active, open, transparent, and available to answer public and news media questions,” SEJ wrote. “From the beginning of the West Virginia emergency, government agencies seemed to be evading the news media, and by extension the public.”

SEJ cited issues like the EPA’s failure to comment on the crisis until a week after the spill and the CDC’s refusal to clarify the data behind its 1 part-per-million analysis as examples of the lack of responsiveness.

Administrators from the CDC responded just two days later, apologizing for “short-chang[ing] the media” and promising to “work to reach that critical balance between accuracy and timely release of information the public expects and needs to protect their health.”

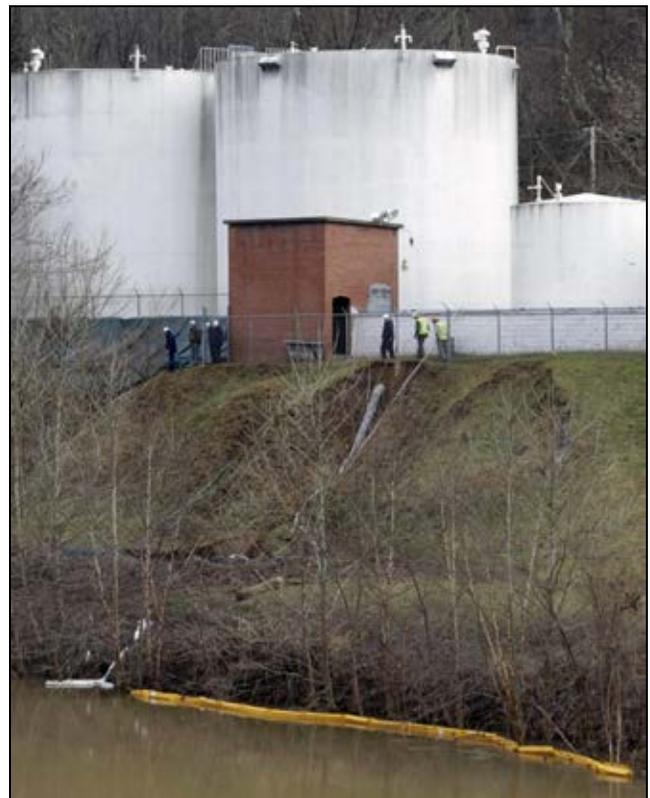
Tim Wheeler, chairman of SEJ’s freedom of information taskforce, said the group appreciated the CDC’s prompt response and said the agency has been engaging in ongoing dialogue with environmental journalists since the letter.

“We hope to have some meaningful dialogue with them about how they could change their procedures and policies,” Wheeler said.

Barbara Reynolds, director of the division of public affairs at the CDC, wrote the CDC’s response to SEJ. In an email interview, she said the CDC usually tries to “allow a state to take the lead during a crisis event in their state, including their communication with the public and media.”

By contrast, the EPA responded nine days after SEJ’s letter saying it had responded “directly and in a timely fashion” to media requests during the crisis and that it was “committed to transparency and helping reporters and the public understand the potential risks with the spill.”

Ward said he responded to Tom Reynolds, the EPA officer who sent the letter, “inquiring as to what exactly his definition of ‘timely’ was,” but did not receive a response. Wheeler also indicated that although the EPA claimed it communicated with 25 news organizations in the days after the spill, “they did not detail which news organizations or how they communicated.”



AP Photo/Steve Helber

Workers inspect an area outside a retaining wall around storage tanks where a chemical leaked into the Elk River at Freedom Industries storage facility in Charleston, W.Va.

SEJ Executive Director Beth Parke said the difference between the responses from the CDC and the EPA was “striking,” because while the CDC seemed interested in working with journalists to improve communication, the EPA was not “taking this seriously as a genuine public interest question.”

Tom Reynolds, associate administrator for external affairs at EPA, wrote CDC’s response to SEJ. He did not respond to requests for comment.

### **Continued coverage**

Ward’s initial reporting efforts included trying to find scientists at both the CDC and the EPA who could answer technical questions about the safety and public health risks of the MCMH and stripped PPH, the two chemicals that leaked into the water supply. He said he received a few “terse, not very helpful” emails from public relations officials, and that the information often conflicted with what outside scientists were telling reporters about the risks.

“We ought not have political operatives deciding what information the public gets in a health crisis,” Ward said, adding that both the CDC and EPA set up interviews for him after the *Gazette* published stories indicating the agencies wouldn’t talk to the press.

Among the problems Ward has encountered in trying to cover the spill is in getting data and testing results.

“We’re just being told to take the government’s word on this,” he said. “We still don’t know exactly what their testing protocol was.”

As he faced increasing difficulty in finding government sources who could speak knowledgeably about the issue, Ward moved from requesting interviews to using more formal mechanisms to get information. But he has found that the agencies have not been quick to reply to requests under the Freedom of Information Act either.

“One of the concerns here is that scientists are telling us that the particular chemicals that leaked here have a tendency to adhere to the materials home plumbing materials are made out of,” Ward said, citing one example and adding that the EPA claimed to have a report that reached a different conclusion, but refused to disclose it on the grounds that it might jeopardize homeland security.

### **Symptoms of a larger problem**

Although the chemical spill crisis brought focus to the problem environmental journalists often have getting clear, accurate information from government sources, Wheeler said this is an ongoing issue.

“This was a crisis, obviously much more urgent than many issues, but SEJ members have experienced difficulty for some time in getting interviews and getting prompt and meaningful responses to requests for information,” he said.

Parke indicated that part of SEJ’s goal in reaching out to the CDC and the EPA was to improve communications generally, not just point out the difficulties in covering this particular crisis.

“It’s really been a trigger incident in terms of how many of these do we have to live through,” she said. “We’re all in the public service here. We’re journalists, you are public servants. Let’s keep it on that level. How can we all do our jobs better?”

Ward, who has been doing environmental journalism for more than 20 years, said that given his past dealings with the CDC and EPA on other issues, he was not surprised by the difficulties he has had covering the West Virginia crisis.

“With both of these agencies and particularly with EPA, this is absolutely nothing new,” he said. “I am not at all surprised that when faced with a tremendous environmental disaster, my community is unable to get information from EPA that might help them understand what’s happening to them.”

CDC’s Reynolds is also the author of *Crisis and Emergency Risk Communication* and CDC’s Crisis and Emergency Risk Communication course. In those materials, she outlines six key principles for agencies responding to public health emergencies.

“Expect the public to immediately judge the content of an official emergency message in the following way: ‘Was it timely? Can I trust this source? and Are they being honest?’” Reynolds wrote. “These questions make implementing the six principles of crisis and emergency risk communication, or CERC, an imperative.”

The six principles Reynolds outlines are be first, be right, be credible, express empathy, promote action and show respect.

“The public can withstand ambiguity if they are allowed to follow the process health officials are using to find answers. In an age of so many modes of communication between officials and the public, we must recognize the overriding demand for information to be delivered quickly,” she wrote. “The key is to tell the public from the very beginning what we know and what we don’t know. We must continue to explain that ‘things can and do change.’ A big dollop of humility and openness in the way we communicate is most important.”

In its letter to the CDC and EPA, SEJ pushed the agencies to put in place stronger policies to encourage communication between agency officials and members of the media. Among the requests were: 24-hour access to public information officers; avoidance of generalized statements to reporters; access to in-house experts; availability of more people for longer give-and-take interviews so that reporters could get more in-depth information and explanations of issues; and the publication of more data.

Wheeler said SEJ is planning its next steps and is “still hopeful” that both agencies will engage in productive discussions with journalism groups.

“But we’re not going to let this drop,” he said. “This is too important, and it’s too important for the public, not just for news organizations, to get this information.”

