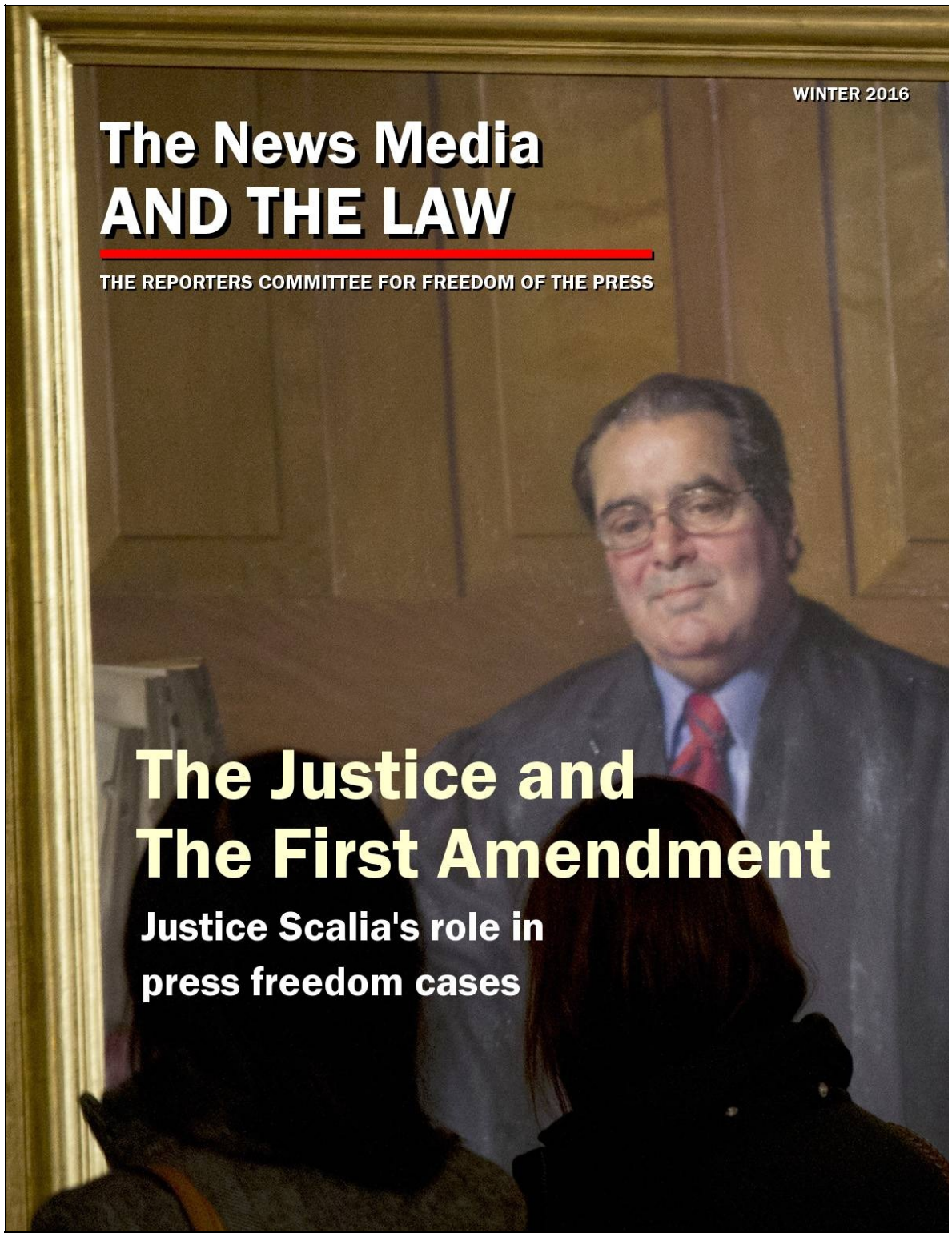

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The News Media AND THE LAW

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

The Justice and The First Amendment

Justice Scalia's role in press freedom cases

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When five became four

Justice Scalia's contribution to the law of free speech

By Ronald K.L. Collins

AP Photo/J. Scott Applewhite

U.S. Supreme Court Justice Antonin Scalia in 2005.

He was a moving force in constitutional and statutory law and in the interpretation of legal documents generally. In that area he was more than a man; he was a movement. In oral arguments, he was spirited and disputatious, a force with which to reckon. In dissent he wielded a pen with the skill of a expert marksman. In sum, he was a larger than life persona. He was, of course, Justice Antonin Scalia (1936-2016).

His shadow did not, however, cast as long in the First Amendment freedom-of-expression arena. His beloved originalist textualism, for example, never took real root when it came to free speech cases. True, there were opinions like his concurrence in *Citizens United v. FEC* (2010). But that was largely cabined to a truncated discussion of whether corporations were covered by the First Amendment. And then there was his opinion for the Court in *Brown v. Entertainment Merchants Association* (2011), an opinion that had an absolutist-historical flare about it. In that case, Justice Scalia spoke categorically: “The most basic principle — that government lacks the power to restrict expression because of its message, ideas, subject matter, or content... — is subject to a

few limited exceptions for historically unprotected speech, such as obscenity, incitement, and fighting words." But it was more of a *cart blanche* declaration than a full-fledged theory of originalism in the free-speech context.

Unlike Justice Hugo Black's First Amendment originalism, Scalia's textualism never took front-and-center stage in the free speech debates over the meaning of the First Amendment. And it is just as well since Scalia's brand of originalism would likely produce diminishing returns. (Consider, for example, his distain for *New York Times, Co. v. Sullivan*. See Erik Wemple, "Antonin Scalia Hates *NYT v. Sullivan*," *Washington. Post*, Dec. 4, 2012).

By way of profile: During his tenure on the Roberts Court, Justice Scalia never wrote for the majority in any of the twelve *5-4 free speech cases* that divided the Justices. Though he authored five *majority opinions*, that number paled in comparison to the thirteen such opinions Chief Justice John Roberts wrote in First Amendment expression cases. Of Scalia's five majority opinions, the judgment in three of them was unanimous and 7-2 in the others. Still, he cast the deciding vote in cases such as

- *Garcetti v. Ceballos* (2006) (government-employee speech)
- *Morse v. Frederick* (2007) (student speech)
- *Harris v. Quinn* (2014) (labor union fees), and in
- *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014) (campaign finance).

Tracking *Harris v. Quinn*, there is *Friedrichs v. California Teachers Association*, another labor union case. It was argued last January. *Friedrichs* teed up the possibility that the Court would overrule *Abood v. Detroit Board of Education* (1977). Judging from oral arguments, it appeared that Justice Scalia was prepared to join his conservative colleagues in pitching *Abood* into the precedential dumpster. But now? Well, *Friedrichs* will likely be either summarily affirmed or reset for oral arguments at some unknown date.

