

newsletter
on
intellectual
freedom



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NSA surveillance controversy grows

Additional stories related to the National Security Agency's surveillance of Americans first exposed this summer by former NSA analyst Edward Snowden, now in Russia, may be found on pages 214, 225, 226, 227, 228, and 240.

Since 2010, the National Security Agency (NSA) has been exploiting its huge collections of data to create sophisticated graphs of some Americans' social connections that can identify their associates, their locations at certain times, their traveling companions and other personal information, according to newly disclosed documents and interviews with officials.

The spy agency began allowing the analysis of phone call and e-mail logs in November 2010 to examine Americans' networks of associations for foreign intelligence purposes after NSA officials lifted restrictions on the practice, according to documents provided by Edward J. Snowden, the former NSA contractor.

The policy shift was intended to help the agency "discover and track" connections between intelligence targets overseas and people in the United States, according to an NSA memorandum from January 2011. The agency was authorized to conduct "large-scale graph analysis on very large sets of communications metadata without having to check foreignness" of every e-mail address, phone number or other identifier, the document said. Because of concerns about infringing on the privacy of American citizens, the computer analysis of such data had previously been permitted only for foreigners.

The agency can augment the communications data with material from public, commercial and other sources, including bank codes, insurance information, Facebook profiles, passenger manifests, voter registration rolls and GPS location information, as well as property records and unspecified tax data, according to the documents. They do not indicate any restrictions on the use of such "enrichment" data, and several former senior Obama administration officials said the agency drew on it for both Americans and foreigners.

NSA officials declined to say how many Americans have been caught up in the effort, including people involved in no wrongdoing. The documents do not describe what has resulted from the scrutiny, which links phone numbers and e-mails in a "contact chain" tied directly or indirectly to a person or organization overseas that is of foreign intelligence interest.

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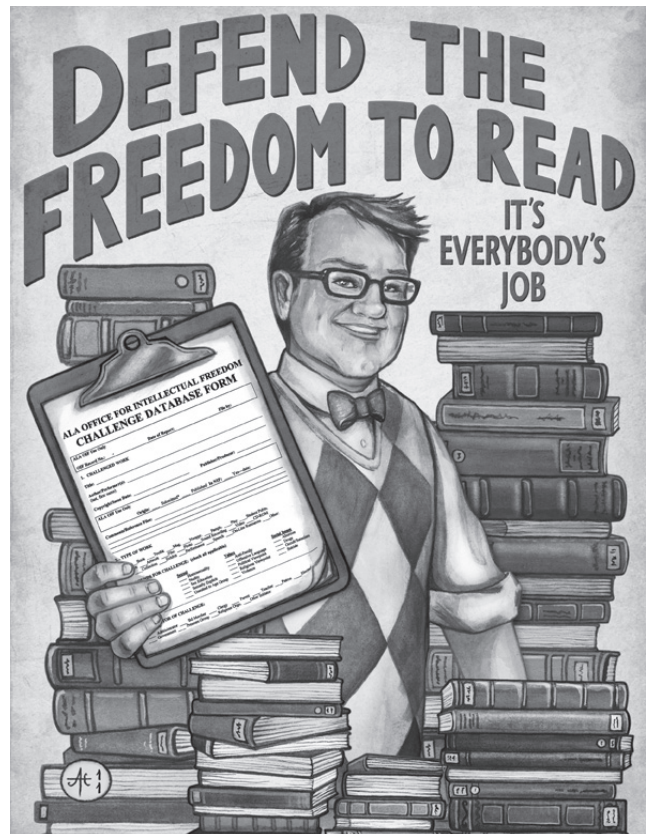
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CRS report on NSA surveillance

The following is the text of the summary of a report released September 4 by the Congressional Research Service. "NSA Surveillance Leaks: Background and Issues for Congress." The full text of the report may be found at <http://www.fas.org/sgp/crs/intel/R43134.pdf>

Recent attention concerning National Security Agency (NSA) surveillance pertains to unauthorized disclosures of two different intelligence collection programs. Since these programs were publicly disclosed over the course of two days in June, there has been confusion about what information is being collected and under which authorities the NSA is acting. This report clarifies the differences between the two programs and identifies potential issues that may help Members of Congress assess legislative proposals pertaining to NSA surveillance authorities.

The first program collects in bulk the phone records—including the number that was dialed from, the number that was dialed to, and the date and duration of the call—of customers of Verizon and possibly other U.S. telephone service providers. It does not collect the content of the calls or the identity of callers. The data are collected pursuant to Section 215 of the USA PATRIOT ACT, which amended the Foreign Intelligence Surveillance Act (FISA) of 1978. Section 215 allows the FBI, in this case on behalf of the NSA, to apply to the Foreign Intelligence Surveillance Court (FISC) for an order compelling a person to produce “any tangible thing,” such as records held by a telecommunications provider, if the tangible things sought are “relevant to an authorized investigation.” Some commentators have expressed skepticism regarding how such a broad amount of data could be said to be “relevant to an authorized investigation,” as required by the statute. In response to these concerns, the Obama Administration subsequently declassified portions of a FISC order authorizing this program and a “whitepaper” describing the Administration’s legal reasoning.

The second program targets the electronic communications, including content, of foreign targets overseas whose communications flow through American networks. These data are collected pursuant to Section 702 of FISA, which was added by the FISA Amendments Act of 2008. This program acquires information from Internet service providers, as well as through what NSA terms “upstream” collection that appears to acquire Internet traffic while it is in transit from one location to another. Although this program targets the communications of foreigners who are abroad, the Administration has acknowledged that technical limitations in the “upstream” collection result in the collection of some communications that are unrelated to the target or that may take place between persons in the United States. Notwithstanding these technical limitations, the FISC has

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privacy fears grow as cities increase surveillance

Federal grants of \$7 million awarded to Oakland, California, were meant largely to help thwart terror attacks at its bustling port. But instead, the money is going to a police initiative that will collect and analyze reams of surveillance data from around town—from gunshot-detection sensors in the barrios of East Oakland to license plate readers mounted on police cars patrolling the city’s upscale hills.

The new system, scheduled to begin next summer, is the latest example of how cities are compiling and processing large amounts of information, known as big data, for routine law enforcement. And the system underscores how technology has enabled the tracking of people in many aspects of life.

The police can monitor a fire hose of social media posts to look for evidence of criminal activities; transportation agencies can track commuters’ toll payments when drivers use an electronic pass; and the National Security Agency, as news reports this summer revealed, scooped up telephone records of millions of cellphone customers in the United States.

Like the Oakland effort, other pushes to use new surveillance tools in law enforcement are supported with federal dollars. The New York Police Department, aided by federal financing, has a big data system that links 3,000 surveillance cameras with license plate readers, radiation sensors, criminal databases and terror suspect lists. Police in Massachusetts have used federal money to buy automated license plate scanners. And police in Texas have bought a drone with homeland security money, something that Alameda County, which Oakland is part of, also tried but shelved after public protest.

Proponents of the Oakland initiative, formally known as the Domain Awareness Center, say it will help the police reduce the city’s notoriously high crime rates. But critics say the program, which will create a central repository of surveillance information, will also gather data about the everyday movements and habits of law-abiding residents, raising legal and ethical questions about tracking people so closely.

Libby Schaaf, an Oakland City Council member, said that because of the city’s high crime rate, “it’s our responsibility to take advantage of new tools that become available.” She added, though, that the center would be able to “paint a pretty detailed picture of someone’s personal life, someone who may be innocent.”

For example, if two men were caught on camera at the port stealing goods and driving off in a black Honda sedan, Oakland authorities could look up where in the city the car had been in the last several weeks. That could include stoplights it drove past each morning and whether it regularly went to see Oakland A’s baseball games.

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Obama efforts to control media 'most aggressive' since Nixon, report says

The Obama administration has “chilled the flow of information on issues of great public interest,” according to a report that amounts to an indictment of the president’s campaign pledge of a more open government. The report from the Committee to Protect Journalists, a non-profit dedicated to global press freedoms, said Obama has “fallen short” on his promises of a transparent government while at the same time forging ahead with an unprecedented effort—the “most aggressive” since the Nixon administration—to silence government officials and the media at large.

“Six government employees, plus two contractors including Edward Snowden, have been subjects of felony criminal prosecutions since 2009 under the 1917 Espionage Act, accused of leaking classified information to the press—compared with a total of three such prosecutions in all previous U.S. administrations,” said the committee’s report, prepared by Leonard Downie Jr., the former executive editor of *The Washington Post*.

In a 2008 campaign speech, however, Obama said: “I’ll make our government open and transparent so that anyone can ensure that our business is the people’s business. No more secrecy.”

Downie wrote that, because of the revelations of the NSA’s surveillance efforts by Snowden, government officials are “reluctant to even discuss unclassified” information amid fears that “leak investigations and government surveillance make it more difficult for reporters to protect them as sources.”

The White House objected to the report, the first time the committee has examined the press climate in the United States. The administration said Obama has given more interviews than his two predecessors combined, has placed online more government data, and has moved to limit the amount of classified government secrets.

But Downie disagrees in what is perhaps his most scathing comment in the report, which includes interviews with several Washington reporters. “The administration’s war on leaks and other efforts to control information are the most aggressive I’ve seen since the Nixon administration, when I was one of the editors involved in *The Washington Post*’s investigation of Watergate,” Downie said.

Among other conclusions, the report found that the White House:

- Employs the Internet to “dispense” favorable information while hindering efforts of a “probing press.”
- Often calls reporters and editors complaining about news stories.
- Spokesmen are “often hostile or unresponsive to press inquiries.”
- Has secretly seized telephone records from The Associated Press and Fox News.
- Declared in an affidavit for telephone records that a Fox News reporter may have breached the Espionage Act in reporting about the United States’ monitoring of North Korea’s nuclear program.

Reported in: wired.com, October 10.

READ BANNED BOOKS

— censorship dateline



libraries

Madison, Alabama

An Alabama legislator who does not support efforts to repeal the sweeping U.S. education initiative known as the Common Core Standards says he believes the reading list issued in conjunction with the standards needs to be revised.

State Senator Bill Holtzclaw (R-Madison) told Alabama Media Group in late August that he believes *The Bluest Eye*, by Nobel Prize-winner Toni Morrison, should be banned from high school libraries, even though it is on the Common Core Standard's recommended reading list for 11th-graders. His call for the ban came after he caught flak from fellow Republicans for opposing plans to repeal the national education standards.

Common Core Standards have been adopted in more than forty states as part of an effort to homogenize education across the country. Alabama adopted the standards in November 2010 and is implementing them this school year.

"The book is just completely objectionable, from language to the content," Holtzclaw told Alabama Media Group.

Published in 1970, Morrison's novel contains passages describing rape, incest and pedophilia. It has been banned from a number of schools over the years, and anti-Common Core groups around the country are coming out against the book, arguing that it contains topics too explicit for high school students. An appeal on Petition2Congress asks concerned citizens to write lawmakers to keep the book off the Common Core reading list. Conservative blog PolitiChicks describes the book as "Common Core approved child pornography."

Holtzclaw previously said he opposed repealing the Common Core Standards because such a decision should be

in the hands of the state school board, instead of legislators. Nevertheless, he told Alabama Media Outlet he believes a book like *The Bluest Eye* has no place in schools. Reported in: huffingtonpost.com, August 28.

Minneapolis, Minnesota

The chairman of the Anoka-Hennepin school board said September 24 that the district erred by not giving parents a chance to object to a book that he described as "R rated" being used in a high school summer reading program.

Eleanor & Park, a novel by Rainbow Rowell, tells the story of two outsider teens in the 1980s who find a common bond in music. Librarians had included the book on school library shelves, and it was selected for use in the summer "Rock the Book" program.

Parents of a student objected to the book's content, citing its use of profanity and its treatment of sexuality. The Anoka County Library had scheduled a visit by Rowell, but the event was canceled due to the controversy. Chair Tom Heidemann of the school board said officials were considering two issues: whether the book should have been included in the library, and whether it was appropriate for the reading program.

"The board has passed no judgment relative to whether or not that should or should not be in the library," Heidemann said. "That is a process that will involve the community and public hearings as we go forward. Where we really had the concern was where it was used as a reading program, which aligns more with classroom curriculum, which has a pretty high standard in our policies relative to whether or not we would allow an R-rated movie to be shown or, in this instance, an R-rated book, based on the adult content and profanity in the book."

Heidemann said concerns focused on "adult sexual issues and also the profanity. And just applying the Motion Picture Association rating guidelines would certainly put that as a hard R." If the board decides the book should not be the library, he said, "I don't think there would be a disciplinary action" against the staff who put it there. He said the library has broader standards than classroom curricula.

"We're tolerant of many, many more points of view for library materials, whereas when you get into the classroom setting, you have to be very careful to make sure you're partnering with parents and letting them help make decisions relative to their kids," he said.

"The issue the board had was that this was a single choice given to students without parent consent. We believe that there has to be a process where we partner with parents to help make that decision that's right for their children. We can't always be making that decision for kids. In this instance, I think parents had a role and we had an obligation to let them know what the content of this book was. ... We did not give the parents the tools necessary to help make the judgment on whether or not this was appropriate for their kids."

Julie Blaha, president of the Anoka-Hennepin Education Minnesota, the union that represents the librarians, said the library staff had followed sound procedure in evaluating the book. She said the book's characters encounter "all kinds of really valuable, challenging issues in their world. And they rise above it, make good choices, and it's a good romance too."

"I think the process our librarians followed made a lot of sense," Blaha said. "They read the book, consulted professional journals, consulted each other, talked to other librarians about this book, and really understood who it was for. These are 16-, 17- and 18-year-olds reading this book. Frankly, these are kids who drive themselves to R-rated movies."

Blaha said the critics objecting to *Eleanor & Park* seemed to have "catalogued every word, looked at every word, but haven't really read the story ... The idea that this is so easily defined simply by a list of words is problematic."

"This is very much the world our students live in, and I think it's actually handled quite sensitively," Blaha said. "The big concern we have is that with all these decisions ... we seem to have jumped the gun and gone to immediately starting to cast aspersions on a book without talking to the librarians or, frankly, even without reading the book first." Reported in: minnesotapublicradio.org, September 25.

Alamogordo, New Mexico

Alamogordo Public Schools has "temporarily removed" a book from its library and English curriculum because of what one parent calls "inappropriate content."

Neverwhere, by bestselling British author Neil Gaiman, has been used in Alamogordo High School's 10th-grade English curriculum since 2004. The science fiction/fantasy story follows Richard Mayhew, an Englishman who helps a girl he finds bleeding on a London sidewalk. From there, he is drawn into an alternate reality of London's abandoned subway system and sewer tunnels, and finds a world far stranger and more dangerous than the one above. Mayhew has fallen through the cracks of reality and landed somewhere different, somewhere that is called Neverwhere.

But a particular passage on Page 86 grabbed the attention of Nancy Wilmott, whose teenage daughter at Alamogordo High School was reading the book as part of an assignment. The four-paragraph passage graphically describes an adulterous sexual encounter between a married man and a single woman in which the F-word is used three times, along with a brief description of groping of one's anatomy.

"I really think that the school needs to let the parents know what their students are going to read beforehand, not the day before or after," Wilmott said. "I am not a closed-minded parent that thinks my kids should hear no evil. Just not something with such graphic detail—a intimate situation between two adults."

Even though the passage is the only one of its kind being singled out, Alamogordo Public Schools Superintendent

Dr. George Straface said the book has been "temporarily removed from usage" until it can be reviewed.

"I reviewed the language personally. I can see where it could be considered offensive," he said. "The F-word is used. There is a description of a sexual encounter that is pretty descriptive, and it's between a married man and a single woman. Although kids can probably see that on TV anytime they want, we are a public school using taxpayer dollars. On that basis, we have decided to temporarily remove the book until we can review it with our panels and make a decision."

That didn't sit well with Pam Thorp, an English teacher at AHS, who is vehemently opposed to what she says amounts to censorship.

"I cannot and will not condone the censorship this parent is promoting," she said. "The implication that we are careless or irresponsible simply is not true. Presenting challenging material of merit that may contain some foul language or mature situations, in a sensitive and academic manner, is part of our responsibility to our students in order to engage them in evaluating the human condition. I take that responsibility very seriously and strive every day to encourage my students to think ... about the world, about their community, about their friends and about themselves. Censorship is the opposite of that."

Straface said a process would begin to form a panel that will review complaints about books the school system uses in its curriculum. He added that "three or four" parents have complained about the material contained within *Neverwhere*.

Straface said there currently is a process by which parents are informed of possible controversial material via a letter sent home with students. He said it gives parents the opportunity to opt their child out of an assignment in favor of a similar assignment.

Wilmott said she received no such letter.

"There was no book waiver until after they had been reading for well over a week," she said. "I was upset that parents were not notified that the book was being read. If a movie is PG-13 or higher, a parent must sign a waiver before a student can watch. The same should have happened with such a book as this."

AHS Principal Darian Jaramillo informed several teachers and staff that she "would like the book pulled from the shelves and not used in classes."

"From here forward, if you are reading any material that has a controversial issues [sic] or adult language/content, please send a letter home to parents about that specific book and what the content is," she wrote.

Because the school system has suspended use of the book, Straface said he is also hearing from First Amendment advocates. "I'm also hearing from the other side that says we shouldn't have done that because, while the language that's there may be objectionable, they hear much worse in the student commons area," he said. "That may be true—and it

probably is—but I don't support it."

Among those from whom Straface heard was ALA's Office for Intellectual Freedom: "The request to remove *Neverwhere* from the library and classrooms of Alamogordo High School represents an anti-democratic effort to suppress ideas and viewpoints deemed by one person to be uncomfortable or offensive," OIF Director Barbara Jones wrote. "Denying students access to information on such grounds not only undermines our democratic traditions, it also undermines the teachers' and librarians' mission to help students broaden their thinking, acquire essential coping and problem-solving skills, and develop a love for reading that will enrich their lives long after they graduate from Alamogordo High School."

The book was recommended for use in Alamogordo in 2004, long before Straface became superintendent in 2011. But he said it was recommended by the publishers of a textbook the school currently uses.

"That is not unusual," he said. "Textbook publishers always provide a list of books to use as supplements to lessons we are trying to teach." But Straface said a recent check of that recommended list no longer contains *Neverwhere*.

Thorp said Wilmott never approached the English teacher, but instead went directly to administration officials with her concerns about the book. The teacher assigned the student an alternate book once she learned through the proverbial grapevine that there was a problem, Thorp said.

"This happened more than a week ago," she said. "We thought things had calmed down and then it all blew up again because she's promoting this agenda. (The parent) hasn't been in contact with the teacher throughout this whole process. That is something that she has completely bypassed to get what she wants, which is to have this book completely taken out of the school.

"It's not about her child, specifically, anymore. It's about censorship."

Straface emphasized that *Neverwhere* had not been banned—yet. "But it may be," he said. "If it becomes so, my rationale would be that after a review, it was our judgment that this was not appropriate for 10th graders. It is our prerogative to do that in the literature that we teach. Some people may call that censorship—and I would say, 'Yes, it is.'" Reported in: *Alamogordo News*, October 11.

schools

Verona, New Jersey

Some Verona parents recently raised concerns about a book in the high school curriculum. While reading the award-winning *Looking for Alaska*, by John Green, with her son, Melissa Ragan said she found the sexual nature of the story inappropriate.

"The first thing I thought was maybe I bought the wrong

book," Ragan said. "I thought for sure there was no way this could be required reading for my son."