# Taking your shield with you

## What the Jana Winter decision means for journalists reporting across state lines

*By Cindy Gierhart*

Journalist Jana Winter's win in New York's highest court in December was undoubtedly a victory not just for her but for journalists everywhere. But just how will the court's decision affect journalists, both inside and outside New York?

### All shield laws are not created equal

Broadly, this case is about a battle between two states' shield laws – sometimes called a reporter's privilege – which protect journalists from having to reveal their sources in court.



AP Photo

Jana Winter

Jana Winter is a Fox News reporter who wrote in July 2012 that James Holmes, the man on trial for the Colorado movie theater shooting, sent a notebook “full of details about how he was going to kill people” to a psychiatrist before the attack. She attributed this and other information to two “law enforcement source[s].”

Six months later, the Colorado court granted a request from Holmes's attorneys to force Winter to testify and to hand over her notes, so they could identify Winter's sources.

Holmes's attorneys argued that Winter's testimony was necessary because the information about the notebook never should have become public, and exposing it could unfairly influence the jury pool and impede Holmes's right to a fair trial. Furthermore, the roughly 14 law enforcement officials who knew about the notebook all swore under oath that they were not the sources, so one or more of them could be charged with perjury.

Fox News, other news organizations, and First Amendment advocates argue that identifying the source now cannot remedy the fact that the jury pool has been tainted, and any interest in charging officials with perjury is irrelevant to Holmes's murder trial.

This decision ultimately came from a New York court because Winter is a journalist living and working in New York. If a Colorado court wants a New York witness to

testify in a criminal proceeding in Colorado, the Colorado court must ask the New York court to force the witness to testify.

Almost every state has enacted a uniform law that makes this process fairly smooth. According to the law, the witness's home state should issue the subpoena if it finds that the witness is "material and necessary" to the case in the other state and if traveling there does not create an "undue hardship."

Initially, New York courts complied, ruling that Winter was a "material and necessary witness" in the Holmes case and that traveling to Colorado would not create an undue hardship, as Holmes's defense team would pay the costs.

In December 2013, however, New York's highest court ruled on appeal that Winter should not be compelled to testify in Colorado.

The New York Court of Appeals, the state's highest court, ruled that forcing Winter to testify in Colorado would violate the strong public policy of New York.

The court wrote that New York "provides a mantle of protection for those who gather and report the news – and their confidential sources – that has been recognized as the strongest in the nation."

There is no doubt that Winter would not be forced to testify in New York, which offers an "absolute privilege" for confidential sources. That is, a New York court can never force a journalist to reveal the identity of a person to whom the journalist promised confidentiality.

Colorado offers a "qualified privilege" – that is, a journalist can be forced to reveal a confidential source if the information sought is "directly relevant to a substantial issue" in the case, it "cannot be obtained by any other reasonable means," and the interest in gaining the information outweighs the First Amendment interests at stake.

Therefore, because New York's protections for journalists are so strong and because Colorado's protections are much weaker, the New York court could not justify sending its own journalist to a state without the protection the journalist would have received at home.

### **What does this case mean for journalists in New York?**

To an extent, this ruling means that the New York law truly acts as a shield that journalists can carry across state borders. It means that New York courts will protect New York journalists from having to reveal their sources not only in New York but in other states, as well.

However, there are limitations.

First, New York journalists cannot necessarily carry this shield into every state. The New York court protected Winter because she was subpoenaed in a state that offered substantially less protection than New York. But if a New York reporter were to be subpoenaed in a state offering the same or similar protections as New York, then New York may defer to the other state's rules on reporter's privilege.

The court, in fact, listed 18 states that offer similar protections to New York's, implying that a reporter subpoenaed in those states may be subject to those states' reporter's privilege laws without the aid of New York's law.

Those states include two that offer "strong – though not absolute – protection" (Arkansas and West Virginia) and sixteen that offer absolute protection for confidential sources (Alabama, Arizona, California, Delaware, District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon and Pennsylvania).

However, Christopher Handman, Winter's attorney who argued the case before the New York Court of Appeals, says the reading of the opinion need not be so restrictive. One could argue in a future case, he said, that putting a journalist in the hands of another state's shield law – even one that offers absolute protection – should not be left to chance. A New York journalist should be afforded the protections of the New York shield law in all 50 states, he argues.

"Let's cut to the chase and avoid any subpoenas at all," he said.

A second limitation of the opinion is that the reporter is only safe from another state's subpoena if the reporter does not physically visit that state. The rules of serving subpoenas are such that a person can always be subject to a subpoena if physically handed that subpoena in the state.

Jana Winter, therefore, has been advised not to travel to Colorado. Even though New York will not force her to testify in Colorado, by entering Colorado, she would suddenly be within the court's reach.

"Aspen ski vacations are probably out of the question until the Holmes case is resolved," Handman said.

A third limitation is in defining who is a "New York journalist" – and therefore who gains protection from the New York shield statute.

"The reason Holmes had to go to New York is because Jana Winter lives in New York, not because that's where she works," Handman said.

Therefore, a journalist who lives in New Jersey but commutes to New York every day for work is *not* a New York journalist. If a state wanted to serve a subpoena on this hypothetical journalist, the state would have to seek a subpoena from New Jersey, and New Jersey would determine whether to issue the subpoena based on its own public policy.

Despite these limitations, the New York court's decision is broad in other respects. While Winter was asked to testify in person in Colorado, the New York court would have reached the same conclusion if Colorado had asked only for her notes and documents, Handman said. The New York shield law protects confidential sources absolutely, so a subpoena from another state's court requesting notes that would identify a confidential source require just as much protection as a subpoena for in-person testimony.

Additionally, the New York court specifically said it does not matter where the

reporting took place for the reporter to claim New York's privilege. So a New York journalist who travels to, say, Illinois for a story, spends weeks conducting interviews, and even writes and files the story in Illinois will still be afforded the same protections under the New York shield law as a New York journalist who conducted interviews over the phone from New York.

### **What does this case mean for journalists outside of New York?**

The New York decision affects only journalists living in New York, but the same notion could be replicated in other states' courts, albeit in limited circumstances.

The key to the New York decision was that Jana Winter was being asked to testify in a state that offered her substantially less protection than her home state. So a similar decision would likely only come from states that have strong shield laws.

"I could see that, at least in those states where the protection is truly absolute, those courts, if asked, ... could look to their laws and say [the] New York [statute] is absolute, so is ours, we share many of the same core values," Handman said. "So [the New York decision] could have some transcendent significance, at least in those states."

Holmes's attorneys have said they plan to request that the U.S. Supreme Court hear an appeal of the New York decision. If the Supreme Court denies that request, the New York decision will remain in effect.

# The NSA's shadow

## Despite court rulings and reforms, surveillance-induced chill remains

By Jamie Schuman

Though President Obama pledged reforms of National Security Agency programs in a January speech, some media lawyers say the changes will do little to thaw a surveillance-induced chill that has enveloped some reporter-source relationships.

“What remains after the president’s speech is a fairly robust freedom to do data collection,” *New York Times* Assistant General Counsel David McCraw said.

Since stories about mass telephone and e-mail surveillance broke, reporters have come forward to say that these programs – combined with the government’s vigorous leaks investigations – are scaring some sources from talking with them. In reports by the [Reporters Committee for Freedom of the Press](#) and the [Committee to Protect Journalists](#), numerous journalists said the chill affects not just the national-security beat but also coverage of other controversial topics inside and outside of the government.

“There is a big cloud hanging over people,” said Dana Priest, a *Washington Post* investigative reporter who focuses on national-security issues. “They just don’t know to what extent the government goes to figure out who is talking to reporters.”