And then there is *Holder v. Humanitarian Law Project* (2010), a 6-3 "material support" for terrorists' case. Scalia's majority vote in *Holder* could prove significant since Justice John Paul Stevens was also in the

majority. Given that Justice Elena Kagan replaced Justice Stevens, if she were to join the *Holder* dissenters that would make for a new five-person majority.

Add this to the jurisprudential mix: Justice Scalia wrote some noteworthy concurrences in free-speech cases. One was in *McCullen v. Coakley* (2014) (an abortion-clinic protest case); the other was in *Citizens United v. FEC* (2010) (a campaign finance case). In both cases, his First Amendment-like absolutism would delight conservatives and depress liberals.

In the changed-his-mind category there is this: In the early days Justice Scalia was a foe of commercial speech as evidenced by his majority opinion in *Board of Trustees of State University of New York v. Fox* (1989). But he came around as suggested by his concurrence in *44 Liquormart v. Rhode Island* (1996) and his majority vote in *Sorrell v. IMS Health, Inc.* (2011).

By contrast, free speech stalwarts will take exception to his dissent in *United States v. Playboy Entertainment Group, Inc.* (2000) in which he treated sexually-oriented programming under the Telecommunications Act of 1996 as if were obscenity. By the same moral measure, there are his concurrences in *Barnes v Glen Theatre, Inc.* (1991) and *City of Los Angeles v. Alameda Books, Inc.* (2002), two secondary-effects cases in which he allowed that doctrine to fence in a good measure of expressive freedom. Likewise, his majority vote in *Rust v. Sullivan* (1991) and his dissent in *Legal Service Corp. v. Velazquez* (2001), both involving funding restrictions on speech, are unlikely to win favor among First Amendment devotees.

If any one Scalia First Amendment free expression opinion stands out from the rest, it is his majority opinion in *R.A.V. v. City of St. Paul* (1992), a race cross-burning case. In *R.A.V.* Justice Scalia fortified the ban on content discrimination by adding a new wrinkle to it – even unprotected speech (e.g., libel) may be entitled to some protection if the subcategories of that speech are impermissibly drawn (e.g., outlawing only libel critical of the government). This fascination with content discrimination has become one of the First Amendment hallmarks of the Roberts Court. (See, e.g., *Reed v. Town of Gilbert* (2015)).

Color him as you will. On the one hand, he was a First Amendment loyalist in the campaign finance and commercial speech line of cases,

while on the other hand he betrayed free speech values in the government speech and student speech line of cases and in the "material support" case. When it came to the First Amendment and free expression, Chief Justice Roberts and Justice Anthony Kennedy largely eclipsed him. And as noted, his originalist jurisprudence never gained much traction in free speech cases.

In the marketplace of today's ideologies, what counts most is whether the Justice who replaces Antonin Scalia is a liberal or conservative. Though it is a sign of our times, it is never a good sign for a robust First Amendment that flies no ideological flags.

Ronald Collins is the Harold S. Shefelman scholar at the University of Washington Law School. He writes a weekly First Amendment News blog post, which appears on the Concurring Opinions website.

Six degrees of Antonin Scalia

Reporters Committee letter prompts apology from Justice

As legal scholars and friends remember the late U.S. Supreme Court Justice Antonin Scalia so, too, does the Reporters Committee recall an exchange in 2004, when a letter of concern over erasure of reporters' recordings of remarks by the Justice garnered an apology for the incident in a personal note of reply.

In April 2004, reporters from The Associated Press and *The Hattiesburg (Miss.) American* were ordered by U.S. Marshals to erase recordings of comments presented by Scalia during an event at Presbyterian Christian High School in Hattiesburg. Although the event was open to the press, Scalia had requested that it not be recorded.

In a letter of concern to Scalia, the Reporters Committee — which similarly wrote to the Attorney General and the U.S. Marshals Service — noted, "As you are certainly aware, the essence of the First Amendment's free press clause is the right to gather and publish news without government interference."

Calling the incident "troubling," the Reporters Committee called on Scalia to both change his policy of forbidding recordings at his public speaking events, and also to remind those who provide security "that they are not allowed to search for and erase recordings.

"In addition to the legal and public policy problems with this practice, we hope that you will consider the public benefit of asssiting members of the news media as they seek to accurately report public statements by public officials."

In a letter of reply dated the next day, Scalia thanked the Reporters Committee for its "well justified concern" over the incident.

"You are correct that the action was not taken at my directon; I was as upset as you were," he wrote. "I have written to the reporters involved, extending my apology and undertaking to revise my policy so as to permit

recording for use of the print media."

Scalia pointed out that security personnel, including the Marshals Service, "do not operate at my direction, but I shall certainly express that as my preference.

"The electronic media in the past respected my First Amendment right not to speak on radio or television when I do not wish to do so, and I am sure that courtesy will continue," he added.

Stopping an end-run around the reporter's privilege

Closing loopholes for subpoenaing third-party communications helps journalists keep information confidential

By Michael Lambert

The ability to maintain the confidences of a reporter-source relationship is a cornerstone of journalism. Reporters often rely on the safeguards of state shield laws and reporter's privilege to preserve the trust. But these protections are not absolute — and in the area of electronic communications, they are often essentially absent.

Many states with shield laws still have loopholes that allow subpoenas of third-party records.

Journalist Kathy Leese recently learned about the loophole in her state's law that allowed the prosecutor to subpoena her cell phone records without her knowledge.

In December 2014, Leese had been asked to reveal her sources for stories in *The Miami County (Ohio) Reporter* that the Miami County Sheriff's Office allegedly mishandled sheriff's sales and signing of deeds. The following May, to Leese's suprprise, the county prosecutor's report on the allegations included three pages of her cell phone records that were acquired with a grand jury subpoena.

Among the 40 states with shield laws, Ohio is one of 39 states that permits subpoenas of third-party records. According to the prosecutor's report, the prosecutor obtained the records to identify those providing

information to Leese about the sales deeds investigation. The report revealed a number of phone calls and text messages between Leese and four others.

“My rule for myself has always been if someone is willing to share their story with you, you owe it to them to be a trustworthy person,” Leese said. “If you don’t know how to keep a confidence, and you don’t know how to maintain trust, you have no business working in the field of journalism.”

The prosecutor’s ability to obtain Leese’s phone records through a grand jury without her knowledge demonstrates the inadequacies of current legal protections for the electronic communications of journalists. Typically, members of the news media are protected from disclosing their sources or newsgathering materials by state shield laws, or the reporter’s privilege stemming from the First Amendment, state constitutions, common law, or court rules. But these laws and privileges do not account for electronic communications through phones, computers, or other technologies.

Ohio’s shield law, for example, does not protect third-party records of journalists' communications. Absent these safeguards, the government can circumvent shield laws by subpoenaing communication providers, such as phone companies and email services.

In October, Montana became the first state to amend its shield law to completely protect journalists' electronic communications from government investigation. The "Media Confidentiality Act" prohibits the government from requesting disclosure of “privileged news media information from services that transmit electronic communications.”

