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Stealing Press Credentials: Law Enforcement Identity Misappropriation of the Press in the Cyber Era

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I. INTRODUCTION

In June of 2007, Timberline High School in Washington State received a series of bomb threats that prompted a week of evacuations.[1] The FBI and local law enforcement traced the purveyor of the threats to

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* Law Clerk, United States Court of Appeals for the Fifth Circuit. B.A., Rice University, 2012; J.D., Harvard Law School, 2015. The author thanks Professors Jack Goldsmith and Charles Fried, Harvard Law School, for their insights and suggestions. The author also thanks the editors of this journal, specifically Jeremy Gale, for their assistance throughout this process.

[1] Gene Johnson, *FBI Says It Faked AP Story To Catch Bomb Suspect*, THE ASSOCIATED PRESS (Oct. 28, 2014), *available at* http://www.ap.org/Content/AP-In-The-News/2014/AP-Seattle-Times-Upset-About-FBI-Impersonation.

an anonymous account on the MySpace social media site.[2] However, the trail seemed to stop there, as investigators were unable to ascertain the identity of the person behind the account.[3] So, the FBI resorted to subterfuge.

According to a letter sent from FBI Director James Comey to the New York Times, an undercover agent, "[r]elying on an agency behavioral assessment that the anonymous suspect was a narcissist, . . . portrayed himself as an employee of The Associated Press" and sent the MySpace account a message via MySpace's internal communications channel.[4] In the message, the agent "asked if the suspect would be willing to review a draft article about the threats," to be sure that the suspect was portrayed fairly.[5] The message then linked to what seemed to be the draft Associated Press (AP) story. However, the draft story was a fake that the FBI designed to mimic the appearance and feel of a genuine article. Additionally, the link contained a particular kind of malicious software ("malware"), meant to enable the FBI to surreptitiously uncover the location and Internet Protocol address of the computer behind the anonymous MySpace account.[6] The suspect agreed to review the draft article and the trap sprang and shut. The 15-year-old suspect clicked on the link to the supposed AP article, and thereby unwittingly downloaded the malware and revealed case-making investigative information to the FBI.[7] The suspect later pled guilty to making the bomb threats.[8]

In early November of 2014, the FBI confirmed that it did indeed create a fake AP story in order to apprehend its suspect.[9] The revelations sparked immediate, if unsurprising, controversy. Christopher Soghoian, the American Civil Liberties Union technologist who revealed the ruse, took to Twitter to announce his outrage at the irresponsibility of impersonating a media entity.[10] Then Senate Judiciary Chairman Patrick

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2 *Id.*

3 *Id.*

4 Letter from James B. Comey, Director, Federal Bureau of Investigation, to the Editor, New York Times (Nov. 6, 2014), *available at* http://www.nytimes.com/2014/11/07/opinion/to-catch-a-crook-the-fbis-use-of-deception.html?_r=2&referrer=.

5 *Id.*

6 *Id.*

7 *Id.*

8 Nate Anderson, *FBI Uses Spyware To Bust Bomb Threat Hoaxster*, ARS TECHNICA (Jul. 18, 2007), *available at* http://arstechnica.com/security/2007/07/fbi-uses-virus-to-bust-bomb-threat-hoaxster/.

9 *Id.*

10 Lily Hay Newman, *The FBI Used Malware and a Fake Seattle Times Article Page to Track a Bomb Threat Suspect*, SLATE, (Oct. 28, 2014), *available at* http://www.slate.com/blogs/future_tense/2014/10/28/the_fbi_made_a_malware_spreading_seattle_times_article_to_track_bomb_threat.html.

Leahy sent a letter to then Attorney General Eric Holder, expressing his "increasing[] concern" that federal law enforcement agencies appropriate the identities of others without their knowledge or consent and further urged the Justice Department to reevaluate its policies on this tactic.[11] Leahy's letter also pointed out that such a tactic carries "ethical and legal risks" as it "raises questions of copyright and trademark infringement" and "independent press."[12] The AP claimed the "ploy violated AP's name and undermined AP's credibility."[13] Moreover, AP's general counsel sent a letter to Attorney General Holder, "protest[ing] in the strongest possible terms the FBI's fabrication and publication of a fake Associated Press news story" and arguing that such a tactic "raises serious constitutional concerns" as it undermines the independence of a free press.[14]

The AP, and the many other media and press organizations[15] that voiced their concern in the aftermath of the FBI's revelations, are understandably upset and vocal. But going beyond the noise, what rules apply to this novel instance of cyber-subterfuge? With the proliferation of both foreign and domestic national security threats, law enforcement authorities have resorted to new investigative techniques to meet this new generation of danger. However, tied to the increase in the complexity and novelty of these new techniques is the opacity of the legal propriety surrounding their use. This article will take the just-declassified FBI investigation of Timberline High School as a case study and examine the legality of this new form of law enforcement deception: the misappropriation of press and media entities in the course of a law enforcement investigation. Under relevant existing legal constraints, this article concludes that given the increasingly legalized environment of an already hyper-legalized field—national security—the ability of law

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[11] Letter from Patrick J. Leahy, Senator and Chairman, Senate Judiciary Committee, to Eric Holder, Attorney General (October 30, 2014), *available at* http://images.politico.com/global/2014/10/31/10-30-14_leahy_to_holder_re_-_fbi_fake_ap_article.html.

[12] *Id.*

[13] Ellen Nakashima and Paul Farhi, *FBI Lured Suspect with Fake Web Page, But May Have Leveraged Media Credibility*, WASHINGTON POST (Oct. 28, 2014), *available at* http://www.washingtonpost.com/world/national-security/fbi-lured-suspect-with-fake-web-page-but-may-have-leveraged-media-credibility/2014/10/28/e6a9ac94-5ed0-11e4-91f7-5d89b5e8c251_story.html.

[14] Letter from Karen Kaiser, General Counsel of The Associated Press, to Eric Holder, Attorney General (Oct. 30, 2014) (hereinafter "AP"), *available at* https://corpcommap.files.wordpress.com/2014/10/letter_103014.pdf.

[15] *See e.g.*, Email from The Reporters Committee for Freedom of the Press et. al, to Eric H. Holder, Attorney General of the United States, and James B. Comey, Director of the FBI (Nov. 6, 2014), *available at* http://www.rcfp.org/sites/default/files/2014-11-06-letter-to-doj-fbi-regarding-se.pdf.

enforcement to engage in an investigative tactic like the one used in Timberline is likely sharply circumscribed under existing internal guidelines even if such a tactic is marginally "legal" as a statutory or constitutional matter.

In Part II, this article will analyze the Timberline investigation on the basis of relevant internal guidance. Specifically, Part II will evaluate the Timberline episode on the basis of the Attorney General's Guidelines on FBI Undercover Operations and the Online Investigative Principles for Federal Law Enforcement Agents. In Part III, this article will analyze the Timberline episode under federal trademark law. In Part IV, the article will examine three grounds on which the FBI's actions in Timberline may have implicated the First Amendment. Specifically, Part IV will analyze whether the FBI's actions interfered with the First Amendment right to the dissemination of information; whether the FBI's actions were constitutionally problematic under the compelled speech framework; and whether the FBI's actions chilled or diluted the speech of the AP to the extent that it amounted to a constitutional violation. Finally, Part V will conclude with some thoughts and observations.

II. THE FBI'S INTERNAL GUIDANCE AND CONTROLS

Obviously, the FBI's own internal policies are relevant to the Timberline episode; FBI Director Comey made that much clear in his missive to the New York Times.[16] By dint of 28 U.S.C. §§ 509, 510 and 533, Congress has delegated considerable power to the Attorney General—who in turn has issued important guidance to investigators within the FBI, namely, the Attorney General's Guidelines on FBI Undercover Operations (the "Guidelines") updated in 2013.[17] Additionally, there exists the Online Investigative Principles for Federal Law Enforcement Agents (the "Principles"), which was drafted in 1999 under the auspices of an interagency working group convened by the Justice Department.[18]

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[16] Comey, *supra* note 4.

[17] John Ashcroft, U.S. DEP'T OF JUSTICE, The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations (2013) (hereinafter the "Guidelines"), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf.

[18] Online Investigative Principles for Federal Law Enforcement Agents (U.S. Dep't of Justice, 1999) (hereinafter the "Principles"), *available at* https://info.publicintelligence.net/DoJ-OnlineInvestigations.pdf.