Obama’s Jan. 17 [speech](#) on the NSA did little to answer that question: he never mentioned journalists in his remarks or in the [policy order](#) he released that day.

Similarly, two district courts did not address reporters’ concerns when they issued opinions on the legality of the government’s bulk collection of phone metadata in December. The U.S. District Court for the District of Columbia deemed this program unconstitutional but the federal court in New York City found it legal. The opposing conclusions – and the prospect of a lengthy appeals process – add to the aura of uncertainty.

**Obama’s NSA reforms**



AP photo by J. Scott Applewhite

Demonstrators rally at the Capitol to protest spying on Americans by the National Security Agency, as revealed in leaked information by former NSA contractor Edward Snowden, in Washington, D.C., on Oct. 26.

Obama sought to clarify the limits of NSA programs in his speech by emphasizing that the government only searches the data for “legitimate national security purposes.”

To Priest, though, that wording is nothing new and offers little guidance to reporters. “That’s the vaguest kind of language they could use,” she said. “Frankly, to me, it doesn’t mean anything.”

Obama did announce a series of reforms that responded in part to the more than 40 [recommendations](#) that a panel he appointed, the President’s Review Group on Intelligence and Communications Technologies, issued in December.

Perhaps the most headline-grabbing change was the president’s pledge to end the government’s storage of bulk surveillance records. Obama is instructing officials to find a way for private companies to hold these materials.

While some reports have heralded this switch as a win for privacy advocates, Electronic Frontier Foundation senior staff attorney David Greene said it will do little for journalists because call and email data will still be accessible.

“It requires the government to take another step, but I don’t know that it will make anyone feel a whole lot better that their information will remain confidential,” Greene said.

Obama also mandated that the government limit searches of phone records to people two steps removed – instead of three – from an individual suspected of terrorist ties. Greene said this change also will have little effect on reporters, who likely are within the “inner-circle” of communications that the government can still investigate.

Obama did not address the panel’s suggestion that the NSA not undermine efforts to create encryption standards. He also declined the review group’s recommendation that officials must get court approval to search contents of Americans’ email and phone messages that the government incidentally receives through programs such as PRISM, which targets international communications. He did, however, direct officials to consider additional reforms on the content-collection programs.

The president also required officials to annually review opinions of the Foreign Intelligence Surveillance Court for declassification. That court, which meets in secret and now only hears argument from the government, approves surveillance warrant requests and issues other decisions on the legality of NSA programs. The ACLU, ProPublica and some other groups are involved in [litigation](#) to get the court to release more of its rulings.

Obama also said he would create a panel of advocates to represent privacy concerns in specific cases before the FISA Court. The Reporters Committee and 36 news organizations have joined together to [call for](#) that type of position to advance the media’s point of view, as journalists are not told if they are the subject of a request the court. But Obama’s public advocate will only be present in cases involving “novel and important” privacy law issues, and cannot monitor the court’s docket to decide which issues meet those criteria.

To McCraw of *The New York Times*, the public advocate is a “plus” for reporters.

But, he said, the reforms are targeted mainly at the civil-liberties concerns of the general public, and not at the specific needs of journalists.

“Without some sort of legal framework that acknowledges the special place that reporters play in the constitutional universe, our specific issues aren’t going to be addressed,” McCraw said. “It’s great that they’re expanding the rights we have as citizens, but reporters play a special role and the procedures should reflect that.”

### **Policy review groups warn of chill**

Though Obama’s speech did not single out journalists, reports by both his review group and a separate advisory board, the Privacy and Civil Liberties Oversight Board, warned that unhinged surveillance can affect newsgathering.

The Review Group on Intelligence and Communications Technologies, which includes five attorneys and intelligence experts, wrote in its 300-page report that a “robust and fearless freedom of the press is essential to a flourishing self-governing society.”

“It will not do for the press to be fearful, intimidated, or cowed by government officials,” the review group wrote.

The other committee, an executive branch body that advises the president, concluded in a January [report](#) that NSA surveillance programs deter confidential sources from speaking to journalists.

“The Board believes that such a shift in behavior is entirely predictable and rational,” the Privacy and Civil Liberties Oversight Board wrote. “Although we cannot quantify the full extent of the chilling effect, we believe that these results – among them greater hindrances to political activism and a less robust press – are real and will be detrimental to the nation.”

### **Uncertainty in the federal courts**

Another high point for journalists was the Dec. 16 holding of the U.S. District Court in Washington, D.C., in [Klayman v. Obama](#) that the bulk collection of phone metadata – which includes phone numbers, timing and duration of calls, but not content – violates the Fourth Amendment.

In *Klayman*, Judge Richard J. Leon called the NSA’s technology “almost-Orwellian” and said Founding Father James Madison “would be aghast” at the encroachment on individual liberties.

Though Leon did not mention the concerns of journalists, McCraw said the opinion’s harsh critique of surveillance validates the reporting that has been done on the subject.

“These matters deserve to be exposed because, as the D.C. court says, they are illegal,” McCraw said.

In [ACLU v. Clapper](#), Judge William H. Pauley III of federal court in New York City found the phone metadata program constitutional, calling it “the Government’s counterpunch” to al-Qaeda. The Dec. 27 opinion did not single out journalists, but it

did dismiss as a “parade of horrors” the ACLU’s claims that surveillance reveals people’s political and religious associations and, therefore, can chill group membership.

Both opinions relied on *Smith v. Maryland*, a 1979 case that found constitutional the police installation on a person’s phone of a “pen register,” a device that collects call logs. The Supreme Court there explained that seizing these records does not violate a person’s “reasonable expectation of privacy” because it is generally known that a third party – the phone company – keeps this information anyway.

The *Klayman* court reasoned that *Smith* does not control because the search there was limited and because people’s use of telephones has changed in the past 35 years. *ACLU* held that *Smith*’s underlying logic applies even if the scope of the surveillance is different.

Leon suspended his order in *Klayman* to stop the metadata program as the government is appealing the decision. *ACLU* is on appeal too, and a third case – *First Unitarian Church of Los Angeles v. NSA* – has not been decided. The [Electronic Frontier Foundation](#) brought that challenge in federal court in San Francisco on behalf of more than 20 advocacy groups who claim, among other things, that metadata collection violates their First Amendment right of association. The Reporters Committee has filed amicus briefs on behalf of media coalitions in both the *ACLU* case and the *First Unitarian* case.

Absent a mandate from the courts or a clear answer from the government about how and when journalists’ communications are being surveyed, reporters and sources are left with questions about how secure their communications are.

To Priest, the best way to get answers and spur reform may be for reporters themselves to continue digging into NSA programs to learn about their reach and value.

“The truth prevails,” Priest said. “That might turn out to be the most important thing that we do: that is, do our job.”

### ***Other resources:***

Brief: [First Unitarian Church of Los Angeles v. National Security Agency](#)

Brief: [ACLU v. Clapper](#)

# At Guantanamo, showing up counts

## Having boots on the ground lets Carol Rosenberg cover the military facility like few others

By Tony Mauro

Unlike most beat reporters, the *Miami Herald's* Carol Rosenberg doesn't have the luxury of moseying on downtown to ply her sources at City Hall or the local courthouse.

Rosenberg's beat is the Guantanamo Bay detention center, which means that she gets there under U.S. military custody, sleeps in a tent, and reports under constant observation. And sources are hard to come by.

But for Rosenberg, there is no other way to cover Guantanamo, which she began writing about when it first opened just months after the Sept. 11, 2001 terrorist attacks. "Showing up counts," is her mantra, and that shows in her coverage.