While not providing a complete bar to subpoenaing third-party electronic communications, the shield laws of three other states — California, Connecticut, and Maine — require notice to journalists prior to seeking information from communication providers. Notice gives journalists the opportunity to fight subpoenas or seek narrowing of the scope. California’s shield law, for example, demands five days' notice to journalists before third-party providers are subpoenaed.

“I think there needs to be a serious look at the legislation,” Leese said. “Freedom of the press is such a vital part of what makes our democracy work, and if reporters can’t protect their sources, we've got a serious problem in our country.”

Although attempts to enact a federal shield law have failed to garner momentum in Congress, the Department of Justice recently amended its guidelines on subpoenaing reporters. The department saw a backlash from the public and media organizations after secretly subpoenaing the phone records of AP and Fox News reporters in 2013.

The guidelines now permit the attorney general to pursue a subpoena of a reporter's third-party communications after the government has made all "reasonable attempts to obtain the information from alternative sources." Additionally, if the attorney general has authorization to obtain third-party records of news media, the journalist will be given "reasonable and timely notice" before the subpoena is sent.

Reporters need these robust protections of their communications to encourage sources to share information with them in confidence. If the government can inspect journalists' communications to uncover their confidential sources, sources will be chilled from sharing valuable information with the press and whistleblowers will be scared into silence. In turn, the press will be hampered from disseminating newsworthy information to the public.

As Leese experienced, this is not a hypothetical fear.

"I've had people say to me since then that, 'I'm afraid to talk,' because what if they take my records again? It scares potential sources, and that's really unfortunate," Leese commented.

Although the prosecutor's office in this case only obtained the phone numbers, dates, and frequency of Leese's communications, collecting this metadata, particularly if aggregated over periods of time, can reveal personal and sensitive information about journalists and their sources. Providing source confidentiality is meaningless if the government can pry into private communications.

Historically, legislators enacted shield laws to protect journalists' sources and their notebooks, documents, and other unpublished material obtained during the newsgathering process. But newsgathering in 2016 is accomplished with cell phones, computers, and other means of electronic communication, all of which function as modern-day notebooks, and which need the full protection under the law.

Private email, government business

FOIA community waits for word from D.C. Circuit on whether officials' email in nongovernment accounts is public

By Caitlin Vogus

A pending decision by the U.S. Court of Appeals for the District of Columbia Circuit on whether the federal Freedom of Information Act applies to agency records held in nongovernmental email accounts could set an important precedent in favor of access to such records.

AP Photo/Charles Dharapak

OSTP Director James Holdren walks and talks with President Obama at the White House in 2014.

On Jan. 14, the Court heard oral arguments in *Competitive Enterprise Institute v. Office of Science and Technology Policy*, which arose from a FOIA request by the conservative advocacy group Competitive Enterprise Institute (CEI) to the White House Office of Science and Technology Policy (OSTP). CEI sought, and was denied access to, OSTP-related email held in OSTP Director James Holdren's email account at Wood's Hole Research Center, Holdren's previous employer.

OSTP denied CEI's request on the ground that that the emails were beyond the reach of FOIA. CEI's administrative appeal was unsuccessful, and it filed suit against OSTP alleging violations of FOIA and other claims.

The U.S. District Court for the District of Columbia, however, granted OSTP's motion to dismiss CEI's suit, holding that OSTP had not "withheld" the requested emails—a prerequisite to FOIA disclosure duties under the 1980 Supreme Court decision in *Kissinger v. Reporters Committee for Freedom of the Press*—because OSTP lacked control over emails located on Holdren's Woods Hole account.

CEI appealed the District Court's ruling to the D.C. Circuit. The central question on appeal is whether the District Court erred in holding that, as a matter of law, OSTP had not withheld the emails requested by CEI.

Reporters Committee, on behalf of a coalition of media companies, filed an amicus brief in support of CEI's position before the D.C. Circuit.

Although as of this writing, the D.C. Circuit has not yet issued its opinion, statements and questions by the panel of judges during oral argument strongly indicate that the Court is not inclined to hold that agency records are, as a matter of law, outside the reach of FOIA merely because they are held in nongovernmental email accounts.

Such a ruling has the potential to reverberate across the field of record requesters and responding agencies, especially as government business is increasingly conducted over email and specifically through employees' personal email accounts.

"Withholding" records

The central question on appeal of whether OSTP "withheld" the requested emails stems from *Kissinger v. RCFP.* In *Kissinger*, the Supreme Court held that a federal court's jurisdiction over a FOIA case depends upon a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records."

In *Kissinger*, three requestors made three separate FOIA requests to the State Department seeking transcripts of Henry Kissinger's telephone conversations from when he was an assistant to President Nixon (from January 1969 to September 1973) and Secretary of State (from September 1973 to January 1977):

- In January 1976, journalist William Safire filed the first FOIA request seeking transcripts created between 1969 and 1971, when Kissinger was an assistant to the president.
- On Dec. 28 and 29, 1976, the Military Audit Project (MAP) submitted

a second FOIA request seeking records of all of Kissinger's conversations while secretary of state and assistant to the president.
- Finally, on Jan. 13, 1977, the Reporters Committee and others filed a third request seeking the transcripts made by Kissinger while he was secretary of state and assistant to the president.

Importantly to the resolution of *Kissinger*, at the time that MAP and the Reporters Committee filed their FOIA requests, the State Department no longer had possession of or legal right to the transcripts that MAP and RCFP sought. In October 1976, while still Secretary of State, Kissinger moved the transcripts from the State Department to the private New York estate of then-Vice President Nelson Rockefeller. Then, on Dec. 24, 1976, before the MAP and RCFP requests were made, Kissinger deeded the transcripts to the Library of Congress. Finally, on Dec. 28, 1976, before the MAP request was made that same day and before the RCFP request was made weeks later, the transcripts were transferred to the Library of Congress.

The Supreme Court held in *Kissinger* that FOIA did not compel the State Department to release the records requested by MAP and RCFP because the State Department had not "withheld" them. The Court concluded that an agency must possess or control records before it can be said to have withheld them and made to disclose them under FOIA.

Because the RCFP and MAP requests were filed *after* the transcripts had been deeded and transferred to the Library of Congress, the Court held that the State Department lacked the custody or control of the transcripts necessary to find the Department had withheld them. The Court also held that FOIA did not obligate an agency to institute a lawsuit to retrieve wrongfully removed documents in order to respond to a FOIA request.

With regard to Safire's request, the Court held that the records sought were not "agency records" because FOIA does not apply to the Office of the President, and Safire sought records made while Kissinger was serving as assistant to the president. Because the issue in *CEI v. OSTP* turned on whether OSTP had withheld the requested records and not whether the requested records are agency records, the resolution of Safire's request in *Kissinger* is not important to *CEI*.

