

FOREWORD

SYRACUSE FIRST AMENDMENT SYMPOSIUM INTRODUCTION

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CONTENTS

I. PRESS FREEDOM AND DEFAMATION LAW	509
II. GOVERNMENT INVESTIGATION OF JOURNALISTS.....	515
CONCLUSION.....	519

The articles in this issue of the *Syracuse Law Review* provide a helpful and wide-ranging overview of First Amendment issues at a pivotal moment for the rights the Amendment protects: the end of the first year of the presidential administration of Donald J. Trump. As practitioners of First Amendment and media litigation, we have often had a front row seat to the developments—both positive and negative—in an eventful year for First Amendment freedoms. In this introduction, we highlight two areas in which we (and our colleagues) have been involved: press freedom (and defamation law, in particular) and government investigations of the press.

I. PRESS FREEDOM AND DEFAMATION LAW

The first days of the Trump presidency illustrate the highs and lows for the First Amendment in 2017. President Trump's inauguration was greeted by what many analysts estimate was the largest single-day protest in United States history—the Women's Marches that took place in cities and towns around the country January 21, 2017—as pure an expression of First Amendment rights as one can imagine.¹ But the day before, Metropolitan Police in Washington, D.C. arrested over two hundred people during more violent protests of the inauguration, including nine journalists covering the events.² Although charges were eventually dropped against seven of the nine journalists, two faced felony charges

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1. See Erica Chenoweth & Jeremy Pressman, *This is What we Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/>.

2. Jonah Engel Bromwich, *Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html>.

with potential decades-long prison sentences.³ By the end of the year, thirty-four journalists had been arrested and forty-four journalists physically attacked—two by politicians they were covering—in the course of their reporting work in the United States, according to the U.S. Press Freedom Tracker.⁴ Professor Rulffes’ article on the First Amendment in times of crisis explores these issues in greater detail, highlighting the treatment of the press covering the protests in Ferguson, Missouri in 2014.⁵

President Trump attacks the “fake news” media on a near daily basis in speeches and on his Twitter feed, going so far as to label the press the “enemy of the American people.”⁶ In October, he questioned whether news networks publishing stories critical of him should have their “licenses” “challenged,” if not “revoked.”⁷ Nevertheless, media organizations have devoted more resources to investigative journalism and holding the powerful to account,⁸ newspapers have seen a surge in

3. Jaclyn Peiser, *Journalist Swept Up in Inauguration Day Arrests Faces Trial*, N.Y. TIMES (Nov. 14, 2017), <https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html>. In a welcome development, the jury delivered not guilty verdicts on all counts in the trial of the first six defendants charged in connection with the January 20 protests, including one of the two journalists who was still facing charges. See Keith L. Alexander and Ellie Silverman, *Not-guilty Verdicts for First Six People on Trial in Violent Inauguration Day Protests*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/local/public-safety/the-first-of-six-people-on-trial-in-violent-inauguration-day-protests-is-found-not-guilty/2017/12/21/6c97fd84-ded9-11e7-8679-a9728984779c_story.html.

4. Peter Sterne, *34 Arrests, 44 Physical Attacks, and More Chilling Numbers from the U.S. Press Freedom Tracker’s First Year*, FREEDOM PRESS FOUND. (Jan. 17, 2018), <https://freedom.press/news/34-arrests-44-physical-attacks-and-more-chilling-numbers-us-press-freedom-trackers-first-year/>.

5. Angela Ruffles, *The First Amendment in Times of Crisis: An Analysis of Free Press Issues in Ferguson, Missouri*, 68 SYRACUSE L. REV. 605 (2018).

6. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en.html>; see, e.g., Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html>.

7. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 5:09 PM), <https://twitter.com/realdonaldtrump/status/918267396493922304?lang=en.html>; see David Nakamura, *Trump Escalates Threats Against Press, Calls News Coverage ‘Frankly Disgusting’*, WASH. POST (Oct. 11, 2017), https://www.washingtonpost.com/politics/trump-escalates-threats-against-press-calls-news-coverage-frankly-disgusting/2017/10/11/32996dba-ae9c-11e7-9e58-e6288544af98_story.html.