Carol Rosenberg

Without dispute, Rosenberg is the dean of the Guantanamo press corps. She uses modern tools of journalism – from a prolific Twitter feed to Google Glass – to give readers as much of a “you are there” feeling as possible. Because of Rosenberg's persistence, the *Herald* is an essential repository of information about Guantanamo, including details about each detainee.

Why does the *Herald* keep sending Rosenberg to Guantanamo? “Because it's our obligation to report on a place where few can go,” executive editor Aminda Marqués Gonzalez wrote recently. “We don't cover Guantanamo to get anyone off, or out of jail. We do it to show the American people and the world what is being done in our name.”

Rosenberg, who will be given an award by the Reporters Committee for Freedom of the Press at its May dinner, answered questions for *The News Media & the Law* about her coverage, also offering advice for other reporters covering challenging beats.

## **Why do you feel it's important to be there often – and how often is that?**

I figure I've averaged a week a month there since the prison opened in January 2002. I've missed several months at a time – for example, during the 11-week stretch in 2004 when I was in Iraq and the Abu Ghraib prisoner abuse scandal broke. But I've spent long periods at Gitmo as well – more than 100 days in the first six months. Plus, I did a 41-night stretch in Media Tent City in the summer of 2008 to report on the trial of Osama bin Laden's driver and some Sept. 11 conspiracy pretrial hearings.

I learned long ago that showing up counts. You can't see the progress, the changes, if you're not on the ground and asking questions, observing. Also, it often takes several trips to get a reasonable or reasoned answer from people in the military. Some stonewall until their rotation ends, the question is dropped, or the institutional knowledge evaporates. Troops down there come and go, are frequently clueless and resort to repeating urban myths that make no sense. Example? The U.S. military now claims it never before 2013 systematically gave out prison hunger strike figures. That's simply untrue. In the very first hunger strike in 2002 the military gave us a meal-by-meal breakdown of how many refused to eat until the Marine general in charge figured out how to end the hunger strike.

## **You've been banished, blacklisted and blocked from coverage at various times. What is your advice for reporters who are assigned to a beat where virtually all the people you need to be in contact with are hostile?**

Have the strong support of your editors. My bosses have written letters of protest, picked up the phone and complained and hired lawyers to argue for our right to coverage. I remember at one point very early on one of the prison camp commanders wrote my editor that they'd like a new *Miami Herald* reporter to cover the story, one who'd never been there. The depth of my knowledge, the general wrote, intimidated the escorts who didn't know as much. My boss was brilliant. The editor wrote the general back that in a democracy the newspaper decides which reporter covers the story, not the military. He also wrote the general that it sounded like the military had a troop training issue, not a reporting issue. I kept reporting there, and although the general never apologized, he never said a word about the effort, and like every commander moved on.

## **What are your techniques for making court procedures, legal concepts and legalese, understandable and important for lay readers?**

For starters, you have to read the briefs. Usually, more than once. And you have to consult the law and regulations. Then, one thing I do is I call up a lawyer or paralegal or someone who's involved in the process and tell him or her what I think the brief is trying to say in ordinary English. I say, "Listen I know you would say it another way. But I'm wondering if what you're saying is..." You'd be surprised how many lawyers go along with the exercise because it helps them frame the explanation for the next reporter. Example? There's something called a "motion to dismiss for unlawful command influence." I ask, "So this is a claim that someone up the political or military chain meddled in the process, right? You think the judge should throw the case out? What's the most persuasive example of meddling, in your opinion? What's the government say about that?" It doesn't replace the need to read the briefs. But it

lets you talk about it with someone who understands it, with give and take, before you write about it.

### **What are the one or two things you would like judges or court personnel to do to make proceedings more accessible and understandable to you and the public?**

First of all, we've had a long-running struggle over release of the court filings. The Pentagon has this elaborate procedure of shopping the briefs around the intelligence community for 15 or more business days to let them redact them. They delete this, black-out that, withhold something as sensitive or the name of a person in a court filing who's a colonel or lower in rank. They do it even if the person's name is obvious from the job description and can be acquired in a Google search. I don't approve of this sweeping culture of secrecy, but they at the very least need to make the briefs public in timely fashion. Reporters and other court watchers need time to read them, make sense of them and chew over the content so we can report what goes on better.

As for the war court judge, I wish he'd slow down when reading his rulings in court – and elaborate with greater detail on why he's going into secret session. He's been using a script lately that says disclosure "could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods or activities."

If the goal is to promote confidence in the system and decision-making, I'm not sure gobbledygook helps.

### **You've called Guantanamo's war court "a court like no other." How so?**

Reporters travel in U.S. military custody, sleep in tents, have troops in the back of their filing center and at their elbow when court is in session. The Pentagon gives intelligence agencies 15 business days or more to censor court filings of information they want to protect. We hear the proceedings on a 40-second delay, can't walk to court without a military minder, have a sticker on our filing center phone that says we consent to government monitoring of our conversations. And that's the best way I can consult my editor aside from using email, which costs \$150 a week and is provided by a Pentagon contractor.

### **Why do you "live tweet" the Guantanamo military proceedings, and who do you think follows the play by play?**

They built this court out of reach of so many people who are actually interested in the incremental down there. This bulletin-style reporting lets those who know the cast of characters and issues dip in and out in the course of a day. Lawyers' spouses follow me. Sept. 11 victims follow me. Law students and other attorneys follow me. I know of two judges who've read the stream: one a Navy reservist who said he had a clerk print it out to read during court recesses; the other, a military judge who sent word through a clerk that I'd gotten something wrong. I had said, based on the explanation of the minder at my elbow, that a witness had a SERE tab on his uniform. The judge, an Army colonel, wanted me to know there's no such thing as a SERE insignia. I double checked, and tweeted a correction. The other thing about tweeting: I know that some folks at Guantanamo follow the report. One officer told

me he was expecting to testify on a given day and had on a uniform for going to court, saw my tweet that his testimony was postponed – and changed back into battle dress.

**What advice do you have for anyone interested in covering the military commissions and Guantanamo in general?**

You have to read the briefs, ask questions, show up, and keep going back again and again to be able to write meaningful stories on what's going on. And don't get seduced by escorts offering Camp X-Ray tours, souvenir shopping or a sail on the bay while court's in session. Keep your eyes open, think about the logic of what you're being told or not told, shown or not shown and recognize that the story unfolds a tidbit at a time.

An example: The current leadership seems to have lost confidence in its message, and is blocking information. But there was a time some years back when you'd have a fairly free exchange with the commanders after-hours, off the record. The leadership would talk to reporters about a wide range of challenges, although not about specific detainees. One night, after one of these exchanges, a colonel dropped us off with a reminder of Gitmo policy, "you can report anything you see." To this she added, "But we won't elaborate or comment." Later that night, a Saudi jet arrived at the airstrip, easily recognizable to anyone who'd traveled throughout the Middle East by the emblem on its tail. Thus began the Bush-era shuttles of Saudi prisoners home. That's why I always tell colleagues that showing up counts. Not every story can be reported in an email inquiry.

