

## **The First Amendment: Limits and Opportunities of the U.S. Information Regime**

Kyu Ho Youm  
Professor and Jonathan Marshall First Amendment Chair  
School of Journalism and Communication  
University of Oregon

***1. Most important first amendment case law in recent years, and why? (Explain how you would define important.)***

*Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), was the most important First Amendment decision in recent years, especially within the context of America's ongoing war on terrorism. What makes the case so significant? *Holder* showcases a considerable retrenchment in the Supreme Court's commitment to protection of political speech in conflict with national security in a global new century. In upholding a federal law banning "material support" to "foreign terrorist organizations," the Supreme Court held that it could be a crime to provide "expert advice," "training," and "services" for terrorist groups designated by the State Department. In a dramatic departure from fundamental First Amendment principles, the Court paid little attention to the political nature of expression of those who challenged the law. The Court refused to apply the strict scrutiny standard required in content-based regulations and the incitement test in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Holder* Court's deference to the political branches' arguments based on national security/foreign relations was extraordinary when the Court blithely ignored its own free-speech principles and precedents. This is all the more disturbing, given that the Internet has made the world of the 21<sup>st</sup> century more global.

## ***2. Issues/decisions of greatest concern and why these are of concern?***

The balancing (or rebalancing) of the public's right to know in the United States as a rule-of-law nation with the government's sweeping assertion of secrecy as a weapon against the war on terrorism has taken on a pressing urgency. The oft-touted "transparency" of the Obama administration has been belied by Edward Snowden's revelations of the NSA's mass surveillance of Americans and non-Americans. Few challenge "the trend of government knowing more and more about the people and the people knowing less and less about the government." (Theodore L. Glasser & Timothy W. Gleason, "Summit Report: Freedom of the Press in the Twenty-First Century—An Agenda for Thought and Action," *19 Communication Law & Policy* 94 (2014)). The overriding question is whether it is possible to reverse the trend legislatively or judicially—or both.

The U.S. government's aggressive pursuit of whistleblowers and journalists is increasingly alarming not only at home but also globally. Hence, it is hardly surprising that the United States is no longer leading the rest of the world in freedom of the press. It is now ranked 43<sup>rd</sup> in the global press freedom index, according to the Reporters Without Borders' 2014 survey of 180 countries. Likewise, the U.S. law on freedom of information (FOI) does not serve as the "global gold standard" for other countries enacting the laws on right to information (RTI). When it comes to the *legal* framework for informational access, the United States has stood at 39 in the 2013 global RTI ratings of 95 countries.

## ***3. What needs re-interpreting, changing? How to ensure a fit-for-purpose first amendment jurisprudence?***

In the United States, classified information is more often leaked by government officials with ulterior motives than by whistleblowers. Most problematic about the leaking is the

government's selective punishment thereof. Few high-ranking government officials are punished for leaking secret government documents, while whistleblowers are lopsidedly subject to a variety of sanctions. When the checking function of the First Amendment is protected as an institutional or individual value in America, courts should consider whether the Espionage Act or similar laws are abused against whistleblowers or journalists.

Freedom of the press is not necessarily only for media entities. Rather, it is for citizens as a whole. Thus, the journalistic "privilege" for reporters to protect confidential news sources should not be viewed as an expendable special right for media professionals. In foreign and international law, source protection is more widely recognized as part of press freedom. In the United States, it is neither a constitutional nor a statutory right insofar as federal law is concerned. Americans need to learn from others' experience with their shield law as a case of "reverse perspective" on freedom of the press to facilitate information gathering for society.

Freedom of information in America should be more broadly recognized as an affirmative right. The U.S. Freedom of Information Act (FOIA) needs to expand its applicational scope, given that more government service is outsourced to private entities. The enforcement mechanisms of FOIA should be strengthened. One of the fundamental problems with the FOIA is that few government officials are held accountable for improperly withholding the records in violation of the federal law. FOIA-related sanctions are on the books, but they are rarely enforced. We need to narrow the gap sooner rather than later.

\*\*\*