A. The Attorney General's Guidelines on FBI Undercover Operations

The Guidelines spell out steps and procedures the FBI must follow in order to engage in "undercover activities and undercover operations."[19] Significantly, the Guidelines define "undercover activities" as "any investigative activity involving the use of an assumed name or cover identity by an employee of the FBI." "Undercover operation" in turn means "an investigation involving a series of related undercover activities over a period of time by an undercover employee."[20] The Guidelines are a plausible—if not obviously clear—fit, given that an FBI agent assumed the name or cover identity of an AP reporter in order to undertake such a scheme. Moreover, the sole exception to the applicability of the Guidelines is "[an] investigation[] utilizing confidential informants . . . ," which is not relevant to the Timberline investigation.[21]

Under Section IV.A of the Guidelines then, the FBI is required to examine and evaluate any undercover investigation in light of the following general approval standards:

> [1] The risk of personal injury to individuals, property damage, financial loss to persons or businesses, damage to reputation, or other harm to persons;
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> [2] The risk of civil liability or other loss to the Government;
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> [3] The risk of invasion of privacy or interference with privileged or confidential relationships and any potential constitutional concerns or other legal concerns;
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> [4] The risk that individuals engaged in undercover operations may become involved in illegal conduct; and
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> [5] The suitability of Government participation in the type of activity that is expected to occur during the operation.[22]

Authorization by the Special Agent in Charge (SAC) constitutes approval of the investigation.[23] Given that the SAC must, "weigh the

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19 Guidelines, *supra* note 17, at 2.
20 *Id.*
21 *Id.* at 2.
22 *Id.* at 3.
23 *Id.*

risks and benefits of the operation," and ensure that the "[i]nitiation of investigative activity . . . is warranted under any applicable departmental guidelines,"[24]—which, as explained above, should include the Guidelines— the fact that the Timberline investigation occurred means that the SAC believed that none of the above standards precluded an investigation that involved the misappropriation of a press identity. In other words, the SAC authorization of the Timberline investigation means that the SAC did not believe that any of the "risks" presented in the general approval standards listed above outweighed the benefits of the operation. As Director Comey stated in his letter to the New York Times, the Timberline investigation "was proper and appropriate under Justice Department and F.B.I. guidelines *at the time*."[25]

There is good reason to doubt whether such a tactic would be appropriate today under the Guidelines. As a preliminary matter, the AP in its letter to Attorney General Holder complained that at least four of the five standards are implicated when law enforcement misappropriates its identity.[26] With the increasing concern over the propriety of certain investigative or law enforcement actions,[27] the "risks" referred to in the general approval standards have likely all increased, affecting the balance to the extent that perhaps only the most paramount of law enforcement interests would permit the use of such a tactic today.

Additionally, Director Comey implicitly admitted the inappropriateness of using the tactic in a Timberline-like situation today. In his letter to the New York Times, he stated in relevant part that the "technique was *proper and appropriate* under Justice Department and F.B.I. guidelines at the time. Today, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be *lawful and, in a rare case, appropriate*."[28] This particular part of the letter is telling for two reasons. First, Comey notes that while the Timberline investigation was legal "at the time," the use of such a technique today would be subject to more stringent review.[29] Second, Comey seems to have drawn a contrast between what is "proper and appropriate" and what is merely "lawful," with the former likely referring to the FBI Undercover Guidelines and the DOJ Principles, and

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[24] *Id.*

[25] Comey, *supra* note 4 (emphasis added).

[26] *See* AP, *supra* note 14.

[27] *See generally* Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131 (2015) (chronicling instances and concerns of police misconduct).

[28] Comey, *supra* note 4 (emphasis added).

[29] *Id.*

the latter referring to broader guidance like statutes or the Constitution. This distinction is important because Comey has apparently conceded the inappropriateness of such an investigation today. In the first sentence, Comey explains that the technique was both "proper and appropriate" under FBI and DOJ guidelines in 2007.[30] However, in the last sentence, Comey admits only the lawfulness of the technique and explains that only in rare cases will the technique also be appropriate.[31] As a result, Director Comey seems to suggest that using the tactic in a Timberline-like situation today would likely be inappropriate in most circumstances. Moreover, Comey refers to the tactic as an "unusual technique" and explains that the tactic is only appropriate in a "rare case."[32] All of this further counsels for the conclusion that the use of the tactic under now existing guidelines is sharply circumscribed if not totally inappropriate.

Additionally, other parts of the Guidelines seem to suggest additional prudence is called for when impersonating a member of the news media, further giving reason to doubt the propriety of the tactic should it be used today. Under Section C, the Guidelines outline numerous situations where approval at FBI Headquarters (Headquarters), in addition to SAC approval, is required.[33] One of these situations is an investigation that presents one or more "sensitive circumstances."[34] As a result, should a sensitive circumstance be present in a potential FBI undercover investigation, the application must be forwarded to Headquarters where both the Undercover Review Committee and the FBI Director or a designated Assistant Director must approve the application.[35]

The Guidelines lists a number of sensitive circumstances, but perhaps the most applicable are (c), (j), and (o).[36] Under circumstance (c), "an [FBI] investigation of possible criminal conduct by any . . . news media" is a sensitive circumstance that would require Headquarters approval.[37] Though the FBI did not investigate the AP, it seems plausible that the reasons behind the adoption of circumstance (c) would also apply in this case. The likely reason for why circumstance (c), an investigation of the press, is a sensitive circumstance is because the press has a special relationship to the public and an often adversarial relationship to the government.[38] As articulated in both case law and the

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30 *Id.*
31 *Id.*
32 *Id.*
33 Guidelines, *supra* note 17, at 5.
34 *Id.* at 6.
35 *Id.*
36 *Id.* at 6–8.
37 *Id.*
38 *See infra* Section IV.

AP letter, independence of the press has been a crucial cornerstone of free society, with the press often serving as a watchdog over the government.[39] Thus, it is no surprise that government activities that may affect or undermine press independence are sensitive circumstances. Obviously, a government controlled investigation of the press has the potential to undermine the press' independence, but misappropriating a media identity should also invoke this concern. Given the potential for public confusion over whether the news they read was written by an independent press or is mere government propaganda, the Government does not need to investigate the press in order to undermine its independence.

Circumstance (j) is even more relevant than (c). Under (j), a special circumstance exists when there is a "significant risk that a third party will enter into a professional or confidential relationship with a person participating in an undercover operation who is acting as . . . [a] member of the news media."[40] That situation clearly occurred in this case when an undercover agent impersonated a member of the news media. Whether or not the Timberline suspect entered or attempted to enter into a confidential relationship with the undercover agent is unclear, but the presence of the circumstance indicates the general concern around impersonating media entities and the delicate nature of undercover operations when there is the potential for setting up confidential relationships.

Finally, circumstance (o) seems, as a textual matter, clearly applicable. Under (o), a special circumstance exists when "persons participating in the undercover operation" make "untrue representation . . . concerning the activities or involvement of any third person without that individual's knowledge or consent."[41] The undercover agent participating in the Timberline operation made untrue representations about the activities and involvement of the AP, without the AP's knowledge or consent, when the agent informed the suspect that the AP was seeking to publish an article about him.

It is unclear whether in the actual Timberline investigation, this or any other sensitive circumstances were found, and thus it is unclear whether the investigation was authorized merely by the SAC, or also by Headquarters.[42] But regardless of whether any sensitive circumstances were literally implicated, the presence of these three sensitive circumstances demonstrates the controversial nature of undercover work,

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39 *Id.*

40 Guidelines, *supra* note 17, at 7.

41 *Id.* at 8.

42 Given the above analysis, it seems likely that the tactic should have been reviewed at FBIHQ, although the disclosed documents do not reveal whether this in fact happened.

especially when it comes to undercover activities that relate to the press and that take place without their knowledge or consent. Given the outcry over the revelation of the Timberline episode—which is in reality an extraordinarily "low-grade" and "contained" example of law enforcement misappropriation of a press identity[43]—and Director Comey's tacit acknowledgement that the use of such a tactic would not be appropriate in a Timberline-like situation today, it would be no surprise if there are few scenarios that would call for the usage of such a technique under today's more stringent interpretation of the Guidelines.

B. The Online Investigative Principles for Federal Law Enforcement Agents

Drafted in 1999 under the auspices of an interagency working group convened by the Justice Department, the Principles are meant to ensure that law enforcement agents "know the rules" regarding various investigative tactics in the cyber-era.[44] Though not technically binding,[45] they do "state the basic rule for each major category of investigative activity"[46] and thus may nonetheless be an important legal authority within the FBI. Of the Principles, the most relevant to the Timberline investigation are Principles 6 ("Undercover Communications"), 7 ("Online Undercover Facilities"), and 9 ("Appropriating Online Identity").[47]

Under Principle 6, "[a]gents may communicate online [with a subject] under a non-identifying name or fictitious identity if agency guidelines and procedures would authorize such communications in the physical world."[48] The FBI is clearly authorized to operate undercover in the physical world.[49] Additionally, Principle 6 allows agents "to make pretext calls or other preliminary contacts without going through an elaborate approval process."[50] Principle 6 provides an example of such a "pretext call":

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[43] Relatively, the Timberline episode was both a low-grade and contained use of deception. "Contained" and "low-grade" are used to mean that in the Timberline episode, no person other than the suspect saw the draft AP article, there was no distribution of the article, and no harm was actually done. As a result, the usage of the tactic in Timberline was very controlled.

[44] Principles, *supra* note 18, at 2.

[45] *Id.* at 1, n. 1.