"Posessing" records

On appeal, the government argues that *CEI v. OSTP* is controlled by *Kissinger*. Just as the State Department had not withheld the transcripts requested by RCFP and MAP in *Kissinger* because it did not have possession or control of the transcripts, the government argues that OSTP has not withheld the email in Holdren's nongovernment account because it does not have possession or control of the email.

In contrast, CEI argues that OSTP withheld the requested emails because it has constructive control over them through its employee-employer relationship with Holdren. CEI notes that OSTP never asked Holdren to turn over agency records in his nongovernmental email account in response to CEI's FOIA request, which constitutes a withholding of those records. CEI also argues that *Kissinger* is distinguishable from this case because, unlike Kissinger, who deeded away the requested transcripts, Holdren retains the email in his nongovernmental account.

On behalf of a coalition of 26 media companies, the Reporters Committee filed an amicus brief agreeing with CEI that OSTP withheld the requested email. The Reporters Committee argues that the Court should use the same definition of "control" used in civil discovery to determine whether OSTP has control over the requested email, a standard that the Reporters Committee says was suggested by the *Kissinger* Court.

As explained by the Reporters Committee brief, the Federal Rules of Civil Procedure require a party to produce documents requested in civil discovery if they are within his or her "control." Federal courts, in turn, have held that documents are under a party's "control" when he or she has the right, authority, or practical ability to obtain the document from a nonparty to the lawsuit. Applying this standard, Reporters Committee argues that the Court should find that OSTP has control over the requested email because it has the right, authority, or practical ability to obtain them from Holdren, an employee of the agency.

The D.C. Circuit considered the parties' arguments during oral argument in January. (A recording of the oral argument can be downloaded from the D.C. Circuit's website.) The Court's skepticism of the government's claims that OSTP did not withhold the requested email, and that *Kissinger* controls the outcome of this case was evident in the questions the judges asked of the government's attorney, Daniel Tenny, during argument.

Judges Harry T. Edwards and David B. Sentelle, in particular, repeatedly returned to the idea that *Kissinger* could be distinguished from this case because Kissinger had deeded away control of the transcripts at the time of the RCFP and MAP requests, while Holdren retains possession of the requested email.

"*Kissinger* just doesn't get you where you're trying to go," said Judge Edwards to the government's counsel during the argument.

Judges Edwards and Sentelle were also critical of the government's view that OSTP did not "control" the requested emails, with Judge Edwards characterizing the government's argument that OSTP lacked control over the emails as "really strange" and "a really very narrow, bizarre" interpretation in light of the Court's precedent on constructive control.

As Tenny argued to the Court that CEI's theory that OSTP must *ask* Holdren for the email in his nongovernmental account is in itself evidence that OSTP lacks control over the email, Judge Sentelle interrupted him.

"Just a moment," said Judge Sentelle, "Now suppose it was a real document instead of a virtual one, and [the employee] had it in his house . . . and the agency says, 'Hey, bring back that file that you had, we need to turn it over in FOIA.' Are you saying that takes it out of the agency category, because he took the document home?"

"And because they had to ask for it?" added Judge Edwards. "That makes no sense!"

"Your argument keeps coming back to, 'You can't make the government ask for it,'" said Judge Edwards to Tenny later in the argument. "That's silly. At least it makes no sense to me. I don't get that."

Judge Edwards added later that to write an opinion the way the government described the case "would really be an embarrassment." He said, "A lot of people would be laughing at us."

The panel asked relatively few questions during the argument about the precise standard that the Court should use to determine whether OSTP has "control" over the requested email. However, late in the government's argument, Judge Edwards noted that the Supreme Court had analogized to the civil discovery standard in *Kissinger*, which was the standard argued for by Reporters Committee on brief.

What it means for FOIA

If the D.C. Circuit rules in favor of CEI and holds that the District Court erred in dismissing CEI's complaint on the basis that OSTP did not withhold the requested email, FOIA requesters will have an important precedent in their arsenal when attempting to obtain government records in the future.

Government employees conduct an increasing amount government business through their unofficial, personal email accounts. News reporting cited in the Reporters Committee's brief has shown that employees at all levels of federal and state government routinely use private or personal email accounts to discuss government business of significant public importance. For example, in a 2015 survey of federal employees conducted by *Government Executive*, 16 percent of respondents reported that personnel in their department or agency *always or often* use personal email accounts for government business, and 47 percent sometimes or rarely do so. The same survey showed that 33 percent of respondents themselves use personal email for government business at least sometimes.

Journalists have also reported that agency personnel at the Internal Revenue Service and the Environmental Protection Agency have used personal email accounts to conduct official business. Similarly, news reports have revealed use of personal email by Department of Energy employees to conduct government work, and a 2015 Office of the Inspector General's Special Report regarding the DOE's email practices found that the DOE has not adequately addressed the use of personal email accounts to conduct agency business and lacks controls to ensure proper retention and archiving of such emails. Secretary of Defense Ash Carter has publicly acknowledged using his personal email for government business. In addition, news reports reveal that Department of Homeland Security personnel, including Secretary Jeh Johnson, used personal email on their work computers, though it is unclear if employees used these accounts to conduct government business.

The government has already begun relying on the District Court's ruling in *CEI v. OSTP* to resist claims that agency records on nongovernmental email accounts should be disclosed under FOIA. For example, the Office of the Inspector General's Report evaluating the State Department's FOIA compliance, released before oral arguments in this case, cited the District Court's opinion to support a claim that "FOIA

neither authorizes nor requires agencies to search for Federal records in personal email accounts maintained on private servers or through commercial providers." A ruling from the D.C. Circuit reversing the District Court will help roll back such claims.

Although the panel did not give a strong indication of whether it will apply the civil discovery standard to determining "control" for purposes of the withholding determination, such an approach would be an important development in FOIA law because it would clarify the standard that courts should apply in determining control of agency records and increase requesters' ability to obtain documents outside of an agency's physical possession. As demonstrated by *CEI v. OSTP*, applying FOIA to records outside an agency's physical possession that the agency has the right, authority, or practical ability to obtain would help subject agency action to public scrutiny in an increasingly digital world.

FixFOIAby50 gains momentum

Congress moves to reform FOIA by its anniversary

By Adam Marshall

The federal Freedom of Information Act will turn 50 in July, and some members of Congress are pushing to mark the date with a birthday present for the public by passing legislation to streamline access to public records.

Half a century after its enactment, FOIA is showing its age. It has been almost 10 years since the last changes to the law, and only a handful of amendments have been enacted since its original passage in 1966.

Sunshine in Government Initiative

The FixFOIAby50 logo.

But each round of reform and improvements is a formidable task for advocates of government transparency. Advancing the public's right to know has never been easy. President Lyndon B. Johnson was deeply skeptical about the original Freedom of Information Act in 1966, even refusing to hold a formal ceremony to mark the signing.

It has only been through the tireless efforts of advocates—both outside and inside government—that access to government records has prevailed and has hope for improvement in the future.