Ragan reached out to members of the Verona Board of Education and stated in an e-mail that she did not "especially want my children reading about drinking, smoking, using drugs, and gratuitous sex scenes, including one where students describe pornography and one where students engage in detailed oral sex."

Ragan also included attachments of the passages from the book. The excerpts covered six of the 221 pages and described the excess of underage drinking at the fictional school, a section about two teenagers' first encounter with oral sex and a game of "Truth or Dare" that leads to kissing and fondling between two characters.

The plot of *Looking for Alaska* involves high schooler Miles "Pudge" Halter's departure from his old, mundane life as he enters a new boarding school and meets the adventurous Alaska Young. The book is a *New York Times* Bestseller and won the Michael L. Printz Award for Excellence in Young Adult Literature in 2006.

Board of Education President John Quattrocchi said he directed Ragan to Director of Curriculum and Instruction Charlie Miller and Humanities Supervisor Sumit Bangia for further information on the book.

Quattrocchi said school officials try to select works that are both age appropriate and interesting to the students. He added that there are often other choices available in reading assignments if a parent or student should object to one of the selections.

Looking for Alaska, published in 2005, was assigned to the sophomore college prep class over the summer. The students were asked two questions to answer in one typed, double spaced essay. *Feed*, a novel by M.T. Anderson, was the other option for the class.

To his knowledge, Miller said this was the first year *Looking for Alaska* was included in the Verona High School lesson plan. He added that there is a filtering process for book selections, but moving forward there may be a redesign to the curriculum committee. Miller said the changes could allow for more "stakeholders" to be present in the decision of choosing literature, which could include more teachers and potentially some parents.

"If anything comes up as being mature content, we would have a disclaimer to give parents a summary so they can be part of the decision-making process," Miller said of future plans. He also said any parents now who may have some concerns about the material can e-mail or call him.

Ragan said, though, that she is "completely unsatisfied" with the responses she received from school officials so far, as she felt she was being handed off to person after person.

One parent said she spoke to Ragan about the book and shared some of her concerns. "I don't think anyone's saying we want books banned," the parent said. "That's never anybody's desire. It's more just the notion that some of the things [in the book] are maybe not as desirable."

Another parent said her husband would “hit the roof” if their son had to read the content found in *Looking for Alaska* and she would end up having to home-school him. “I’m really scared about this,” she said. “I don’t know what we can do but I’m all for getting it off [the curriculum].” Reported in: *Verona-Cedar Grove Times*, August 30.

Columbus, Ohio

For the second time this year, Ohio School Board President Debe Terhar came under fire for voicing her personal opinion, this time about a novel by Ohio native and Nobel Prize-winning author Toni Morrison.

Terhar said at the state school board meeting September 10 that *The Bluest Eye*, Morrison’s first novel, should not be included on a suggested reading list for Ohio high-school students because it is “totally inappropriate.”

“I don’t want my grandchildren reading it, and I don’t want anyone else’s children reading it,” Terhar said at the board meeting. “It should not be used in any school for any Ohio K-12 child. If you want to use it in college somewhere, that’s fine.”

At the time, Terhar did not specify why she opposes Morrison’s novel, but said it is inappropriate for the school board to “even be associated with it.”

Set in the 1940s in Lorain, Ohio, the book’s heroine is a black girl, Pecola Breedlove, who dreams of how her life would be better if she had blue eyes like a white person. In the novel, the girl is raped and impregnated by her father.

Neither the board nor the Ohio Department of Education made any immediate changes to the book list that is suggested, not required, in Common Core curriculum standards being implemented by Ohio and other states to better prepare students for college. *The Bluest Eye* is on the list for 11th-grade English/language arts.

John Charlton, spokesman for the Department of Education, said Morrison’s book is “not part of the new learning standards in Ohio and it’s not required of any school or teacher. Local school districts make their own decisions.”

“It’s not the position of the board that the book, or any book, be banned,” Charlton added.

Terhar was backed by fellow board member Mark Smith, president of Ohio Christian University, who said he is very concerned about such books, because they are “quite divisive, and the benefit educationally is questionable at the least.”

“I see an underlying socialist-communist agenda ... that is anti what this nation is about,” Smith said.

Morrison, a Lorain native, published *The Bluest Eye* in 1970. She won the Pulitzer Prize for *Beloved* in 1988 and was awarded the Nobel Prize for literature in 1993.

Paul Bogaards, head of media relations for Knopf Doubleday, Morrison’s publisher, responded to Terhar’s comments. “Toni Morrison’s contribution to American letters is widely known. ... When school representatives

choose to trumpet ideology over ideas, asking for books to be banned or withdrawn, students suffer. We oppose literary censorship in all forms and support the First Amendment rights of readers to make their own reading choices.”

The Common Core standards have drawn fire from conservatives, and Morrison’s book has become the latest flash point because of its graphic rape scene. In August an Alabama state senator unsuccessfully sought to ban use of the novel in schools (see page 216).

The American Civil Liberties Union of Ohio sent a letter to Terhar questioning her comments. “Unfortunately, there is a long and troubling tradition of attacking African-American literature on the grounds that it is ‘too controversial’ for young people,” Christine Link, executive director of the ACLU of Ohio, said in a statement. “These attempts to ignore or gloss over complex issues do a disservice to our students, who cannot lead our future unless they fully understand the past and present.”

In a statement Terhar said her comments reflected her personal views and stressed that she remained “completely supportive of Ohio’s new learning standards.”

“The comments I made reflected my concern about the graphic passages contained in a specific text. I do not personally believe these passages are suitable for school-age children. Nothing more and nothing less should be inferred. In particular, no disparagement was meant towards the celebrated career of Ohio author Toni Morrison.”

After President Barack Obama’s call for stricter gun-control laws earlier this year, Terhar posted a picture of Adolf Hitler on her Facebook page with the quotation: “Never forget what this tyrant said, ‘To conquer a nation first disarm its citizens.’—Adolf Hitler.” She survived an ouster vote by fellow board members and apologized for her “error in judgment.” Reported in: *Columbus Dispatch*, September 13.

Troy, Pennsylvania

The Pillars of the Earth, by Ken Follett, has been pulled from a senior English Honors class in the Troy Area School District after parent objections. The objections concerned material of a sexual nature in the book that the parents deemed inappropriate. The parents attended the most recent school board meeting to discuss the issue and ask questions. District superintendent W. Charles Young confirmed that the book has been pulled from the class.

The district’s policy requires the superintendent, the principal and the school board to approve books for inclusion in classes, and in this case, the policy wasn’t followed, he said. He called it a “systemic failure.” When questioned at the last meeting, he said that there is “a policy in place to fix it.” He was referring to the potential of such an incident taking place again.

Young assured the group of concerned individuals at the meeting that the district would do its very best to ensure

that it wouldn't happen again. He also noted, however, that humans are involved, an allusion to the proverb, "to err is human."

Young told one of the concerned people at the meeting to call him regarding her concerns about a single copy of the book being in the library.

The American Library Association website shows the book as one of the "100 most frequently challenged books: 1990-1999." It's no. 91 on the list. Reported in: *Troy Daily Review*, September 13.

Austin, Texas

Religious conservatives serving on state textbook review panels have criticized several proposed high school biology textbooks for not including arguments against Charles Darwin's theory of evolution. The review panels include several creationists. They urged the State Board of Education to reject the books unless publishers include more disclaimers on key concepts of evolution.

One reviewer even suggested a rule requiring that each biology book cover "creation science." That would run counter to a 1987 U.S. Supreme Court ruling. The decision banned the teaching of creationism in public school science classes.

The evaluations were presented at a board meeting in September. Publishers must consider them, along with testimony. They can make changes before the board votes on the texts in November.

"I understand the National Academy of Science's strong support of the theory of evolution," said Texas A&M University nutritionist Karen Beathard, one of the biology textbook reviewers. "At the same time, this is a theory. As an educator, parent and grandparent, I feel very firmly that creation science based on biblical principles should be incorporated into every biology book that is up for adoption."

Other reviewers objected to the books' acceptance of key evolutionary principles. Among them is the fossil evidence for the evolution of humans and other life species.

Former State Board of Education Chairwoman Gail Lowe nominated nearly a third of the 28 reviewers for biology books. A social conservative and creationist, Lowe was defeated in her re-election bid last year.

Texas Freedom Network president Kathy Miller said that coverage of evolution and climate change in biology books from seven publishers has come under fire from social conservatives. Her group often spars with social conservative organizations over education issues.

"Once again, culture warriors on the state board are putting Texas at risk of becoming a national laughingstock on science education," Miller said. "What our kids learn in their public schools should be based on mainstream, established science, not the personal views of ideologues, especially those who are grossly unqualified to evaluate a biology textbook in the first place."

As one of the largest textbook purchasers in the nation, Texas wields strong influence on books marketed in other states.

In all, publishers have offered 14 high school biology books for adoption in Texas. That includes offerings from the three big textbook publishers: Houghton Mifflin Harcourt, McGraw-Hill and Pearson. Although school districts are not required to buy textbooks adopted by the board, most do. To get on the list, a book must cover at least half of the curriculum requirements in each subject area.

Social conservatives on the review panels also criticized the coverage of global warming in some books. They argued that questions remain about the impact of climate change.

The science books up for adoption reflect curriculum standards that the education board approved in 2009. The vote followed lengthy debate over evolution and how it should be taught in Texas schools. Reported in: *Dallas Morning News*, September 9.

theater

New Ulm, Minnesota

In New Ulm, a small town 85 miles southwest of Minneapolis, September 27 was supposed to be the opening night for a production of *Inherit the Wind*, the classic play written more than a half-century ago depicting a fictionalized version of the 1925 Scopes Monkey trial. Instead, the play has been shut down due to opposition from professors and administrators at Martin Luther College (MLC). The play's crime? Being pro-evolution, and thereby endangering the college's religious identity.

The play wasn't even being performed at MLC. It was a production of the New Ulm Actors Community Theatre. But the theater group has routinely held auditions and rehearsals at the college, and MLC student Zach Stowe was chosen as director. After seeing a poster for an audition of *Inherit the Wind*, MLC professors and administrators objected and banned the audition.

Stowe resigned as director after "a flood of e-mails and letters objecting to his association with the play from MLC professors" and community members, fearing possible punishment from the school. Following Stowe's departure, six cast members who were also MLC students resigned from the play, forcing it to be postponed and possibly cancelled.

Jeffrey Schone, MLC's VP of Student Life, explained: "We felt it was not compatible with what [the school] teaches the Bible says about the universe and the world. This is a ministerial school. People employing our students need confidence about their views." Reported in: *academeblog.org*, October 1.

publishing

Washington, D.C.

The Obama administration is blocking a federal law-enforcement agent from publishing a book about the failed “Fast and Furious” gun-smuggling sting operation because of concerns that the book would negatively affect morale, the American Civil Liberties Union charged October 7. The ACLU said that the federal Bureau of Alcohol, Tobacco, Firearms and Explosives is worried that the book proposed by an ATF agent would hurt relationships with other U.S. law-enforcement agencies.

In a six-page letter to ATF Deputy Director Thomas Brandon, the ACLU said the bureau’s decision to block the book proposed by Special Agent John Dodson was a violation of his First Amendment rights. The ACLU described Dodson as a whistle-blower.

According to the letter, the ATF denied Dodson’s request to try to publish a book about his version of the Fast and Furious operation scandal because the bureau predicted it would have “a negative impact on morale in the Phoenix (Field Division) and would have a detrimental” impact on ATF relationships with the FBI and the Drug Enforcement Administration.

A federal law-enforcement official said the government is still considering whether Dodson can publish his proposed book if he doesn’t make any money. The official said federal law generally bars government employees from outside work that is based on their official duties.

Dodson was an agent in the Phoenix field office, where the Fast and Furious investigation was run from, when he went to Congress with details about the sting operation in which the ATF allowed gun-runners to buy weapons in hopes of tracking the weapons and disrupting Mexican gun-smuggling rings. At least one of the guns was found at the scene of the 2010 shooting death of Border Patrol Agent Brian Terry in southern Arizona.

In the wake of the public revelations about Fast and Furious, many top bureau leaders were reassigned, forced out of the agency or retired, including then-Acting Director Kenneth Melson.

In a statement provided by the ACLU, Dodson defended his book. “At the end of the day, we have a right to know and talk about what law-enforcement agencies do in our name,” Dodson said. Reported in: *Arizona Republic*, October 7.

prisons

Hartford, Connecticut

The Connecticut Department of Correction will reconsider its policy on prisoner reading material after an acclaimed novel by Connecticut author Wally Lamb was removed, then reinstated, on the library shelves at York Correctional Institution in August.

“This experience has opened up a lot of eyes,” said Michael Lawlor, a top adviser to Gov. Dannel P. Malloy on criminal justice policy. “The process has to be adjusted.”

Lamb’s 1992 novel, *She’s Come Undone*, was pulled due to “sexually explicit” content after the Media Review Board rejected an inmate’s request to read the book. At that same August 6 meeting, the board, which scrutinizes all inmate reading requests, rejected five other books on similar grounds: *Capital Punishment*, by Billy Wayne Sinclair; *Dirty Spanish Workbook*, by Ulysses Press; *Hate List 2*, by Reign; and *Lust to Kill* and *Last Time We Saw Her*, both by Robert Scott.

Department policy permits the rejection of materials deemed sexually explicit, violent or otherwise objectionable unless the material, taken as a whole, has redeeming literary, educational or scientific value. Lawlor and others argued that Lamb’s book is a work of art with an inspirational message and should be permitted on the library shelves at the women’s prison, despite some sexually explicit passages.

The department has barred pornography inside the state’s prisons since June of 2012. Magazines barred by the state’s correctional facilities in recent weeks include *Phat Puffs*, *Smooth Girl* and *Inked Girl*. But also on the list of periodicals rejected in August was that month’s issue of *GQ* magazine and the July 22 edition of *The New Yorker* because “its content poses a threat to the safety or security of staff, other inmates, or the public, facility order or discipline or rehabilitation.” Numerous issues of the Coalition for Prisoners’ Rights newsletter are also on the prohibited list.

“The DOC’s review board seems to be erring on the side of censorship,” said David McGuire, a staff attorney with the American Civil Liberties Union of Connecticut. “Prisoners have a right to these materials unless there’s penological harm.”

McGuire said he appreciates the challenge that the department faces in assessing a large volume of books and periodicals twice a month, but said he fails to see how an entire issue of the *New Yorker* magazine could promote a dangerous environment.

“It’s not an easy job, but when they err on the side of complete censorship, they violate prisoners’ rights,” McGuire said. The ACLU has received letters from prisoners complaining that the books they sought to purchase had been rejected by the review panel.

At the August 6 meeting, the Media Review Board approved 37 books and 162 magazines and rejected 20 books and 32 magazines. Portions of another 15 magazines were ordered removed and six books, including *The Evil Side of Money*, are under further review.

Among the offensive material ordered removed by the board was an ad for diaper rash cream on page 31 of the August 2013 edition of *Parents* magazine. The ad, which

(continued on page 250)

from the bench



U.S. Supreme Court

Amid a slew of actions on the first day of its 2013–14 term, the U.S. Supreme Court let stand two appeals court rulings that raised free speech issues on college campuses.

In one, *Crystal Dixon v. University of Toledo*, the justices declined to hear a challenge to a 2012 decision in which the U.S. Court of Appeals for the Sixth Circuit upheld Toledo’s firing of a former human resources administrator who had made comments some viewed as anti-gay. The Sixth Circuit panel ruled that Dixon was a policy maker who engaged in speech on a policy issue related to her position, and that the university’s interests in upholding its equal opportunity policies outweighed her interests in commenting on a matter of public concern.

The Supreme Court also declined to hear *Ed Ray v. OSU Student Alliance*, in which the U.S. Court of Appeals for the Ninth Circuit last year ruled that student journalists at Oregon State University had provided sufficient evidence to prove a free speech violation by administrators who signed off on the seizure of a conservative publication’s distribution bins, but were prevented from presenting it because the lower court judge erred in not letting them amend their lawsuit. Reported in: insidehighered.com, October 8.

The Supreme Court declined October 7 to weigh into the legal thicket of when an online threat becomes worthy of prosecution, a decision leaving conflicting federal appellate court views on the topic.

Without comment, the justices let stand an Iraq war veteran’s 18-month sentence for singing in a YouTube video he would kill a local Tennessee judge if the judge did not grant him visitation rights to his young daughter. The veteran’s petition to the high court came at a time when it’s routine for adults and juveniles to be prosecuted in federal and state court for their threatening online speech.

Attorneys for the veteran, Franklin Jeffries, maintained that the federal threats law—which dates to a 1932 statute making extortion illegal and applies to the offline world as well—was unconstitutional. A felony conviction, these lawyers said, is wrongly based on whether a “reasonable person” would believe the threatening statement was made with the intent to inflict bodily injury and was uttered to achieve some goal through intimidation.

The convict’s counsel argued to the justices in a filing that what should matter is whether the person making the threat was serious, not whether a “reasonable person” believed the threat would be carried out. Jeffries was suffering post traumatic stress disorder and never intended to carry out his words, his lawyers said. They said psychologists urged him to vent his frustration with the child-custody courts in a song.

In his eight-minute YouTube video, Jeffries strummed a guitar while singing a song of revenge in 2010. “And when I come to court this better be the last time. I’m not kidding at all, I’m making this video public. ‘Cause if I have to kill a judge or a lawyer or a woman I don’t care,” Jeffries chants on the video. “Take my child and I’ll take your life,” the song continues.

Of eight circuit courts of appeal to decide the issue, only the San Francisco-based U.S. Court of Appeals for the Ninth Circuit has chosen to view the law in line with Jeffries’ interpretation. When there is a split in circuits, that’s often when the high court intervenes to assure conformity across the country.

The Obama administration argued in a brief to the justices that the federal law, which is mirrored by many state statutes, is designed to protect individuals from fearing violence, regardless of whether the person who made the threat actually meant it. The Solicitor General’s office wrote the justices that, “requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats.” Reported in: wired.com, October 7.

schools

Washington, D.C.

A federal judge has thrown out a lawsuit challenging 2011 regulations for the main federal education privacy law that added student identification numbers to the “directory” of information that may be disclosed by schools and colleges. The Electronic Privacy Information Center and four individuals sued the U.S. Department of Education over the latest rules for the Family Educational Rights and Privacy Act of 1974, or FERPA.

But Judge Amy Berman Jackson of U.S. District Court in Washington issued summary judgment for the Education Department, ruling that the plaintiffs have not suffered any real legal injuries stemming from the regulations and thus they lack legal standing to bring their suit.

“The individual plaintiffs have alleged nothing more than a hypothetical possibility of some vague harm, and that harm does not even flow from the challenged regulations,” Judge Jackson said in her September 26 decision. “And the organizational plaintiff, EPIC, complains simply that the new rules have prompted it to engage in the very sort of advocacy that is its *raison d’être*.”

FERPA governs the disclosure of student records by educational institutions receiving federal funds. Most records generally may not be disclosed without a parent’s consent, or the consent of an adult student.

Schools and colleges, however, may disclose directory information without consent, including a student’s name, address, participation in sports and activities, dates of attendance, and degrees awarded, among other categories.

The 2011 regulations added student ID numbers or unique personal identifiers to the list of directory information, including those displayed on student ID badges, as long as such numbers cannot be used to access the student’s other educational records without a password or PIN.

The rules also slightly changed some definitions in the law in a way that EPIC said would “expose troves of sensitive, non-academic data” and “insufficiently safeguard students from the risk of re-identification,” or allowing someone to use a student ID number from a card to access more detailed records, the organization said.