[46] *Id.* at viii.

[47] *Id.* at 27, 34, 44.

[48] *Id.* at 33.

[49] *See e.g.*, Lewis v. United States, 385 U.S. 206 (1966) (upholding the constitutionality of undercover deception by law enforcement officials).

[50] Principles, *supra* note 18, at 36.

> An agent is seeking information about an attack on a computer system. She proposes to inquire about the attack, without disclosing her affiliation with law enforcement, in a chat room frequented by the suspected computer hackers. If the agency would consider such a communication to be an undercover contact had it occurred in person or over the telephone, it should be considered an undercover contact online, subject to the same procedures and constraints . . . . The agent in [this example] is permitted by her agency guidelines to make the isolated inquiry without seeking approval for an undercover operation. One of the participants in the chat room states that he has information, and a conversation ensues . . . .Depending on the agency's undercover guidelines and the sensitivity of the operation, the agent may need to obtain approvals under the agency guidelines before engaging in further undercover communications on this matter.[51]

Although the above example does not map perfectly on to the Timberline case, it is clearly illustrative. On the one hand, the FBI identified an online account and then engaged in communication with the person behind the account, thereby leading to the suspect's identification. On the other, and unlike the example provided above of an undercover agent merely "inquir[ing]" about a cyber-attack, the Timberline communication did not comprise of an inquiry for general information conveyed within a quasi-public forum (a chat room), but instead a targeted search for specific information conveyed to the target directly at a virtual location occupied by him only (his Myspace account). What's more, the FBI's missive did not have a true communicative purpose at all; the message instead was merely the vehicle by which malware was delivered.[52]

Principle 7 explains that "[j]ust as law enforcement agencies may establish physical-world undercover entities; they also may establish online undercover facilities, such as bulletin board systems, Internet service providers, and World Wide Web sites, which covertly offer

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[51] *Id.* at 40–41.

[52] *See* Memorandum from the Operational Technology Division, FBI, to Cyber Division, FBI Seattle Field Office (July 5, 2007) (on file with the Electronic Frontier Foundation, pg.27 of document available at https://www.eff.org/files/filenode /cipav/fbi_cipav-08.pdf) (hereinafter "CIPAV Memo") (noting that the "objective" of operation was the deployment of the malware, aka CIPAV).

information or services to the public."[53] The principle provides an example:

> As part of a project to identify and prosecute computer criminals, a law enforcement agency considers a proposal to operate a World Wide Web site with information about and computer programs for hacking, links to other hacker sites, and a facility to allow people who access the site to discuss hacking techniques. The proposal would allow the law enforcement agents running the site to track all visitors, and monitor all communications among the users.[54]

Principle 7, however, goes on to warn that online undercover facilities "can raise novel and complex legal issues . . . involving privacy, international sovereignty, and unintended harm to unknown third parties."[55] Moreover, "[a]gencies must be sensitive to the profound public policy implications that can be raised by online undercover facilities. Imprudent or undisciplined use of such facilities by any agency will surely lead to public distrust of law enforcement's online work in general."[56]

It is unclear whether in the Timberline investigation the FBI created a fake AP website in addition to a fake draft article.[57] But the admonishments of Principle 7 to be sensitive to the incidental harms inflicted on third parties and other public policy considerations is prescient, especially given the AP's and the general public's eventual reaction to the method used to snare the Timberline suspect. There exists a current wave of public distrust of intelligence and investigative tactics, and perhaps more generally of the conduct of law enforcement and the intelligence community.[58] Given that the FBI must be sensitive to this, it is likely that more and more tactics that involve the misappropriation of identities will be regarded as an "imprudent" choice to be toned down or phased out. Indeed, like the weighing process under the FBI Guidelines,

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53 *Id.* at 42.
54 *Id.*
55 *Id.*
56 *Id.* at 46.
57 *Compare* Mike Carter, *FBI Created Fake Seattle Times Web Page To Nab Bomb-Threat Suspect*, SEATTLE TIMES, Oct. 27, 2014, *available at* http://www.seattletimes.com/seattle-news/fbi-created-fake-seattle-times-web-page-to-nab-bomb-threat-suspect/ (noting that the FBI created a fake web page in addition to a fake news article), *with* CIPAV Memo, *supra* note 52, at 61 (mentioning only the deployment of a fake news article).
58 Calvert, *supra* note 27.

the balance may have fundamentally shifted so that such a tactic may no longer be appropriate, even if it is still marginally legal.[59]

Finally, the big-ticket issue here is not simply that the FBI created a fake online website (Principle 7) or employed a non-identifying name or fictitious identity (Principle 6), but that the FBI impersonated existing entities: the Associated Press and perhaps one of its reporters. Principle 9 discusses the misappropriation of an online identity, which occurs when "a law enforcement agent electronically communicates with others by deliberately assuming the known online identity (such as the username) of a real person, without obtaining that person's consent."[60]

A potential wrinkle is that the AP, a private company, is a corporate person rather than a physical one, and thus may or may not be within Principle 9's coverage as a literal matter.[61] Either way, the spirit of Principle 9, when considered in conjunction with Principles 6 and 7, very much seems to be implicated by the impersonation of the AP qua organization. Principle 9 declares that misappropriation of identity is "an intrusive law enforcement technique" that may "raise significant legal problems" and as such, "[t]he technique should be confined only to investigations of serious criminal cases, and should be used in those investigations as narrowly as possible."[62] It further outlines procedures the Justice Department must follow if it seeks to undertake such an action. For instance, an agent involved in the investigation "must, whenever possible, seek the concurrence of the United States Attorney's Office's Computer and Telecommunications Coordinator (CTC) in the District where the investigation is taking place."[63] But unlike any other principle, and perhaps reflective of the uniquely "important concerns raised" by misappropriating an existing identity, Principle 9 further directs that the CTC must in turn "notify the appropriate supervisor in the U.S. Attorney's Office when they are consulted under this Principle."[64]

Principle 9 makes it clear that impersonating any real entity is delicate matter, and that any investigation using this tactic must be closely monitored, scrutinized, and circumscribed. But there is good reason why the dictates of Principle 9 are at their pinnacle when law enforcement impersonates a press entity. For one, the AP is a high-

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59 *See infra* Part IV.

60 Principles, *supra* note 18, at 54.

61 This particular wrinkle may be immaterial if the undercover agent in Timberline actually impersonated a specific AP reporter or writer. But neither the disclosed documents nor Comey's letter reports this.

62 Principles, *supra* note 18, at 54.

63 *See Id.* at 57 (noting Principle 7, which addresses the establishing of an online undercover facility, has a similar requirement); *also see Id.* at 43

64 *Id.* at 57.

profile outfit. Just as misappropriating the identity of a well-known human being (a senator or a general) would likely pose more concerns than misappropriating the identity of a low-ranking drug dealer, the status of the AP means that there is an especially present "threat [of] damage to their reputations" and "[t]he damage caused may be both long-lasting and widespread."[65]

Moreover, the first general approval standard under the FBI Guidelines—which states that the FBI must evaluate "the risk of personal injury to individuals, property damage, financial loss to persons or businesses, damage to reputation, or other harm" when undertaking an investigation—is particularly relevant when the media's identity is misappropriated.[66] Like all media organizations, the AP's currency is its reputation for being a reporter of facts, a disseminator of news, instead of falsities. Therefore, government actions that directly damage that reputation, which the AP warned of in its letter to the FBI, seem particularly inappropriate under this general approval standard.[67] As a result, there is good reason to believe that such a tactic, if used against a member of the institutional press or mass media, may be inappropriate. This is especially true given that Principle 7, as explained above, warns of "profound public policy implications that can be raised by online undercover facilities" and that improper use of such facilities will "surely lead to public distrust of law enforcement's online work in general."[68] Misappropriating the identity of a leading media organization would seem to present just that possibility.

Given the considerations and framework presented by both the FBI Guidelines and the DOJ Principles, it may well be the case that even if the law enforcement tactic of misappropriating the identity of a press organization is legal,[69] it may nonetheless never be appropriate under now existing guidance. Both the Guidelines and Principles note the

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65 *Id.* at 55; *see also* Guidelines, *supra* note 17, at 3.

66 Guidelines, *supra* note 17, at 3.

67 There is a concern, perhaps existential, that the "damage to reputation" prong is nonexistent if a ruse like that used in the Timberline investigation remains under wraps. In other words, from the FBI's perspective, it is at least arguable that the most theoretically reputation-damaging undercover activities could be undertaken if the Bureau takes adequate precautions to prevent the activities from becoming public knowledge. But this interpretation appears dubious. It is doubtful that Guideline 1, when it directs the FBI to "examine" the "damage to [the] reputation" of a person, is really directing the FBI to examine how well it can keep damaging stuff secret. For one, such an interpretation would obviate the need for any Guidelines or safeguards; risk to reputation would be zero in every case where the FBI believed it could achieve total secrecy. That moreover, would seemingly run counter to a key purpose behind the Guidelines: to "carefully consider[] and monitor[]" undercover activities. Guidelines, *supra* note 17 at 1.