8. See, e.g., David Folkenflik, *CNN Beefs Up Investigative Reporting*, NAT’L PUB. RADIO (Jan. 30, 2017, 1:00 PM), <https://www.npr.org/2017/01/30/512457231/cnn-beefs-up-investigative-reporting>.

readership and subscriptions,⁹ and donations to press and civil liberties organizations have skyrocketed.¹⁰ At the end of the year and into 2018, several outlets published a wave of important stories about sexual misconduct at the highest levels of government, politics, and the entertainment industry, the effects of which are just beginning to unfold.¹¹

Turning to libel law, as Professor Gutterman's insightful article discusses, President Trump campaigned on a promise to "open up our libel laws" to make it easier to successfully sue the press, though the executive branch has almost no authority to alter the constitutional principles underlying libel law.¹² However, thus far, the President's most tangible contributions to libel law since taking office have actually been as a *defendant* arguing for *greater* speech protection in the face of libel suits. In New York, a state court dismissed a libel claim against President Trump over tweets attacking a political commentator who criticized him on television, Cheryl Jacobus.¹³ Then-candidate Trump had tweeted that Jacobus "[b]egged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!"¹⁴ The court emphasized the importance of the social media context in dismissing the claim,

9. See, e.g., Austen Hufford & Lukas I. Alpert, *New York Times Says Subscriber Growth is Highest in its History*, WALL STREET J. (May 3, 2017), <https://www.wsj.com/articles/new-york-times-says-subscriber-growth-is-highest-in-its-history-1493824033>; Jason Schwartz, *Young Subscribers Flock to Old Media*, POLITICO (Oct. 21, 2017, 6:59 AM), <https://www.politico.com/story/2017/10/21/millennials-trump-paying-for-news-244001>.

10. See, e.g., Jennifer Gould Keil, *Donations for Press Freedom Group Spike in Trump Era*, N.Y. POST (May 24, 2017, 6:27 PM), <https://nypost.com/2017/05/24/donations-for-press-freedom-group-spike-in-trump-era/>; Liam Stack, *Donations to A.C.L.U. and Other Organizations Surge After Trump's Order*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/aclu-fund-raising-trump-travel-ban.html>.

11. See, e.g., Louise Boyle, *EXCLUSIVE: 'He pulled me, naked and dripping from the shower to yell at me.' Ex-wife of Trump Aide Rob Porter Who's Dating Hope Hicks, Tells How he Called her a 'f***ing b***h' on their Honeymoon and she Filed a Protective Order Against Him*, DAILYMAIL.COM (Feb. 6, 2018), <http://www.dailymail.co.uk/news/article-5359731/Ex-wife-Rob-Porter-Trumps-secretary-tells-marriage.html>; Karen K. Ho, *The Media Today: When the 'Weinstein effect' Became a Flood*, COLUMB. JOURNALISM REV. (Nov. 10, 2017), https://www.cjr.org/the_media_today/weinstein-louis-ck-roy-moore-matthew-weiner.php; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Stephanie McCrummen et al., *Woman Says Roy Moore Initiated Sexual Encounter when She was 14, He was 32*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html.

12. Roy S. Gutterman, *Actually . . . A Renewed Stand for the First Amendment Actual Malice Defense*, 68 SYRACUSE L. REV. 577 (2018).

13. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 334–35, 344 (Sup. Ct. 2017), *aff'd*, 64 N.Y.S.3d 889, 889 (App. Div. 2017).

14. *Id.* at 334.

concluding that the tweets were expressions of opinion, which could not serve as the basis of a libel claim (which requires a verifiably false statement).¹⁵ Even though the tweets contained statements that, when viewed in isolation, could be read to convey facts, the overall context of the “familiar back-and-forth between a political commentator and the subject of her criticism,” and “Trump’s regular use of Twitter to circulate his positions and skewer his opponents and others who criticize him” compelled the conclusion that readers would understand the statements as nonactionable opinion.¹⁶

Meanwhile, in Washington, D.C., Donald J. Trump for President, Inc. (i.e., the Trump Campaign) is defending a lawsuit from a group of Democratic National Committee donors and staff arising out of the publication of their emails by WikiLeaks. As part of its defense, the Trump Campaign has argued for expanded application of the D.C. Anti-SLAPP Act.¹⁷ Anti-SLAPP statutes—which have been adopted in thirty states and the District of Columbia—provide heightened protections (including procedures for an early special motion to dismiss and fee-shifting) to defendants in “Strategic Lawsuits Against Public Participation” (SLAPPs), which are lawsuits intended to censor, intimidate, or silence criticism.¹⁸ Although the application of state (and D.C.) anti-SLAPP laws in federal court is in flux, the Trump Campaign argued that the D.C. law should apply in the U.S. District Court for the District of Columbia.

