



In a post-Snowden era, while legal scholars and advocates re-examine government transparency and secrecy, the Media Freedom and Information Access Clinic at Yale Law School is working to protect the First Amendment rights of citizens and news media across the country.

# Transparency, Surveillance, and the Future of First Amendment Law

By Debra Kroszner

“It’s quite clear that new technologies and the way the government is using them have fundamentally altered the relationship between the government and the people who are governed,” explains David Schulz ’78, newly appointed clinical lecturer in law at Yale Law School and co-director of the Media Freedom and Information Access (MFIA) Clinic.

“There’s been a huge power shift,” Schulz continues. “Never before in history has the government had the ability to know anything that anybody is saying at any time and been willing to exercise that ability. So it’s just critical that we use the tools that we have as citizens to know what the government is up to, and to be able to exercise oversight.”

Founded in 2009 by four second-year students and Professor Jack Balkin, the MFIA Clinic has handled dozens of critical and precedent-setting cases while working to protect the fundamental right to speak and access information—rights that are essential to a healthy and functioning democratic system.

Whether it's protecting the rights of New York city cab drivers to protest their employer's unfair wage practices, defending a reporter's right to access government files, or compelling the foreign intelligence surveillance court to disclose its decisions, the MFIA Clinic has been a leading force in a field that has quickly moved to the foreground of legal scholarship and national attention.

Schulz, a leading First Amendment lawyer, became a co-director of the Clinic after years of working with students in a part-time capacity. The new role is the result of generous financial support of the Stanton Foundation and the John S. and James L. Knight Foundation, including recent support of \$828,600 from each foundation. The Clinic is part of the Floyd Abrams Institute for Freedom of Expression at Yale Law School's Information Society Project (ISP).

The addition of Schulz as a full-time co-director will enable the MFIA Clinic to expand its reach by taking on more cases, with a longer view of pursuing litigation to establish precedents that will protect the rights of citizens and investigative reporters. It will also help leverage the Clinic's expertise through joint efforts with other organizations supporting open government.

Through his private practice, Levine Sullivan Koch & Schulz LLP, Schulz has litigated issues concerning government secrecy in many contexts. He was tapped to provide advice on the WikiLeaks by multiple clients, and to advise the *Guardian* on the Edward Snowden disclosures. He has also pursued reporters' access rights at Guantanamo Bay, and has represented a number of journalists in federal leak investigations. Most recently, he has been representing news organizations asserting a constitutional right to inspect and copy videotape evidence of the forced feedings of a Guantanamo detainee introduced in a habeas proceeding alleging that the techniques amounted to torture.

"Now that David is with us full time, Yale is going to produce a new generation of first-rate legal advocates devoted to the protection of press freedoms," explains Jack Balkin, Knight Professor of Constitutional Law and the First Amendment, who co-directs the

MFIA Clinic with Schulz. "His efforts here will have beneficial effects for many years to come."

"Dave has an unbelievable amount of experience as a First Amendment access lawyer and to have him here full time will be fantastic for our clients, and more importantly, will be fantastic for the students, who will be able to learn that much more from someone who is really one of the best First Amendment lawyers in the country," says Jonathan Manes '08, a supervising attorney with MFIA and the Abrams Clinical Fellow for the ISP.



David Schulz '78

**Now that David is with us full time, Yale is going to produce a new generation of first-rate legal advocates devoted to the protection of press freedoms.** JACK BALKIN