The EPIC suit said the Education Department lacked authority under FERPA to adopt the regulations it did and thus violated the Administrative Procedure Act.

“Unlike other directory information such as name and major field of study, student ID numbers used in conjunction with other readily available directory information provide access to education records in violation of the FERPA,” the privacy group said in one court filing. “Publicly available unique student identifiers expose personal information that places at risk the privacy of students, the precise concern of Congress in enacting the statute.”

Judge Jackson said in her opinion that “this case begins and ends with plaintiffs’ constitutional standing to bring their claims.” The judge suggested that the only plaintiff who came close to having standing to challenge the regulations was Pablo Garcia Molina, a doctoral student at Georgetown University (who also happened to be an administrator there.)

“Plaintiffs have not shown that disclosure of Molina’s Georgetown University ID number on a badge makes it substantially more probable that he will be the victim of identity theft,” the judge said. Reported in: *Education Week*, September 30.

Chicago, Illinois

Federal courts rarely afford much weight to the

“academic freedom” of public school teachers when they’re disciplined for what they say during class, but an Illinois district court has made an exception in a rather unlikely factual setting: A Chicago teacher suspended for saying the “n-word” in front of sixth-graders.

In *Brown v. Chicago Board of Education*, a federal judge in the Northern District of Illinois refused September 25 to dismiss a middle-school teacher’s First Amendment challenge to a suspension imposed after he used the racially offensive word as part of a cautionary classroom discussion.

There was no allegation that English teacher Lincoln Brown directed the word toward any student as an insult—to the contrary, he was lecturing students about not using the term—but the school district suspended him for five days for violating a rule against “using verbally abusive language.”

When Brown sued, alleging the suspension violated his First Amendment rights, the Chicago school district moved to dismiss the case on the grounds that a teacher’s remarks in the course of classroom instruction are the official speech of the school and not the constitutionally protected speech of an individual.

The school’s argument was rooted in the U.S. Supreme Court’s 2006 ruling, *Garcetti v. Ceballos*, in which the Court refused to protect a government employee against punishment for speech “made pursuant to the employee’s official duties.” The Court declined in *Garcetti* to decide whether educators might be entitled to greater protection for their workplace speech on the grounds of “academic freedom.” Courts have recognized—but never precisely defined the boundaries of—academic freedom as an important element of promoting the free exchange of ideas necessary for learning.

In September, the California-based federal Ninth Circuit declined to apply the *Garcetti* rule to the speech of a Washington college professor who criticized his institution’s teaching methods (see page 000). That decision, in the college context, was less groundbreaking than Judge Edmond E. Chang’s decision in *Brown*, since courts have been more hesitant to second-guess the discipline of educators at the K-12 level.

Of decisive significance in Brown’s case, there was no evidence that the school had a categorical rule against the use of the “N-word” before he was punished. Because school rules would not, on their face, have given Brown notice that mentioning the word in the teaching context was forbidden, Brown will have a chance to go forward with his First Amendment claim.

The Brown ruling is at a preliminary stage of the case, and the school still may ultimately prevail. But the judge’s willingness to recognize academic-freedom protection for a middle-school teacher is worth noting—and watching if the case is appealed. Reported in: *splc.org*, October 8.

colleges and universities

Chicago, Illinois

Faculty free speech advocates gained a victory September 16 when an Illinois appeals court overturned a lower court's ruling that Northeastern Illinois University was protected by state anti-SLAPP (strategic lawsuit against public participation) laws in a defamation suit brought by a professor who alleged retaliation for her activism on campus. In its opinion, the court said that the university "does not refute any essential element" of Loretta Capeheart's claims of defamation, including that a university administrator had said she "stalked" a student on campus. The court also found that the university failed to meet its burden of proof that Capeheart's case was a SLAPP, under the Illinois Citizens Participation Act.

Capeheart's supporters, including the American Association of University Professors, have said that the act was designed to protect individuals from more powerful institutions, and that Northeastern Illinois' defense was turning it on its head. The ruling reinstated Capeheart's initial lawsuit against the university, which includes claims that she was denied a department leadership position for backing students who protested the Central Intelligence Agency and for publicly criticizing administrative spending. In an e-mail, Capeheart, who is still a tenured professor of justice studies at Northeastern Illinois, said "we are thrilled that the appeals court did not allow for the perversion of the act."

A university spokeswoman said that Northeastern Illinois is evaluating the decision and "weighing its options." Reported in: insidehighered.com, September 17.

Pullman, Washington

The U.S. Court of Appeals for the Ninth Circuit has ruled that the First Amendment protects a Washington State University professor's calls for change at his institution, handing a major victory to advocates of the idea that college faculty members have speech rights beyond those afforded other public employees.

In a decision handed down September 4, a three-member panel of Ninth Circuit judges held that a U.S. District Court judge had erred in concluding that David K. Demers, then a tenured associate professor of communications, lacked any First Amendment protection for his criticisms of Washington State and its Edward R. Murrow College of Communication, where he worked.

The appeals court ruling overturned the lower court's summary judgment in the university's favor and sent the case back to that court to weigh Demers's claims that Washington State administrators had retaliated against him over his speech.

With the ruling, the Ninth Circuit became the second to buttress the First Amendment rights of public colleges'

faculty members in the wake of a 2006 U.S. Supreme Court decision that created uncertainty over their speech protections. That ruling, in *Garcetti v. Ceballos*, held that public agencies can discipline their employees for statements made in connection with their jobs, but put off the question of whether that should apply to "speech related to scholarship or teaching."

In its conclusion the Ninth Circuit panel's opinion states, "We hold that there is an exception to *Garcetti* for teaching and academic writing."

In a 2011 decision involving an associate professor who had accused the University of North Carolina at Wilmington of denying him a promotion based on his conservative views, the U.S. Court of Appeals for the Fourth Circuit similarly concluded that a faculty member of a public college should be considered exempt from *Garcetti*.

The federal appeals courts for the Third, Sixth, and Seventh Circuits, however, have gone the opposite way, holding that the *Garcetti* decision left public-college faculty members unable to claim being the victims of illegal retaliation over certain types of speech related to their jobs.

The split among the federal appeals courts makes it likely that the Supreme Court will feel a need to revisit the question of how its *Garcetti* decision applies to speech in academic settings.

In the meantime, the American Association of University Professors and the Modern Language Association have mounted efforts to pressure public colleges to protect the speech of faculty members through policies or contract provisions. Among the institutions that have adopted such provisions, the University of California's Board of Regents in July amended its faculty code of conduct to protect faculty members' "freedom to address any matter of institutional policy or action."

Demers's lawsuit against Washington State had put its journalism school at odds with free-speech advocacy groups such as the AAUP and the Thomas Jefferson Center for the Protection of Free Expression, which had jointly warned that a ruling denying the professor any First Amendment protection for the speech at issue would set "a dangerous precedent" jeopardizing academic freedom and the sound governance of public colleges.

Demers had argued in his lawsuit against several university administrators that he had been subjected to unfairly bad performance reviews, changes in his class assignments, an unwarranted investigation for improper behavior, and other negative management actions in response to two of his writings: a pamphlet calling for changes in the management of the journalism school and a book, *The Ivory Tower of Babel*, that criticized Washington State's administration more broadly. The university's lawyers had argued that the actions taken against him were justified and unrelated to his speech.

In dismissing Demers's lawsuit in 2011, Judge Robert H. Whaley of the U.S. District Court based in Spokane

rejected the professor's assertions that the speech at issue had not been made pursuant to his official duties. Judge Whaley also held that the speech at issue did not deal with a matter of public concern and therefore did not qualify for protection under a 1968 Supreme Court ruling, in *Pickering v. Board of Education*.

But the Ninth Circuit panel disagreed. Its opinion, written by Judge William A. Fletcher, said that the pamphlet published and circulated by Demers clearly tackled a matter of public concern because it "contained serious suggestions about the future course of an important department" at the public journalism school. The opinion concluded that the provisions of *Pickering*, not those of *Garcetti* apply to academic expression.

The panel rejected Demers's assertions that he had suffered retaliation for his book. It also held that the administrators named as defendants in the case are entitled to qualified immunity, sparing them the possibility of paying any punitive damages.

But applying the *Garcetti* ruling to teaching and academic writing, the opinion said, "would directly conflict with the important First Amendment values previously articulated by the Supreme Court."

Kathy Barnard, a Washington State University spokeswoman, declined to comment on the decision other than to note that it did not find the university or its employees to have been engaged in any wrongdoing.

Demers, who left Washington State University in 2012 to become an instructor at Arizona State University's journalism school, said he was "elated" by the Ninth Circuit's ruling.

"What it means is that the appeals court has basically said that faculty members have a right to criticize administrators and their policies, and a right to create their own alternative plans for restructuring a program," Demers said. "This," he added, "is what shared governance is supposed to do." Reported in: *Chronicle of Higher Education* online, September 6.

surveillance

Washington, D.C.

A federal judge sharply rebuked the National Security Agency in 2011 for repeatedly misleading the court that oversees its surveillance on domestic soil, including a program that is collecting tens of thousands of domestic e-mails and other Internet communications of Americans each year, according to a secret ruling made public August 21.

The 85-page ruling by Judge John D. Bates, then serving as chief judge on the Foreign Intelligence Surveillance Court, involved an NSA program that systematically searches the contents of Americans' international Internet communications, without a warrant, in a hunt for discussions about foreigners who have been targeted for surveillance.

The Justice Department had told Judge Bates that NSA officials had discovered that the program had also been gathering domestic messages for three years. Judge Bates found that the agency had violated the Constitution and declared the problems part of a pattern of misrepresentation by agency officials in submissions to the secret court.

The release of the ruling, the subject of a Freedom of Information Act lawsuit, was the latest effort by the Obama administration to gain control over revelations about NSA surveillance prompted by leaks by the former agency contractor Edward J. Snowden.

The collection is part of a broader program under a 2008 law that allows warrantless surveillance on domestic networks as long as it is targeted at noncitizens abroad. The purely domestic messages collected in the hunt for discussions about targeted foreigners represent a relatively small percentage of what the ruling said were 250 million communications intercepted each year in that broader program.

While the NSA fixed problems with how it handled those purely domestic messages to the court's satisfaction, the 2011 ruling revealed further issues.

"The court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program," Judge Bates wrote.

One of the examples was redacted in the ruling. Another involved a separate NSA program that keeps logs of all domestic phone calls, which the court approved in 2006 and which came to light in June as a result of leaks by Snowden.

In March 2009, a footnote said, the surveillance court learned that NSA analysts were using the phone log database in ways that went beyond what the judges believed to be the practice because of a "repeated inaccurate statements" in government filings to the court.

"Contrary to the government's repeated assurances, NSA had been routinely running queries of the metadata using querying terms that did not meet the standard for querying," Judge Bates recounted. He cited a 2009 ruling that concluded that the requirement had been "so frequently and systematically violated that it can fairly be said that this critical element of the overall ... regime has never functioned effectively."

The Electronic Frontier Foundation, a free speech and privacy rights group, sued to obtain the ruling after Senator Ron Wyden, an Oregon Democrat who sits on the Senate Intelligence Committee, fought last summer to declassify the basic fact that the surveillance court had ruled that the NSA had violated the Fourth Amendment.

In a statement, Wyden—an outspoken critic of NSA surveillance—said declassification of the ruling was "long overdue." He argued that while the NSA had increased privacy protections for purely domestic and unrelated communications that were swept up in the surveillance,

the collection itself “was a serious violation of the Fourth Amendment.”

Mark Rumold of the Electronic Frontier Foundation praised the administration for releasing the document with relatively few redactions, although he criticized the time and the difficulty in obtaining it. But he also said the ruling showed the surveillance court was not equipped to perform adequate oversight of the NSA.

“This opinion illustrates that the way the court is structured now it cannot serve as an effective check on the NSA because it’s wholly dependent on the representations that the NSA makes to it,” Rumold said. “It has no ability to investigate. And it’s clear that the NSA representations have not been entirely candid to the court.”

A senior intelligence official portrayed the ruling as showing that NSA oversight was robust and serious. He said that some 300 NSA employees were assigned to seek out even inadvertent violations of the rules and that the court conducted “vigorous” oversight.

The ruling focused on a program under which the NSA has been searching domestic Internet links for communications—where at least one side is overseas—in which there are “strong selectors” indicating insider knowledge of someone who has been targeted for foreign-intelligence collection. One example would be mentioning a person’s private e-mail address in the body of an e-mail.

Most of the time, the system brings up single communications, like an e-mail or text message. But sometimes many messages are packaged and travel in a bundle that the NSA calls “multi-communication transactions.”

A senior intelligence official gave one example: a Web page for a private e-mail in-box that displays subject lines for dozens of different messages—each of which is considered a separate communication, and only one of which may discuss the person who has been targeted for intelligence collection.

While Judge Bates ruled that it was acceptable for the NSA to collect and store such bundled communications, he said the agency was not doing enough to minimize the purely domestic and unrelated messages to protect Americans’ privacy. In response, the NSA agreed to filter out such communications and store them apart, with greater protections, and to delete them after two years instead of the usual five.

A Justice Department “white paper” released with the ruling shed new light on NSA surveillance of communications streaming across domestic telecommunications networks. Such “upstream” collection, which still must be targeted at or be about noncitizens abroad, accounts for about 10 percent of all the Internet messages collected in the United States, it said; the other 90 percent are obtained from Internet companies under the system the NSA calls Prism.

The administration also released a partly redacted semi-annual report about “compliance” incidents, or mistakes involving the privacy rights of Americans or people in the United States. It found that there had been no willful

violations of the rules, and that fewer than 1 percent of queries by analysts involved errors.

The document also showed that the government recently changed the rules to allow NSA and CIA analysts to search its databases of recorded calls and e-mails using search terms designed to find information involving American citizens, not foreigners—an issue that has long concerned Senator Wyden and that was mentioned in a document leaked by Snowden.

The number of “selectors” designed to filter out and store communications targeted at foreigners had gone up steadily, the document said, although the numbers were redacted. And its increase is expected to “accelerate” because the FBI recently made the ability to nominate people for such collection “more widely available to its field office personnel.” Reported in: *New York Times*, August 21.

Washington, D.C.

Intelligence officials released secret documents September 10 showing that a judge reprimanded the National Security Agency in 2009 for violating its own procedures and misleading the nation’s intelligence court about how it used the telephone call logs it gathers in the hunt for terrorists. It was the second case of a severe scolding of the spy agency by the Foreign Intelligence Surveillance Court to come to light since the disclosure of thousands of NSA documents by Edward J. Snowden, a former contractor, began this summer.

The newly disclosed violations involved the NSA program that has drawn perhaps the sharpest criticism from members of Congress and civil libertarians: the collection and storage for five years of information on virtually every phone call made in the United States. The agency uses orders from the intelligence court to compel phone companies to turn over records of numbers called and the time and duration of each call—the “metadata,” not the actual content of the calls.

Since Snowden disclosed the program, the agency has said that while it gathers data on billions of calls, it makes only a few hundred queries in the database each year, when it has “reasonable, articulable suspicion” that a telephone number is connected to terrorism.

But the new documents show that the agency also compares each day’s phone call data as it arrives with an “alert list” of thousands of domestic and foreign phone numbers that it has identified as possibly linked to terrorism.

The agency told the court that all the numbers on the alert list had met the legal standard of suspicion, but that was false. In fact, only about ten percent of 17,800 phone numbers on the alert list in 2009 had met that test, a senior intelligence official said.

In a sharply worded March 2009 ruling, Judge Reggie B. Walton described the NSA’s failure to comply with rules set by the intelligence court, set limits on how it could use the

data it had gathered, and accused the agency of repeatedly misinforming the judges.

“The government has compounded its noncompliance with the court’s orders by repeatedly submitting inaccurate descriptions of the alert list process” to the court, Judge Walton wrote. “It has finally come to light that the FISC’s authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses” the phone call data.

The senior American intelligence official, who briefed reporters before the documents’ release, admitted the sting of the court’s reprimand but said the problems came in a complex, highly technical program and were unintentional. “There was nobody at NSA who really had a full understanding of how the program was operating at the time,” said the official. The official noted that the agency itself discovered the problem, reported it to the court and to Congress, and worked out new procedures that the court approved.

In making public 14 documents on the Web site of the director of national intelligence, James R. Clapper Jr., the intelligence officials were acting in response to Freedom of Information Act lawsuits and a call from President Obama for greater transparency about intelligence programs. The lawsuits were filed by two advocacy groups, the Electronic Frontier Foundation and the American Civil Liberties Union.

“The documents only begin to uncover the abuses of the huge databases of information the NSA has of innocent Americans’ calling records,” said Mark M. Jaycox, a policy analyst at the Electronic Frontier Foundation. He said the agency’s explanation—that none of its workers fully understood the phone metadata program—showed “how much of a rogue agency the NSA has become.”

Judge Walton’s ruling, originally classified as top secret, did not go that far. But he wrote that the privacy safeguards approved by the court “have been so frequently and systematically violated” that they “never functioned effectively.”

Senator Patrick J. Leahy of Vermont, the chairman of the Senate Judiciary Committee, welcomed the release of the documents, but said that they showed “systemic problems” and that the bulk collection of Americans’ phone records should be stopped.

Intelligence officials have expressed some willingness to adjust the program in response to complaints from Congress and the public, possibly by requiring the phone companies, rather than the NSA, to stockpile the call data. But they say that the program remains crucial in detecting terrorist plots and is now being run in line with the court’s rules.

A different intelligence court judge, John D. Bates, rebuked the NSA in 2011 for violations in another program and also complained of a pattern of misrepresentation (see page 225). The 2011 opinion, which made a reference to the 2009 reprimand, was released by intelligence officials in August.

Since June, Snowden’s revelations have set off the most extensive public scrutiny of the NSA since its creation in 1952.

On September 10, the National Institute of Standards and Technology (NIST), the agency charged with setting federal cybersecurity standards, scrambled to try to restore public confidence, after reports that it had recommended a standard that contained a back door for the NSA.

The agency said it would reopen the public vetting process for the standard, used by software developers around the world. “If vulnerabilities are found in these or any other NIST standard, we will work with the cryptographic community to address them as quickly as possible,” the agency said in a statement.

As part of the NSA’s efforts, it had worked behind the scenes to push the same standard on the International Organization for Standardization, which counts 163 countries among its members.

The national standards agency denied that it had ever deliberately weakened a cryptographic standard, and it moved to clarify its relationship with the NSA. “The National Security Agency participates in the NIST cryptography process because of its recognized expertise,” the standards agency said. “NIST is also required by statute to consult with the NSA.”

Cryptographers said that the revelations had eroded their trust in the agency, but that reopening the review process was an important step in rebuilding confidence. “I know from firsthand communications that a number of people at NIST feel betrayed by their colleagues at the NSA,” Matthew D. Green, a cryptography researcher at Johns Hopkins University, said. “Reopening the standard is the first step in fixing that betrayal and restoring confidence in NIST.” Reported in: *New York Times*, September 10.

Washington, D.C.

A judge on the nation’s intelligence court directed the government September 13 to review for possible public release the court’s classified opinions on the National Security Agency’s practice of collecting logs of Americans’ phone calls.

Judge F. Dennis Saylor IV issued the opinion in a response to a motion filed by the American Civil Liberties Union, saying such a move would add to “an informed debate” about privacy and might even improve the reputation of the Foreign Intelligence Surveillance Court on which he sits.

The ruling was the latest development to show the seismic impact of the disclosures by Edward J. Snowden, the former NSA contractor, on the secrecy that has surrounded both the agency and the court. It came a day after the director of national intelligence, James R. Clapper Jr., said in a speech that Snowden’s leak of secret documents had set off a “needed” debate.