68 Principles, *supra* note 18, at 46.

69 *See infra* Part IV.

paramount concerns that come with misappropriating the identity of third parties without their knowledge or permission. Because the press occupies a particularly sensitive and unique role in American society and democracy, the "risks" involved in misappropriating their identity, or the identity of any news organization, may present an unacceptable burden. With the ever-increasing cognizance and wariness of law enforcement and intelligence misconduct, and the general distrust of law enforcement and intelligence authorities as a whole, the FBI, and law enforcement authorities generally, may do well to avoid misappropriating the identities of the press in the future.

III. TRADEMARK

Senator Leahy's letter claimed copyright law as a possible ground for the illegality of the FBI's actions.[70] This section analyzes the applicability of federal trademark law and determines that the Lanham Act (the "Act") is not applicable.[71]

The Lanham Act, the primary federal trademark statutes, provides two causes of action[72] to owners of trademarks against "any person" who uses the trademark without the owner's permission.[73] Under the Act, a cause of action exists when a person shall:

> 1) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;
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> 2) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or

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70 Leahy, *supra* note 11.

71 15 U.S.C. §§ 1051- 1127 (2012).

72 There are two additional causes of action for dilution by blurring and dilution by tarnishment. *See* 15 U.S.C. § 1125(c) (2012). Neither of these two causes of action are relevant given that they require similarity between a famous mark and the mark in question. That is not at issue here as the FBI did not create a similar mark to the AP's, rather, the FBI misappropriated the AP's mark.

73 15 U.S.C. § 1114(1) (2012).

> advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.[74]

The good news for the AP is that as defined in the Act, "any person" does "include the United States, [and] all agencies and instrumentalities thereof,"[75] and thus the FBI may be a defendant in a trademark suit. Moreover, the FBI cannot claim sovereign immunity.[76] However, there are a number of other issues that likely preclude the application of the Act.

First, the FBI must have used in "commerce" or intended to use in "commerce" the counterfeited or reproduced mark.[77] Although the Act defines commerce broadly as "all commerce which may lawfully be regulated by Congress,"[78] even under a broad reading of the Commerce Clause, it would be difficult to characterize the FBI's actions in Timberline as commerce. The FBI's actions were not a "use of channels of interstate commerce," nor were they "instrumentalities of interstate commerce."[79] As a result, the only way that the FBI's actions could be interpreted as commerce is if their actions substantially affected commerce,[80] but this seems unlikely. The misappropriation of AP's mark was a single isolated instance and it is unfathomable to think that any law enforcement agency would misappropriate identities to the extent that it would substantially affect commerce.[81] Though it is conceivable that if the topic of a fake news article was on an economically salient issue and the article was released to the public, that the article may generate widespread public confusion and thereby lead to substantial economic effects, it seems unlikely the FBI would be so reckless as to do so.

Second, even if somehow the trademark was regarded as being used in commerce, the FBI's actions would still have to be "in connection with the sale, offering for sale, distribution, or advertising of any goods or services."[82] Clearly, the FBI's actions were not in connection with the

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74 *Id.* at (a)-(b).
75 *Id.* at (1)(b).
76 15 U.S.C. § 1122(a) (2012).
77 15 U.S.C. § 1114(1).
78 15 U.S.C. § 1127 (2012).
79 United States v. Lopez, 514 U.S. 549, 558–59 (1995).
80 *Id.*
81 Moreover, the actual act of writing a fake article would likely not count as economic activity if not done for profit, thus, the AP would not be able to aggregate the effects of all instances of identity misappropriation. *See e.g.*, Lopez, 514 U.S. at 561, 600 (holding that activities that are not commercial or economic in nature cannot be aggregated for purposes of the "substantially affects" test).
82 15 U.S.C. § 1114(1)(a)-(b).

sale, offering for sale, or advertising of goods or services. As for distribution, though the point of newspapers and the press is to distribute information, the tactic that the FBI used was meant to trick the suspect and was not in connection with the distribution of any goods or services. Indeed, it would seem the FBI has a pressing interest against any sort of distribution as the leakage of any false news articles to the general public would be a cause of concern.[83] As a result, it is very unlikely that the Lanham Act is applicable to the FBI's actions should a Timberline-like episode occur again.

IV. THE FIRST AMENDMENT

Finally, the First Amendment may be implicated. Though Senator Leahy, the AP, and notable others have suggested the possibility of a constitutional violation, it is perhaps noteworthy that they have not identified specific First Amendment grounds for why the FBI's actions were unconstitutional. [84] Indeed, in their letters, there is strikingly little analysis on how such law enforcement actions would amount to a First Amendment violation. This is in fact not surprising since there is little literature on the First Amendment in the context of identity misappropriation. This section explores three possible grounds on which the First Amendment may apply, and preclude, what the FBI did in Timberline.

A. Independence of the Press

Both Senator Leahy and the AP in their respective letters to Attorney General Holder suggested that the FBI's actions implicated the independence of the press.[85] This section will first explore what it means for the press to be independent and then analyze whether the FBI's actions interfered with the independence of the press on two fronts: first, whether the freedom of dissemination has been affected; and two, whether the compelled speech framework applies. Although it is difficult to characterize the FBI's actions as being in violation of the First Amendment in both these instances, an expansive reading of these frameworks may allow for the First Amendment's applicability.

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[83] Principles, *supra* note 18, at 54 (noting that appropriation of online identity should only be used in limited circumstances).

[84] *See* Reporters Committee E-Mail, *supra* note 15.

[85] *See generally*, Kaiser, *supra* note 14 *and* Leahy, *supra* note 11.

1. The Freedom of Dissemination

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[86] The freedoms of speech and the press[87] have generally been understood to mean that the government cannot control what speakers say or what the press publishes.[88] As such, the right of independence of the press is in essence the freedom of the press from "government in decisions about whether and what to publish."[89]

From this premise, a long line of case law has developed regarding what kinds of government actions interfere with this right of publication. For instance, the jurisprudence on prior restraint deals with government interference on whether and what to publish. However, these prototypical examples of how the government can undermine the independence of the press are not directly relevant to the case at hand. At issue is the fact that the FBI used the AP's name without its permission and subsequently tricked a reader into thinking that a phony AP article was in fact published by the AP. The FBI in no way prevented the AP from publishing, or decided for the AP when and what to publish. As such, most of the existing case law dealing with the independence of the press is inapposite.

Given the difficulty of fitting the actions of the FBI into the existing framework, a broader view of the term "independence" is needed if the argument that the FBI violated the First Amendment is to succeed. The typical syllogism is as follows: just like in the Sixth Amendment context

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[86] U.S. CONST. amend. I.

[87] As a general matter, the Supreme Court has treated the freedom of speech and the freedom of the press as coextensive. Though some justices have suggested that because "the First Amendment speaks separately of freedom of speech and freedom of the press," the Constitution "requires sensitivity . . . to the special needs of the press in performing it effectively," Houchins v. KQED, 438 U.S. 1, 17 (1978) (Stewart, J., concurring), most cases hold that the press is not entitled to special or deferential treatment that ordinary speakers would not receive. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that newspapers have "no special immunity from the application of general laws" and that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against others persons or organizations"); Pennekamp v. Florida, 328 U.S. 331, 364 (1946) ("the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.").

[88] *See e.g.*, Turner Broad. Sys., Inc., 512 U.S. 622, 653 (1994) (stating that "The First Amendment protects the editorial independence of the press.").

[89] Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896 (1998).

where the Supreme Court has interpreted the right to assistance of counsel as the right to effective assistance of counsel,[90] independence of the press is not limited to only independence from direct government control. Such a result makes sense as the government could easily skirt First Amendment publication protections by interfering with other stages of the publishing process. As such, the Court has generally recognized First Amendment protections that go beyond the immediate scope of the decision of what and when to publish.

For instance, in *Branzburg v. Hayes*, the Court held that "news *gathering* is not without its First Amendment protections" because "without some protection for seeking out the news, freedom of the press could be eviscerated."[91] As Justice Stewart's dissent more clearly explained, the right to publish must also entail the right to gather news, for without extending the First Amendment to news gathering, the right to publish may be compromised.[92] The logical conclusion of *Branzburg* is obvious; if the gathering of information for the purposes of speech or press is afforded First Amendment protections, then so too must the dissemination of speech and press. Indeed, the Court has held as such, ruling in *Lovell v. City of Griffin,* that the First Amendment protects dissemination as much as it protects publication.[93] As a result, the First Amendment right for the press to publish must be effective, and it is given effectiveness by extending the protection to the collection of information necessary for publication, and allowing the published materials to be distributed or disseminated without government interference.[94]

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[90] Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

[91] Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

[92] *Id.* at 727–78 (Stewart, J., dissenting) ("A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.").