Most recently, in January, the U.S. House of Representatives unanimously passed H.R. 563, the "FOIA Oversight and Implementation Act of 2016," which would significantly alter and improve how records requests are processed and adjudicated under FOIA.

H.R. 563 is the latest in a long-running effort to fix the problems that

plague records requestors. A 2015 Associated Press analysis, for example, found the backlog of unanswered requests grew 55 percent by the end of FY 2014 over the year before, and federal agencies cited a record number of exemptions to withhold information.

That such negative trends have persisted under President Obama's administration, which promised to be the most transparent in history, has confirmed for many that anything short of legislative reform is not enough.

Previously, in late 2014, a bipartisan FOIA reform bill failed to be put to a House vote, despite unanimous passage in the U.S. Senate and the earlier passage of an even more expansive bill in the House. Last-minute holds in the Senate and further delays in the House, reportedly following objections from the banking industry, led to the measure's ultimate demise.

This time around, lawmakers pressed forward with extensive hearings before the House Oversight and Government Reform Committee last summer. Headed by Chairman Jason Chaffetz (R-Utah), the hearings examined the public's frustration with getting information through FOIA.

Official Photo

U.S. Rep. Jason Chaffetz (R-Utah) is chairman of the House Oversight and Government Reform Committee, which held FOIA hearings last summer.

New York Times vice president and assistant general counsel David McGraw was one of many media representatives who testified about the "culture of unresponsiveness," as he called it, that has taken over at many federal government agencies.

In January 2016, Committee Chairman Chaffetz published a detailed report titled "FOIA Is Broken," based on testimony and comments at the hearing, as well as additional comments from the public. It concluded that "[u]nnecessary complications, misapplication of the law, and extensive delays are

common occurrences. Agencies fail to articulate reasons for delays or explain how to navigate the process. Requesters wait months, not weeks, before receiving any response."

Far from implementing instructions from the President and Attorney General to adopt a presumption of openness, "[f]ar too often, agencies have adopted a unlawful presumption in favor of secrecy when responding to Freedom of Information Act requests," the report says.

In response to these problems, H.R. 563, as passed, lays out a number of reforms.

First, it codifies the presumption of openness laid out by President Obama and then-Attorney General Eric Holder in 2009. Under the new standard "[a]n agency may not withhold information…unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.''

Legislating the presumption of openness is consistent with case law, which makes clear FOIA should be broadly construed in favor of public access, and it ensures that policy will endure. In 2001, then-Attorney General John Ashcroft famously issued a memo essentially encouraging agencies to withhold information wherever possible under FOIA. That memo was rescinded in 2009, but codification of the presumption of openness will make it harder for future administrations to revert to a policy of secrecy.

Substantive changes have also been made to specific exemptions, including Exemption 5 — commonly called the "withhold it because you want to" exemption. Chief among these reforms is a 25-year sunset provision, which would open up important historical documents previously withheld from the public.

Another change to Exemption 5 is that "opinions that are controlling interpretations of law" must be disclosed, along with "final reports or memoranda" created by other entities but used to make "a final policy decision." These reforms would help ensure the public has access to records that reflect the government's policies and reasons they were adopted, as well as legal guidance, such as Office of Legal Counsel opinions.

The issue of delay, one of the most vexing concerns about FOIA inefficiency, is addressed in the bill by limiting the amount of time

agencies can consult with other "entities" (government or otherwise) on a request. Under the bill, when an agency that receives a FOIA request "consults" with another entity, the original agency must let the requester know what it is doing. The entity being consulted has 15 days to review up to 3,000 pages of records before its interest is deemed waived. Another 15 days are given to the consulted entity to review each additional 3,000 pages of responsive records.

The Office of Government Information Services (OGIS) is also strengthened by H.R. 563. The bill mandates that reports to Congress on how FOIA is functioning be submitted directly to Congress without being vetted by the Archivist of the U.S. or Office of Management and Budget. H.R. 563 also requires agencies responding to FOIA requests to provide information about the services provided by OGIS, and ensures that they update their regulations to allow for engagement with OGIS.

Additional FOIA reform in H.R. 563 includes:

- Mandating all agencies accept FOIA requests via email.
- Prohibiting the use of Exemption 6 (personal privacy) to withhold the name of a federal employee engaged in his or her official duties.
- Creating a universal online request portal.
- Requiring the release of all records that have been requested three or more times.
- Mandating an award of costs and attorney's fees for successful litigants.
- Requiring agencies to proactively post more records in their electronic reading rooms.
- Providing detailed information regarding the assessment or estimation of fees.
- Creating a "Chief FOIA Officers Counsel" that will develop recommendations and share information to increase efficiency.
- Providing for periodic Inspector General reviews of agency FOIA compliance.

The passage of the House bill is widely seen as a positive development by the news media. The Sunshine in Government Initiative, of which the Reporters Committee is a member, stated that it showed "the bipartisan spirit to make government transparent and accountable to the public is

alive and well."

But despite the many improvements made by H.R. 563, a last-minute addition that carves out the intelligence community from many of its reforms remains controversial. More than 40 organizations signed a letter objecting to the change that was apparently added "at the behest of members of the House Permanent Select Committee on Intelligence."

The letter goes on to state that "efforts to exempt the Intelligence Community from certain provisions of the FOIA amendments in this bill are not acceptable," and allowing "the Intelligence Community to differentiate itself from other agencies with its responsibilities to FOIA is a bad precedent."

Part of the concern over the intelligence carve-out is that the language is unclear. The bill includes a section titled "rules of construction" that states, among other things, that nothing in the amendments made to FOIA's exemptions "shall be construed to require the disclosure information that … would adversely affect intelligence sources and methods that are protected by an exemption under such section."

The scope of the phrase, "adversely affect intelligence sources and methods", is uncertain. And a pair of letters exchanged between Rep. Devin Nunes (R-Calif.) and Chaffetz regarding the exemption does little to shed light on the intent of the last-minute addition.

In the Senate, the bipartisan reform effort is being led by Sen. John Cornyn (R-Texas) and Sen. Patrick Leahy (D-Vt.) in the Judiciary Committee. They are not taking up H.R. 563 as passed by the House, but rather starting from S. 337, which was passed by the Judiciary Committee last year.

That bill, while less sweeping than H.R. 563, still includes many of its most important reforms, including codifying the presumption of openness, placing a 25-year sunset on the deliberative process aspect of Exemption 5, and strengthening OGIS.

While previous FOIA reform efforts have been approved by the Judiciary Committee a number of times, there are outstanding concerns among some senators that might hamper its passage by unanimous consent in the full Senate. A handful of senators currently have holds on the bill, a situation that echoes 2014, when a number of holds jeopardized the Senate's action on FOIA reform.

When S. 337 was previously passed by the Senate Judiciary Committee,

concerns were specifically expressed about the 25-year sunset provision on Exemption 5. As explained in the Committee Report, for some the sunset "could chill government lawyers from offering candid advice and invite criminal defendants and their attorneys to re-open and re-litigate long-resolved cases."