### An Array of Casework

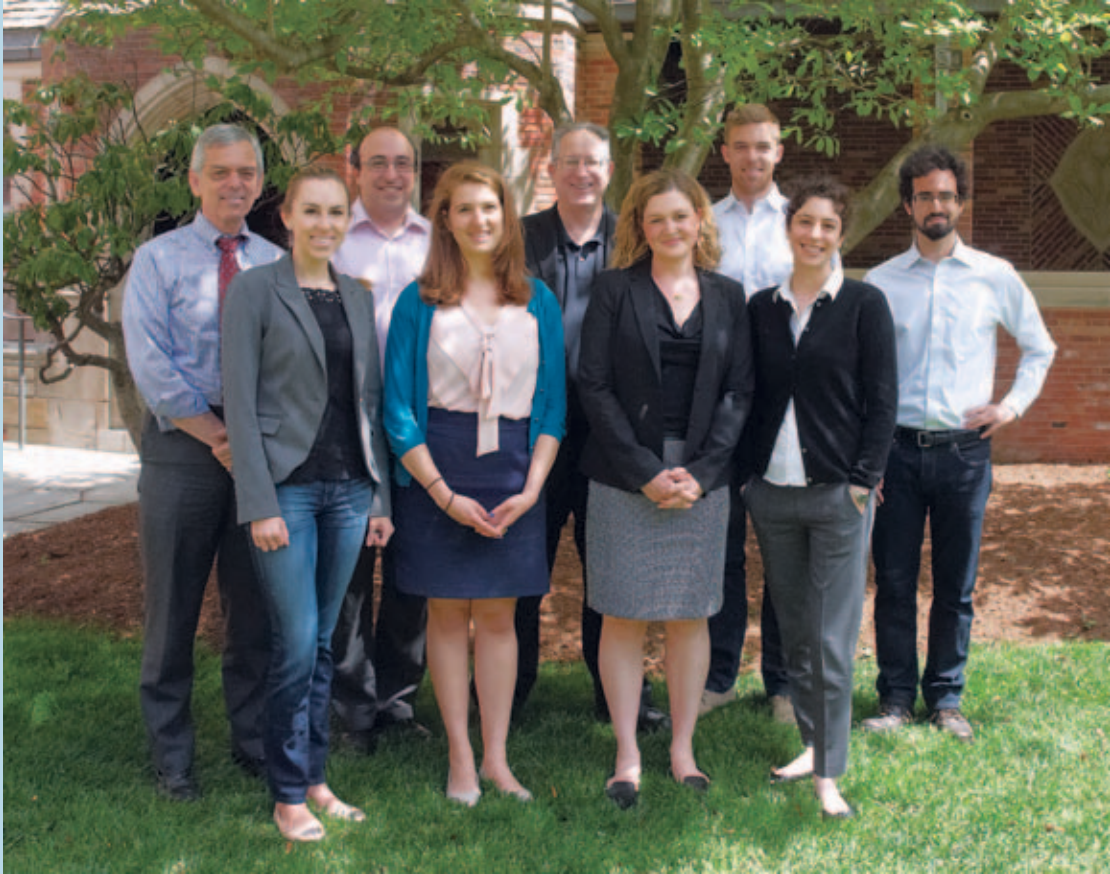
In 2009, second-year students Margot Kaminski '10, Pat Kabat '10, Nabiha Syed '10, and Adrienna Wong '10 came together with Professor Jack Balkin to start a clinic with two specific goals in mind—to fill the growing need for legal services for journalists as budget cuts created massive changes in the news industry's ability to litigate; and to provide a robust public right of access and otherwise encourage open government in the face of the national security state.

In the six years since, the mission has taken root and flourished, particularly following the launch of the Floyd Abrams Institute for Free Expression at Yale Law School in 2011, which provided additional resources.

"We each had slightly different ideas of what gaps the Clinic could fill and what services it would provide. Two of us had experience in national security litigation, two were coming from summer work on digital civil liberties, and two were inspired by the increasing dearth of impact litigation by legacy news organizations," recalls Kaminski, the former executive director of Yale ISP who now teaches at The Ohio State University Moritz College of Law. "It's extraordinary to see how the Clinic today does valuable work affecting issues in all of these areas and continues to trust and empower its student leadership. It really has fulfilled our initial vision, in an impressively short time."

Today, the Clinic is in high demand, working on an array of casework that is gen-





Faculty and students of the MFIA Clinic (from left): David Schulz '78, Brianna van Kan '15, Jonathan Manes '08, Vera Eidelman '15, Jack Balkin, Alexandra Perloff-Giles '17, Benjamin Graham '15, Rebecca Wexler '16, Nicholas Handler '15

erally split between three different areas of First Amendment and media law — the constitutional right of access, government operations, and national security.