[93] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (striking down an ordinance which prohibited the distribution of circulars, handbooks, advertising, or literature of any kind without a permit because even though the ordinance relates to distribution and not to publication, "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

[94] To be clear, when I use the term "effective," I do not mean to suggest that the government is under a positive obligation to support speech or publication. The First Amendment has typically been understood as a mostly negative right. *See* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473 (2013). Rather, I simply mean that First Amendment protections must be effective, and it becomes effective by applying to all stages of the publication process.

Thus, on the grounds of a First Amendment right to dissemination, an argument can be formulated that the FBI's actions amounted to interference. However, first among these difficulties is that just like the FBI did not directly interfere with the publication process of the AP, the FBI also did not directly interfere with the distribution of AP's articles. Unlike in *Lovell*, where a city ordinance intentionally and directly prohibited the distribution of flyers, circulars, and other materials, the FBI's actions did not affect the dissemination of the AP's articles. Consider an orator delivering a speech. The fact that an audience member talks during the speech may interfere with the audience's ability to hear, and thereby receive, the speech, but it does not interfere with the actual ability of the orator to disseminate his message. The AP could still publish its articles and disseminate them as they did before.

Now, the mass distribution of fake articles that physically displace genuine articles may interfere with distribution. For example, if the FBI had created a mass of fake New York Times newspapers, and distributed them by placing the fake papers over genuine New York Times papers in stores and vending machines, then the physical act of covering up the genuine papers with the fake papers could be interpreted as interfering with dissemination. In the cyber realm, if the FBI had created and distributed so many fake AP articles that when, for example, a user googles "AP articles," the first hundred results are for fake articles because the genuine articles have been pushed lower on the search results page, then that may also count as interference.

But it would be difficult to imagine a world where the FBI would engage in such widespread behavior. Given how the FBI's internal guidelines would almost certainly preclude the mass misappropriation of the press's identity, it would be difficult to imagine this particular constitutional issue from ever becoming relevant. A single isolated incident of identity misappropriation, like the Timberline episode, would not affect the ability of the AP to distribute and reach its listeners.

2. Compelled Speech

Beginning in *West Virginia State Board of Education v. Barnette,* the Supreme Court has consistently held that the freedom of speech and press includes the freedom to not speak or publish.[95] Hence, as a general matter, policies that compel speech are scrutinized the same way as

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[95] West Virginia State Bd. of Ed. V. Barnette, 319 U.S. 624 (1943); *see also* Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97 (1988) ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.").

policies that prohibit speech.[96] Compelled speech cases have arisen in instances where the government directly compelled a private actor to deliver a government message the actor would not have otherwise delivered. For instance, at issue in *Barnette* was the compulsory recitation of the pledge of allegiance and salute of the flag.[97] Likewise, at issue in *Wooley v. Maynard* was a New Hampshire law that mandated the "Live Free or Die" motto on every New Hampshire vehicle license plate.[98]

The compelled speech framework, however, has expanded to included instances where a government policy would force a speaker to accommodate,[99] support[100], or deliver any message[101] that is not the speaker's own, even if the message is not a government message. An example of such a "compelled access" case is *Miami Herald Publishing Co. v. Tornillo*, where the Supreme Court invalidated a "right-of-reply statute" that required any newspaper that published a piece critical of a political candidate to make room for a reply from the criticized candidate.[102] The grounds for applying the traditional compelled speech doctrine to compelled access cases are that compelling access necessarily means controlling, to a degree, what a speaker says. Hence, in *Tornillo*, the Court struck down the right-of-reply statute on the grounds that the statute necessarily compelled newspapers to print the speech of others.[103] Although these are the grounds on which compelled access statutes are analyzed on, the examination of additional compelled access cases demonstrates that these cases can be analyzed under a new framework.

As articulated above, the right of speech and press must effectively protect speech and press. Given how the Supreme Court has held that the right to speak necessarily also means the right to not speak, then the First Amendment must also effectively protect purposeful silence.[104] Thus, an alternative reason for why compelled access cases offend the First Amendment is that compelling an actor to deliver, accommodate, or support another speaker jeopardizes the actor's right to effective silence. As a result, central to the inquiry over whether the right to silence has

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96 *Id.* at 796. With the possible exception of commercial speech, which is not at issue here.

97 *Barnette*, 319 U.S. at 625–26.

98 Wooley v. Maynard, 430 U.S. 705 (1977).

99 PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

100 Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997).

101 Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

102 *Id.* at 258.

103 *Id.* at 254–58.

104 *See e.g.*, *Riley*, 487 U.S. at 796–97 ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.").

been implicated is the extent to which the public attributes the compelled access speech to the compelled actor's own decision to speak. In other words, to analyze whether the First Amendment right to not speak has been violated, there must be an examination of public confusion.

For instance, in *PruneYard Shopping Center. v. Robins*, a private shopping center challenged the California Supreme Court's decision that it could not exclude from its private property a group of high school students from passing out pamphlets that were critical of a U.N. resolution.[105] Pruneyard argued, among other things, that to force it to accommodate these speakers would be an instance of compelled access, which would be inconsistent with *Wooley*, *Barnette*, and *Tornillo*.[106] In other words, Pruneyard's argument was that because the freedom of speech includes the freedom to refrain from speaking, allowing these pamphleteers to speak while on Pruneyard's private property would risk the public viewing that Pruneyard was in agreement with the pamphleteers, that is to say, that Pruneyard was in fact speaking. In rejecting the shopping center's challenge, the Supreme Court noted that the views expressed by the pamphleteers "[would] not likely be identified with those of the owner."[107] Although the Supreme Court stopped short of recognizing a violation of the First Amendment, it implicitly lent support to the view that if the public truly thought that Pruneyard agreed with the pamphleteers—thus thinking that Pruneyard had spoken when it had not—then forcing Pruneyard to allow the pampleteers access to its grounds may violate Pruneyard's right to not speak.

A variation of this logic is present in *Turner Broadcasting System, Inc. v. F.C.C.*, where cable TV operators challenged a provision that required them to carry local stations.[108] In rejecting the operators' compelled access challenge, the Court held that because "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator," the cable operators would not be "forced [] to alter their own messages to respond to the broadcast programming they are required to carry."[109] Implicit in this case is not only the same concern demonstrated in *Pruneyard*, but also the subsequent concern of the actions that the compelled actor must take in order to clarify the now unclear messages being sent to the public by the compelled actor.

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105 PruneYard Shopping Center v. Robins, 447 U.S. 74, 77–78 (1980).
106 *Id.* at 86–88.
107 *Id.* at 87.
108 *Turner*, 512 U.S. 622 (1994).
109 *Id.* at 655.

The importance of *Pruneyard* and *Turner* is that they stand for the proposition that there may be a First Amendment violation under the compelled speech doctrine even when no speech is compelled. In both *Pruneyard* and *Turner*, neither the shopping center nor cable TV operators were compelled to speak.[110] Instead, at issue was whether their carriage of others messages would be viewed as the functional equivalent of them speaking.[111] Under such a framework, as long as there is sufficient association that the message the actor is compelled to carry is thought to be the actor's own message, then there may be a First Amendment violation.

In this case, the FBI's use of the AP's name may be addressed under the compelled speech doctrine, irrespective of the fact that the FBI did not compel the AP to say or publish anything. Rather, the mere fact that the FBI uses the AP's name, and the resulting misattribution of the speech, is enough. Consider if the pamphleteers in *Pruneyard* were wearing Pruneyard's uniforms without Pruneyard's knowledge or approval. In such a case, the public would understandably think that Pruneyard was in fact against the U.N. resolution because of the misattribution of the pamphleteers' speech. Although Pruneyard would not have said anything, nor would it have been compelled to say anything, it seems unlikely the Supreme Court would have let stand such a practice on constitutional grounds. In this respect, misappropriated speech is indistinguishable from compelled speech. Just as it is difficult to tell the difference between speech that is compelled and speech that is voluntary, it is also difficult to tell if one is speaking his own words or merely acting as the vehicle through which another person's thoughts are pronounced though. As a result, both compelled speech and misappropriated speech cause the misattribution of speech.

Under this framework, the instant case may present more of an issue than typical compelled speech cases. First, in cases where the State has been allowed to compel the speech or force the access to private parties, it has been justified and upheld on the grounds of truth or factual disclosure.[112] In other words, the compelled disclosure actually corrected distortions in the marketplace of ideas or the marketplace of the economy. Here however, the FBI's actions actually added distortion. Add to this the fact that the Supreme Court has consistently held that lies have no First Amendment value,[113] and the result is a decent argument

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[110] *Pruneyard*, 447 U.S. at 88; *Turner*, 512 U.S. at 647.

[111] *Prunyard*, 447 U.S. at 85–87; *Turner*, 512 U.S. at 653.

[112] *See, e.g.,* Zaunderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

[113] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the

that the FBI's actions were problematic. Moreover, even though the Supreme Court has held that untruthful information lacks First Amendment protections, the Court has often permitted its dissemination because of the fear of chilling protected speech.[114] Here, this justification for allowing untruthful speech is not available.