*— Tony Mauro is the Supreme Court correspondent for the National Law Journal and a member of the Reporters Committee's steering committee.*

# More Reporters Committee coverage of Guantanamo

*Articles related to Guantanamo proceedings on the Reporters Committee's site:*

- [Military courts continue to stymie public access](#) (8/1/2013)
- [Government forced to release names of Guantanamo Bay prisoners](#) (6/20/2013)
- [Reform comes slowly to Guantanamo Bay](#) (11/1/2011)
- [Pentagon launches new Guantanamo commission website](#) (9/30/2011)
- [The Pentagon's culture of secrecy](#) (11/1/2010)
- [Four journalists banned from reporting on Guantanamo trial](#) (5/7/2010)
- [Reporters Committee objects to Pentagon treatment of reporters](#) (5/7/2010)
- [Guantanamo Trial Will Be Telecast to 9/11 Families – Only](#) (4/18/2008)
- [D.C. Circuit rules Gitmo detainee info must be released](#) (2/4/2008)
- [Guantanamo prisoner names must be released](#) (1/24/2006)
- [Judge: Ask Guantanamo detainees about their 'privacy'](#) (9/2/2005)
- [Status Review: Media access to the legal proceedings of detainees remains unclear following Supreme Court rulings](#) (8/1/2004)
- [Kept at Bay, in Guantanamo](#) (11/1/2003)
- [U.S. military in Cuba keeps journalists at bay](#) (11/2/2002)
- [Press restrictions tighten at Guantanamo Bay](#) (9/18/2002)

# Ninth Circuit begins live video streaming en banc proceedings

By Michael Rooney

The U.S. Court of Appeals in San Francisco (9th Cir.) announced in December that it would become the first federal appeals court in the country to live stream video coverage of its major cases. The court began providing streaming arguments over the Internet for the media and general public on Dec. 9, 2013.

“The Ninth Circuit has a long history of using advances in technology to make the court more accessible and transparent,” the court’s Chief Judge Alex Kozinski told the [Los Angeles Times](#). “Video streaming is a way to open the court’s doors even wider so that more people can see and hear what transpires in the courtrooms, particularly in regard to some of our most important cases.”

The recent [announcement](#) limits video streaming to cases heard *en banc*, a procedure used to resolve intra-circuit conflicts or other complex or important legal questions. A typical appeal is heard by a three-judge panel; *en banc* cases are heard before the chief judge of the circuit and 10 other judges chosen at random, but only if enough judges on the circuit vote to review a panel decision. The Ninth Circuit [currently hears](#) approximately 20 *en banc* cases per year.

In addition, as of Jan. 6, 2014, the Ninth Circuit provides live audio streaming of all of its proceedings through its [website](#).

With these moves, the circuit has also provided media outlets with an alternative to sending journalists to possibly far away locations to cover oral arguments. Kristina Davis, a federal courts reporter at *The San Diego Union-Tribune*, said the option is especially helpful because declining newsroom budgets mean that “travel expenses have more impact.”

“It’s good to be able to sit at my desk and write the story as I listen,” Davis said.

The Ninth Circuit includes federal district courts in nine of the western states, as well as two Pacific Island jurisdictions and four appellate courthouses. All courtrooms in the Ninth Circuit’s appellate courthouses are now audio and video equipped, with three courtrooms in San Francisco, Calif., Pasadena, Calif., and Portland, Ore. all having high definition cameras.

## An early tech leader

Unlike much of the federal judiciary, the Ninth Circuit has embraced the use of technology in its courtrooms since the early 1990s. At that point, it was only one of two circuit courts to allow outside cameras into its courtrooms at the request of the

media. Since the early 1990s, the court has granted 378 media requests for still and video photographs. The Second Circuit also employs that practice, but only in civil cases where the parties are represented by counsel.

Through the 1990s and into the 2000s, the Ninth Circuit's use of technology continued to grow, according to the website of [the Administrative Office of the U.S. Courts](#). In 2003, the court began to provide the public with full access to digital audio recordings of all of its oral arguments across all four appellate locations within 24 hours of the argument. Shortly after this development, the court also began to provide video recordings through the use of courthouse cameras after the end of oral arguments.

Then, in 2010, the Ninth Circuit began to offer its first real-time streaming of *en banc* proceedings, but it only provided the service to all of its courthouses. It did not stream arguments to the general public.

That same year, the a district judge within the Ninth Circuit attempted to take the use of technology one step farther by providing coverage of a district court trial on the constitutionality of Proposition 8, a ballot initiative that banned same-sex marriage in California. It planned to remotely broadcast the trial to five federal courthouses across the nation, but the U.S. Supreme Court blocked the effort.

The Supreme Court's ruling was not based on the merits of the argument, but, rather, turned on whether the trial court acted properly in allowing the remote broadcast of the trial.

"The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," the majority wrote in an unsigned [opinion](#). " It did so to allow the broadcasting of this high-profile trial without any considered standards or guidelines in place... [T]he order in question complied neither with existing rules or policies nor the required procedures for amending them."

### **Other courts still low-tech**

The federal court system has been long shied away from technology in the courtroom. This history dates back to the 1940s and continues through today.

The [first formal acknowledgment](#) of electronic coverage came in 1946, when the Federal Rules of Criminal Procedure explicitly prohibited the use of electronic media in all criminal proceedings.

In 1972, the Judicial Conference, the rule-making body for the federal judiciary, expanded the prohibition to include all "broadcasting, televising, recording, or taking of photographs in the courtrooms or areas immediately adjacent thereto." This prohibition was written into the Code of Conduct for all federal judges and went beyond the 1946 prohibition in criminal proceedings to include all civil proceedings as well.

The strict stance on electronic media in the courtroom was based on two main policy concerns. First, the Judicial Conference was concerned that the presence of audio or video technology would have a negative impact on the presentation and

consideration of all evidence in the trial-level courts. The concern was that witnesses or attorneys or even juries would act differently if they knew the trial was being viewed or heard by the public.

The second policy reason dealt with the standard of review afforded the appellate courts. Courts of appeal normally give deference to the trial court on matters such as credibility. The Judicial Conference was concerned that if there was a clear and detailed audio or video record of the trial proceedings, the courts of appeal might impede on the deference granted to the trial courts.

In spite of these policy concerns, upon the recommendation of the internal Ad Hoc Committee on Cameras in the Courtroom, the Judicial Conference commenced its first pilot program for cameras in the courtrooms on July 1, 1990. The pilot program was limited to the Ninth and Second Circuits, and six district courts. Circuit courts are the federal courts of appeal, while district courts are the federal trial-level courts.

At the end of the pilot program in September 1994, the Judicial Conference, disregarding the findings of the Federal Judicial Center's research "[Electronic Media Coverage of Federal Civil Proceedings](#)," declined to approve a recommendation that would have permitted photography, recording, and broadcasting of civil proceedings in federal trial and appellate courts.

Two years later, in March 1996, the conference seemingly reversed its stance. It authorized each circuit court to make its own determination as to whether it would permit any photography, television or radio coverage of oral arguments.

While that decision may seem to be a reversal, Karen Redmond, public information officer at the Administrative Office of the U.S. Courts explained it this way: "The pilot showed there might be a chilling effect on witnesses and jurors at the trial court level if cameras were present. [Since] there are no witnesses or jurors in appellate proceedings [there is] no chilling."

It was after this change that the Ninth Circuit made a regular practice of granting media requests to record oral arguments in its appellate courts, as the Judicial Conference still strongly urged against audio and video coverage of proceedings at the trial-level district courts.

## **Moving forward**

In September 2010, the Judicial Conference [announced](#) its second pilot program aimed only at trial-level district courts to evaluate the effect of cameras in the courtroom. The three-year program was limited to civil cases and also required the approval of the presiding judge as well as the consent of all parties prior to the proceeding.

In the U.S. District Court for [southern Ohio](#), proceedings that were permitted to be videotaped would be recorded by court staff and distributed to the media outlets via the court's website. This distribution would not be done in real time, however.

The pilot kicked off on June 18, 2011, includes 13 district courts spanning the nation, and was originally scheduled for completion in mid-2014. Last September, however, the Conference announced a one-year extension to the program, citing a need for

more data.

With the conclusion of the pilot in the near future, the federal judiciary will yet again be faced with the question of whether it will permit the expansion of the use of cameras in the courtroom.