Judge Saylor of Boston, one of the eleven federal judges who take turns sitting on the court operated under the Foreign Intelligence Surveillance Act, said in his ruling that the publication in June of a court order leaked by Snowden regarding the phone logs had prompted the government to release a series of related documents and “engendered considerable public interest and debate.”

Among the documents voluntarily made public by the Obama administration since then are two FISA court rulings from 2009 and 2011 that were highly critical of the NSA (see page 225 and 226), which the judges said had not only violated the agency’s own rules and the law, but had repeatedly misled them.

Those disclosures ran counter to a longstanding assertion by the court’s critics that it acts as a rubber stamp for the NSA and the FBI, since statistics show that it has rarely turned down a request for a government eavesdropping warrant.

Judge Saylor seemed to applaud the fuller picture of the court’s actions from the disclosures to date, saying of the possibility of the release of more declassified rulings that “publication would also assure citizens of the integrity of this court’s proceedings.”

The court was responding to the ACLU’s request for public release of rulings related to the NSA’s collection of the so-called metadata of virtually all phone calls in the United States—phone numbers, time and duration of calls, but not their content. The collection takes place under a provision of the USA PATRIOT Act that allows the government to gather “business records” if they are relevant to a terrorism or foreign intelligence investigation.

Though the intelligence court has continued to approve orders to the telephone companies to turn over the call logs, members of Congress—including Representative Jim Sensenbrenner of Wisconsin, a Republican and an author of the USA PATRIOT Act, and Senator Patrick J. Leahy of Vermont, the Democratic chairman of the Judiciary Committee—have said the NSA’s collection goes too far.

Alex Abdo, a staff lawyer with the ACLU’s national security project, said the ruling showed that the court “has recognized the importance of transparency to the ongoing public debate about the NSA’s spying.” Abdo added, “For too long, the NSA’s sweeping surveillance of Americans has been shrouded in unjustified secrecy.”

Before Snowden began his release of documents in June, intelligence officials insisted that any public discussion of NSA programs or the secret court rulings governing them would pose a danger to national security. But the strong public and Congressional response to many of the disclosures has forced the spy agency to shift its stance, and President Obama has directed it to make public as much as possible about its operations and rules.

In response, Clapper’s office has created a new Web page to make public documents, statements by officials and

other explanatory material. In a talk to intelligence contractors, Clapper said he thought Snowden’s leaks had started a valuable discussion. “It’s clear that some of the conversations this has generated, some of the debate, actually needed to happen,” he said. “If there’s a good side to this, maybe that’s it.”

But he denounced Snowden’s leaks, saying they had damaged national security. “Unfortunately, there is more to come,” he said, referring to the fact that news reports have covered only a small fraction of the tens of thousands of documents Snowden took. Reported in: *New York Times*, September 13.

Washington, D.C.

The Foreign Intelligence Surveillance Court has granted the National Security Agency (NSA) permission to continue its collection of records on all U.S. phone calls.

The Office of the Director of National Intelligence announced the court’s approval in a statement October 11. The court authorized the program for only limited time periods and requires that the government submit new requests every several months for re-authorization.

The existence of the bulk phone data collection was one of the most controversial revelations from the leaks by Edward Snowden. The NSA uses the program to collect records such as phone numbers, call times and call durations on all U.S. phone calls—but not the contents of any conversations, according to the administration. The NSA collects the records from the phone companies and compiles them in a massive database. NSA analysts are only allowed to search the database if there is a “reasonable, articulable suspicion” that a phone number is connected to terrorism.

Shawn Turner, a spokesman for Director of National Intelligence James Clapper, said the office decided to announce the court decision, which is usually kept secret, “in light of the significant and continuing public interest in the telephony metadata collection program.”

Numerous lawmakers have expressed outrage at the NSA’s collection of records of millions of Americans who are not suspected of any wrongdoing. Sen. Patrick Leahy (D-VT), the chairman of the Senate Judiciary Committee, and Rep. Jim Sensenbrenner (R-WI), the original author of the USA PATRIOT Act, are working on legislation that would prohibit the NSA from conducting bulk data collection.

“While I appreciate the recent efforts by the Court and the administration to be more transparent, it is clear that transparency alone is not enough,” Leahy said in a statement. “There is growing bipartisan consensus that the law itself needs to be changed in order to restrict the ability of the government to collect the phone records of millions of law-abiding Americans.” Reported in: *thehill.com*, October 11.

free press

Washington, D.C.

A federal appeals court declined October 15 to hear an appeal by James Risen, an author and a reporter for *The New York Times*, who was ordered in July to testify in the trial of a former Central Intelligence Agency official accused of leaking information to him. The decision, by the full United States Court of Appeals for the Fourth Circuit, was expected to set up an appeal by Risen to the Supreme Court in what has become a major case over the scope and limitations of First Amendment press freedoms.

“We are disappointed by the Fourth Circuit’s ruling,” said Joel Kurtzberg, a lawyer for Risen. “My client remains as resolved as ever to continue fighting.”

In July, a three-judge panel of the appeals court ruled in a 2-to-1 decision to order Risen to testify in the trial of the CIA officer, Jeffrey Sterling. It is rare for a full appeals court to grant petitions to rehear cases that have already been decided by a panel. Still, the vote count was notably lopsided: 13 voted to reject the petition, while only Judge Roger L. Gregory, who had cast the dissenting vote in July, wanted to grant it.

The Obama administration had urged the appeals court not to rehear the matter, saying the ruling by the panel had been correct and that no reconsideration of the matter was justified.

Attorney General Eric H. Holder Jr. recently issued new guidelines for leak investigations that are intended to offer greater protections against subpoenas involving reporters’ phone calls or testimony, and the Obama administration has backed legislation in Congress that would create a federal statute giving judges greater power to quash such subpoenas.

Still, under Holder, the Justice Department has pursued Risen’s testimony for years as part of a broader crackdown on leaks. The case against Sterling is one of seven such cases it has brought, compared with three under all previous administrations; an eighth, against Chelsea Manning, formerly Pfc. Bradley Manning—who was convicted of giving files to WikiLeaks—was handled by military prosecutors.

The judges who rejected Risen’s appeal did not explain their votes, but Judge Gregory wrote a brief dissent reprising his view that reporters should have some legal protection from being forced to testify against an alleged source. Calling the issue raised by the case one of “exceptional importance,” he said that for “public opinion to serve as a meaningful check on governmental power, the press must be free to report to the people the government’s use (or misuse) of that power.”

He also wrote that “some reporters, including the one in this case, may be imprisoned for failing to reveal their sources, even though reporters seek only to shed light on the workings of our government in the name of its citizens.”

Risen has said he would go to prison rather than comply

with a judicial order to testify about his sources, and after the decision said, “I am determined to keep fighting.”

It is unclear whether the Constitution gives any protection to journalists from being required to testify against their alleged sources in criminal trials. The main Supreme Court precedent on the topic, which is more than four decades old, involved grand jury investigations rather than trials, and it is considered by many legal scholars to be ambiguous. Risen’s case could provide clarity—one way or the other—about the scope of the First Amendment’s protections to reporters.

In the July ruling, two other judges on the panel said that the First Amendment did not protect reporters who receive unauthorized leaks from being forced to testify against the people suspected of leaking to them. In 2011, in an earlier stage of the case, Judge Leonie M. Brinkema of U.S. District Court in Alexandria, Virginia, had said that it did.

The case concerns the sourcing for a chapter in Risen’s 2006 book, *State of War*, which recounted an effort by the CIA in the Clinton administration to sabotage Iranian nuclear research. The chapter portrayed the operation as reckless and that it had been botched. Sterling was accused of being Risen’s source for that material in December 2010 and indicted under the Espionage Act. Reported in: *New York Times*, October 15.

publishing

Cupertino, California

As punishment for engaging in an e-book price-fixing conspiracy, Apple will be forced to abide by new restrictions on its agreements with publishers and be evaluated by an external “compliance officer” for two years, a federal judge has ruled. But the judge, Denise L. Cote of U.S. District Court in Manhattan, rejected some of the measures sought by the Justice Department, including extensive government oversight over Apple’s App Store.

In an early September filing, Judge Cote issued her final ruling on the penalties to be imposed on Apple after the long-running lawsuit against the technology giant filed by the Justice Department in April 2012.

The government accused Apple, along with five major book publishers, of illegally colluding to raise the price of e-books and of trying to curb Amazon’s influence in the publishing industry as Apple prepared to introduce its iPad in 2010.

All five publishers, Macmillan, HarperCollins, Simon & Schuster, Hachette Book Group and Penguin Group USA, have since settled, while saying that they did nothing wrong. Random House, which was not named in the lawsuit, merged with Penguin earlier this year.

But Apple, confident of its innocence and with the financial resources to fight in court, went to trial this summer. It defended itself with testimony from a string of high-ranking Apple executives, including Eddy Cue, the company’s

senior vice president for Internet software and services, who led the negotiations with publishers.

In July, Judge Cote ruled against Apple in a nonjury trial, saying there was compelling evidence it had violated antitrust laws by conspiring with the publishers.

In her September ruling, Cote said that Apple may not enter into any agreement with the five settling publishers that “restricts, limits or impedes Apple’s ability to set, alter or reduce the retail price of any e-book.” The ruling also said that Apple would be prohibited from discussing with any publisher its contractual negotiations with another publisher.

In addition, Cote ordered that Apple cooperate with an external monitor who will evaluate and report on the company’s training reforms and antitrust compliance.

William J. Baer, the assistant attorney general, said in a statement that the Justice Department was pleased by the court’s ruling. “Consumers will continue to benefit from lower e-books prices as a result of the department’s enforcement action to restore competition in this important industry,” he said. “By appointing an external monitor to ensure future compliance with the antitrust laws, the court has helped protect consumers from further misconduct by Apple. The court’s ruling reinforces the victory the department has won for consumers.”

Apple has said that it will appeal Cote’s July ruling.

“Apple did not conspire to fix e-book pricing,” Tom Neumayr, an Apple spokesman, said. “The eBook-store gave customers more choice and injected much-needed innovation and competition into the market.” Reported in: *New York Times*, September 6.

social media

Hampton, Virginia

Clicking “Like” on Facebook is constitutionally protected free speech and can be considered the 21st century-equivalent of a campaign yard sign, a federal appeals court ruled September 18. The U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia, reversed a lower court ruling that said merely “liking” a Facebook page was insufficient speech to merit constitutional protection.

Exactly what a “like” means—if anything—played a part in a Virginia case involving six people who say Hampton Sheriff B.J. Roberts fired them for supporting an opponent in his 2009 re-election bid, which he won. The workers sued, saying their First Amendment rights were violated.

Roberts said some of the workers were let go because he wanted to replace them with sworn deputies while others were fired because of poor performance or his belief that their actions “hindered the harmony and efficiency of the office.” One of those workers, Daniel Ray Carter, had “liked” the Facebook page of Roberts’ opponent, Jim Adams.

U.S. District Court Judge Raymond Jackson in Norfolk

had ruled in April 2012 that while public employees are allowed to speak as citizens on matters of public concern, clicking the “like” button does not amount to expressive speech. In other words, it’s not the same as actually writing out a message and posting it on the site.

Jackson acknowledged that other courts have ruled that Facebook posts are constitutionally protected speech, but he said in those cases there were “actual statements.” Simply clicking a button is much different and doesn’t warrant First Amendment protection, he wrote. In his ruling, Jackson acknowledged the need to weigh whether the employee’s speech was a substantial factor in being fired. But the judge wrote that the point is moot if “liking” something isn’t constitutionally protected speech.

The three-judge appeals court panel disagreed, ruling that “liking a political candidate’s campaign page communicates the user’s approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.” The case was sent back to the lower court.

Facebook and the American Civil Liberties Union, which filed friend of court briefs in the case, applauded the ruling. “This ruling rightly recognizes that the First Amendment protects free speech regardless of the venue, whether a sentiment is expressed in the physical world or online,” Ben Wizner, director of the ACLU Speech, Privacy & Technology Project, said in a written statement. “The Constitution doesn’t distinguish between ‘liking’ a candidate on Facebook and supporting him in a town meeting or public rally.” Reported in: talkingpointsmemo.com, September 18.

Richmond, Virginia

A federal judge in Richmond has refused to dismiss from a lawsuit several FBI and Secret Service agents as well as local police officers who arrested a military veteran based on an opinion from a counselor who had never met him that he might be a danger. The officers had confronted the veteran, Brandon Raub, after he expressed criticism of the U.S. government on a social networking page.

They arrested Raub and kept him in custody for an evaluation based on the long-distance opinion from Michael Campbell, a psychotherapist hired by the local county. But when the case came before a judge, his ruling found the concerns raised by the officers were “so devoid of any factual allegations that it could not be reasonably expected to give rise to a case or controversy.”

Raub then sued the officers for taking him into custody. The latest ruling rejected a request by the officers to end the case.

“Brandon Raub’s case exposes the seedy underbelly of a governmental system that continues to target military veterans for expressing their discontent over America’s

rapid transition to a police state,” said John W. Whitehead, president of The Rutherford Institute. “While such targeting of veterans and dissidents is problematic enough, for any government official to suggest that they shouldn’t be held accountable for violating a citizen’s rights on the grounds that they were unaware of the Constitution’s prohibitions makes a mockery of our so-called system of representative government. Thankfully, Judge Hudson has recognized this imbalance and ensured that Brandon Raub will get his day in court,” he said.

The decision came from U.S. District Judge Henry Hudson, who essentially said there is not enough information at this point in the case to dismiss the law enforcement defendants. He ordered limited discovery. The Rutherford Institute called the decision a victory for free speech and the right to be free from wrongful arrest.

Raub, a decorated Marine, had been taken into custody by “a swarm” of FBI, Secret Service agents and local police and forcibly detained in a psychiatric ward for a week because of controversial song lyrics and political views posted on his Facebook page, Rutherford reported. Hudson said the Rutherford Institute, which is representing Raub, had alleged sufficient facts to indicate that the involuntary commitment violated his rights under the U.S. Constitution’s First and Fourth Amendments.

Institute attorneys had filed the civil rights lawsuit in federal court on behalf of Raub, alleging that his seizure and detention were the result of a federal government program code-named “Operation Vigilant Eagle” that involves the systematic surveillance of military veterans who express views critical of the government.

The complaint alleges that the attempt to label Raub as “mentally ill” and his subsequent involuntary commitment was a pretext designed to silence speech critical of the government.

It was August 16, 2012, when Chesterfield police, Secret Service and FBI agents arrived at Raub’s home, asking to speak with him about his Facebook posts. Like many Facebook users, Raub, a Marine who has served tours in Iraq and Afghanistan, uses his Facebook page to post song lyrics and air his political opinions. Without providing any explanation, levying any charges against Raub or reading him his rights, law enforcement officials handcuffed Raub and transported him to police headquarters, then to John Randolph Medical Center, where he was held against his will.

In a hearing on August 20, government officials pointed to Raub’s Facebook posts as the reason for his incarceration. While Raub stated that the Facebook posts were being read out of context, a special justice ordered Raub be held up to 30 more days for psychological evaluation and treatment.

But Circuit Court Judge Allan Sharrett ordered Raub’s immediate release a short time later, and the lawsuit was initiated. Reported in: wnd.com, August 3.

privacy

Mountain View, California

In a major legal setback for Google, a federal appeals court in San Francisco said September 10 that a lawsuit accusing the Internet giant of illegal wiretapping could proceed. The ruling, which came at a moment when online privacy is being hotly debated, has its origins in a much-publicized Google initiative, Street View, which tried to map the inhabited world. In addition to photographs, Street View vehicles secretly collected e-mail, passwords, images and other personal information from unencrypted home computer networks.

The scooping of data brought outrage and investigations in at least a dozen countries when it was first revealed in Germany in 2010. It also prompted a handful of lawsuits by United States citizens who said Google had violated their privacy and was illegally wiretapping them. Those suits were condensed into one case, which was heard by a California court.

Google tried to get the case dismissed, saying the Wi-Fi communications it captured were “readily accessible to the general public” and therefore not a violation of federal wiretapping laws. The lower court rejected that argument, and the U.S. Court of Appeals for the Ninth Circuit did too.

“This is an important opinion for privacy rights,” said Kathryn E. Barnett of Lieff Cabraser Heimann & Bernstein, one of the law firms working for the plaintiffs. “It says that when you are in your home, you have a right to privacy in your communications. Someone just can’t drive by and seize them.”

The unanimous, 35-page decision by a three-judge panel found little merit in Google’s legal maneuverings, stating at one critical point that the company was basically inventing meanings in an effort to declare its actions legal.

The court wrote that Google’s proposed definition of “radio communication” was “in tension with how Congress—and virtually everyone else—uses the phrase.” Radio communication is not covered by the wiretapping law.

“We are disappointed in the Ninth Circuit’s decision and are considering our next step,” said Niki Fenwick, a spokeswoman for Google. The company can ask the entire appeals court to rule on the case, an effort that could be fairly characterized as a long shot. Otherwise, the case will go back to the lower court for trial.

The first thing the lawyers for the 22 plaintiffs would like to do, Barnett said, is to get the case certified as a class-action suit. If the case does become a class action, millions could join. The potential penalties might, in theory, be large enough that even Google would notice. The plaintiffs are asking for \$10,000 each along with unspecified punitive damages.

“In the past, Google has been able to buy its way out of privacy violations with penalties that are mere pocket

change,” said John Simpson of Consumer Watchdog, which is a co-counsel in the case. “This suit has the potential for meaningful damages.”

Along with other tech companies, Google is already under a spotlight for its relationship to the government. Google is seeking permission from the secret Foreign Intelligence Surveillance Court to be more transparent about the types of national security requests it receives. The secrecy now in place, Google said this week, “undermines the basic freedoms that are at the heart of a democratic society.”

In the Street View case, however, Google was frequently accused of a lack of transparency itself, without any national security considerations at stake. It initially denied that any data had been collected in Street View, then denied regulators the opportunity to look at what was gathered.

The company said a rogue engineer was at fault for inadvertently scooping up the data, but a Federal Communications Commission investigation said he was merely unsupervised. As the public relations crisis deepened, Google executives apologized. But Barnett said: “I don’t think Google was sorry until they were investigated. We would love for them to accept responsibility for what they did—real responsibility.”

Regulators have frequently pursued Google on privacy issues. Last March, Google settled a Street View case brought by 38 state attorneys general. It was fined \$7 million and it promised to aggressively monitor its employees on privacy issues.

Marc Rotenberg of the Electronic Privacy Information Center, which filed a brief supporting the plaintiffs in the Street View case before the Ninth Circuit, called the ruling “a landmark decision.”

“The court made clear that federal privacy law applies to residential Wi-Fi networks,” he said. “Users should be protected when a company tries to capture private data that travels between their laptops and their printer in their home.”

The ruling, written by Judge Jay Bybee, took sharp issue with Google’s contention that data transmitted over a Wi-Fi network was not protected by federal wiretapping laws because it was an electronic “radio communication.”

“In common parlance, watching a television show does not entail ‘radio communication,’ ” Judge Bybee wrote. “Nor does sending an e-mail or viewing a bank statement while connected to a Wi-Fi network.”

Neither did the court think much of Google’s argument that unencrypted data sent over a Wi-Fi network is “readily accessible to the general public” because both the hardware and software needed to intercept and decode the data are widely available.

People can easily buy technology to log every keystroke on someone’s computer, the court noted, but that did not make those keystrokes “readily accessible to the general public.” Reported in: *New York Times*, September 10.