If the compelled speech framework is applicable, then the FBI's actions may well be unconstitutional. Crucial to the analysis is the extent and pervasiveness of the practice. The publication and misattribution of a single fake AP article likely would not raise concerns given that this would only be a *de minimis* violation of the AP's right to not speak effectively. However, a large scale practice of distributing fake AP articles to the extent that there is widespread confusion over which AP articles are genuine would likely violate the AP's right to not speak.

B. Indirect Interference with Protected Activities

Supreme Court cases have recognized the potential for a First Amendment violation for government actions that stop short of directly prohibiting or acting upon protected activities. These cases, which in essence hold that the government's indirect interference with a protected activity is actionable, are potentially applicable to the case at hand on the basis that the FBI's actions amounted to such indirect interference. [115] This section examines the applicability of the "chilled" and "diluted" speech doctrines in turn.

1. Chilled Speech

The incidental suppressive effects of direct government actions have long been part of First Amendment jurisprudence.[116] However, it was not until *Laird v. Tatum* that a group sought to make out a First Amendment violation on the basis of indirect effects alone. [117] At issue in *Tatum* was the U.S. Army's surveillance of allegedly lawful and peaceful civilian political activity.[118] This surveillance, as the Respondents argued, was

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marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter-speech, however persuasive or effective"); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact'").

[114] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate . . . punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

[115] Laird v. Tatum, 408 U.S. 1, 6-14 (1972).

[116] *See, e.g.,* Lamont v. Postmaster Gen. of U.S., 381 U.S. 301, 307 (1985).

[117] *Tatum,* 408 U.S.at 1.

[118] *Id.* at 2.

unconstitutional because it "chilled" their exercise of protected First Amendment activities, even though the Army in no way directly interfered with such activities.[119] As a result, *Tatum* recognized that a deterrent or chilling effect "of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights" may nonetheless result in a First Amendment violation.[120] The Court, however, held that there was no cognizable injury in the actual case.[121]

Nonetheless, lower courts in the aftermath of *Tatum* have jumped on this "indirect effects" cause of action, distinguished *Tatum,* and held that various indirect government activities have indeed amounted to a First Amendment injury. For instance, in *Berlin Democratic Club v. Rumsfeld*, a political organization alleged that the U.S. Army, among other things, covertly infiltrated their meetings, spread discord and disharmony, and disseminated harmful files about their members.[122] The Court distinguished *Tatum* and held the suit as justiciable because the result of the Army's actions was the "termination or restriction of employment opportunities, unfair military trials, or damaged reputations" of members of the groups.[123]

Likewise, in *Handschu v. Special Services Division*, the court held as justiciable various political action groups' claims that the New York City Police Department's Security and Investigation Section (SIS) chilled their free speech and association rights.[124] In *Handschu*, the groups alleged, that SIS agents infiltrated their organizations and spread discord and disharmony.[125] This discord and disharmony so affected the performance of the organizations that one group "disbanded [because of the] atmosphere among its members of mistrust, suspicion and hostility" which was created by the SIS.[126]

Finally, in *Alliance to End Repression v. City of Chicago*, the court held that the infiltration of political organizations by undercover officers of the Chicago Police Department chilled the speech of these organizations. [127] In the case, undercover officers pretended they were interested members and one officer eventually ascended to the board of one organization, becoming their treasurer.[128] That officer then spread

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119 *Id.* at 10.

120 Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Tatum, 408 U.S. at 11).

121 *Tatum*, 408 U.S. at 13–14.

122 Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 147–48 (D.D.C. 1976).

123 *Id.* at 149–50.

124 Handschu v. Special Services Division, 349 F. Supp. 766, 768 (S.D.N.Y 1972).

125 *Id.*

126 *Id.* at 770.

127 All. to End Repression v. City of Chicago, 627 F. Supp. 1044 (N.D. Ill. 1985).

128 *Id.* at 1051–52.

false information about the organization, which effectively destroyed the group's reputation and nullified their message.[129]

These three cases suggest that notwithstanding *Tatum*, it is possible to make out a First Amendment violation on the basis of the mere effects of a government action even if the government action did not directly prohibit the protected activity. Indeed, these cases show that as long as there is sufficient injury, government actions that chill or interfere with protected activities are actionable. The AP has stated that the FBI's creation of a false AP story could have damaged its reputation and affected its credibility.[130] As such, under the chilled speech doctrine, if the FBI's activities so undermined the organizational capabilities of the AP to the extent that it was no longer a trusted wire service or perceived to be a mere conduit through which false government-created articles would flow, then it could be argued that the AP's First Amendment rights were effectively chilled.

Of course, there is the issue of the magnitude of the chill needed. As *Tatum* held, not any chill is a cognizable injury.[131] *Berlin Democratic Club*, *Handschu*, and *Alliance to End Repression* demonstrate, however, that when the chill rises to a certain threshold, such as the loss of employment or the disbanding of an entire organization, then such a chill may be cognizable. The Timberline episode falls short of such a level and as mentioned above, it is highly unlikely that the FBI or any law enforcement agency would misappropriate the press' identity to the extent needed for a constitutional violation under the chilling doctrine. Moreover, such a systematic practice, if put in place, would likely violate internal government guidelines.[132] But the doctrine does nonetheless suggest that a widespread and consistent practice of creating and disseminating fake AP articles, to the extent that the AP's very ability to function is impaired, may be a First Amendment violation.

2. Diluted Speech

The diluted speech doctrine is closely related to the chilled speech doctrine. The basic theory is that actions that dilute speech can infringe on the First Amendment. Perhaps the easiest application and visualization of this doctrine is in the trademark context. As mentioned above, two causes of action exist under the Lanham Act for dilution. Thus, courts have concluded that while the use of a mark for an expressive purpose, such as commentary, comedy, parody, news

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129 *Id.* at 1047.
130 *See* AP, supra note 14.
131 Laird v. Tatum, 408 U.S. 1, 13 (1972).
132 *See supra* Part I. A.

reporting or criticism, is protected speech, the use of a mark to identify the source of a message is not protected and is subject to the Lanham Act.[133] The justification for this contrast is that the First Amendment "protects an individual's right to speak out . . . but it does not permit an individual to suggest that the markholder is the one speaking."[134]

However, there are several issues with applying the trademark dilution doctrine to the expressive speech context. First, the Lanham Act's theory of dilution is limited to the dilution of commercial value as opposed to the value of protected First Amendment activities.[135] That is to say, what is diluted in trademark cases is not speech, but the commercial and monetary value associated with a particular trademark. But there are instances of this dilution rationale being used to protect more than just mere commercial value. For instance, in *People v. Golb*, a New York Supreme Court case, the defendant used emails to impersonate actual persons and was subsequently prosecuted under a state law that criminalized such impersonation.[136] The defendant, the son of an expert on the Dead Sea Scrolls, set up email accounts in which he pretended to be several scholars who disagreed with his father's opinion on the origin of the Scrolls.[137] Among other things, the defendant sent emails in which he misappropriated the identity of one of these scholars and purportedly "admitted" to acts of plagiarism.[138] The court determined that the fake emails damaged the careers and livelihoods of the impersonated scholars and, in relying on various trademark cases, held that the "First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message is that other person."[139]

Another issue with trademark law's dilution theory is that it is grounded in statutory law, that is, the Lanham Act. But in this case, since there is no applicable statute that the AP can rely on, the AP must prove the dilution rationale as a matter of constitutional law. However, the Supreme Court may have already started to constitutionalize the dilution rationale, thus making it at least plausible for the AP to argue that the FBI's actions diluted their speech in a manner that offended the First Amendment.

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133 SMJ Grp. v. 417 Lafayette Rest., 439 F. Supp. 2d 281, 291 (S.D.N.Y. 2006).

134 *Id.*

135 *See* 15 U.S.C. § 1114 (the Lanham Act is directed at the "sale [or] offering for sale" of products with like marks, clearly indicating that the Lanham Act is meant to protect against the dilution of commercial value).

136 People v. Golb, 991 N.Y.3d 455, 458–59. (2014).

137 *Id.* at 459.

138 *Id.*

139 *Id.* at 471.