California media lawyer Kelly Aviles believes that there will be a move towards more open proceedings.

"It is destined to happen based on how technology is proceeding," said Aviles, who is vice president for open government compliance at Californians Aware, a nonprofit organization focused on open government. "The world is moving towards everything being accessible on demand. Court proceedings should be no different."

The district-court pilot does not affect other circuit courts, which are still under the guidance given by the Judicial Conference in 2010.

To Aviles, the Ninth Circuit's use of live streaming "will show other courts that it's not that scary" to allow for more transparency.

Journalists also remain optimistic that, following the lead of the Ninth Circuit, the federal courts will move towards broadcasting more hearings.

"[A]nything any federal court does that involves a camera in the courtroom, particularly live, is a very positive development, given the hidebound ways of the federal judiciary on this issue through the years," said Howard Mintz, a legal affairs reporter at the *San Jose Mercury News*.

# Bloggers and the 'institutional press'

## Online writers have the same defamation protections on matters of public concern

*By Cindy Gierhart*

The Ninth Circuit ruled on Jan. 17 in *Obsidian Finance Group v. Cox* that bloggers -- and other members of the public -- are governed by the same decades-old defamation jurisprudence as the "institutional press" when speaking about matters of public concern.

Crystal Cox wrote blog posts alleging a bankruptcy trustee and his company committed fraud, corruption, and money-laundering. The trustee, Kevin Padrick, and company, Obsidian Finance Group, sued for defamation.

One question before the court was whether the *New York Times v. Sullivan* and *Gertz v. Robert Welch* line of cases applied to Cox, as a blogger, or whether the rules set forth under those cases only applied to the "institutional press."

The court noted that "a First Amendment distinction between the institutional press and other speakers is unworkable." Quoting *Citizens United*, the court further noted that, with the prevalence of online commentary, the "line between the media and others who wish to comment on political and social issues becomes far more blurred."

Because *Gertz* applies to Cox, she should have only been found liable for defamation if she acted negligently, and a jury should not have awarded presumed damages without first finding that she acted with "actual malice" (that is, that she knew her statements were false or acted with reckless disregard for the truth).

The court also ruled that her blog post was on a matter of public concern, as "public allegations that someone is involved in crime generally are speech on a matter of public concern," the court wrote.

However, the court further ruled the bankruptcy trustee was not a public figure, as Cox had argued, based solely on the fact he was appointed by the court to serve as trustee.

The Reporters Committee filed a friend-of-the-court brief in this case, arguing that both who is considered a journalist and what is a matter of public concern should be defined broadly.

*This story was first reported on our website on Jan. 17.*

***Other resources:***

Brief: [Obsidian Finance Group, LLC, et al., v. Crystal Cox](#)

# Do we have a right to online anonymity?

## It depends on which judge you ask

By [Jeff Kosseff](#)

The Edward Snowden leaks have forced Americans to question whether the government monitors their online activities. But intelligence gathering is not the only government threat to Internet privacy: plaintiffs in defamation cases are using court subpoenas to attempt to unmask Internet users' identities.

In some seedy corners of the Internet, commenters use the veil of anonymity to utter vulgar, false, and damaging comments that they likely would never write if their names were attached. Some defamation victims file lawsuits to mitigate the harm to their reputations. Before they can collect damages, they must identify the defendant, and they typically accomplish this by issuing a subpoena to the defendant's Internet Service Provider, seeking the defendant's name and address.

Although these repulsive cases receive much publicity, they represent only a sliver of all anonymous online speech. Online anonymity enables commenters to express unpopular political views, expose government corruption, and seek information about sensitive topics such as personal health. Indeed, anonymous speech was the cornerstone of our nation's founding, with the publication of the Federalist Papers under the pseudonym Publius. Removing protections for anonymity would, to some degree, chill a form of speech that has been a bedrock of American democracy.

For more than a decade, state and federal judges have attempted to balance these competing interests as they determine whether the First Amendment protects the right to speak anonymously online. Some courts require plaintiffs to demonstrate an exceptionally strong defamation case, and to satisfy numerous procedural requirements, before the courts will enforce subpoenas for the identity of anonymous Internet posters. Other courts provide very little, if any, protection for online anonymous speech.

The issue came to a head in two recent defamation cases in the past month. The Virginia Court of Appeals [ordered](#) Yelp to disclose the identities of seven users who wrote negative reviews of an Alexandria, Va. carpet cleaning company. Because the carpet cleaning company suggested that the reviewers were not actually customers, the court held that the reviewers' identities were not protected under the First Amendment or state law. The Court acknowledged that customers' opinions on Yelp are generally protected opinion under the First Amendment, but reasoned that if "the reviewer was never a customer of the business, then the review is not an opinion; instead, the review is based on a false statement of fact—that the reviewer is writing his review based on personal experience."

Also last month, a three-judge panel of the Michigan Court of Appeals [granted](#) a protective order that prevented a Warren, Mich. public works official from using court discovery to unmask the identities of people who anonymously criticized him on a local message board. But the Michigan judges struggled to distinguish their decision from last year's decision by another three-judge panel on the same court, which held that Michigan's discovery rules, and not the First Amendment, apply to such requests. In last week's decision, the judges recognized the lack of concrete standards on this "complex and emerging" issue, and invited the state Legislature or Supreme Court "to consider anew this important question."

Although the threat to anonymity is most commonly present in online defamation cases, it arises in other types of cases as well. For instance, a federal magistrate judge in New Orleans recently [granted](#) a criminal defendant's request to force the New Orleans Times-Picayune to provide identifying information about online commenters who had posted about a criminal investigation into the defendant. The magistrate judge wrote that if one of the commenters was a Justice Department manager, "his or her identity might lead to the conclusion that there was a pattern, policy or practice of pre-indictment prosecutorial misconduct in the accusatory process material to Jackson's defenses alleging violations of her due process rights." The Times-Picayune has moved to quash the subpoena.

If one thing is clear, it is that there is no clarity. State and federal courts will continue to issue a mish-mash of conflicting opinions that provide little consistency or certainty for online speech. The U.S. Supreme Court, which is the final arbiter of all things constitutional, has not ruled the right to anonymous online speech. The lower courts have been forced to guess the proper constitutional outcome based on the Supreme Court's most recent opinion on anonymous speech, a 2002 case involving a municipal requirement for door-to-door solicitors to display a permit that lists their name.

Eventually, the U.S. Supreme Court will have no choice but to provide a concrete guidance on whether the First Amendment protects anonymous online speech. When it does, the justices should ensure that plaintiffs cannot use the court system to chill speech and suppress unpopular viewpoints.

Some plaintiffs have good reason to attempt to expose the identities of individuals who make revolting, untrue, and damaging comments online. But these trolls are a vocal minority of online speakers. Courts should not address these rare cases by eroding the First Amendment protections that have been vital to our nation's political discourse for centuries.

*– Jeff Kosseff is a media and privacy associate at Covington & Burling LLP. The views expressed are those of the author and not of the firm. This commentary appeared first on the [InsideTechMedia](#) blog of Covington & Burling LLP.*

# Libel immunity up in the air?

## The U.S. Supreme Court reiterates that the New York Times "actual malice" standard requires materially false statements

By Robert Corn-Revere, Rochelle L. Wilcox, Ronald G. London, and Alison B. Schary

On Monday, Jan. 27, 2014, the Supreme Court unanimously reversed a \$1.2 million Colorado defamation verdict in the case of *Air Wisconsin Airlines Corp. v. Hoepfer* — a notable decision for a court that rarely accepts libel cases. The Court interpreted an immunity provision of the Aviation and Transportation Security Act (ATSA) but it had much to say about the proper application of the actual malice standard set forth in [New York Times Co. v. Sullivan](#), 376 U.S. 254 (1964).