Mountain View, California

A federal judge on September 26 found that Google may have breached federal and California wiretapping laws for machine-scanning Gmail messages as part of its business model to create user profiles and provide targeted advertising.

The decision by U.S. District Court Judge Lucy Koh was rendered in a proposed class-action alleging Google wiretaps Gmail as part of its business model. Google sought to have the federal case in California dismissed under a section of the Wiretap Act that authorizes e-mail providers to intercept messages if the interception facilitated the message’s delivery or was incidental to the functioning of the service in general.

“Accordingly, the statutory scheme suggests that Congress did not intend to allow electronic communication service providers unlimited leeway to engage in any interception that would benefit their business models, as Google contends. In fact, this statutory provision would be superfluous if the ordinary course of business exception were as broad as Google suggests,” Judge Koh wrote.

Gmail, including its business service called Google Apps, is the world’s biggest e-mail service, with some 450 million users globally.

The decision was also a blow to Yahoo, whose free e-mail platform with more than 300 million users also scans e-mail to deliver ads. Microsoft’s rebranded free Outlook webmail offering does not scan messages of its 400 million users.

It was the second time in a month that a federal court found Google potentially liable for wiretapping (see page 231). That case concerns nearly a dozen combined lawsuits seeking damages from Google for eavesdropping on open Wi-Fi networks from its Street View mapping cars. The vehicles, which rolled through neighborhoods around the world, were equipped with Wi-Fi-sniffing hardware to record the names and MAC addresses of routers to improve Google location-specific services. But the cars also gathered snippets of content.

Like the appeals court ruling, Judge Koh’s decision guts Google’s wiretapping defense in the Gmail case.

“The ruling means federal and state wiretap laws apply to the Internet. It’s a tremendous victory for online privacy. Companies like Google can’t simply do whatever they want with our data and e-mails,” said Jon Simpson, the privacy director for Consumer Watchdog of Santa Monica, California.

Google said in a statement that it was “disappointed” with the ruling and was considering its legal options. “Automated scanning lets us provide Gmail users with security and spam protection, as well as great features like Priority inbox,” the company said.

Google is not automatically eligible to appeal the ruling to the U.S. Court of Appeals for the Ninth Circuit. It must ask Koh to grant permission in what is known as an

interlocutory appeal. Because of the important legal issue, Koh is likely to grant an appeal rather than having a trial first.

Google maintained that Gmail users have consented to the scanning because of its end-user agreement. Judge Koh, however, said the agreement did not adequately spell out to consumers that Google was reading messages. What's more, Koh outright rejected Google's contention that non Gmail users consented to the scanning of their messages when their communications interact with Gmail's platform.

According to Koh: "Google further contends that because of the way that e-mail operates, even non-Gmail users knew that their e-mails would be intercepted, and accordingly that non-Gmail users impliedly consented to the interception. Therefore, Google argues that in all communications, both parties—regardless of whether they are Gmail users—have consented to the reading of e-mails. The Court rejects Google's contentions with respect to both explicit and implied consent. Rather, the Court finds that it cannot conclude that any party—Gmail users or non-Gmail users—has consented to Google's reading of e-mail for the purposes of creating user profiles or providing targeted advertising. Google points to its Terms of Service and Privacy Policies, to which all Gmail and Google Apps users agreed, to contend that these users explicitly consented to the interceptions at issue. The Court finds, however, that those policies did not explicitly notify Plaintiffs that Google would intercept users' e-mails for the purposes of creating user profiles or providing targeted advertising." Reported in: wired.com, September 26.

copyright

Panama City, Panama

A federal court has found file-hosting website Hotfile liable for copyright infringement, according to movie industry body Motion Picture Association of America. The U.S. District Court for the Southern District of Florida also held that Hotfile's principal, Anton Titov, was personally liable for Hotfile's infringement, MPAA said. Hotfile was incorporated in Panama in 2006.

"This case marked the first time that a U.S. court has ruled on whether so-called cyberlockers like Hotfile can

be held liable for their infringing business practices," it added. The order was marked on online court records as "restricted/sealed until further notice." The opinion was to be made public by the court after confidential and proprietary information was redacted, MPAA said.

The court agreed with the movie studios' complaint that Hotfile gave incentives to post copyrighted content. Five U.S. movie studios filed a copyright infringement suit against Hotfile in 2011, alleging that the company paid incentives to those who uploaded popular files to the system, that were widely shared. Its affiliate program still offers payment "calculated based on a percentage of the total value of premium accounts purchased by users who download the affiliate's uploaded files."

The scheme gave incentives to users to upload popular copyright infringing content to lure users who would pay for premium accounts to access and download the files, according to the complaint by the studios. Hotfile offers downloads on a high-speed connection to holders of paid premium accounts, in contrast to slower download speeds and fewer downloads offered to free users.

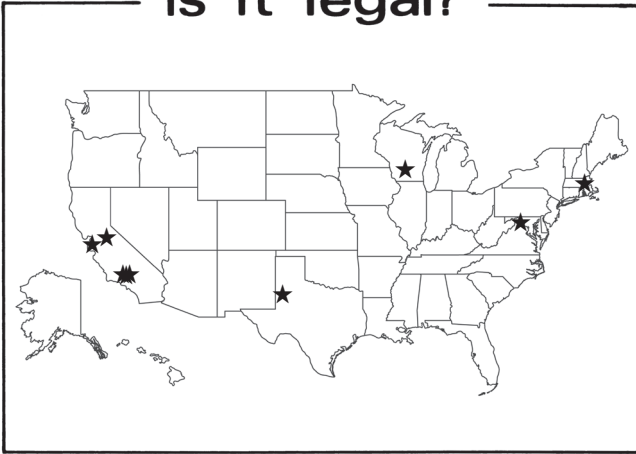
"The more frequently the content is downloaded illegally, the more defendants pay the uploading user," the complaint said. Hotfile was also charged with paying websites that hosted and promoted links to infringing content on its servers.

The file-sharing site did not provide a searchable index of the files available for download from its website, and instead relied on "third-party pirate link sites" to host, organize and promote URL links to Hotfile-hosted infringing content, according to the complaint.

In a filing to the court in the civil suit, Hotfile said it is in full compliance with the safe harbor provisions of the Digital Millennium Copyright Act. "Hotfile and Mr. Titov run a legitimate business that fully complies with (and, indeed, embraces) the United States' copyright laws and the DMCA," it said. The terms of service and an intellectual property and rights policy published on its website explicitly prohibited copyright infringement, it added.

The website said it removes access when notified about files that allegedly infringe copyright, and has provided copyright holders, including the five studios, the "unfettered ability to remove access to files by directly commanding Hotfile's servers through special rightsholder accounts." Reported in: pcworld.com, August 29.

is it legal?



schools

Anaheim Hills, California

A student at a high school in Anaheim Hills said administrators ordered her to change out of a T-shirt that promoted the National Rifle Association. Sophomore Haley Bullwinkle said when she wore her NRA shirt to Canyon High School, she landed in the principal's office for violating the school's dress code that forbids offensive, violent or divisive clothing.

"They were treating me like I was a criminal," she said. "I was not allowed to wear that at school because it promoted gun violence."

The shirt, which was a gift from Bullwinkle's father when he became a card-carrying member of the NRA, features a buck, an American flag and a hunter's silhouette. It also has the words "National Rifle Association of America: Protecting America's Traditions Since 1871" written in the center.

Bullwinkle's father said he e-mailed the school's principal to find out why his daughter had to change her shirt. Principal Kimberly Fricker responded in an e-mail, which said, in part, "The shirt had a gun on it, which is not allowed by school police. It's protocol to have students change when they're in violation of the dress code."

The girl's father, who has retained an attorney, now wants to know how the school defines violence. He said the drill team is allowed to twirl fake rifles and the mascot is a Comanche. "I think that if you consider the hunter, the image of the hunter to be offensive, certainly there are groups that would consider the Comanche Indian chief to be offensive," he said. Reported in: cbsla.com, October 2.

Glendale, California

Glendale school officials have hired a company to monitor and analyze students' public social media posts, saying it will help them step in when students are in danger of harming themselves or others. After collecting information from students' posts on such sites as Facebook, Instagram, YouTube and Twitter, the Hermosa Beach company, Geo Listening, will provide Glendale school officials with a daily report.

The report will categorize posts by their frequency and how they relate to cyber-bullying, harm, hate, despair, substance abuse, vandalism and truancy, according to the newspaper.

Glendale Unified, which piloted the service at Hoover, Glendale and Crescenta Valley high schools last year, will pay the company \$40,500 to monitor posts made by about 13,000 middle school and high school students at eight Glendale schools.

According to a district report, Geo Listening gives school officials "critical information as early as possible," allowing school employees "to disrupt negative pathways and make any intervention more effective."

Glendale Unified Superintendent Dick Sheehan said the service gives the district another opportunity to "go above and beyond" when dealing with students' safety. "People are always looking to see what we're doing to ensure that their kids are safe. This just gives us another opportunity to ensure the kids are safe at all times," he said.

Yalda T. Uhls, a researcher at the Children's Digital Media Center at UCLA, and a parent of two, said students should be made aware that their posts are being monitored. "As a parent, I find it very big brother-ish," Uhls said, adding that students could lose trust in adults once they find out their posts are being tracked. However, she also admires schools' efforts in trying to attack the problem of cyber-bullying. "This could be one piece in a school's tool kit to combat that problem and it should be a very small piece," she said.

School board member Christine Walters said that as Glendale educators have become increasingly aware of how much bullying occurs online, officials have become more "proactive to find ways to protect our students from ongoing harm," she said.

"Similar to other safety measures we employ at our schools, we want to identify when our students are engaged in harmful behavior," she said.

Student response to the decision was mixed on Twitter, where several students expressed frustration and concern. One person, who tweeted under the name Meghri, asked, "What else does GUSD wanna do put cameras in our rooms?" Another, who tweeted under the name Arayik, said, "GUSD should be smarter and start spending money on educational purposes rather than trying to stalk students."

A tweet from a mock Twitter account using the school district's logo and named GUSD, said: "In order to protect.

We must invade. Understand.”

However, not all students found news of the monitoring concerning. Hoover High School sophomore Mikaela Perjes said she didn't mind Glendale Unified using the service, and didn't find it an invasion of privacy. “It's [students'] choice if they want to make [their accounts] public or private,” she said. Reported in: *Los Angeles Times*, August 28.

Los Angeles, California

It took exactly one week for nearly 300 students at Roosevelt High School to hack through security so they could surf the Web on their new school-issued iPads, raising new concerns about a plan to distribute the devices to all students in the district. Similar problems emerged at two other high schools as well, although the hacking was not as widespread.

Officials at the Los Angeles Unified School District have immediately halted home use of the Apple tablets until further notice.

The incident, which came to light September 22 prompted questions about overall preparations for the \$1-billion tablet initiative. The roll-out is scheduled to put an iPad in the hands of every student in the nation's second-largest school system within a year. Roosevelt was among the first to distribute them.

Tablets were still being handed out when administrators discovered the hacking already in progress, allowing students to reach such restricted sites as YouTube and Facebook, among others.

“Outside of the district's network ... a user is free to download content and applications and browse the Internet without restriction,” two senior administrators said in a memo to the board of education and L.A. schools Superintendent John Deasy. “As student safety is of paramount concern, breach of the ... system must not occur.”

Other schools reporting the problem were Westchester High and the Valley Academy of Arts and Sciences in Granada Hills.

Students began to tinker with the security lock on the tablets because “they took them home and they can't do anything with them,” said Roosevelt senior Alfredo Garcia.

Roosevelt students matter-of-factly explained their ingenuity. The trick, they said, was to delete their personal profile information. With the profile deleted, a student was free to surf. Soon they were sending tweets, socializing on Facebook and streaming music through Pandora, they said.

L.A. Unified School District Police Chief Steven Zipperman suggested, in a confidential memo to senior staff, that the district might want to delay distribution of the devices. “I'm guessing this is just a sample of what will likely occur on other campuses once this hits Twitter, YouTube or other social media sites explaining to our students how to breach or compromise the security of these devices,” Zipperman wrote. “I want to prevent a ‘runaway

train' scenario when we may have the ability to put a hold on the roll-out.”

L.A. Unified officials were weighing potential solutions. One would limit the tablets, when taken home, to curricular materials from the Pearson corporation, which are already installed. All other applications and Internet access would be turned off, according to a district “action plan.” A second approach would be to buy and install a new security application.

Apple's just-released new operating system might help, but not the current iteration, according to the district. A fix from Apple is not likely to be available before late December. The devices should work normally at school, although even that has been problematic. Teacher Robert Penuela said his use of the tablets has been limited because he can't get them to work for all students at once.

Roosevelt freshman Alan Munoz said that, so far, he was using his iPad only during free time. The excitement of receiving the device quickly wore off for senior Kimberly Ramirez when she realized it was for schoolwork only. “You can't do nothing with them,” she said. “You just carry them around.” Reported in: *Los Angeles Times*, September 24.

Seagraves, Texas

School officials in Seagraves, who say they are preparing 7th-graders “for the business world,” banned a straight-A student from class in September because her mom dyed the girl's hair blonde.

“I've waited two years to dye my hair and I've had to earn it by my grades,” Seagraves Junior High School student Neices Houston told a local TV station. Her mother, Watasha, performed the dye job as a reward for the girl's outstanding academic performance.

She said that, even though she showed up at school at usual, she was not allowed to attend classes for two days. “It's killing her not to be able to walk into a classroom and get her work done because in the long run she's gonna be behind,” said her mother. “Because of her hair?”

But the school says it has strict rules governing the appearance of student coiffures. “Any color or bleach that creates two different colors that are extreme, opposite of the natural color, then that is violation of dress code,” Superintendent Dr. Kevin Spiller explained.

Spiller said that Neices was not, in fact, disciplined for the breach of fashion etiquette, but the girl says that is not true. “You can't go to your normal classes until you get your hair changed,” she says that she was told by the junior high principal. “If you don't get it changed by a certain date then you're gonna be put in ISS (in school suspension) and if it's still not changed by then, then we're either going to suspend you or go from there.”

Spiller said that dress code violations are dealt with on a case-by-case basis and the purpose of the code is to get students ready for the business world.

Watasha Houston says she has now placed her daughter in the highly-rated Loop Independent School District in a nearby community. Reported in: opposingviews.com, September 20.

colleges and universities

Modesto, California

Passing out free copies of the United States Constitution may seem like a reasonable way to celebrate Constitution Day, but in an apparent infringement of the Constitution's own First Amendment, one California college prevented a student from doing just that.

On September 17, Robert Van Tuinen of Modesto Junior College reportedly stood outside the student resource center handing out pamphlets of the Constitution for approximately ten minutes before campus police approached him and demanded that he cease.

According to college regulations, Tuinen was only permitted to hand out materials in the designated "free speech zone," implying that free speech is unacceptable elsewhere at the school. Even in the "free speech zone," Tuinen would have needed to schedule the event days in advance, so he was unable to continue.

A video of the incident shows Tuinen asking, "Don't I have free speech, sir?" after which a police officer informs him that he must leave, either willingly or forcibly.

The Foundation for Individual Rights in Education (FIRE) organization stepped in once they learned of the incident, and sent a letter to the college requesting an abandonment of current policies. The letter read:

"The video of Modesto Junior College police and administrators stubbornly denying a public college student's right to freely pass out pamphlets to fellow students—copies of the Constitution, no less!—should send a chill down the spine of every American. Worse, FIRE's research shows that Modesto Junior College is hardly alone in its fear of free speech. In fact, one in six of America's 400 largest and most prestigious colleges have 'free speech zones' limiting where speech can take place. This video brings to life the deeply depressing reality of the climate for free speech on campus."

According to the video, Tuinen was hoping to garner enough interest to start a chapter of the Young Americans for Liberty at his school. With this new publicity, the school may have inadvertently helped the student accomplish his goal. Reported in: opposingviews.com, September 19.

Wellesley, Massachusetts

A Chinese scholar known for his liberal political views says fellow faculty members at Peking University have voted to fire him, a move that threatens Peking's ties with at least one college in the United States and has raised concerns about academic freedom in China.

Xia Yeliang, an economist who has publicly called for democratic freedoms and human rights in China, said that a committee in the university's School of Economics had decided to terminate his contract, effective January 31. The vote was 30 to 3 with one abstention.

The professor was informed in June that he might be dismissed and began speaking to the news media about his plight, which he said the university warned him against. He said the decision by his fellow academics had nothing to do with his work as an instructor or researcher.

"The vote was not based on my academic evaluation," he said. "It was based only on whether they would like to employ me anymore. They just voted on this."

His case has drawn international attention, and faculty members at one American institution, Wellesley College, have said that if Xia were dismissed, they would push Wellesley to reconsider its nascent partnership with Peking, which is one of China's most prestigious universities.

"We don't want a partnership with a university if it's purging faculty members," said Thomas Cushman, a professor of sociology at Wellesley who this past summer organized a petition in Xia's defense that more than 130 Wellesley professors signed.

Faculty members at Wellesley have yet to meet on what to do next about the Peking partnership, which includes student and faculty exchanges, but Cushman said he and other professors there were working to secure Xia a position as a visiting scholar on their campus. Sofiya Cabalquinto, a spokeswoman for Wellesley, said the college's administration was aware of Xia's case and was "reviewing next steps."

In September, H. Kim Bottomly, president of the Massachusetts college, said that if the Wellesley faculty no longer supported the partnership, then it would end. But she added, "I believe it is important not to close doors, especially when it involves the exchange of ideas with other universities and with other countries—an exchange that is more important than ever."

In June, Wellesley signed a memorandum of understanding with Peking to include faculty and student exchanges, joint research and virtual collaborations.

The letter from Wellesley faculty was not the first instance of a faculty banding together to voice concerns about academic freedom raised by an overseas partnership—though it could prove to be the first case of a faculty derailing one. Faculty members at Yale University, which just opened a liberal arts college jointly with the National University of Singapore, approved a resolution expressing concern about Singapore's poor record on civil and political rights, and Duke University's Academic Council compelled the university administration to scale back its plans for a campus in China after raising a variety of concerns about the venture, academic freedom among them.

The case at Wellesley is different, however, in that it does not involve a broad statement about principles of

academic or other freedoms but rather is a response to a single, specific case.

“The line just got crossed,” said Susan M. Reverby, the Marion Butler McLean Professor in the History of Ideas and a professor of women’s and gender studies at Wellesley. “This is a pure and absolute example of the failure of academic freedom. Then the question becomes what’s our position as the partner here? What’s our moral position?”

The partnership between Peking and Wellesley makes Xia “our colleague,” said Cushman. “We need to protect him. It’s almost a duty.”

Several other top American institutions, including Stanford University, have ties with Peking. Stanford, where Xia was a visiting scholar this year, opened a research center at Peking in 2012.

And in August, Zhang Xuezhong, a lecturer at East China University of Political Science and Law, in Shanghai, was told that he was being suspended from teaching. Zhang said the university had done so because of articles he wrote this year urging China to adopt a constitution.

An editorial that recently appeared in *The Global Times*, a state-run newspaper, said that Xia had failed to pass a teaching evaluation and that his liberal beliefs were “in conflict with mainstream values.” (Xia said he had never failed an assessment of his academic work.)

Zhang Qianfan, a law professor at Peking University, said that administrators had told him that Xia’s dismissal stemmed from “academic reasons.”

“The university did tell me that he did not publish enough and that he got low evaluations on teaching by students,” he said. “It is easy to suspect it is because of political reasons, but we don’t know for sure. I think it is bad news, and as I told the university it might be better if this happened during some other time or to some other person who is not so politically high profile, so people won’t link the two together.”