Defamation lawsuits—or, more often, threats or fears of defamation lawsuits—continue to be a potent tool in the arsenal of those trying to squelch unfavorable news coverage, given the potential for crippling

15. *Id.* at 342–43.

16. *Id.* at 343. President Trump has already relied heavily on this decision to defend another libel lawsuit—this one from a former contestant on the reality television show formerly hosted by Trump, *The Apprentice*, who accused Trump of sexually assaulting her on multiple occasions. Memorandum of Law in Support of President Donald J. Trump’s Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. PP. § 425.16(B)(1) or, in the Alternative, for a Stay Pursuant to CPLR 2201 at 1, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. July 7, 2017), <https://www.documentcloud.org/documents/3891277-Trump-Dismissalmotion.html>. When he called the accusations “phony” and a “hoax,” she sued for libel. *See id.* at 1–2. Citing the *Jacobus* decision, the President’s lawyers argued his statements were “nothing more than heated campaign rhetoric designed to persuade the public audience that Mr. Trump should be elected president irrespective of what the media and his opponents had claimed over his 18-month campaign.” *Id.* at 25.

17. *See* Defendant Donald J. Trump for President, Inc.’s Special Motion to Dismiss Under the D.C. Anti-SLAPP Act at 5–11, *Cockrum v. Donald J. Trump for President, Inc.*, No. 1:17-cv-01370-ESH (D.D.C. Sept. 5, 2017).

18. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection/> (last visited Jan. 20, 2018).

damages awards. In the spring of 2016 a Florida jury awarded professional wrestler Hulk Hogan \$140 million in his lawsuit against the internet publisher Gawker Media, which sent the company into bankruptcy and shut down its flagship news and gossip website Gawker.com.¹⁹ Although Hogan's claim was based primarily on invasion of privacy, not libel, it was soon discovered that the lawsuit was one of a number of cases (including several libel claims) that had been secretly bankrolled by billionaire PayPal co-founder Peter Thiel, who had been upset by earlier coverage of him by Gawker.²⁰ In August 2017, Walt Disney Co. paid over \$177 million to settle a defamation case brought by a meat product manufacturer over a series of news reports by ABC World News that referred to the company's product as "pink slime."²¹ The settlement was reached almost four weeks into a trial in South Dakota (where the plaintiff company is based), in which the plaintiff company was seeking \$5.7 billion under the state's "ag-gag" law, which provides for treble damages in food product disparagement cases.²² And in April 2017, First Lady Melania Trump reached a reported \$2.9 million settlement with United Kingdom newspaper the *Daily Mail* over a 2016 article that republished allegations (reported elsewhere) that Ms. Trump may have worked as an escort early in her modeling career.²³

It is impossible to definitively measure the impact of these settlements and verdicts on other press outlets, but journalists and commentators have noted the existence of an apparent "Gawker effect" making media companies think twice about publishing inflammatory

19. See Paul Farhi, *Gawker Files for Chapter 11 Bankruptcy Protection*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/lifestyle/style/gawker-files-for-chapter-11-bankruptcy-protection/2016/06/10/45ef7420-2f2e-11e6-9b37-42985f6a265c_story.html.

20. See Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>.

21. See Eriq Gardner, *Disney Discloses \$177 Million Settlement in Aftermath of ABC's 'Pink Slime' Trial*, HOLLYWOOD REP. (Aug. 8, 2017, 5:40 PM), <https://www.hollywoodreporter.com/thr-esq/disney-reports-177-million-settlement-aftermath-abcs-pink-slime-trial-1027814>.

22. See Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses From Public Scrutiny*, ATLANTIC (Mar. 20, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/>; Susan Seager, *Why ABC's 'Pink Slime' Settlement Is a Red Flag for Free Press*, WRAP (June 28, 2017, 3:39 PM), <https://www.thewrap.com/why-abcs-pink-slime-settlement-is-a-red-flag-for-free-press/>.