In an opinion written by Justice Sonia Sotomayor, the Court found that the ATSA immunity provision was patterned after the *New York Times* actual malice standard, under which a plaintiff must show that the statements at issue are false to prevail in a defamation action. The Court reiterated that actual malice requires that the falsity must be “material,” such that minor inaccuracies are not sufficient to support a claim where the report is substantially true. The actual malice standard does not cover materially true statements, even if made recklessly.

Although the Court was unanimous in reversing the decision below, Justice Antonin Scalia, joined by Justices Clarence Thomas and Elena Kagan, would have remanded the case to allow the jury to determine whether the statements at issue were materially false. Justice Sotomayor’s opinion for the Court, however, applied the actual malice standard to the facts and found that the defamation claim failed as a matter of law.

The immunity provision of the ATSA at issue was passed by Congress in the wake of the September 11 attacks. Based on the adage “if you see something, say something,” the law provides immunity from civil liability for airlines and their employees for reporting suspicious behavior to the Transportation Security Administration (TSA). Immunity is lost only where a disclosure is made “with actual knowledge that the disclosure was false, inaccurate or misleading” or “with reckless disregard as to the truth or falsity of that disclosure.” The exception was explicitly patterned after the *New York Times* actual malice standard.

The case arose when Air Wisconsin airline employees reported their concerns to the TSA about a disgruntled employee — William Hoepfer, an Air Wisconsin pilot — who had an angry outburst after failing a proficiency test for a new model of aircraft; knew that his termination was imminent after failing that test; was authorized to

carry a firearm on board an aircraft as a Federal Flight Deck Officer (FFDO); and was about to board a commercial flight. The TSA responded to this report by removing Hoeper from the plane, searching and questioning him.

Hoeper sued for defamation and the trial court rejected Air Wisconsin's ATSA immunity defense. The court found that immunity was a question for the jury, which ultimately found for Hoeper, awarding compensatory and punitive damages. Both the Colorado Court of Appeals and Supreme Court affirmed. Although the state Supreme Court held that ATSA immunity was a question of law for the court and not the jury to decide, it found the error was harmless because the record supported the jury's finding of reckless disregard for the truth. In coming to that conclusion, the Colorado Supreme Court stated — in a footnote that the U.S. Supreme Court declared was “key” — that it “need not, and therefore do[es] not, decide whether the statements were true or false.”

The U.S. Supreme Court granted certiorari to address whether ATSA immunity can be denied without deciding whether the report is true. It held that congressional adoption of the *New York Times* standard necessarily incorporated case law interpreting actual malice to require a finding of material falsity.

The decision also addressed the broader issue of the scope of appellate review, which went beyond the specific question accepted for review. In a single sentence that arguably resolved a circuit split over the appropriate standard for review of a jury finding of falsity, the Court emphasized that where the issue on appeal is a matter of law — as the immunity determination was found to be — a reviewing court's deferential review of jury findings “cannot substitute” for its own independent review of the record.

Justice Sotomayor's opinion for the Court went on to explain why the airline's statements were not materially false: the difference between what the airline said and a more technically precise choice of words would have had no appreciable effect on a reasonable TSA officer's actions. In so doing, the Court reiterated that it is enough for a statement to convey the accurate “gist,” regardless of whether “trained lawyers or judges might with the luxury of time have chosen more precise words.” Justice Scalia's separate opinion would have left the question of material falsity for the jury on remand.

The Court's meticulous dissection of substantial truth provides a helpful guide for future cases, and it reiterates the importance of taking one's audience into account when determining what is “materially” false. And although this case arose in the context of airline security, its reasoning should prove particularly useful in other speech cases where time is of the essence, such as fast-breaking news and emergency reporting.

Davis Wright Tremaine [filed an amicus brief in the case](#) on behalf of the Reporters Committee for Freedom of the Press and a coalition of media organizations.

*This article first appeared on the [website of Davis Wright Tremaine LLP](#). Disclaimer: This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for*

*specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.*

# Filling in the background

## Public bodies move to requiring background checks for press credentials when safety is an issue

*By Michael Rooney*

On January 8, Maryland became the latest state to require criminal background checks for journalists covering the state house. The new credentialing requirement is part of an ongoing movement across the country of state and local jurisdictions, including Pennsylvania, Chicago and Los Angeles, to come down on the side of regulation while balancing public safety concerns and greater press access.

Beginning with the 2014 session of the Maryland General Assembly, even those reporters with previous, unexpired press credentials are required to undergo a criminal background check to comply with the new rules, according to a December 6, 2013, press release from Governor Martin O'Malley.

The rules were a second proposal of the sort. In October, the governor's office considered offering credentials only to those reporters who work inside the state house exclusively, which would have effectively eliminated press access for any other journalist. However, since then, the office of the governor has said it will offer credentials to all reporters covering the state house if they are able to pass a criminal background check.

Press credentials are needed to bypass security checkpoints when entering the state house or to access press areas. These credentials will be approved or denied by the governor's press office.

According to O'Malley spokeswoman Nina Smith, the background check consists of a search of the state's judiciary website for all criminal charges where the person was found guilty.

Those reporters who are flagged as having a felony on their record will be denied credentials. Those who pass will be issued a press credential. However, those initially denied may have their denial overridden by House Speaker Michael Busch or by Senate President Thomas V. Mike Miller.

According to the state, these measures are needed to ensure security at the state house in Annapolis.

### **Pennsylvania leads the way on restrictions**

Maryland is not the first state to implement criminal background checks as a prerequisite to receiving press credentials at a state capitol. In 2002, the

Pennsylvania Department of General Services (DGS) took a number of steps to further secure the state capitol in Harrisburg.

Previously, the press had wide access to the capitol using press credentials issued by the state senate. However, the DGS proposed requiring reporters to pass a criminal background check to be credentialed.

After discussions with the Pennsylvania Legislative Correspondents Association (PLCA), the DGS and the PLCA agreed to a proposal of three options by which reporters could gain access to the Pennsylvania state capitol.

First, reporters could choose to comply with the new DGS proposal, undergo a background check at their own expense and be approved for a press credential. Second, a reporter's employer could review the background check to verify if that reporter would be eligible for a pass. Third, reporters could refuse the background check but still gain access to the capitol by going through security checkpoints and by showing valid identification.

By creating a flexible system, the DGS and the PLCA say they were able to ensure safety of the capitol without imposing strict requirements on the issuance of press credentials.

In 2013, according to Holly Lubart of the DGS, a new system was implemented that offered a two-tiered approach to press credentialing at the state capitol.

News outlets and individual journalists could choose one of two identification badges to gain access to the state capitol: either a badge for those who did not work on capitol grounds, or a badge for those who worked in the capitol newsroom.

While the issuance of the two badges is roughly equal, Lubart says, the former requires journalists to pass through the public entrance and display their badges to capitol police, while the latter badge grants 24-hour access to the capitol, allowing journalists to enter any door with a badge reader at any time.

Access appears to be the only difference in badge types, as Jan Murphy of the *Harrisburg Patriot-News*, whose fellow reporters generally work from the capitol newsroom, says that both credentials require the same state police criminal background check and a fee of \$30.

### **Chicago moves to fingerprinting**

Police departments across the country have also had a history of requiring criminal background checks for journalists to obtain their credentials.

Though it had been on the books for decades, in 2002 the Chicago Police Department began enforcing an ordinance that required all journalists applying for press credentials with the department to be photographed and fingerprinted for security purposes. Chicago Police Department press credentials allow journalists to cross police lines.