In 2010, the Clinic scored a big win with the *Mosalem v. Berenson* case when the Appellate Division of the New York Supreme Court ruled unanimously that documents in a civil lawsuit alleging corporate corruption were improperly sealed, and clarified the scope of the constitutional access right in the New York courts. In the case, MFIA represented an online journalist who was seeking access to this information. The decision expressly affirmed the First Amendment right of access to court records and outlined the steep burdens that must be placed on parties seeking to seal documents. According to Manes, it represented a significant step toward greater openness of judicial records. “The Mossalem case is an example of where we are creating new and good law through the litigation,” says Manes.

Currently, the Clinic is using these same First Amendment principles in a lawsuit filed on behalf of *Guardian US*, the *Associated Press*, the *Arizona Republic*, the *Arizona Daily Star*, and two Arizona TV stations challenging the refusal of the Arizona Department of Corrections to disclose information about the source and quality of drugs used to carry out lethal injection executions in that state. The lawsuit asserts a First Amendment right of access to information concerning the means of carrying out state-sponsored executions, which has historically been available to the public and is essential for democratic oversight of the process.

As lethal injections become more controversial, Schulz says there has been increasing secrecy, which, this lawsuit contends, is a violation of the First Amendment. The lawsuit is the second brought by the MFIA Clinic challenging government secrecy regarding lethal injection drugs. In the spring of 2014, the

Clinic filed a similar case in Missouri asserting violations of both the First Amendment and the state open records act, known as the Missouri Sunshine Law.

“It’s a fascinating case on a number of levels,” says Schulz. “It’s pushing the theory a step beyond where it’s been, and it’s going to be very interesting to see how this plays out.” At press time, the ruling was still pending.

A significant case in the government operations arena for the Clinic involved a Freedom of Information request filed on behalf of Carol Rosenberg, a *Miami Herald* reporter seeking the names of “indefinite detainees” at Guantanamo Bay. The names included prisoners the government had concluded they had no basis to charge criminally, but were not going to release because they were deemed too dangerous. When the Department of Defense (DOD) failed to respond within the statutory deadline, the Clinic filed an administrative appeal. With still no response several months later, the Clinic and Rosenberg sued the DOD in federal court, resulting in the release of the records by the government in June 2013. The legal victory set an example of transparency over secrecy, making it more difficult for the government to use national security as a justification for hiding information from the public that it vitally needs to assess government policies and practices.

The third area of casework the Clinic is pursuing is national security—which is closely related to its work on right to access and government operations. Shortly after the Snowden disclosures in June 2013, the Clinic, together with the American Civil Liberties Union (ACLU), filed two lawsuits to compel the Foreign Intelligence Surveillance Court (FISC) to disclose its opinions construing its authority and requesting opinions that may shed light on the scope, meaning, and constitutionality of Section 215 of the Patriot Act.

The filing came after media accounts published an FISC order requiring Verizon to turn over months’ worth of phone call data. The secret order used Section 215 of the Patriot Act as the legal justification for the action, which has been the source of intense scrutiny and public debate in recent years, Schulz explains.

Currently, one of the cases has been resolved, with the court ordering the government to disclose redacted, declassified opinions. However, Schulz says, the court stopped short of deciding whether they have to do it in the future. In the second case, the Clinic is still waiting for a decision.

“Those are really interesting cases, both because of the focus on national security, but also the whole issue of whether the constitutional access right applies to a secret court,” Schulz says. “And the Foreign Intelligence Surveillance Court side-stepped the issue of the constitutional right by invoking some

statutory mechanisms to require the Department of Justice to release these opinions, so there’s still an issue [unresolved].”

Another national security case that is still pending, and which may have sweeping ramifications, is the case of Nicholas Merrill, who has been under a decade-long gag order imposed on him from the FBI. The order bars Merrill from discussing his personal knowledge of FBI surveillance techniques since 2004. At that time, Merrill operated an independent Internet Service Provider in Manhattan when the FBI served him with a National Security Letter (NSL), demanding information about one of his clients.