23. See Dan Morse, *Melania Trump Settles Lawsuits with Daily Mail*, WASH. POST (Apr. 12, 2017), https://www.washingtonpost.com/local/public-safety/melania-trump-settles-lawsuits-with-daily-mail/2017/04/12/e6214032-1f91-11e7-be2a-3a1fb24d4671_story.html.

allegations, even when the allegations are backed up by solid reporting.²⁴

An even more aggressive tactic to silence speech that has emerged this past year is the use by private parties of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (RICO)—a statute designed to enable prosecution of (and civil remedies against) the mafia—in place of or in conjunction with defamation claims.²⁵ The environmental activist group Greenpeace was the subject of two high profile lawsuits by companies whose activities they criticized under the theory that the organization's advocacy amounted to a criminal fraud conspiracy.²⁶ In *Resolute Forest Products, Inc. v. Greenpeace International*, brought by a Canadian logging company, the district court granted Greenpeace's anti-SLAPP motion under California law and dismissed the case, but with leave to amend.²⁷ The attorneys who brought that lawsuit filed another similar suit against Greenpeace on behalf of an owner of the Dakota Access Pipeline in August, and motions to dismiss are being briefed.²⁸ On a smaller scale, a pro se plaintiff in New York sued the major television news networks, the *Washington Post*, and the *New York Times* under RICO on the grounds that each organization was an enterprise engaged in federal wire fraud for publishing false and misleading stories about President Trump during the 2016 campaign; that case was dismissed by the district court and the Second Circuit affirmed.²⁹ And a climate change skeptic in Texas sued (pro se) several dozen environmental groups for a criminal scheme that he referred to as

24. See, e.g., Kim Masters, *Fighting 'the Gawker effect' in the Wake of Weinstein*, COLUM. JOURNALISM REV. (Oct. 13, 2017), https://www.cjr.org/first_person/amazon-roy-price.php; Margaret Sullivan, *That R. Kelly 'Cult' Story Almost Never Ran. Thank Hulk Hogan for That.*, WASH. POST (July 30, 2017), <https://www.washingtonpost.com/lifestyle/style/that-r-kelly-cult-story-almost-never-ran-thank-hulk-hogan-for-that/>.

25. 18 U.S.C. §§ 1961–68 (2012); see *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong. 135–36 (1970) (statement of Rep. Bennett) (using an example of the Cuban Mafia and the Italian Mafia engaging in the illegal drug trade to illustrate support for the legislation).

26. See *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-02824-JST, 2017 U.S. Dist. LEXIS 170927, *3 (N.D. Cal. Oct. 16, 2017); Dino Grandoni, *Dakota Access Pipeline Owner Sues Greenpeace, Arguing it Broke Organized Crime Law*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/08/22/dakota-access-pipeline-owner-sues-greenpeace-arguing-it-broke-organized-crime-law/>.

27. *Resolute Forest Prods.*, 2017 U.S. Dist. LEXIS 170927, at *4.

28. See Grandoni, *supra* note 26.

29. *Hollander v. CBS News Inc.*, No. 16 Civ. 6624 (PAE), 2017 U.S. Dist. LEXIS 71445, *2–*3 (S.D.N.Y. May 10, 2017), *aff'd sub nom. Hollander v. Garrett*, 2018 U.S. App. LEXIS 2229 (2d Cir. 2018)..

the “Climate Alarmism Enterprise”; that case was also dismissed.³⁰

Although the RICO suits have not found success, courts refer to civil RICO claims as “an unusually potent weapon—the litigation equivalent of a thermonuclear device,” because “the very pendency of a RICO suit can be stigmatizing and its consummation costly; a prevailing plaintiff, for example, stands to receive treble damages and attorneys’ fees.”³¹ It remains to be seen whether litigants will continue trying to use this strategy to attack critics. The lawyer representing the plaintiffs in the Greenpeace lawsuits sounded an ominous note when he told one reporter that he has been in touch with other companies thinking of filing their own RICO lawsuits: “When Greenpeace directly attacks a company’s customers, financing, and business, that company has little choice but to legally defend itself . . . I know others are considering having to do so, and would be shocked if there are not many more.”³²

II. GOVERNMENT INVESTIGATION OF JOURNALISTS

One of the more disappointing legacies of the Obama administration was its aggressive prosecution of whistleblowers and even journalists in connection with government leaks. Among other things, the Obama Department of Justice pursued eight prosecutions under the Espionage Act for leaking government secrets (more than every prior administration combined), named a Fox News reporter as an unindicted co-conspirator in a prosecution of a government leaker, and seized telephone records from the Associated Press.³³

Despite President Trump’s open antipathy toward the press and “leakers,” it is difficult to know whether he will follow in his predecessor’s footsteps with action, as opposed to rhetoric.³⁴ One disturbing signal came in August 2017, when Attorney General Jeff Sessions announced that Department of Justice had “more than tripled” the number of leak investigations since the end of the Obama

30. See *Goldstein v. Climate Action Network et al.*, No. 5:16-cv-00211-C (N.D. Tex. June 12, 2017); Complaint at 2–4, *Goldstein*, No. 5:16-cv-00211-C.

31. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (citing 18 U.S.C. § 1964(c) (2012)).

32. Paul Barrett, *How a Corporate Assault on Greenpeace is Spreading*, BLOOMBERG (Aug. 28, 2017, 9:00 AM), <https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-greenpeace-is-spreading>.

33. See Michael Calderone, *Trump Administration Follows Obama Template in Targeting Journalists’ Sources*, HUFFINGTON POST (June 6, 2017, 5:23 PM), https://www.huffingtonpost.com/entry/trump-obama-espionage-act_us_5936f08ee4b0cfcda9183ec9.

34. See Cleve R. Wootson Jr., *Trump Rages About Leakers. Obama Quietly Prosecuted Them*, WASH. POST (June 8, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/08/trump-rages-about-leakers-obama-quietly-prosecuted-them/>.

administration, and would revisit internal Department guidelines that limit how and when federal prosecutors can subpoena information and records from journalists in the course of such investigations.³⁵ Those guidelines had been issued in January 2015 by then-Attorney General Eric Holder following extensive discussions between members of the news media and the government after revelations of the Department's actions going after journalists in 2013.³⁶ The guidelines impose limitations on when prosecutors could subpoena records or information from journalists.³⁷ The Department's apparent willingness to revisit the guidelines so soon after they were implemented is certainly troubling, and commentators have expressed concern that the current administration may use the Espionage Act to go after journalists directly when they report on leaked information.³⁸

On the other hand, the Department of Justice quickly backed down in the face of two high profile First Amendment lawsuits from technology companies. In one case, Microsoft sued the Department over indefinite gag orders that restricted internet service providers from notifying their subscribers when the government seeks the content of the subscribers' communications, saying that the orders violate the technology companies' First Amendment rights.³⁹ In February 2017, the district court denied the government's motion to dismiss the case.⁴⁰ In October, the Department agreed to change its policy, limiting the situations in which gag orders would be sought and setting defined time limitations when the orders are used; as a result of the changes, Microsoft dropped its

35. See Josh Gerstein & Madeline Conway, *Sessions: DOJ Reviewing Policies on Media Subpoenas*, POLITICO (Aug. 4, 2017, 11:42 AM), <https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329>.

36. See *id.*

37. See *id.*; Memorandum from the Office of the Attorney General to All Department Employees (Jan. 14, 2015), <https://www.justice.gov/file/317831/download>; Press Release, Dep't of Justice, Attorney General Holder Announces Updates to Justice Department Media Guidelines (Jan. 14, 2015), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-updates-justice-department-media-guidelines>.

38. See, e.g., Alexandra Ellerbeck, *How US Espionage Act Can be Used Against Journalists Covering Leaks*, COMMITTEE TO PROTECT JOURNALISTS: BLOG (May 20, 2017, 8:30 AM), <https://cpj.org/blog/2017/05/how-us-espionage-act-can-be-used-against-journalis.php>.

39. *Microsoft Corp. v. U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 896–97 (W.D. Wash. 2017); see Steve Lohr, *Microsoft Sues Justice Department to Protest Electronic Gag Order Statute*, N.Y. TIMES (Apr. 14, 2016), <https://www.nytimes.com/2016/04/15/technology/microsoft-sues-us-over-orders-barring-it-from-revealing-surveillance.html>.

40. See *Microsoft Corp.*, 233 F. Supp. 3d at 916.

lawsuit.⁴¹

A similar dynamic played out in the spring when Twitter filed a lawsuit against the government to block an order demanding that Twitter reveal the identity behind a user account that was critical of President Trump's immigration policies.⁴² The day after Twitter filed the lawsuit, the company voluntarily dismissed it, saying that the government had withdrawn the summons seeking the records.⁴³

Meanwhile, on February 27, 2018, the Supreme Court heard argument over whether United States law enforcement can compel Microsoft to hand over its users' data when the information is stored on servers located overseas—in this case, in Ireland, pursuant to a warrant issued in 2013 (under the Obama administration).⁴⁴ The U.S. Court of Appeals for the Second Circuit held that the warrant for the records violated the presumption against extraterritorial application of United States statutes.⁴⁵ In many ways, the case presented the inverse of the issues explored in Kurt Wimmer's article on the application of European Union privacy regulations to United States companies.⁴⁶ Judicial resolution of these issues, however, will have to wait for another day. After argument, Congress passed the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), which attempts to address the comity, law enforcement and privacy concerns that were raised in this case, and the Supreme Court thereafter dismissed the case as moot.⁴⁷

41. See Ellen Nakashima, *Justice Department Moves to End Routine Gag Orders on Tech Firms*, WASH. POST (Oct. 24, 2017), <https://www.washingtonpost.com/world/national-security/justice-department-moves-to-end-routine-gag-orders-on-tech-firms.html>.