Chicago journalists heavily opposed the move. However, David Bayless, director of news affairs for the Chicago Police Department at the time, emphasized that in the

wake of the September 11 attacks, the city of Chicago had become a major terror target. The review of all security policies, including press credentials, was initiated as a result of the high-security, post-9/11 world.

The Chicago Police Department's original policy was later amended in 2010 when the Chicago City Council revised the ordinance to reflect both reporters' privacy rights and to update antiquated language that referred to news reels but did not mention television, cable, or online journalism.

While the amendment preserved the criminal background check, it repealed the fingerprinting requirement. Further, it mandated that the results of criminal background checks be destroyed immediately upon completion of the background check. Additionally, to obtain a Chicago Police press pass, a journalist must present a letter from a news organization proving their employment.

According to the Office of News Affairs of the Chicago Police Department, the Department now receives little to no complaints as to their credentialing process, which was implemented without much opposition.

### **Los Angeles Police restrictions**

The Los Angeles Police Department (LAPD) also has different requirements to obtain press passes. The LAPD's requirements come at a cost of both time and money, charging \$16 to apply and imposing a processing period that can last up to 45 days.

After the application has been processed, journalists must undergo fingerprinting and a Department of Justice criminal background check. If applicants are able to pass a background check and can prove that over the course of two years they have crossed either a police or fire line six times, they are eligible for press credentials.

Dan Weikel, a staff writer for the *Los Angeles Times*, has had a press pass with the LAPD for nearly 20 years and takes no issue with the requirements.

"I still have my original thumb print from my LAPD background check," he said. "It doesn't bother me. It's always been that way here."

### **Bloggers and freelance journalists**

The processes required by state governments and local police departments reflect the traditional role that journalists play. However, these standard procedures can become less applicable to the ever-evolving world of modern journalism, leaving a generation of new journalists less likely to obtain press credentials.

Maryland's credentialing policy does not exclude bloggers or other new media specifically. However, critics of the policy worry that it would allow the state to judge who is a journalist and who is not. This concern was most evident in the case of attorney and blogger Jay Liner.

In late 2009, Liner was denied a request by the governor's press office after applying for a press pass to cover the 2010 session of the General Assembly. While no reason was given for this denial, Liner wrote in his complaint that he believes that

his press credential application was denied because his blog did not contain “original content regarding state government,” a delineated reason for the denial of a press pass. Following a suit against the governor’s office, however, Liner was credentialed.

The Chicago Police Department’s policy regarding press credentials has also evolved. In the ordinance first enforced in 2002, the Chicago rules for press credentialing made no provision for part-time or freelance journalists.

In 2010, however, the new ordinance expanded the definition of news media to include electronic periodicals, which would include online news sources, as well as blogs. Further, a requirement that the reporter be a full-time employee of a news outlet was removed, allowing part-time and freelance reporters access to press passes.

Philadelphia issued press credentials to bloggers and freelancers so long as they provided work samples from the past three to four months. However, the city no longer issues press credentials whatsoever, not unlike many other cities.

Overall, the policies have not evoked strong reactions from those upon which they are imposed. Across the nation, these new policies have been implemented quietly and without much pushback from local journalists.

This also seems to be the case in Maryland.

“We ultimately agreed that the process was not overly burdensome on our reporters, and it was for a reasonable cause,” said Jack Murphy of the Maryland Delaware and District of Columbia Press Association.

# Asked and Answered

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

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

### **Q: Can I film outside a federal government building?**

**A:** This question turns on whether the property is a “public forum” or a “nonpublic forum public property.” Reporters, and the general public as well, have more rights on the former than on the latter.

Public forums are publicly owned and open to the general public. Examples are municipal sidewalks, streets, and parks.

Nonpublic forums include government property that has not traditionally been open to the public. Examples include schools, prisons, and the inside of government buildings.

Few cases deal specifically with journalists' rights on these types of property. However, the media have at least as much access to places as the general public. There are many decisions on what rights members of the public – most often protesters – have outside of government buildings. Reporters should draw analogies with those cases.

The government cannot deny people access to places designated as public forums, but it can impose reasonable time, place and manner restrictions on activities. These restrictions must be content neutral; narrowly tailored; serve a significant government interest; and leave open alternative channels of communication. For instance, police may be able to limit public access from government property when they believe it is necessary for public safety or to prevent interference with an investigation.

Designation of a space as a “nonpublic forum” does not mean that a reporter has no right to gather news there. Rather, it means that the government can exclude reporters, and other members of the public, if authorities can show that access would interfere with normal operations of the facility.

If the inside of a government building is a nonpublic forum and a park nearby is a public forum, gray areas are the sidewalks and outdoor space that immediately flank the buildings. The Supreme Court took on this question in 1983's *United States v. Grace*. The case asked whether the government could restrict picketers from the

grounds outside the Supreme Court.

The justices in *Grace* ruled that the outdoor patios, steps and walkways abutting the Court, as well as the inside of the building, are nonpublic forums. The fact that people are able to freely leave and enter these grounds did not make them public property. Restrictions on protesters there are constitutional because people's presence could interfere with normal business operations.

In contrast, sidewalks that form the perimeter of the Court are "public forums" and picketers are generally allowed there. The justices found those sidewalks those "indistinguishable from any other sidewalks" in the city and noted there are no barriers that could indicate that they are part of the Court grounds.

Courts have cited *Grace* when determining that the sidewalks near the Vietnam Memorial and other outdoor space on the National Mall are public forums. In contrast, courts have found that a national cemetery run by the Veteran's Administration as well as the interior of the Jefferson Memorial (which is on the National Mall) are nonpublic forums. Similarly, people can be denied access to outdoor areas inside of military bases.

Courts also have found that sidewalks that directly abut a United States Post Office are nonpublic forums. The rationale is that these sidewalks are not designated for public use, but instead are principally for people entering and exiting the post office.  
-- *Jamie Schuman*

# "Open & Shut"

## A collection of notable quotations

"I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware 'the abridgement of freedom of the people by gradual and silent encroachments by those in power,' would be aghast."

*-- Judge Richard J. Leon, of the U.S. District Court for the District of Columbia, finding the NSA's collection of phone metadata unconstitutional in *Klayman v. Obama**

"Technology allowed al-Qaeda to operate decentralized and plot international terrorist attacks remotely. The bulk telephony metadata collection program represents the Government's counter-punch..."

*-- Judge William H. Pauley, of the Southern District of New York, finding the NSA's collection of phone metadata constitutional in *ACLU v. Clapper**

"Guests had been greeted by a 'cell phone check' table where they deposited their camera phones on arrival and it was understood that this was not an occasion for Tweeting party photos or Facebooking details."

*-- People Magazine on gag order White House imposed on guests at Michelle Obama's 50th birthday party*

"So great was the secrecy surrounding the party that guests were handed an invitation — on their way out."

*-- Chicago Tribune, same event*

"The U.S. Supreme Court is now one of the last major institutions of Western civilization that has not entered the 21st century technologically. I join with those in a growing movement calling on the justices to change that."

*-- Ohio Supreme Court Chief Justice Maureen O'Connor in an editorial urging the U.S. Supreme Court to allow cameras in its courtroom*

"The value of anonymous speech has long been recognized. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names."

*-- Lori Mince, lawyer for Nola.com/The Times-Picayune, in a motion to quash a subpoena that seeks names of the people who posted anonymous online comments regarding the criminal investigation of a New Orleans city leader who now faces bribery charges*

“If we don’t address this in an effective way, we risk losing the information of our age...If you don’t keep the record, you can’t be accountable, good or bad.”

*-- Maine Secretary of State Matthew Dunlap in the Portland Press Herald on the state’s need to address concerns about non-compliance with its open-records act*