It is also possible that there are other concerns regarding Exemption 8, which covers reports from financial institutions, and regulatory oversight. But as noted in testimony before the House last year, there is little reason to think the proposed reforms would have any damaging impact.

Florida forecast cloudy, but now with a chance of sunshine

Attempt to nix attorney fees for successful FOIA litigants in question

By Adam Marshall

Until recently Florida's Public Records Law, widely regarded as one of the strongest in the nation, looked to be in danger of losing one of its most important enforcement mechanisms.

AP Photo/Steve Cannon

Florida Sen. Rene Garcia speaks in the legislature in 2015.

Two bills introduced in the legislature would have eliminated mandatory awards of costs and attorney's fees for successful public records litigants. Instead, courts would have discretion over whether a requester who wins the release of records can recover his expenditures.

But a new amendment, prompted by pushback from the press and the public, recently resulted in a narrower Senate bill that doesn't harm the vast majority of requesters. And as of late February the pospects for passage of House's version have diminished, if not disappeared.

The motivation for the original bills, according to state Sen. René García (R-38th), sponsor of SB 1220, was to curtail a "cottage industry" of persons and entities entities who make numerous public records requests, sue and then recover fees. "Right now, there are organizations that will make hundreds of public records requests, each potentially containing thousands of documents, all to order around a city or county so they can

receive a settlement," he told a Senate committee.

State Rep. W. Gregory "Greg" Steube (R-73rd), sponsor of HB 1021, said in an interview with Florida radio station WTSP that "our tax dollars shouldn't be going to people setting up local governments, trying to sue them for things."

Press and transparency groups immediately rallied against the bills as originally introduced, arguing that a small group of individuals are the source of the problem, and that recovering attorney's fees is essential to ensuring the public's right to know is enforced.

Barbara Petersen, executive director of the Florida First Amendment Foundation in Tallahassee, told the Reporters Committee that there are no more than a dozen individuals and organizations who are the source of these overreaching requests. In a letter from the First Amendment Foundation to Steube, Petersen said "[t]his is a small group of people, particularly when compared to the vast majority of citizens who simply want access to the public records they seek. In effect, your bill punishes them because of the misdeeds of a small minority."

Tampa Bay Times Columnist Daniel Ruth argued that the public's right to know would be unfairly restricted by the bills as they are currently worded. "So the Florida Legislature wants to disenfranchise nearly 20 million residents and the state's news media from accessing public records they have every right to see, merely because a minute fraction of legal gadflies might — might — have abused the process?"

The Reporters Committee for Freedom of the Press, joined by 24 national and state media organizations, also sent a letter to Florida lawmakers expressing concern over the bills and the potential damage to information access by the press and the public.

Florida Rep. Greg Steube comments during a 2015 subcommittee meeting.

"[E]ven where denials of requests for access at the state and local level are clearly in violation of a state public records law, financial hurdles can, and frequently do, prevent journalists

and members of the public from challenging those denials in court," the letter states. Ensuring an award of costs and attorneys fees "ensures that the press and the public will not shy away from enforcing the public's right to government records and information."

The letter also notes that mandating awards of fees also provide an incentive for public entities to obey the law. Accordingly, it has "the potential to *save* both requesters and the state from unnecessary litigation."

Petersen said that as introduced, the bills would make Florida government agencies less accountable than private contractors performing government functions. Under a bill that recently passed the legislature, as long as a requester asking for records held by such a private entity gives eight days' notice, he is entitled to recover costs and fees if successful in a lawsuit for access. It is possible, she said, that a similar notice provision could be incorporated into HB 1021 and SB 1220.

On Feb. 9, SB 1220 was amended by Sen. García in response to discussions with the First Amendment Foundation and other interested groups. The amendment reinstates the mandatory fee award, if the requester gives five business days notice before filing a lawsuit. It also states that attorney's fees may not be awarded in cases where the lawsuit was frivolous, malicious, or intended to harass the agency.

Sen. García's statements during the introduction and discussion of the amendments made clear that he wanted to preserve the public's right to information, and was seeking a more focused solution to address the small group of prolific requesters.

As amended, SB 1220 passed the Judiciary Committee 7-3, and is on course for a third and final reading before the Senate.

The House bill cleared two committees with near-unanimous approval and is awaiting a vote in a State Affairs Committee. As of late February the bill had not been placed on the Committee's calendar and its future is uncertain. The Committee is not scheduled to meet again in the current legislative session.

Near at 85: A look back at the landmark decision

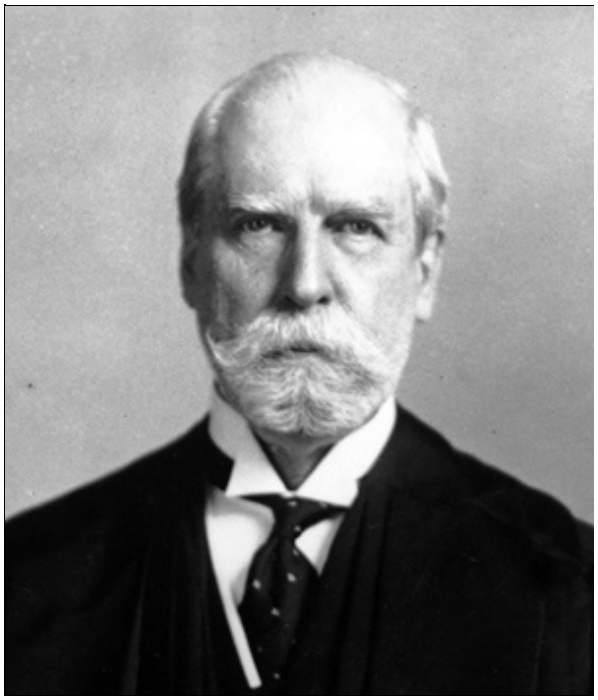
Prior restraint ruling continues to resonate

By Kevin Delaney

This year marks the 85th anniversary of *Near v. Minnesota*, the milestone U.S. Supreme Court decision that created the presumption that prior restraints — government restriction of speech prior to publication — are unconstitutional.

Although a lifetime has passed between 1931 when the Court issued its opinion and 2016, *Near's* holding continues to resonate.

On *Near's* 85th birthday, we look back at the case that, if not for a change in the composition of the court, could have been decided differently and assess its continued impact on journalism.



AP Photo

Chief Justice Charles Evans Hughes in 1933

Challenging the Public Nuisance Law

A 1925 Minnesota law gave courts within the state the power to enjoin as a public nuisance — that is, stop the publication of — any "malicious, scandalous and defamatory newspaper, magazine or other periodical." The Public Nuisance Law, as it was called, gave those charged under it the defense of showing that they published the truth with good motives and for justifiable ends.

Jay Near challenged the constitutionality of the Public Nuisance Law in the U.S. Supreme Court after a Minnesota trial court used the law to stop the publication of his paper, *The Saturday Press*.