The NSL included a gag order forbidding Merrill from acknowledging that he had even received the letter and from discussing anything about its contents. In April 2004, Merrill, represented by the American Civil Liberties Union (ACLU), filed a major lawsuit challenging the NSL, the first of its kind. While that case resulted in a landmark ruling striking down the NSL statute’s gag provisions, Congress subsequently amended the law, and the court ultimately upheld most of the gag order, citing the need for secrecy in an ongoing investigation related to national security. In 2010, Merrill dropped his appeal of that decision when the government agreed finally to let him identify himself as the plaintiff in that lawsuit and recipient of the NSL.

In 2014, the Clinic took Merrill on as a client and filed a lawsuit contending that the effectively permanent gag order violates Merrill’s First Amendment right to free speech and that it also goes beyond anything that Congress meant to

**Those are really interesting cases, both because of the focus on national security, but also the whole issue of whether the constitutional access right applies to a secret court. DAVID SCHULZ**

authorize. The case is still pending. “We are in the thick of it now,” says Manes.

During the Spring 2015 semester, students presented arguments to the court and filed a summary judgment asking the court to lift the gag order. Manes is hopeful that the court will hold oral arguments and the students will be able to present their case.

“If we win this case, it would mean that the First Amendment rights of private citizens like Nick Merrill to speak trumps the FBI’s interest in keeping secret its interpretation of the statute,” says Manes. “We are not asking the FBI to disclose anything about an ongoing investigation. The question is whether the public can be kept in the dark about how the FBI chooses to use its authority. And particularly after all these Snowden disclosures, it’s become very clear that these statutes can be twisted and expanded in secret, and the issue in this case is whether the government can do that by putting permanent gag orders on private citizens. It would have implications beyond this case.”

### The Need for Advocacy

While on face value these individual cases appear vastly different, Manes believes they are tied together by core values advocating for the need for accountability and transparency. And without an organization like the Clinic willing to take on these cases pro bono, most of their clients would have nowhere else to go.

“Without smart, committed lawyers who are willing to partner with people who want to speak or are advocating for their own speech rights, it’s difficult to make progress,” Manes says.

With traditional and independent journalists strapped for resources, the work of the MFIA Clinic is now more important than ever to help this last line of defense hold the government accountable and ensure transparency.

“If there isn’t a credible threat that journalists are going to be asserting their rights in court, then there are opportunities for the government to obfuscate and stall and to expand their secrecy claims,” says Manes. “The Clinic plays an important role as a check against government secrecy to ensure that the laws Congress wrote are respected by the government, and we do that on behalf of news organizations and individual journalists as well as public interest and advocacy organizations.”

For Schulz, who has worked on every issue imaginable in the realm of First Amendment and media law, having the opportunity to work and mentor young lawyers at Yale Law School is something that truly excites him.

“They are incredibly bright, highly motivated, and very creative,” says Schulz of the students he has supervised. “And so



(from left) David Schulz '78, Jonathan Manes '08, Jack Balkin

the work of the Clinic in terms of thinking through legal theories, how the First Amendment doctrine is going to apply online, how we expand the right of access, it’s just a font of wisdom, and it’s just really motivating and exciting for me to have this opportunity.”

For students, the Clinic provides an unparalleled experience that puts them directly in courtrooms and working on the front lines of a rapidly evolving legal arena, with the unique opportunity of learning from lawyers like Schulz, Balkin, and Manes.

“MFIA students get the chance to take the lead on writing briefs, arguing cases, and communicating with the clients, which is an amazing way to learn substantive areas of law like the First Amendment, FOIA, and civil procedure,” says Divya Musinipally '16, a student co-director for MFIA. “I am excited to continue my work fighting for the transparency of government surveillance programs so that Americans have a full understanding of what information their government collects about them.”

As the Clinic continues to grow, Schulz hopes that the model at Yale can be replicated around the country in order to expand the reach and defend more citizens and journalists who are seeking the truth.

“If we don’t develop some legal standards, and institutions to replace what the news organizations used to do, our democracy is going to suffer,” says Schulz. “It’s just critical that we have this type of activity, and it’s wonderful that Yale recognizes that need and is prepared to support it and step into the fray.” **Y**



Watch David Schulz '78 discuss First Amendment & Media Law in a video interview online at [vimeo.com/yalelaw](http://vimeo.com/yalelaw)