Zhang also said Peking administrators had warned him not to talk to the news media about the faculty vote.

As for Xia, he said that, despite knowing about the impending vote, it was still a shock. “For a long time I have had psychological preparation for this, but I still felt very surprised when I got the official notice,” he said. “I knew it would come someday, but I did not realize it would come so soon.”

He said that he would continue to teach until the end of January and that he would try to negotiate with the school, but he doubted that would help. He said he would start to look for other employment opportunities, including at American universities. “Of course in my mind, I feel very angry,” he said. “I am trying to control myself.”

Xia, a classical liberal economist who describes himself as a fan of Milton Friedman, is one of the drafters of Charter 08, a manifesto that called for the end of one-party rule in China. “We think in China we need a constitutional democracy,” Xia said in a video-taped interview he gave with

Cushman and Reverby during a recent visit to Wellesley.

Cushman, who studies human rights, said that the Wellesley partnership was signed at a time that the Chinese government was growing increasingly repressive and intolerant of Western, liberal thought. A government memo this spring outlines seven topics that are considered taboo, including in universities: among the “speak-not subjects” are “universal values” of human rights, press freedom, judicial independence, economic neoliberalism, and historic mistakes of the Communist Party.

“I knew about that intensification of the repressive environment [in China] at the same time I was hearing from our college administration about this glorious new exchange,” Cushman said. “So my question originally in the early part of the process is to what extent is the college cognizant of the fact that the academic and intellectual environment is becoming more repressive even as we go into an exchange that we’re celebrating for all its liberal virtues?”

Yet C. Pat Giersch, an associate professor of history and an expert on China, worries that the way in which the letter was presented and framed could result in Wellesley potentially “painting itself into a corner” as far as its engagements with China go. “I am concerned that we could be getting into a situation where we define almost any exchange with a Chinese institution as something that morally we could not do because we will not find an institution where academic freedom is absolute,” he said.

“In the end I think we need exchanges with China and they’re not always going to be under the conditions that we set for ourselves at American institutions, especially liberal arts institutions,” Giersch continued. Reported in: *Chronicle of Higher Education* online, October 18; insidehighered.com, September 13.

Madison, Wisconsin

These are heady days for the disciples of open access. The Obama administration has set a one-year limit on journals’ charging readers for articles derived from federally sponsored research. Some states are weighing similar steps. And a majority of peer-reviewed articles, according to a new tally, are now in open formats.

But in other realms of public access to publicly financed research, the situation remains murky, and may be getting even more opaque. About half the states have laws that let state universities keep some details of their research activities secret until publication or patenting. And officials at the University of Wisconsin at Madison, who are eager for their state to join that list, predict the pressure for such protections will only grow stronger as states face mounting pressure to turn their university research operations into revenue.

State lawmakers must realize, said William W. Barker, the institution’s director of the Office of Industrial

Partnerships, that a public university is a cherished asset and needs to be treated accordingly. The primary threat, Barker said, comes from outsiders—sometimes faculty members at other institutions—who use his state’s freedom-of-information rules to poach ideas from University of Wisconsin scientists.

It’s a matter of “economic competitiveness,” he said, made even more urgent by this year’s change in federal law giving ownership rights to the first person to file for a patent rather than to the person who can prove the earliest development of an idea.

Others aren’t so sure. Despite several months of prodding by the university, Wisconsin lawmakers have declined to act on the proposal. And a key opponent of the idea, the Wisconsin Freedom of Information Council, a coalition of media organizations have argued that state law already lets the university keep research data secret if a release can cause harm, including economic harm.

The council’s president, Bill Lueders, has challenged the university’s rationale, saying he’d be surprised to see instances of outside faculty members’ filing freedom-of-information requests against University of Wisconsin rivals. “That seems to be poor form,” he said.

Pressed on the matter, Barker could not provide specific examples involving state law. He and his staff found records of two requests from researchers at out-of-state universities seeking details of research conducted at Madison, but both were submitted to the National Institutes of Health under federal law. Barker said that the university remained worried about the threat, especially given the change in federal patent law.

Other states agree, Barker said. University legal experts have identified at least 25 other states that have some explicit protections against the prepublication release of research information, he said.

In a memorandum prepared for state lawmakers, university officials suggested a law making clear they could withhold virtually any research data until they have been “publicly released, published, or patented.”

“Nobody’s talking about keeping research results secret, because we’re going to publish them—it’s a public institution,” Barker said. “It’s just a matter of timing, that’s all we’re talking about.”

Beyond the issue of economic competitiveness, the university has made clear that animal-rights groups also factor into its thinking. Two groups, People for the Ethical Treatment of Animals and a Wisconsin ally, Alliance for Animals and the Environment, have been trying to pressure the university to halt experiments with animals.

They’re upset by research like that carried out by Tom C. Yin, a professor of neuroscience whose work is aimed at improving human hearing. Part of Yin’s work involves cats, and PETA used open-records requests to obtain and publish photographs that show a cat with metal sensors screwed into its skull.

The university wants to block such requests for reasons that include the costs, largely staff time, that it takes to process them, Barker said. There’s also the risk that researchers and other university staff members, even after combing their records to answer requests from groups such as PETA, might fail to redact something of unrecognized importance that could help an economic competitor or violate an agreement with an outside partner, he said.

Lueders rejects the university’s arguments. Animal-related records processing may cost \$100,000 a year—the number cited by the university in its memo to lawmakers—but that’s a fraction of the university’s tens of millions in annual research dollars, he said.

Leaders in the movement for open-access journals, waging their own battles to have articles financed by authors rather than readers, see themselves as separate from any fights over prepublication access.

“It is really contentious,” said Heather Joseph, executive director of the Scholarly Publishing and Academic Resources Coalition, calling the states “all over the board” on what disclosure protections, if any, they afford their researchers.

Some of those restrictions seem understandable from a university’s perspective, Joseph said. But overall, she said, they don’t seem in line with the sense—demonstrated empirically in open-access studies—that everyone does better when information is more widely shared.

John W. Houghton, a professorial fellow at Victoria University, in Australia, has carried out a series of economic analyses of open-access publishing in various countries. He has found that a full open-access system produces substantial and widespread economic benefits, but that early adopters among both countries and universities bear the burden, since they have to pay for journal subscriptions while financing their own authors.

A study financed by the European Commission and released last month estimated that, in the United States and several other countries, half of all papers are now freely available within a year or two of publication.

A committee of the California Legislature approved a bill this year requiring free access to state-financed research, and Illinois passed a bill last month urging a similar move by its public universities. As for limiting prepublication disclosures, the Wisconsin Legislature is proving difficult to predict. Lawmakers rebuffed an initial request, and university leaders admit they’re still battling anger over the discovery this year that the institution—at a time of tight budgets—was keeping hundreds of millions of dollars in accounts that some lawmakers felt were not fully disclosed.

“It hurt a lot of things” affecting the university, Barker said of the accounts. “It hurt this, and a lot of things.” Reported in: *Chronicle of Higher Education* online, September 9.

net neutrality

Washington, D.C.

In a momentous battle over whether the Web should remain free and open, members of a federal appeals court expressed doubt over a government requirement that Internet service providers treat all traffic equally.

On September 9, the Federal Communications Commission and Verizon, one of the largest Internet service providers, squared off in a two-hour session of oral arguments—three times as long as was scheduled. As Verizon pushed for the authority to manage its own pipes, the government argued that creators of legal content should have equal access to Internet users, lest big players gain an unfair advantage.

But two judges appeared deeply skeptical that the FCC had the authority to regulate the Internet in that manner. The two jurists, Judge Laurence H. Silberman and Judge David S. Tatel, said that the agency's anti-discrimination rule—which requires an Internet service provider to give all traffic that travels through its pipes the same priority—illegally imposed rules meant for telephones on the infrastructure of the Web. The FCC itself disallowed the telephone-type regulation a decade ago.

The third judge, Judith W. Rogers, did not ask as many questions but appeared to accept much of the FCC's position.

Consumers could experience a significant change in the Internet if the United States Court of Appeals for the District of Columbia Circuit strikes down the FCC's requirement, called the Open Internet Order. Currently, companies that offer goods or services online do not have to pay anything to get their content to consumers. If Internet service providers started charging fees to reach customers more quickly, large, wealthy companies like Google and Facebook would have an edge, the FCC says. The government argued that such a tiered service could cause small, start-up companies with little money to pay for their access—the next Google or Facebook, perhaps—to wither on the vine.

In any case, the added costs would be likely to be passed on to consumers.

The case, which is expected to be decided late this year or early next year, has attracted enormous interest.

The judges were not entirely hostile to the FCC's arguments. Judge Tatel, who many telecommunications analysts expect to be the swing vote on the case, pushed lawyers on both sides to concede that the part of the FCC rule that prohibits outright blocking of online content or applications could be allowed.

Judge Tatel also queried each side on whether the two main provisions of the Open Internet Order—no blocking and no discrimination—had to be taken as a whole or could be separated, with the no-blocking rule being upheld.

An opinion that voided one provision yet upheld the other would be more likely to be appealed to the Supreme

Court, telecommunications lawyers said, because neither side would be completely happy with the decision.

Helgi C. Walker of the law firm Wiley Rein, who argued the case on behalf of Verizon, said the rules had to be struck down as a whole. Congress never intended the FCC to have authority to regulate the Internet, she said.

Sean A. Lev, who argued the case for the agency, told the judges that the FCC did have the authority to govern the Internet under numerous parts of the Telecommunications Act, including one that gives the commission the duty to work to expand broadband access. Companies that have equal access to consumers are encouraged to innovate, Lev said, adding that it would result in more vibrant start-ups and a growth in demand for Internet service.

The judges themselves seemed intent on viewing the case from as many sides as possible. Each side was scheduled twenty minutes to present its case and answer questions from the justices. But after spending thirty minutes on Verizon's presentation, the judges proceeded to grill the FCC's lawyer for a full hour.

The remainder of the two-hour session was spent hearing from a lawyer representing public-interest groups, who joined the lawsuit on the FCC's side, and a rebuttal from Verizon.

"I was hoping for a better argument than this," Andy Schwartzman, a media attorney who supports the rules, said in an interview. "It doesn't look good for the commission."

The FCC's uphill battle, in part, reflects politics and past decisions by the agency. In 2002, its chairman at the time, Michael K. Powell, a Republican, got the majority of the commission to agree that the Internet was not a telecommunications service like the telephone system. Instead, it classified the Web as an information service, making it subject to much lighter regulation.

A ruling striking down the anti-discrimination rule would be a blow to the Obama administration, as well as to companies like Google, Facebook and Netflix, who could begin having to pay Internet providers for priority access to users.

Supporters of the rules argue that they are necessary to protect a free and open Internet, and that all websites should be treated equally. They worry that discrimination by providers could prevent the next Google from even getting off the ground. But Republicans have long argued that the rules, which were adopted in late 2010, unnecessarily restrict the business choices of Internet providers and amount to government control of the Internet.

Public interest advocates bemoaned the fact that the FCC chose to classify broadband as an "information service" instead of a "telecommunications service," which the agency has broad authority to regulate, including as a common carrier.

"That's why we have always said that these should be common carrier services," Matt Wood, the policy director for Free Press, said in an interview. "That's why you had

the FCC up there doing gymnastics for an hour because they refuse to make that determination.”

If the FCC reclassified broadband as a “telecommunications service,” it would put the rules on firmer legal ground, but it would spark a massive political battle with congressional Republicans, who fear the agency would have expansive authority to impose burdensome regulations on the Internet.

If the court does strike down part of the rules, it will likely be up to Tom Wheeler, president Obama’s nominee for FCC chairman, to decide how to respond. Reported in: *New York Times*, September 9; thehill.com, September 9; *Ad Week*, September 10.

privacy and surveillance

Washington, D.C.

In a detailed legal attack on the National Security Agency’s collection of Americans’ phone call data, the American Civil Liberties Union argued in court papers filed August 26 that the sweeping data gathering violates the Constitution and should be halted.

The ACLU cited the writings of George Orwell and the comprehensive East German surveillance portrayed in the film *The Lives of Others* in warning of the dangers of large-scale government intrusion into private lives. The new motion, elaborating on the ACLU’s arguments against the data collection, came in a federal lawsuit challenging the NSA program that the group filed in June.

Intelligence officials have emphasized that the NSA database does not contain the contents of any Americans’ calls, but only the so-called metadata—the numbers called and the time and duration of each call. They say the database is searched only based on “reasonable, articulable suspicion” of terrorism and is valuable for tracking terror plots.

The Justice Department is expected to ask the judge in the case, William H. Pauley III of the Southern District of New York, to dismiss it.

In a declaration in support of the ACLU, Edward W. Felten, a professor of computer science and public affairs at Princeton, said that by gathering data on the three billion calls made each day in the United States, the NSA was creating a database that could reveal some of the most intimate secrets of American citizens (see page 212).

“Calling patterns can reveal when we are awake and asleep; our religion, if a person regularly makes no calls on the Sabbath or makes a large number of calls on Christmas Day; our work habits and our social aptitude; the number of friends we have, and even our civil and political affiliations,” Felten wrote.

He pointed out that calls to certain numbers—a government fraud hot line, say, or a sexual assault hot line—or a text message that automatically donates to Planned Parenthood can reveal intimate details. He also said sophisticated data

analysis, using software that can instantly trace chains of social connections, can make metadata even more revealing than the calls’ contents.

The NSA’s collection of call log data is approved in general terms by the Foreign Intelligence Surveillance Court. But the information is collected without individualized court warrants, based in part on a Supreme Court ruling from 1979, *Smith v. Maryland*, that said call logs recorded in a criminal case were not subject to protection under the Fourth Amendment.

The ACLU argues that the *Smith* ruling involves “narrow surveillance directed at a specific criminal suspect over a very limited time period.” The organization said the facts in the *Smith* case bore little resemblance to the mass collection of data on every call made in the country over the last seven years, which it said violated the Fourth Amendment’s guarantee against unreasonable searches and seizures.

The lawsuit also charges that the data collection violates the First Amendment’s free speech clause by imposing “a far-reaching chill” on the ACLU’s interaction with clients and sources.

“Americans do not expect that their government will make a note every time they pick up the phone of whom they call, precisely when they call them and for precisely how long they speak,” the group wrote.

The ACLU lawsuit is one of several challenges to NSA programs based on leaks by Edward J. Snowden, the former NSA contractor who is now in Russia.

The Electronic Privacy Information Center, an advocacy group, has asked the Supreme Court to intervene and void the surveillance court’s approval of the phone data collection. Other individuals and interest groups are also pursuing court cases. Reported in: *New York Times*, August 26.

Washington, D.C.

While the National Security Agency has been working to gather data about Americans’ communications, other branches of government have been working to develop new rules to promote online privacy and security. Among them is the National Institute of Standards and Technology. With the private sector’s input, NIST has been putting together an obscure but important proposal to improve the nation’s resilience against malicious hackers.

Buried in the back of it is a series of recommendations that, if approved, might pave the way for stronger government oversight of businesses when it comes to their use of personal information. They include suggestions such as figuring out what exactly a company knows about its employees and its customers; whether its handling of the information poses a security risk; and how to treat personal data in the event of an online attack.

These ideas are based on a common set of privacy principles that don’t have the force of law. But according to Stewart Baker, the NSA’s one-time top lawyer and former

Bush administration official, the NIST guidelines could eventually turn into more enforceable regulations:

“That’s because of how the cybersecurity executive order treats NIST’s work product. Once NIST has finished the framework, next January, the administration plans to use a wide range of incentives to get industry to adopt the framework. But the document’s effect will be felt as soon as a preliminary draft is issued in October. The executive order instructs every regulatory agency in the federal government to review the preliminary NIST framework and report to the President on whether the agency has authority to impose NIST’s framework on the industries it regulates. If an agency lacks authority, it will almost certainly be invited to go ask for it. This means that the privacy appendix, which made its first appearance in public in the dead of August, will have a potentially irreversible effect as early as October 10, when NIST is due to issue the preliminary framework.”

Baker argues that due to this possibility, the privacy guidelines have no place in NIST’s proposed framework. Perhaps it might be better for Congress to write its own privacy protections into a comprehensive piece of IT security legislation. But for more than a year, Congress has failed to agree on a bill, with privacy usually being the key sticking point. Civil libertarians hated CISPA, the House’s proposed law, because they feared that it was overly intrusive. (The White House agreed, twice threatening a veto.) The Senate, meanwhile, has yet to unveil its version of a bill.

Which leaves NIST’s draft framework as the next best alternative. Despite the fact that the government is assembling the document, the process for determining what goes in it has mostly been led by industry—the result of numerous comments from the private sector urging against new mandatory requirements. NIST, sensitive to the risks of looking like it’s imposing something on corporations, has been quick to get out of the way, and industry groups ranging from U.S. Telecom to BSA—The Software Alliance have been quick to applaud the administration on its hands-off approach.

“I’ve personally attended all four of the NIST workshops and I think there’s been great industry representation,” said John Marinho, a cybersecurity executive at CTIA—The Wireless Association. “NIST has done a very, very good job of bringing all the right stakeholders together.”

“Relative to what NIST was asked to do,” said Lockheed Martin’s Lee Holcomb, “I would give them a very good score.”

Business leaders say that Baker’s doomsday scenario seems unlikely. There are a lot of leaps between the voluntary regime being floated now and a brand-new circle of regulatory hell. For example, the principles would have to be finalized as-is and avoid being watered down (some privacy critics would say the principles are already broad and toothless). Then, to get businesses to swallow the voluntary principles, the White House would likely need to dangle additional incentives, such as promises of better

liability protection. Since some of these would require an act of Congress—a body that isn’t really in a position to do anything right now—that effort would probably fail. And then, before turning the privacy principles into actual regulation, the government would need to solicit feedback from industry sources who would be pretty irate.

“It’s hard for me to imagine how a privacy policy proposal—that clearly says it’s a proposal and not regulation—is then turned into regulation by the Federal Trade Commission, which requires a rule-making process,” said Tim Molino, BSA’s director of government relations.

Chances are the final language on privacy will be weakened. But the fact that privacy gets an explicit mention at all is significant given that prior legislation has mostly treated it as an afterthought. And some businesses, such as Microsoft, would like to see the privacy principles integrated more tightly with the cybersecurity recommendations, making them easier for smaller companies to adopt. Reported in: *Washington Post*, October 11.

Menlo Park, California

A coalition of six major consumer privacy groups has asked the Federal Trade Commission to block coming changes to Facebook’s privacy policies that they say would make it easier for the social network to use personal data about its users, including children under 18, in advertising on the site.

In a letter sent to the agency September 4 the coalition said Facebook’s changes, scheduled to go into effect later that week, violate a 2011 order and settlement with the FTC over user privacy.

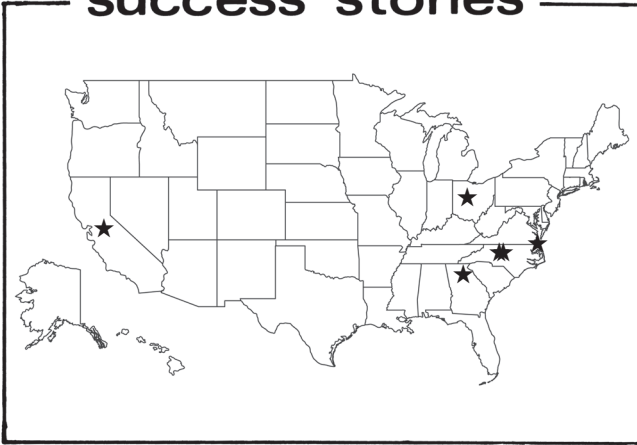
“Facebook users who reasonably believed that their images and content would not be used for commercial purposes without their consent will now find their pictures showing up on the pages of their friends endorsing the products of Facebook’s advertisers,” the letter says. “Remarkably, their images could even be used by Facebook to endorse products that the user does not like or even use.”