According to the dissenting opinion in *Near*, *The Saturday Press* regularly published "malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race." It added, "Many of the statements [contained within the paper] are so highly improbable as to compel a finding that they are false."

"Near's journalism was garbage. It was a terrible, terrible paper," Eric B. Easton, a First Amendment professor at the University of Baltimore School of Law said. "I certainly wouldn't want to be associated with his [Near's] editorial content."

Notwithstanding *The Saturday Press's* flaws, the Court, in a 5-4 decision, deemed the Public Nuisance Law unconstitutional. Citing the famed English jurist William Blackstone, Chief Justice Charles Evans Hughes wrote that press freedoms were granted primarily to ensure that prior restraints could not be imposed. According to Hughes, a public officer who believes the press has falsely assailed his character should bring a libel action.

AP Photo/Jim Wells

The precedent set in Near v. Minnesota led the U.S. Supreme Court to allow The New York Times to resume printing The Pentagon Papers in 1971.

Especially important to Hughes was ensuring the press remained free to criticize government officials. Hughes worried that government officials may use the Public Nuisance Law as a way to prevent criticism by bringing a publisher before a judge on a charge that he regularly published scandalous and defamatory matter. Once there, the publisher, to defend himself, would be forced to show that he published not only the truth but also that he did so with good motives and for justifiable ends. This, according to Hughes, is "the essence of censorship."

Although creating a presumption against prior restraints, the Court did

not rule out the possibility that the government may impose one in limited circumstances, such as when someone is preparing to publish "the number and location of troops."

A change in the lineup might have made a change in the law

Easton said the Court might have reached a different outcome had a change in who sat on the Court not occurred less than a year before the oral arguments.

On the same day in March of 1930, Chief Justice William Howard Taft and Associate Justice Edward T. Sanford died roughly five hours apart. Although Sanford was on the Court at the time of his death, Taft had resigned five weeks earlier.

According to an academic journal article by Easton, Taft, Sanford, and the four justices who dissented in *Near* made up a firm conservative voting bloc. Had Taft and Sanford not been replaced by successors who voted in Near's favor — Charles Evans Hughes and Owen J. Roberts — Easton questions whether the decision would have gone the other way.

"Nobody can predict what would have happened," Easton said in a phone interview, "and I would never say unequivocally that but for that sequence of personnel changes on the Court that the case would have come out the other way. But I think [it would have been] a very, very close call, and I don't think anybody would have been surprised if [Near] had lost."

The dissent advocated a definition of the First Amendment under which freedom of the press is limited to meaning that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends."

Ruling resonates

The late First Amendment scholar and Pulitzer Prize-winning journalist Anthony Lewis described *Near* as "a turning point for freedom of the press" and a "bulwark of American press freedom."

After *Near*, court-imposed prior restraint orders are rarely upheld in the United States. This is different from Britain, where, Lewis wrote, "courts routinely do such things as prohibit the publication of a book when someone asserts that he will be libeled in it."

But *Near's* impact extends beyond limiting when a prior restraint can be imposed.

After *Near*, Easton said, "The Court seemed to take First Amendment claims much more seriously," which began "a real change in the strength

of the press freedom argument."

Easton cannot say whether *Near* itself is responsible for that change. He speculated that the Court's favorable approach to First Amendment cases after *Near* resulted from the shift in the Court's composition as well as the Court's adoption of the view, in the 1925 case *Gitlow v. New York*, that the First Amendment applied to the states in addition to the federal government.

But he noted that after *Near*, a power to win free speech cases existed that was not present before.

Near's positive impact can be seen in *New York Times Co. v. United States*, a case in which the U.S. Supreme Court addressed whether the government could restrain *The New York Times* and *The Washington Post* from publishing the contents of a classified study on the history of the Vietnam War. In a decision that resulted in nine separate concurring and dissenting opinions, many of which mentioned *Near*, the Court decided that the government had not overcome the "heavy presumption" against prior restraints.

Clay Calvert, a media law professor in the College of Journalism and Communications at the University of Florida, added that *Near* remains important because of the Court's decision to protect speech at the outer limits of the First Amendment. Calvert said the decision "suggests that the First Amendment doesn't just protect [papers like] *The Washington Pos*t, *The New York Times*, [and] *USA Today*.... It also protects the *National Enquirer*, and the tabloid press that we have today."

He added: "The Court could have said that Jay Near had a trashy publication and we are going to somehow create and draw a line. .... But the Court ... said that some degree of abuse is inseparable in anything and in no case is this more profound than in the First Amendment."

According to Easton, *Near* also marked the first time the press came together as an interest group to advocate on behalf of freedom of expression. "In terms of editorial freedom, the press for decades prior to *Near* had been too partisan to come together," he said. "During the World War I period that preceded *Near*, you had mainstream press arguing that there is no problem if the socialist press got shut down. They didn't see their community of interests in that area."

Due in large part to the efforts of Robert Rutherford McCormick, the editor and publisher of the *Chicago Tribune*, things changed with *Near*.

McCormick, an ardent supporter of press freedom, feared a scenario in which other states would enact laws similar to Minnesota's, greatly reducing the power of the press. In addition to providing Near with a legal team to take his case to the U.S. Supreme Court, McCormick successfully lobbied groups like the American Newspaper Publishers Association and the American Society of Newspaper Editors to mount a united front against the Public Nuisance Law.

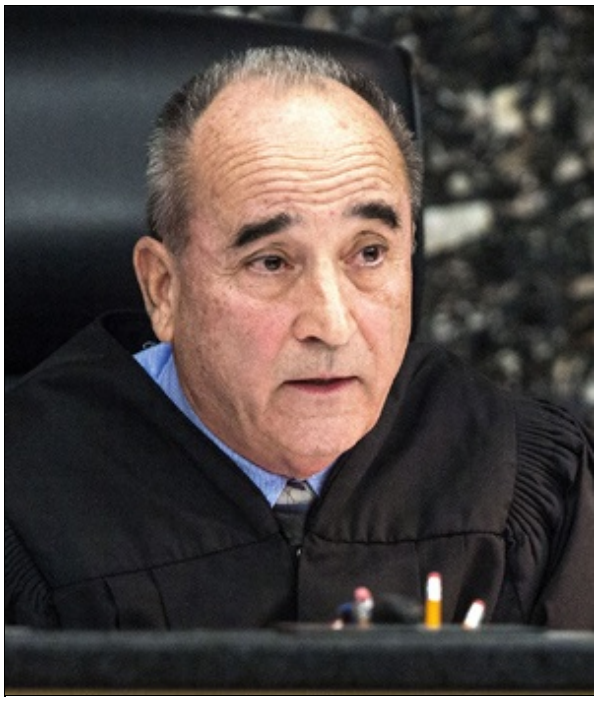
"[After *Near*] you had a new sense of community in the press that saw itself as the protector of First Amendment rights," Easton said. He stated that this sense of community has culminated in the creation of various press-freedom interest groups, such as the Reporters Committee, and helped shaped First Amendment doctrine.