The best example of this phenomenon is a combination reading of the Supreme Court's decision in *United States v. Alvarez*[140] and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett.*[141] In *Alvarez*, the Court addressed the constitutionality of the Stolen Valor Act (SVA).[142] Under the SVA, "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined [], imprisoned not more than six months, or both."[143]

Xavier Alvarez held himself out as a retired Marine who was awarded the Congressional Medal of Honor and was subsequently prosecuted under the SVA.[144] However, Alvarez did not make the statements to secure financial benefits or other privileges, nor did the SVA require such for prosecution.[145] Indeed, the government defended the statute on the grounds that it was necessary to "preserve the integrity and purpose of the Medal [of Honor], integrity and purpose [that is] compromised and frustrated by the false statements the statute prohibits."[146] As a result, the government made the argument that "false representations have the tendency to dilute the value and meaning of military awards;" a quintessential dilution rationale.[147]

In a deeply fractured opinion, a majority of the Supreme Court struck down the statute, but no rationale gained more than a plurality of the justices. But in neither Justice Kennedy's four-justice plurality opinion, nor Justice Breyer's two-justice concurring opinion, was the dilution rationale rejected. Justice Kennedy rejected the government's dilution argument simply on the grounds that the government articulated preservation of the integrity of military medals as a compelling interest but "point[ed] to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."[148] As such, Justice Kennedy's plurality opinion implicitly seemed to accept that the dilution of "the high purpose of the award, [] the honor it confirms, and . . . the appearance that the Medal is awarded [rarely]" could be a possible justification in a better case.[149]

Justice Breyer's two-justice concurring opinion is even more interesting. Justice Breyer specifically notes that trademark statutes are

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140 United States v. Alvarez, 132 S. Ct. 2537 (2012).
141 Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).
142 *See Alvarez*, 132 U.S. 2537.
143 *Id.* at 2543.
144 *Id.* at 2542.
145 *Id.* at 2542 and 2547.
146 *Id.* at 2543.
147 *Id.* at 2549.
148 *Id.*
149 *Id.*

the "closest analogy" to the present statute, but acknowledges that the former focuses "upon commercial and promotional activities that are likely to dilute the *value* of a mark."[150] However, Justice Breyer goes on to explain that

> Like both the plurality and the dissent, I believe the statute nonetheless has substantial justification . . . .The statute serves this interest by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. To permit those who have not earned those honors to claim otherwise *dilutes* the value of the awards. Indeed, the Nation cannot fully honor those who have sacrificed so much for their country's honor unless those who claim to have received its military awards tell the truth.[151]

As such, Justice Breyer merely struck down the statute on the basis that the compelling interest in the preservation of the value of military medals could be achieved in less burdensome ways.

As a result, *Alvarez* is useful analytically to the case at hand in several ways. First, it suggests, like *People v. Golb*, that dilution is not limited to merely the commercial dilution doctrine. Rather, intangible things such as the perceived honor of awards can be diluted. Hence, if—as Justice Breyer notes—all nine justices agree that the "integrity" of military medals can be diluted, and the preservation of their value is a significant government interest, then surely the speech of the press can be diluted in constitutionally significantly ways.[152]

Second, the issue in *Alvarez* can be reframed as a matter of expression. Just like how bumper stickers on a car,[153] mottos on a license plate,[154] or messages written on a t-shirt[155] are matters of free speech protected by the First Amendment, so too is the wearing of badges or medals on a uniform. Medals, like flags or other symbols, convey a message to the public; wearing medals is speech. In the *Alvarez* case, medals conveyed the message that the wearer of the medal has undergone extreme experiences, demonstrated exceptional bravery, valor, and honor. Indeed, Justice Kennedy's opinion in *Alvarez* acknowledges that the purpose of military medals is for expressing

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150 *Id.* at 2554 (emphasis added).
151 *Id.* at 2555.
152 *Id.*
153 *See* Baker v. Glover, 776 F. Supp. 1511, 1512 (D. Alaska 1991).
154 Wooley v. Maynard, 430 U.S. 705 (1977).
155 Cohen v. California, 403 U.S. 15 (1971).

"public recognition of valor and noble sacrifices."[156] Thus, what the Stolen Valor Act was really concerned with was the dilution of the message that is conveyed whenever a person wears such a medal; that is to say, the dilution of speech.[157] As a result, *Alvarez* implied that it was possible for this speech—the wearing of a medal— to be so damaged and diluted, that it would potentially justify intervention by a federal statute that burdened other speech.

Of course, as mentioned above, the critical issue here is that unlike in *Alvarez* there is no statute that criminalized what the FBI did in Timberline. However, *Arizona Free Enterprise*, when read in conjunction with *Alvarez*, suggests that this dilution rationale appears to have traction in the constitutional realm. As Justice Kennedy explains in *Alvarez*, the dilution effect caused by people undeservingly wearing medals comes from the "appearance that the Medal is awarded more often than is true" and that "pretenders" that wear the medal "tarnish" the quality of both the medals and those who wear them.[158] Thus, the dilution effect in *Alvarez* is caused by two factors: first, the generation of excess medal wearers interferes with the message of existing, legitimate, medal wearers, and second, the fact that undeserving pretenders wear the medals reduces the overall quality of the medals. Much is the same in the instant case. The FBI's production of excess AP articles interferes with the messages of existing, legitimate AP articles, and the production of false articles "tarnishes" the overall quality of the AP wire service.

The first cause for dilution—the generation of excess articles—has been found by the Supreme Court to be constitutionally problematic in *Arizona Free Enterprise v. Bennett*.[159] At issue in *Arizona Free Enterprise* was the matching funds provision of Arizona's Citizens Clean Elections Act. The matching funds provision provided public funds for candidates running for political office whose opponents' privately raised campaign funds exceeded a certain threshold.[160] In this fashion, Arizona sought to reduce the monetary gap between candidates who were and who were not able to raise substantial funds from private sources.[161] The United States as amicus argued that the Arizona law did not burden the speech of candidates not receiving public funds (that is, candidates who were successful in fundraising money from private sources) because the

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156 *Alvarez*, 132 U.S. at 2548.

157 *Id.* at 2549 (characterizing the compelling interest at stake as the "meaning of military medals").

158 *Id.* at 2549.

159 *See* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2824 (2011).

160 *Id.* at 2813–16.

161 *See id.*

law in no way prevented, prohibited, or interfered with the speech of those candidates.[162] However, the Court struck down the provision as in fact burdening the speech of those candidates, explaining that:

> Of course it [burdens speech]. One does not have to subscribe to the view that electoral debate is zero sum to see the flaws in the United States' perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted. And even if the publicly funded candidate decides to use his new money to address a different issue altogether, the end goal of that spending is to claim electoral victory over the opponent that triggered the additional state funding.[163]

In essence, *Arizona Free Enterprise* acknowledged that speech can dilute, and therefore burden, other speech as a constitutional matter. To make this clear, the Court struck down a law that would otherwise have generated more "speech" on the grounds that this new publicly funded speech would dilute existing privately funded speech. And since there is no statute criminalizing the production of this excess speech—indeed the statute at issue actually forced the production of speech—the Court relied on the dilution rationale in striking down the statute under the First Amendment.

As a result, the FBI's generation of "speech"—the fake AP articles—could be seen as constitutionally diluting and burdening the AP's existing speech—the genuine articles produced by the AP, and thus illegal even in the absence of a statute. To be sure, the fake AP articles produced by the FBI would likely not be completely contradictory or opposed to whatever the AP actually publishes. However, *Arizona Free Enterprise* did not limit its holding that speech burdens other speech to only circumstances where two instances of speech are in perfect conflict; rather, the case stands for the general principle that the effectiveness of speech can be reduced by additional speech.[164] Therefore, the effectiveness of the AP's existing speech—which is based entirely on the timely presentation of accurate and truthful information—is clearly diminished by speech that is not truthful and indeed, entirely fabricated.

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[162] *See Id.* at 2824.

[163] *Id.*

[164] *Id.* at 2824 ("[E]ven if the publicly funded candidate decides to use his new money to address a different issue altogether, the end goal of that spending is to claim electoral victory.").

As such, under the dilution doctrine, the issue is not whether the FBI's publication of fake AP articles dilutes or decreases the effectiveness of the AP's message, but rather, to what degree the AP's speech is sufficiently diluted and degraded to constitute a constitutional violation. For this question, it should not be controversial to say that the creation of a single, fake AP article, as was the case in Timberline, is not of sufficient magnitude. Not every incidental burdening of the press is a First Amendment violation.[165] Moreover, the United States in *Alvarez* conceded that "an isolated misrepresentation by itself would not tarnish the meaning of military honors."[166] Hence, in order for there to be any sort of arguable dilutive effect, the AP would likely have to point to a policy of publishing and disseminating fake articles greater than the lone isolated occurrence in Timberline. But it is unclear what exactly the tipping point is. Though *Arizona Free Enterprise* suggests that any additional speech burdens or dilutes existing speech, it is unclear whether the Court would abide by the logic of *Arizona Free Enterprise* when a matter of security is offered by the FBI as the countervailing interest.

Perhaps what is more problematic for the AP is the availability of counter speech. As was made clear in *Alvarez*, "the remedy for speech that is false is speech that is true," and who better to provide counter speech than a member of the press? [167] Indeed, the fact that the revelation of the FBI's actions caused a tremendous uproar and resulted in numerous press and media organizations denouncing the FBI's actions seems to suggest that the press is especially capable of defending itself against any dilutive effects fake articles may pose.