The language in Facebook’s new policy documents seems to reverse the default setting for user privacy when it comes to advertising. The old language gives users the explicit right to control how their names, faces and other information are used for advertising and other commercial purposes. The company’s new policy says consumers are automatically giving Facebook the right to use their information unless they explicitly revoke permission—and the company made that harder to do by removing the direct link to the control used to adjust that permission.

“Facebook is now claiming the default setting is they can use everyone’s name and image for advertising and commercial purposes, including those of minors, without their consent,” said Marc Rotenberg, executive director

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success stories



libraries

Asheboro, North Carolina

Invisible Man will once again be on the shelves of Randolph County Schools' high school libraries. The Randolph County Board of Education decided, by a 6-1 vote, at a special meeting September 25 to reinstate Ralph Ellison's book to the county school library shelves. Casting the dissenting vote was board member Gary Mason.

On September 16, the board, by a 5-2 vote, originally decided to ban the book after receiving a parent's complaint. The decision brought international attention to Randolph County. Both the American Library Association and the national Kids' Right to Read Project sent letters to school board members about the book ban. Both groups wrote about their concerns, particularly constitutional ones, and asked the board to reconsider its action. The People For the American Way Foundation also contacted board members urging them to reverse their decision about the book ban.

The book was one of three selections to choose from on Randleman High School juniors' summer reading list; both school-level and district committees recommended the book stay on library shelves.

Before the vote to return the book, board members who originally voted to ban the book spoke to the approximately fifty people who attended the meeting about their reasoning and other considerations since the first vote. Many of those present were media representatives.

Mason said he reread the book since the last meeting and deliberated about the ban for several days. He talked about dedicating "his entire life to the safety and protection

of other people" and his obligations to parents, students and the citizens who had elected him to represent them.

He said he remained concerned about the "strong language" in the book. "I still feel it is not appropriate for children or young teens to read," Mason said, adding that he realized that others would disagree with him for opposing the book.

Board member Matthew Lambeth led off the discussion, apologizing for not personally seeking counsel from the board's legal adviser, teachers and the superintendent before voting last week. He said he read the book twice, once in college and again three weeks ago after receiving a copy. He explained that as a college freshman it gave him a perspective he had never seen, having been raised in a "very white background." However, he said he took issue with "explicit accounts" of incest and rape with which he was familiar because of incidents affecting individuals he knew.

Lambeth said he had listened to other viewpoints and still was concerned about the book's content and protection of students, but realized that the decision was about a child's First Amendment rights and educational values, not his personal perspective.

Board member Tracy Boyles said he wondered as he drove home from the last meeting whether he had made the right decision. Reading e-mails which he and other board members received made him realize that he didn't have the right to subject his morals on others. "I can't cast them on someone else; it's the job of parents to do so." He also reflected on his son being in the Air Force and "in war twice. ... He was fighting for these rights. I'm casting a vote to take them away. Is it right of me? No."

And Boyles became teary when he spoke of having to explain his initial book ban decision to his 12-year-old daughter. "That's hard."

After comments by both Mason and Boyles, Lambeth added that he'd want his children to be provided the perspective about feeling "invisible," like the book's narrator, even though he thought some of the content was offensive.

Board Chair Tommy McDonald said he agreed with 99 percent of what the others said and didn't want the decision to become a moral issue. He also said he received a lot of e-mails which he termed "very enlightening," but also some he described as "downright vulgar."

"My job is to make sure that book is there," he said. He thanked the staff for supplying additional information about the book.

Board member Gary Cook agreed with McDonald and said he admired Mason for his stand. He pointed out that the board may have been too hasty in making the first decision and reminded fellow members that they had put off a decision earlier in the summer which would have originally cut teacher assistants' hours to 80 percent. After re-examination of the financial options available, the board ended up reducing them to 94 percent.

Superintendent Dr. Stephen Gainey told the board, "We want to do what's right for the kids and resolve this issue.

I respect your opinions. I do want to get back to the No. 1 prized possession, what's right for kids."

Lambeth introduced the motion, seconded by Cook, "to reinstate Ralph Ellison's *Invisible Man* back into the Randolph County Schools libraries." In favor were McDonald, Boyles, Cook and Lambeth, as well as board members Emily Coltrane and Todd Cutler, who both opposed the ban the first time but did not offer any comments.

At the beginning of the special session, Board Attorney Jill Wilson explained that she asked for the special meeting because she thought the school board was only discussing a parent's complaint about the book on September 16 and scheduling a hearing on the matter, not taking action. Wilson pointed out legal considerations when removing a book from the schools, also noting constitutional considerations and that school libraries are "marketplaces for ideas." She said books can be removed if they are found to be "pervasively vulgar and without merit."

Catherine Berry, assistant superintendent of curriculum and instruction, reviewed the process which was followed after a complaint about *Invisible Man* was received from parent Kimiyutta Parson.

Berry said Parson was unable to attend the meeting, but provided a statement that was made available at the special session. Parson said school libraries are not public libraries and shouldn't have materials that are not appropriate for students 15 years old or younger. Reported in: *Asheboro Courier-Tribune*, September 23, 25.

Currituck, North Carolina

A sexually charged book about teen girls and their reactions to an ardent senior boy will remain in the Currituck County High School library.

The Currituck County Board of Education decided by a 4-1 vote October 14 that *A Bad Boy Can Be Good for a Girl*, by Tanya Lee Stone, should remain available as it has since 2006, board member Karen Etheridge said.

"I'm disappointed," said Elissa Cooper, the parent who raised the challenge, "but I thank God we still have the right to debate. I feel like there will be good from this." Cooper had asked to have the book removed from the school library after her freshman daughter brought it home last February. The mother's challenge also was turned down by committees at the high school and district levels. Reported in: *Virginian Pilot*, October 15.

schools

Lodi, California

More than a month after students, parents and free speech organizations protested a Lodi school district's social media contract, the district's board of trustees unanimously agreed

on a reworked policy. The new policy, which administrators say is designed to reduce cyberbullying in the Lodi Unified School District, is a list of social media best practices for students and will replace the contract approved in March that said students could be punished for posts that administrators found offensive.

All students and their parents will be required to sign the new policy to indicate they have read the guidelines.

The board considered three similar versions of the guidelines and approved the third, which removed a paragraph detailing the school district's authority to discipline students for online speech, whether on- or off-campus, provided administrators have a reasonable belief that the speech will cause "substantial disruption" or if the speech is lewd, vulgar or offensive.

"If something is brought to our school administrator's attention that is cyber-bullying and creating a hostile environment at school for any student ... any consequences the cyber-bully may receive will be within the scope of the administrator's authority without infringing on anyone's First Amendment rights," Dawn Vetica, the district's assistant superintendent of secondary education, said. "It is our hope that parents review the guidelines with their students and there is a dialogue about posting things on social media."

Under *Tinker v. Des Moines Independent Community School District*, schools can punish students for on-campus speech if it is suspected of causing substantial disruption. The *Tinker* case involved only on-campus speech; however, some courts have applied *Tinker* to off-campus speech either directed at or disruptive of the school.

In August the district suspended its previous social media policy to make revisions following repeated concerns from the community. Earlier, the Student Press Law Center and the American Civil Liberties Union of Northern California sent a letter to Superintendent Cathy Nichols-Washer and the board that said the policy's wording made students' ability to participate in extracurricular activities conditional on accepting a "draconian and constitutionally infirm" level of school control.

Zachary Denney, a staff writer on Bear Creek High School's student newspaper, was one of the students who protested the original policy. He said the district did a good job with addressing students' and parents' concerns.

"We're very happy there's no longer a contract and the wording was no longer vague," Denney said. "When they put this contract in place, they did it with the best intent ... but they didn't look at it clearly enough and see there were threats to our rights." Denney said he's glad their efforts helped create positive change for the district and their fellow students.

"As of right now, I think our rights are fine. There really isn't anything in the policy that could threaten us," Denney said. "We have a solution, so we're happy for that." Reported in: *splc.org*, September 6.

Clarke County, Georgia

Clarke County middle school teachers won't be forbidden to use Tomas Rivera's novel *And the Earth Did Not Devour Him*, the county's school board decided narrowly September 9. Board members voted 3-2 to back Clarke County Schools Superintendent Philip Lanoue, who had denied a request from parents Chad and Beth Lowery to have the book removed from a reading list in a gifted class their daughter was in last year at Burney-Harris-Lyons Middle School.

The couple will now take their case to the state school board, Beth Lowery said after a hearing of about two hours at Clarke school system headquarters. "I'm very disappointed in the decision, and we'll definitely be appealing to the state," she said.

The couple had asked school administrators to tell the teacher of the gifted class not to use the book. One paragraph in particular, an old man's rant against the injustices he faced as a migrant worker, contained language middle school students shouldn't be exposed to, the parents said.

"If the book was a video it would receive an 'R' rating," Chad Lowery told the board. Using the word "f---" automatically gets a movie an R rating, and board policy prohibits teachers from showing R-rated films to students, he said. But there's no such guidance when it comes to books. The word is used seven times in the subject paragraph, and a handful of other times in the book, he said.

"We're stuck here. We're going to have to decide if this (the rule on movies) applies to a book," he said.

Board members Sarah Ellis, David Huff and Denise Spangler voted to uphold Lanoue; members Linda Davis and Carl Parks voted to remove the book from the middle school gifted class's reading list. The vote might have been different, but several board members were absent, some because of illness.

Absent board members Ovita Thornton and Vernon Payne had also missed the first vote on the book, when board members voted 5-2 to send the question back to Lanoue for reconsideration after he told parents he wouldn't ask the teacher to stop using the book. Lanoue said the book should remain, but that in the future parents should be allowed to opt out for their children, who could then be assigned alternative reading material. But he argued against the idea of making decisions about whether children can read books simply based on offensive language.

"To think we're going to be able to decide what's appropriate or not based on language ... We haven't done that ever in our society," he said.

The Lowerys brought two witnesses, both parents, who said they found the language offensive. Lanoue, presenting the school district's case, also brought two parent witnesses who said they found the language offensive, but not enough to warrant throwing out the book.

"I don't think it's appropriate material for kids that age. If they were at home and used that kind of language,

they'd get in trouble," said parent Deborah Allen, one of the Lowerys' witnesses.

"I think it's a beautifully written memoir," said Don DeMaria, a parent called by Lanoue. The passage the Lowerys question does have some bad language, but the book is more than 80 pages, he said.

The couple's complaint demonstrates that the board should talk about better communication with parents regarding what their children are reading, Spangler said. But board members shouldn't be making decisions about what teachers can or can't do in the classroom, she said.

"The educators need to make decisions about what happens in the classroom," Spangler said. "I'm convinced the educators in this district know what they're doing." Ordering the book removed would set a bad precedent, she added. "I'm afraid we're going down a road of looking at every poem, every book, every account of the Holocaust."

The board should "try to defer" to teachers in professional decisions, Parks conceded. But the Burney-Harris-Lyons teacher is an "outlier," he said. "When I dig deeper, you do have to have some kind of societal standards." Reported in: *Athens Banner-Herald*, September 9.

Guilford, North Carolina

Guilford parents and students have a resolution to their concerns about a controversial book on the high school suggested reading list.

Last fall parents of high schoolers challenged *The Handmaid's Tale*, by Margaret Atwood, saying that the book is inappropriate for high school readers because it is "detrimental to Christian values" and they want it taken off the summer reading list. The 1985 book offers graphic scenes of sex and violence.

On September 17, the board of education held a special meeting to retain the book on the suggested reading list. The board voted 5-2 in favor, with Vice Chairman Amos Quick and board member Linda Welborn dissenting.

Catherine Barnette, a parent who will have a student at Page High School next year, challenged the book. "This assignment is negligent and dangerous and it corrupts sexually immature students," Barnette said. "I'm not asking it to be banned or removed from school libraries, just removed off of the reading list."

Mike Albert, an AP teacher at Grimsley High School where the book is taught, spoke in favor of the text. "These students that are reading this text are in 12th grade in a college-level course," he said. "They have the ability to think about problems on their own. The words and descriptions are horrible but on purpose."

Board members discussed the advantages and disadvantages of the book but most did not feel good about not giving students the option to read the book.

"I understand the objections but think choice is important," said board Chairman Alan Duncan. "We've heard

from several parents and students saying the book had a helpful place in their maturation process. There are also words and themes that require some guidance. I'm not willing to take it off the reading list. I don't feel it's appropriate to deny all our students."

Alan Parker, principal at Southwest Guilford High School said the book doesn't cause a daily issue at his school. "It is not a part of our daily instruction in the classroom," he said. "It's on our Advanced Placement (12th grade) suggested reading list so if students would like to read it they can do that. It is an option but they don't have to."

The procedure that a parent is supposed to go through to challenge a book starts at the school level. If a parent is concerned about a book, he or she brings it to the attention of the teacher, media specialist or administrator and the parent is offered an alternative book. If that does not satisfy the parent, the parent fills out a statement of concern to the media specialist and principal. After that, it goes to the school's media and technology advisory committee, then the district review committee and if that is not satisfactory for the parent, like with *The Handmaid's Tale*, it goes to the board of education. Reported in: *High Point Enterprise*, September 18.

college

Columbus, Ohio

Four weeks after Columbus State Community College (CSCC) student Spencer Anderson filed a lawsuit against the school challenging its policies on student expression, CSCC has revised its policies to allow individuals and groups smaller than 50 people to use the vast majority of outdoor campus space for speech without notifying the school in advance.

Before the change, CSCC limited public speech to just two small areas of campus and required students to ask for permission to use even those areas at least one business day in advance. Anderson's suit contended that the policy was unconstitutional on its face and that it was selectively enforced against him when he was told he could hand out flyers only in the less well-traveled speech area. While awaiting the CSCC board of trustees' vote on the policy change, Anderson's attorneys stated that they would be willing to settle out of court.

Following CSCC's policy change, students may now speak publicly, hand out flyers, and display signs in any "publicly accessible outdoor area" besides parking lots, garages, and driveways, as long as the students are not disrupting ordinary college business or damaging property. Events involving more than 50 students will still have to provide the school with two days' notice.

CSCC said the revisions were in the works long before Anderson filed his suit against the school. Reported in: the-fire.org, September 23.

NSA surveillance controversy grows. . . from page 212

The new disclosures add to the growing body of knowledge in recent months about the NSA's access to and use of private information concerning Americans, prompting lawmakers in Washington to call for reining in the agency and President Obama to order an examination of its surveillance policies. Almost everything about the agency's operations is hidden, and the decision to revise the limits concerning Americans was made in secret, without review by the nation's intelligence court or any public debate. As far back as 2006, a Justice Department memo warned of the potential for the "misuse" of such information without adequate safeguards.

An agency spokeswoman, asked about the analyses of Americans' data, said, "All data queries must include a foreign intelligence justification, period."

"All of NSA's work has a foreign intelligence purpose," the spokeswoman added. "Our activities are centered on counterterrorism, counterproliferation and cybersecurity."

The legal underpinning of the policy change, she said, was a 1979 Supreme Court ruling that Americans could have no expectation of privacy about what numbers they had called. Based on that ruling, the Justice Department and the Pentagon decided that it was permissible to create contact chains using Americans' "metadata," which includes the timing, location and other details of calls and e-mails, but not their content. The agency is not required to seek warrants for the analyses from the Foreign Intelligence Surveillance Court.

NSA officials declined to identify which phone and e-mail databases are used to create the social network diagrams, and the documents provided by Snowden do not specify them. The agency did say that the large database of Americans' domestic phone call records, which was revealed by Snowden in June and caused bipartisan alarm in Washington, was excluded. NSA officials have previously acknowledged that the agency has done limited analysis in that database, collected under provisions of the USA PATRIOT Act, exclusively for people who might be linked to terrorism suspects.

But the agency has multiple collection programs and databases, the former officials said, adding that the social networking analyses relied on both domestic and international metadata. They spoke only on the condition of anonymity because the information was classified.

The concerns in the United States since Snowden's revelations have largely focused on the scope of the agency's collection of the private data of Americans and the potential for abuse. But the new documents provide a rare window into what the NSA actually does with the information it gathers.

A series of agency PowerPoint presentations and memos describe how the NSA has been able to develop software

and other tools—one document cited a new generation of programs that “revolutionize” data collection and analysis—to unlock as many secrets about individuals as possible.

The spy agency, led by Gen. Keith B. Alexander, an unabashed advocate for more weapons in the hunt for information about the nation’s adversaries, clearly views its collections of metadata as one of its most powerful resources. NSA analysts can exploit that information to develop a portrait of an individual, one that is perhaps more complete and predictive of behavior than could be obtained by listening to phone conversations or reading e-mails, experts say.

Phone and e-mail logs, for example, allow analysts to identify people’s friends and associates, detect where they were at a certain time, acquire clues to religious or political affiliations, and pick up sensitive information like regular calls to a psychiatrist’s office, late-night messages to an extramarital partner or exchanges with a fellow plotter.

“Metadata can be very revealing,” said Orin S. Kerr, a law professor at George Washington University. “Knowing things like the number someone just dialed or the location of the person’s cellphone is going to allow them to assemble a picture of what someone is up to. It’s the digital equivalent of tailing a suspect.”

Just six days after the Snowden NSA leaks revealed that the government was collecting essentially all telephone call “metadata,” the ACLU filed a lawsuit challenging the practice as unconstitutional.

On August 26, the ACLU filed a declaration by Princeton Computer Science Professor Edward Felten to support its quest for a preliminary injunction in that lawsuit. Felten, a former technical director of the Federal Trade Commission, has testified to Congress several times on technology issues, and he explained why “metadata” really is a big deal.

Storage and data-mining have come a long way in the past 35 years, Felten notes, and metadata is uniquely easy to analyze—unlike the complicated data of a call itself, with variations in language, voice, and conversation style. “This newfound data storage capacity has led to new ways of exploiting the digital record,” writes Felten. “Sophisticated computing tools permit the analysis of large datasets to identify embedded patterns and relationships, including personal details, habits, and behaviors.”

There are already programs that make it easy for law enforcement and intelligence agencies to analyze such data, like IBM’s Analyst’s Notebook. IBM offers courses on how to use Analyst’s Notebook to understand call data better.

Unlike the actual contents of calls and e-mails, the metadata about those calls often can’t be hidden. And it can be incredibly revealing—sometimes more so than the actual content.

Knowing who you’re calling reveals information that isn’t supposed to be public. Inspectors general at nearly every federal agency, including the NSA, “have hotlines through which misconduct, waste, and fraud can be reported.”

Hotlines exist for people who suffer from addictions to alcohol, drugs, or gambling; for victims of rape and domestic violence; and for people considering suicide. Text messages can measure donations to churches, to Planned Parenthood, or to a particular political candidate.

Felten points out what should be obvious to those arguing “it’s just metadata”—the most important piece of information in these situations is the recipient of the call.

The metadata gets more powerful as you collect it in bulk. For instance, showing a call to a bookie means a surveillance target probably made a bet. But “analysis of metadata over time could reveal that the target has a gambling problem, particularly if the call records also reveal a number of calls made to payday loan services.”