42. See David Ingram, *Twitter Refuses U.S. Order to Reveal User Behind Anti-Trump Account*, REUTERS (Apr. 6, 2017, 3:48 PM), <https://www.reuters.com/article/us-twitter-lawsuit/twitter-refuses-u-s-order-to-reveal-user-behind-anti-trump-account-idUSKBN1782PH>.

43. See David Ingram, *Twitter Pulls Lawsuit over Anti-Trump Account, Says Summons Withdrawn*, REUTERS (Apr. 7, 2017, 1:20 PM), <https://www.reuters.com/article/us-twitter-lawsuit/twitter-pulls-lawsuit-over-anti-trump-account-says-summons-withdrawn-idUSKBN1792N9>.

44. See Associated Press, *Justices Look at How Older Law Applies to Internet Cloud*, N.Y. TIMES (Feb. 27, 2018, 2:48 PM), <https://www.nytimes.com/aponline/2018/02/27/us/politics/ap-us-supreme-court-microsoft-searches.html>.

45. See *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 201–02 (2d Cir. 2016), *cert. granted sub nom.* United States v. Microsoft Corp., 138 S. Ct. 356 (2017).

46. Kurt Wimmer, *Free Expression and EU Privacy Regulation: Can the New GDPR Reach U.S. Publishers?*, 68 SYRACUSE L. REV. 545 (2018).

47. See United States v. Microsoft Corp., 138 S.Ct. 1186, 1188 (Apr. 17, 2018); Brad Smith, *The CLOUD Act is an important step forward, but now more steps need to follow*, Microsoft On the Issues (Apr. 3, 2018), <https://blogs.microsoft.com/on-the-issues/2018/04/03/the-cloud-act-is-an-important-step-forward-but-now-more-steps-need-to-follow/>.

The Twitter lawsuit was filed in a year that saw many interesting First Amendment developments related to social media. The article in this issue by Professors Brown and Peters ably explores whether the government could regulate social media in order to curb the spread of “fake news” without running afoul of the Constitution.⁴⁸ In July, the Supreme Court held 8-0 that there was a First Amendment right to access social media, striking down a state law that made it a felony for registered sex offenders to access certain commercial social media websites like Facebook and Twitter.⁴⁹ Justice Kennedy’s majority opinion described the law as “unprecedented in the scope of First Amendment speech it burdens,” observing that

[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.⁵⁰

The Supreme Court’s recognition in *Packingham* that social media platforms offer “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard,”⁵¹ informs a lawsuit that was filed by the Knight First Amendment Institute at Columbia University on behalf of seven Twitter users who were “blocked” by President Trump—which means those users cannot see the President’s tweets in their own feeds, and cannot reply directly to his tweets.⁵² The Institute’s executive director explained,

President Trump’s Twitter account has become an important source of news and information about the government, and an important forum for speech by, to, or about the president. . . . The First Amendment applies to this digital forum in the same way it applies to town halls and open school board meetings. The White House acts unlawfully when it excludes people from this forum simply because they’ve disagreed with the president.⁵³

48. Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521 (2018).

49. See *Packingham v. North Carolina*, 137 S.Ct. 1730, 1738 (2017).

50. *Id.* at 1737.

51. *Id.*

52. See *Critics Blocked from President’s Twitter Account File Suit*, KNIGHT FIRST AMEND. INST. (July 11, 2017), <https://knightcolumbia.org/news/critics-blocked-presidents-twitter-account-file-suit>.

53. *Id.*

2018]

Foreword

519

The case is pending before a district judge in New York.

CONCLUSION

Although it is difficult to draw any firm conclusions about what the ultimate legacy of this administration will be for the First Amendment, there are a number of troubling signals on the horizon. At the same time, we have been inspired by the degree of civic engagement and exercise of First Amendment rights, and, thus far, the courts continue to be a bulwark for upholding civil liberties.