But, nonetheless, *Alvarez* and *Arizona Free Enterprise* do suggest that as a constitutional matter, speech can degrade other speech and therefore the act of publishing false AP articles, even if not at the level of causing a constitutional violation, is at least constitutionally significant. Given the internal guidelines mentioned in Part II, which implores the FBI to take into account possible constitutional and other legal considerations,[168] it may be advisable for law enforcement agencies to refrain from such practices given the practical risks. For instance, if the AP decided to pursue claims against the FBI, it would seem likely that in the court of public opinion the FBI would lose decisively.[169] For this reason alone, the FBI may wish to refrain from using any tactics that may

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165 *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

166 United States v. Alvarez, 132 U.S. 2537, 2549 (2012).

167 *Id.* at 2550.

168 *See* Ashcroft, *supra* note 17, at 3 (noting that the FBI must consider the "risk of invasion of privacy or interference with privileged or confidential relationships and any potential constitutional concerns or other legal concerns.").

169 *See e.g.*, Nakashima, *supra* note 13.

have even an inkling of legal infirmity. This is especially the case if the tactic concerns the press, which, as mentioned above, has the tools to defend themselves, and given their position in American society, the tools to shape the public discourse in ways unfavorable to the FBI and government.

C. The Right to Receive Information

The last area of potential First Amendment applicability deals not with the First Amendment protections of the AP or the press generally, but rather, the First Amendment rights of ordinary Americans who read, watch, or listen to the press. As a general matter, the Supreme Court has held the First Amendment rights to freedom of speech and press are speaker's rights in the sense that it protects the right of speakers to speak and the press to publish.[170] However, a thread of First Amendment case law has suggested that the First Amendment is more about the right of the people to receive information than for protecting those who are speaking.[171] This latter theory thus creates the "First Amendment right to receive information and ideas."[172] Under such a theory, the "guarantees [of the First Amendment] are not for the benefit of the press so much as for the benefit of all of us."[173]

Perhaps the clearest illustration of such a right to receive information is *Lamont v. Postmaster General of U.S.*[174] At issue in *Lamont* was a statute that required the postal service to detain, and eventually destroy, unsealed mail sent from foreign countries that was deemed to be communist political propaganda, unless the addressee returned a reply card indicating his desire to receive the mail.[175] The Court struck down the statute as unconstitutional, but crucially held that it was an unconstitutional abridgement of the First Amendment right of addressees to receive mail.[176] In so holding, the Court necessarily realized a First Amendment right to receive certain types of speech. On the basis of

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[170] *See, e.g.*, United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.").

[171] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 13 (2000).

[172] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980).

[173] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[174] Lamont v. Postmaster General of U.S., 381 U.S. 301 (1965).

[175] *Id.* at 302.

[176] *Id.* at 307 ("We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights.").

Lamont alone then, the FBI's creation of false AP articles could be viewed as infringing on the rights of the public to receive speech.

Of course, a critical difference is that the FBI, unlike the postal service in *Lamont*, did not directly prohibit or interfere with the right to receive actual AP articles. Nonetheless, if the dilution argument above is adopted, then the FBI's actions may be viewed as burdening the public's right to receive speech if the FBI published and disseminated a large number of fake AP articles. To put it another way, the statute at issue in *Lamont* did not prevent or prohibit the receipt of mail, but merely burdened that right with the added requirement that the receiver send a reply card. Similarly, in this case, the burden occurs when the FBI creates many false AP articles, making it difficult for recipients to receive actual AP articles.

Under an alternative analysis of the right to receive information, the FBI's policy may also be potentially problematic, assuming again, that the policy was carried out on a large-scale basis. The underpinning of the "right to receive information" view of the First Amendment is the belief that the First Amendment is meant to ensure an informed and educated electorate capable of participating in democracy.[177] There are two versions of this belief. The first is the view that the press functions as a political check on government power, thereby allowing the public to not only be aware of governmental misconduct, but also, to be able to respond through political reprisal.[178] Justice Stewart is perhaps the most famous purveyor of this view, arguing in his famous Yale address that the purpose of the press and media freedoms was to allow the press to function as a "Fourth Estate" in checking government power.[179]

Given that the press has been viewed by many as the defender of truth or the inspector general tasked with checking all three branches of government, it seems particularly egregious that the FBI would

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[177] *See* Genevra Kay Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1443 (1975).

[178] Leathers v. Medlock, 499 U.S. 439, 447 (1991) ("The press plays a unique role as a check on government abuse . . . "); Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (The press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences['']); *see also* Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern).

[179] Address at Yale University (Nov. 2, 1974), in "Or of the Press," 26 HASTINGS L.J. 631, 632 (1975).

misappropriate the identity of those assigned to check it. Indeed, if the right to receive information is premised on the fact that information about the government is needed via the independent press so that the public can make intelligent and informed decisions, then any interference with the press's delivery of such information may be a constitutional violation.

The second and related view is that the dissemination of information is necessary as part of democratic self-governance. The need for an "open society," "an informed citizenry," or "personal self-fulfillment," is necessary to make correct choices. [180] This so called search for truth in the marketplace for ideas[181] is the "right of the viewers and listeners, not the right of the broadcasters,"[182] and is especially apparent in the commercial context where correct and accurate information is necessary for making the right economic choices.[183]

Consider the commercial speech context where the Supreme Court has in some instances allowed compelled speech statutes to stand. The type of statute that is often at issue in these cases is a statute that compels a commercial entity to provide various factual disclosures. The justification offered in all of these cases is that the compelled disclosure of factual information meant to either correct or prevent the dissemination of "commercial speech that is false, deceptive, or misleading," is needed because the decisions that consumers make must be intelligent and well informed.[184]

Indeed, the clearest formulation of this rationale appears in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where the court struck down a statute that banned the advertisement of prescription drug prices. [185] In the case, there was no claim that advertised prices were misleading or deceptive, but rather, that the

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[180] *Branzburg*, 408 U.S. at 726–27 (Stewart, J., dissenting)("In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy.").

[181] *See* e.g., Board of Educ. v. Pico, 457 U.S. 853, 866 (1982); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537, 538 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760 (1975); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 382 (1966).

[182] Red Lion, 395 U.S. at 390.

[183] Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763–65 (1976).

[184] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985).

[185] 425 U.S. 748 (1976).

advertisements tarnished the professionalism of the licensed pharmacist.[186] The Supreme Court struck down the statute on the grounds that the statute interfered with the public's right to know certain information. As Justice Blackmun explained:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest . . . however tasteless and excessive it sometimes may seem, [advertising] is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[187]

Virginia State Board therefore adopts the viewpoint that consumers have, at the very least, a "keen" interest in knowing certain pieces of information—in this case, the price of prescription drugs—in order to make, in the aggregate, intelligent economic choices in a free market economy.[188] But perhaps more relevant is the first part of the quote of Justice Blackmun's explanation where he acknowledges that this same rationale applies in the political context. Hence, extrapolating *Virginia State Board* to the case at hand, several things can be said.

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186 *Id.* at 766, 771–72.
187 *Id.* at 763–65 (emphasis added).
188 *Id.*

First, the democratic society we live in can be viewed as having a keen interest in the receipt of certain types of truthful and accurate information so that the populace can make smart, intelligent, and informed political decisions. Just as in *Virginia State Board*, where the Court struck down a policy that interfered with the flow of commercial information necessary to make an informed commercial decision, the FBI's policy of misappropriating press credentials and disseminating false news articles jeopardizes the ability of the populace to be informed and make smart political or governance decisions. In other words, if the First Amendment is viewed as protecting the right to receive information, and the information the public has the right to receive is information necessary for the public to be informed and for the public to use for matters of politics and governance, then government policies that impair the ability of the public to receive such information may be treated as a constitutional infringement of the First Amendment.

Second, as discussed under the compelled speech section, there is even less justification for the FBI's tactic given that the tactic actively distorts the marketplace and creates deception and confusion. As such, regardless of which view of the right to receive information is adopted, the theory that the First Amendment protects the right to receive information therefore centers on whether or not the public received the information necessary for the public to exercise its discretion. Thus, this theory places a premium on the dissemination of truthful information by the press. Given that the FBI's tactic would do the exact opposite by providing the public with misinformation, which may lead to incorrect choices based on this incorrect information, it seems that the FBI's tactic may well be constitutionally problematic at a theoretical level.

Of course, the practical implications of the FBI's misappropriation of the AP's identity are likely to be zero. In order for any of these theories to come into play, the FBI's policy would have to have been carried out on a large scale. The isolated, sporadic, and sparing use of this technique, though likely to anger many, is far from a constitutional violation as it would not infringe, to any tangible degree, on the public's receipt of truthful information. Indeed, given that in this particular case the article was not even viewed by any person except the bomb suspect, there would have been no ill effects on the public's right to receive information.

V. CONCLUSION

The FBI's misappropriation of the AP's identity is a novel variation of law enforcement subterfuge. This has raised concerns that in the

course of the FBI solving crimes, it has stepped on the constitutional rights of the media. However, this single, isolated event is unlikely to raise constitutional concerns. Until the FBI engages in a systematic and consistent practice of misappropriating the identity of the press, First Amendment legal concerns are unlikely to arise. Nonetheless, important questions have been raised about the propriety of such tactics and whether they are ever appropriate.