The data can even reveal the most intimate details about people’s romantic lives. Felten writes: “Consider the following hypothetical example: A young woman calls her gynecologist; then immediately calls her mother; then a man who, during the past few months, she had repeatedly spoken to on the telephone after 11pm; followed by a call to a family planning center that also offers abortions. A likely storyline emerges that would not be as evident by examining the record of a single telephone call.”

With a five-year database of telephony data, these patterns can be evinced with “even the most basic analytic techniques,” he notes.

By collecting data from the ACLU in particular, the government could identify the “John Does” in the organization’s lawsuits that have John Doe plaintiffs. They could expose litigation strategy by revealing that the ACLU was calling registered sex offenders, or parents of students of color in a particular school district, or people linked to a protest movement.

The NSA had been pushing for more than a decade to obtain the rule change allowing the analysis of Americans’ phone and e-mail data. Intelligence officials had been frustrated that they had to stop when a contact chain hit a telephone number or e-mail address believed to be used by an American, even though it might yield valuable intelligence primarily concerning a foreigner who was overseas, according to documents previously disclosed by Snowden. NSA officials also wanted to employ the agency’s advanced computer analysis tools to sift through its huge databases with much greater efficiency.

The agency had asked for the new power as early as 1999, the documents show, but had been initially rebuffed because it was not permitted under rules of the Foreign Intelligence Surveillance Court that were intended to protect the privacy of Americans.

A 2009 draft of an NSA inspector general’s report suggests that contact chaining and analysis may have been done on Americans’ communications data under the Bush administration’s program of wiretapping without warrants, which began after the September 11 attacks to detect terrorist activities and skirted the existing laws governing

electronic surveillance.

In 2006, months after the wiretapping program was disclosed, the NSA's acting general counsel wrote a letter to a senior Justice Department official, which was also leaked by Snowden, formally asking for permission to perform the analysis on American phone and e-mail data. A Justice Department memo to the attorney general noted that the "misuse" of such information "could raise serious concerns," and said the NSA promised to impose safeguards, including regular audits, on the metadata program. In 2008, the Bush administration gave its approval.

A new policy that year, detailed in "Defense Supplemental Procedures Governing Communications Metadata Analysis," authorized by Defense Secretary Robert M. Gates and Attorney General Michael B. Mukasey, said that since the Supreme Court had ruled that metadata was not constitutionally protected, NSA analysts could use such information "without regard to the nationality or location of the communicants," according to an internal NSA description of the policy.

After that decision, which was previously reported by *The Guardian*, the NSA performed the social network graphing in a pilot project for 1½ years "to great benefit," according to the 2011 memo. It was put in place in November 2010 in "Sigint Management Directive 424" (sigint refers to signals intelligence).

In the 2011 memo explaining the shift, NSA analysts were told that they could trace the contacts of Americans as long as they cited a foreign intelligence justification. That could include anything from ties to terrorism, weapons proliferation or international drug smuggling to spying on conversations of foreign politicians, business figures or activists.

Analysts were warned to follow existing "minimization rules," which prohibit the NSA from sharing with other agencies names and other details of Americans whose communications are collected, unless they are necessary to understand foreign intelligence reports or there is evidence of a crime. The agency is required to obtain a warrant from the intelligence court to target a "U.S. person"—a citizen or legal resident—for actual eavesdropping.

The NSA documents show that one of the main tools used for chaining phone numbers and e-mail addresses has the code name Mainway. It is a repository into which vast amounts of data flow daily from the agency's fiber-optic cables, corporate partners and foreign computer networks that have been hacked.

The documents show that significant amounts of information from the United States go into Mainway. An internal NSA bulletin, for example, noted that in 2011 Mainway was taking in 700 million phone records per day. In August 2011, it began receiving an additional 1.1 billion cellphone records daily from an unnamed American service provider under Section 702 of the 2008 FISA Amendments Act, which allows for the collection of the data of Americans if at least

one end of the communication is believed to be foreign.

The overall volume of metadata collected by the NSA is reflected in the agency's secret 2013 budget request to Congress. The budget document, disclosed by Snowden, shows that the agency is pouring money and manpower into creating a metadata repository capable of taking in 20 billion "record events" daily and making them available to NSA analysts within 60 minutes.

The spending includes support for the "Enterprise Knowledge System," which has a \$394 million multiyear budget and is designed to "rapidly discover and correlate complex relationships and patterns across diverse data sources on a massive scale," according to a 2008 document. The data is automatically computed to speed queries and discover new targets for surveillance.

A top-secret document titled "Better Person Centric Analysis" describes how the agency looks for 94 "entity types," including phone numbers, e-mail addresses and IP addresses. In addition, the NSA correlates 164 "relationship types" to build social networks and what the agency calls "community of interest" profiles, using queries like "travelsWith, hasFather, sentForumMessage, employs."

A 2009 PowerPoint presentation provided more examples of data sources available in the "enrichment" process, including location-based services like GPS and TomTom, online social networks, billing records and bank codes for transactions in the United States and overseas.

At a Senate Intelligence Committee hearing September 26 General Alexander was asked if the agency ever collected or planned to collect bulk records about Americans' locations based on cellphone tower data. He replied that it was not doing so as part of the call log program authorized by the USA PATRIOT Act, but said a fuller response would be classified.

If the NSA does not immediately use the phone and e-mail logging data of an American, it can be stored for later use, at least under certain circumstances, according to several documents.

One 2011 memo, for example, said that after a court ruling narrowed the scope of the agency's collection, the data in question was "being buffered for possible ingest" later. A year earlier, an internal briefing paper from the NSA Office of Legal Counsel showed that the agency was allowed to collect and retain raw traffic, which includes both metadata and content, about "U.S. persons" for up to five years online and for an additional ten years offline for "historical searches."

None of the phone companies that handed over communications metadata in bulk to the National Security Agency ever challenged the agency on its data requests, another newly declassified government document shows.

In a formerly secret memo published by the Foreign Intelligence Surveillance Court—the judicial body responsible for approving the NSA's surveillance—Judge Claire Eagen reveals that "to date, no holder of records who has

received an Order to produce bulk telephony metadata has challenged the legality of such an Order . . . despite the explicit statutory mechanism for doing so.”

Section 215 of the USA PATRIOT Act has been interpreted by the NSA to authorize the blanket seizure of millions of U.S. phone records. The law allows court orders issued under Section 215 to be contested if the recipient can prove that the data request is unreasonably broad.

Silicon Valley has been known to take advantage of a similar mechanism in response to other types of data requests. In the 2000s, Yahoo tried to resist a court order on Fourth Amendment grounds but failed, leading it to become one of the handful of companies participating in the PRISM program. The legal action was kept secret because of the gag order that accompanies NSA data requests.

Tech companies including Google and Microsoft are now suing the government for permission to talk more openly about the FISA court orders.

Unlike the tech firms, however, it now appears that the telephone providers never once resisted the NSA. Speaking in Tokyo September 17 a top Verizon exec dismissed Google and Microsoft’s suits as “grandstanding.”

“The laws are not set by Verizon; they are set by the governments in which we operate,” said John Stratton, president of Verizon Enterprise Solutions. “I think it’s important for us to recognize that we participate in debate, as citizens, but as a company I have obligations that I am going to follow.”

The newly released FISA document also appears to gloss over how Congress was notified about the surveillance programs. It suggests that members of Congress had ample opportunity to review the NSA’s activities before reauthorizing the relevant sections of the USA PATRIOT Act—something the Obama administration also has repeated:

“In light of the importance of the national security programs that were set to expire, the Executive Branch and relevant congressional committees worked together to ensure that each Member of Congress knew or had the opportunity to know how Section 215 was being implemented under this Court’s Orders. Documentation and personnel were also made available to afford each Member full knowledge of the scope of the implementation of Section 215 and the underlying legal interpretation,” the document states.

However, Rep. Mike Rogers (R-MI), chair of the House Intelligence Committee, withheld a letter from fellow members that would have explained the programs in detail. In its newly declassified document, the FISA court simply accepts that lawmakers were suitably informed when many have publicly disagreed. Last month, Rep. Justin Amash posted on Facebook that “the House Permanent Select Committee on Intelligence did NOT, in fact, make the 2011 document available to Representatives in Congress, meaning that the large class of Representatives elected in 2010 did not receive either of the now declassified documents detailing these programs.”

In another revelation the NSA acknowledged August 23 that its officials deliberately overstepped their legal authority multiple times in the past decade. The admission contradicted previous statements by lawmakers and the Obama administration that any privacy violations were unintentional.

“Over the past decade, very rare instances of willful violations of NSA’s authorities have been found, but none under [the Foreign Intelligence Surveillance Act] or the USA PATRIOT Act,” the agency said in a statement. “NSA takes very seriously allegations of misconduct, and cooperates fully with any investigations – responding as appropriate. NSA has zero tolerance for willful violations of the agency’s authorities.”

According to *Bloomberg News*, which first reported on the NSA’s statement, the violations were of Executive Order 12333, which was issued by President Reagan in 1981.

The admission came days after the government released a 2011 court opinion that concluded that the NSA had unconstitutionally collected about 56,000 e-mails of Americans over a three-year period (see page 225). The NSA said that incident and other legal violations were the result of technical glitches.

Just a week earlier Senate Intelligence Committee Chairwoman Dianne Feinstein (D-CA) said she was unaware of any intentional privacy violations. “As I have said previously, the committee has never identified an instance in which the NSA has intentionally abused its authority to conduct surveillance for inappropriate purposes,” she said in a statement.

Feinstein made the comment after *The Washington Post* published an internal NSA audit finding that the agency illegally obtained private communications thousands of times in recent years. But the news report did not identify any deliberate violations.

“The disclosed documents demonstrate that there was no intentional and willful violation of the law and that the NSA is not collecting the e-mail and telephone traffic of all Americans,” House Intelligence Committee Chairman Mike Rogers (R-MI) said at the time.

“The committee does not tolerate any intentional violation of the law. Human and technical errors, like all of the errors reported in this story, are unfortunately inevitable in any organization and especially in a highly technical and complicated system like NSA,” he added.

Josh Earnest, the White House deputy press secretary, only echoed Feinstein’s statement that her committee had not identified deliberate abuse. “Rather, the majority of the compliance incidents are unintentional,” Earnest said at the time.

One official told Bloomberg that the actions were the result of “overzealous NSA employees or contractors eager to prevent any encore to the September 11, 2001, terrorist attacks.”

A financial aspect of the scandal emerged in late August, as well as leaked documents published by *The Guardian*

revealed that the agency reimbursed some of the nation's top tech companies for participating in its PRISM surveillance program.

Previous NSA documents have linked companies such as Google, Facebook, Yahoo and Microsoft to the PRISM program, though many of the companies have denied granting the NSA "direct access" to their servers. Although a Yahoo spokesperson said the government is supposed to reimburse companies for cooperating with federal surveillance requests, the other tech companies either denied receiving money or refused to respond directly to the accusations.

Some critics fear that the shadow revenue flowing to the private sector could create a perverse incentive for tech companies. "The line you have to watch for . . . is the difference between reimbursement for complying with a lawful order and actually a profit-making enterprise," Michelle Richards, legislative counsel for the American Civil Liberties Union's said.

Google and Microsoft have asked the government for permission to disclose the aggregate numbers behind the NSA's secret surveillance requests. However, since the companies filed those suits, the Justice Department has asked for (and received) an extension of the deadline six times. It's unclear whether the government can simply continue deferring indefinitely. Reported in: *New York Times*, September 28; *arstechnica.com*, August 27; *Washington Post*, August 23, September 18; *thehill.com*, August 23.

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held that this program is consistent with the requirements of both Section 702 and the Fourth Amendment provided that there are sufficient safeguards in place to identify and limit the retention, use, or dissemination of such unrelated or wholly domestic communications.

The Obama Administration has argued that these surveillance activities, in addition to being subject to oversight by all three branches of government, are important to national security and have helped disrupt terror plots. These arguments have not always distinguished between the two programs, and some critics, while acknowledging the value of information collected using Section 702 authorities, are skeptical of the value of the phone records held in bulk at NSA. Thus, recent legislative proposals have primarily focused on modifying Section 215 to preclude the breadth of phone records collection currently taking place. They have also emphasized requiring greater public disclosure of FISC opinions, including the opinion(s) allowing for the collection of phone records in bulk.

This report discusses the specifics of these two NSA collection programs. It does not address other questions that have been raised in the aftermath of these leaks, such as the

potential harm to national security caused by the leaks or the intelligence community's reliance on contractors.

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For law enforcement, data mining is a big step toward more complete intelligence gathering. The police have traditionally made arrests based on small bits of data—witness testimony, logs of license plate readers, footage from a surveillance camera perched above a bank machine. The new capacity to collect and sift through all that information gives the authorities a much broader view of the people they are investigating.

For the companies that make big data tools, projects like Oakland's are a big business opportunity. Microsoft built the technology for the New York City program. IBM has sold data-mining tools for Las Vegas and Memphis. Oakland entered into a contract with the Science Applications International Corporation, or SAIC, to build its system. (In late September, that company was renamed Leidos Holdings.)

The company's contract to help modernize the New York City payroll system, using new technology like biometric readers, resulted in reports of kickbacks. Last year, the company paid the city \$500 million to avoid a federal prosecution. The amount was believed to be the largest ever paid to settle accusations of government contract fraud.

Even before the initiative, Oakland spent millions of dollars on traffic cameras, license plate readers and a network of sound sensors to pick up gunshots. Still, the city has one of the highest violent crime rates in the country. And an internal audit in August 2012 found that the police had spent \$1.87 million on technology tools that did not work properly or remained unused because their vendors had gone out of business.

The new center will be far more ambitious. From a central location, it will electronically gather data around the clock from a variety of sensors and databases, analyze that data and display some of the information on a bank of giant monitors.

The city plans to staff the center around the clock. If there is an incident, workers can analyze the many sources of data to give leads to the police, fire department or Coast Guard. In the absence of an incident, how the data would be used and how long it would be kept remain largely unclear.

The center will collect feeds from cameras at the port, traffic cameras, license plate readers and gunshot sensors. The center will also be integrated next summer with a database that allows police to tap into reports of 911 calls. Renee Domingo, the city's emergency services coordinator, said school surveillance cameras, as well as video data from the regional commuter rail system and state highways, may be added later.

Far less advanced surveillance programs have elicited resistance at the local and state level. Iowa City, for example, recently imposed a moratorium on some surveillance devices, including license plate readers. The Seattle City Council forced its police department to return a federally financed drone to the manufacturer.

In Virginia, the state police purged a database of millions of license plates collected by cameras, including some at political rallies, after the state's attorney general said the method of collecting and saving the data violated state law. But for a cash-starved city like Oakland, the expectation of more federal financing makes the project particularly attractive. The City Council approved the program in late July, but public outcry later compelled the council to add restrictions. The council instructed public officials to write a policy detailing what kind of data could be collected and protected, and how it could be used. The council expects the privacy policy to be ready before the center can start operations.

The American Civil Liberties Union of Northern California described the program as "warrantless surveillance" and said "the city would be able to collect and stockpile comprehensive information about Oakland residents who have engaged in no wrongdoing."

The port's chief security officer, Michael O'Brien, sought to allay fears, saying the center was meant to hasten law-enforcement response time to crimes and emergencies. "It's not to spy on people," he said.

Steve Spiker, research and technology director at the Urban Strategies Council, an Oakland nonprofit organization that has examined the effectiveness of police technology tools, said he was uncomfortable with city officials knowing so much about his movements. But, he said, there is already so much public data that it makes sense to enable government officials to collect and analyze it for the public good.

Still, he would like to know how all that data would be kept and shared. "What happens," he wondered, "when someone doesn't like me and has access to all that information?" Reported in: *New York Times*, October 13.

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depicted a baby's naked bottom, was deemed "sexually explicit" by the board.

"We recognize that there are security issues in prisons," said Deborah Caldwell-Stone, deputy director of the American Library Association's Office for Intellectual Freedom. But "unless there is a compelling threat to public safety or the security of the prison, prisoners should have access to a range of reading material."

"You would hope that prisons would help inmates" prepare for re-entering society, Caldwell-Stone said. "What's

the best way to do that? Through reading and education. We find it problematic when the goal of maintaining order in the prisons denies prisoners access to material that will entertain them and educate them."

The board operates largely out of public view. It is made up of 17 members, all of whom are department employees. In addition to captains and counselors, the roster includes two mail handlers and a secretary. A prison librarian, a school principal and a staff attorney also serve on the panel, which meets twice monthly at the department's headquarters in Wethersfield.

Lawlor also acknowledged the difficult task that members of the panel face in determining what's appropriate for a prisoner to read. "Who's qualified to make those determinations? I don't think I am," he said. Reported in: *Hartford Courant*, August 28.

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of the Electronic Privacy Information Center, one of the groups that wrote the letter, in an interview. "Red lights are going off in the privacy world."

The privacy groups, which helped persuade the FTC to issue the 2011 order, said Facebook's changes regarding children were especially problematic. The company's new policy says that if a user is under age 18, "you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf."

"It's an extraordinary claim to make," Rotenberg said. "That's something you can't do without explicit consent." He said courts and regulators have found that the personal information of children should receive special privacy protection.

Facebook, which has nearly 1.2 billion users worldwide, said that the privacy policy changes were partly made to clarify what it does with user information as part of a recent class-action settlement in the United States over its privacy practices.

"As part of this proposed update, we revised our explanation of how things like your name, profile picture and content may be used in connection with ads or commercial content to make it clear that you are granting Facebook permission for this use when you use our services," a company spokeswoman, Debbie Frost, said. "We have not changed our ads practices or policies—we only made things clearer for people who use our service."

Comments by Facebook users have been overwhelmingly negative on the official page where the company's chief privacy officer for policy, Erin Egan, announced the changes.

The groups asking the FTC to block Facebook's privacy changes are the Electronic Privacy Information Center, the Center for Digital Democracy, Consumer Watchdog, Patient Privacy Rights, U.S. PIRG, and the Privacy Rights Clearinghouse.

Typically, the agency does review such letters. And in the case of the 2011 Facebook settlement, the agency periodically examines the company's compliance with the commission's order. Reported in: *New York Times*, September 4.

Sacramento, California

California Gov. Jerry Brown (D) vetoed a state online privacy bill that would have protected residents' electronic communications accounts from warrantless access by law enforcement agencies. The bill would require law enforcement agencies to obtain a warrant before accessing electronic communications. They would have to notify a user within three days of accessing that user's electronic communications.

Under current federal law, the Electronic Communications Privacy Act (ECPA), law enforcement agencies do not need warrants to require electronic communication companies to turn over their users' communications if they have been electronically stored for more than 180 days.

If law enforcement agencies do obtain a warrant, they do not have to notify the user. If they have subpoenas or court orders—which have a lower burden of proof than warrants—they are required to inform the user.

Led by Senate Judiciary Committee Chairman Patrick Leahy (D-VT), Congress is considering ECPA reform but has yet to pass legislation updating the 27-year-old law.

These expanded notice requirements in the California bill “go beyond those required by federal law and could impede ongoing criminal investigations,” Brown wrote in his veto statement on Saturday. “I do not think that is wise.”


Brown's concerns are “overblown,” according to Hanni Fakhoury, staff attorney at the Electronic Frontier Foundation (EFF), which supported the bill. The EFF wrote to Brown encouraging him to sign the bill into law. The bill is “a sensible [one] that updates the state's electronic privacy laws to the realities of the 21st century,” the group wrote.

Fakhoury said privacy advocates have been optimistic that states will pass privacy-enhancing legislation where the federal government has tried to and failed, especially now that Congress is mired in apparent partisan gridlock.

“Our hope has been to get states to jump in and fill the voids,” he said. Reported in: *thehill.com*, October 14.

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