Quashing a prior restraint

Appeals court stops judge's attempt to stop publication of jailhouse recordings

By Kevin Delaney

In late December of last year, the Florida Fourth District Court of Appeal, in the case *Palm Beach Newspapers v. State*, overturned a trial court's order prohibiting *The Palm Beach Post* from publishing transcripts of a prisoner's recorded telephone conversations.



Palm Beach Post/Lannis Waters

Palm Beach County Circuit Judge Jack S. Cox talks to attorneys during the December 2015 hearing.

Since January of 2013, the Fourth District has overturned four prior restraint orders, with three reversals coming within the last 18 months. The Fourth District hears appeals from trial courts located in Palm Beach, Broward, St. Lucie, Martin, Indian River and Okeechobee Counties.

Prior restraints are judicial orders that restrict speech before it occurs. They are considered presumptively unconstitutional under the First Amendment.

Clay Calvert, a media law professor in the College of Journalism and Communications at the University of Florida, described the Fourth District's number of reversals as an "unusual trend," which he said could be driven by trial courts' fear of the permanency of Internet speech.

"I think the trial court judges fear that the Internet is somehow different [from other media]...[and] that they have a right to stop [Internet speech] because once it's out there, it's going to be permanent," said Calvert, who

also serves as director of the Marion B. Brechner First Amendment Project. “The good news is that the appellate courts in Florida are recognizing that the principles of prior restraint cut across all media, not just traditional ones.”

The prior restraint involving *The Palm Beach Post* arose after inmate Frederick Cobia filed motions seeking to, among other things, prevent the paper from publishing the content of his recorded jail telephone conversations.

According to the Fourth District’s opinion in *Palm Beach Newspapers*, inmate Jamal Smith accused Cobia of presenting himself as a jailhouse paralegal in order to gather information on other inmates. Smith alleged that Cobia received favorable treatment in exchange for providing the state with information and testimony. The Fourth District wrote that Cobia has “formally agreed to testify against seven inmates, including Smith, as part of a plea deal in his own murder case, but he claims to have information on a total of sixty inmates.”

On Oct. 15, 2015, before Cobia’s motions could be ruled on, *The Palm Beach Post* published an article on its Web site titled “Palm Beach County jailhouse lawyer doubles as jailhouse snitch.”

The article contained quotes from Cobia’s recorded conversations, in which he touted the amount of information he knew and the number of cases for which he could provide testimony. At another point, the article paraphrased the conversations to display the benefits Cobia has received.

The article also linked to full transcripts of the calls.

Citing “Mr. Cobia’s right to privacy” in the content of his phone conversations, Florida Circuit Judge Jack Cox granted Cobia’s motions on Nov. 30, 2015. Judge Cox ordered *The Palm Beach Post* “to remove the transcripts of the calls from its website” and prohibited the paper “and any other person currently in possession of the recorded calls...from publishing or disclosing them in any way to any third party.”

The Fourth District calls prior restraints unconstitutional

The Fourth District struck down Judge Cox’s order on Dec. 22, 2015. In a written opinion explaining its decision, released in late January of 2016, the Court wrote that prior restraints are presumed unconstitutional and, quoting from the U.S. Supreme Court’s 1976 decision in *Nebraska Press Association v. Stuart*, described them as “the most serious and the

least tolerable infringement on First Amendment rights."

The court wrote that a party seeking to uphold a prior restraint on the press must show a compelling interest that overcomes the press's First Amendment rights.

Noting that "[t]he only interest asserted ... is Cobia's right to privacy regarding the content of his telephone conversations," the court ruled this standard had not been met. "Where matters of public concern are involved," the court wrote, "privacy interests give way to the First Amendment right to publish lawfully obtained, truthful information about such matters."

The court further rejected Cobia's privacy argument by writing that it is well-settled in Florida that "a jail inmate has no reasonable expectation of privacy in his telephone conversations."

According to attorney L. Martin Reeder Jr., who represented *The Palm Beach Post*, the lack of an expectation of privacy derives from prisoners being "on notice that their calls are being recorded and can be used against them."

Reeder added, "In any event, whether he [Judge Cox] thought Mr. Cobia had a right of privacy or not, the idea that that privacy right ... would trump the First Amendment, when what the newspaper was doing was reporting on a matter of public concern," is not accurate.

"The press was doing its job in bringing to light the benefits that Mr. Cobia allegedly was receiving for his testimony, and the phone calls were direct evidence of that because they were Mr. Cobia's reported statements about the benefits he was receiving," said Reeder, who is a partner at Reeder & Reeder P.A. in Jupiter, Fla.

In order to justify the prior restraint, the court wrote that Cobia also had to demonstrate that the prior restraint would effectively protect his privacy. To the court, this burden could not be met. By the time Judge Cox entered his order, "the full transcripts of Cobia's conversations had been available on the Post's website . . . for over a month," the court wrote. The court also noted that the full transcripts had sat in an open court file for a month and excerpts for four months.

Judge cites reporter's love of journalism

The majority opinion in *Palm Beach Newspapers* constituted a clear victory for the paper.

But to Reeder, the concurring opinion written by Chief Judge Cory J. Ciklin resonated the most.

Ciklin wrote the opinion "to briefly remind . . . readers . . . about the significance of the First Amendment to the United States Constitution." To that end, he quoted numerous Supreme Court opinions stressing the importance of a free press.

Ciklin ended his opinion, however, by quoting Susan Spencer-Wendel, a court reporter for *The Palm Beach Post* who died of Lou Gehrig's disease in 2014.

In describing Spencer-Wendel's love of being a journalist, Ciklin quoted her as writing: "It was a privilege to go to work each day and grow democracy, to ferret out stories no one wanted told, to be trusted to inform and, yes, entertain our readers. When someone would ask me: 'Who sent you?' I loved to reply: 'Well, ma'am, that would be Thomas Jefferson.'"

"It was an emotional thing for a lot of people at the paper to see that tribute to her," Reeder said. "That was a really sweet part of what the Fourth District did."

In the other recent cases where the Fourth District struck down the orders as unconstitutional prior restraints on speech, trial courts issued injunctions preventing one party from, among other things, using the other party's name or likeness for commercial purposes, *Vrasic v. Leibel*, 106 So. 3d 485 (Fla. 4th DCA 2013)*;* stopping a political organization from disseminating information about a judicial candidate via a Web site or in any other format, *Concerned Citizens for Judicial Fairness v. Yacucci*, 162 So. 3d 68 (Fla. 4th DCA 2014); and prohibiting billionaire businessman Alki David from posting information about another individual online, and ordering him to take down material already posted, *David v. Textor*, No. 4D14-4352, 2016 Fla. App. LEXIS 177 (Fla. 4th DCA Jan. 6, 2016).