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REPORT FROM THE COURT

State Bans Employees From Indecent Internet Activity; U.S. Fourth Circuit En Banc Hearing of *Urofsky v. Gilmore*

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On October 25, 1999 the constitutional debate over a Virginia statute limiting state employees from performing uncensored computer-assisted research resumed before the United States Fourth Circuit Court of Appeals. The case in debate is *Urofsky v. Gilmore*. The statute affects all Virginia state employees, who amount to over 100,000 people.

The plaintiffs suing the state are six university professors who allege that the act unconstitutionally interferes with their research, teaching and publication responsibilities. The plaintiffs, represented by Acting American Civil Liberties Union ("ACLU") Attorney Marjorie Heins asked for this rehearing after two

previous decisions. The district court in Alexandria first heard the case and found for the plaintiffs. The Commonwealth then appealed and the case was heard in front of a three-judge panel of the Fourth Circuit Court of Appeals, that decision reversed the district court and held for the Commonwealth. The plaintiffs then filed for this rehearing before the full court. The court granted that petition and arguments commenced on October 25, 1999.

The plaintiffs include Melvin Urofsky, a professor at Virginia Commonwealth University and now a University of Richmond School of Law adjunct professor, in Richmond, Virginia, who states that he was reluctant to assign students online research assignments on federal "indecency" law. Bernard Levin and Brian Delaney are professors of psychology and literature at Blue Ridge Community College. They use the Internetfor teaching and research of the human sexual experience, including Freudian theories, concepts of stages of development, and penis envy. Other plaintiffs are Terry L. Meyers, an expert on Victorian poets, Paul Smith who taught a class on how pornography shapes gender roles and sexual identity in our culture at George Mason University, in Fairfax, Virginia, and Dana Heller, a professor at Old Dominion University, in Norfolk, Virginia, whose field of study includes lesbian and gay studies. The plaintiffs in the case are backed by The American Association of University Professors, The Thomas Jefferson Center for the Protection of Free Expression, and The Authors Guild.

The defendant is Governor James Gilmore, of the Commonwealth of Virginia. The Office of the Attorney General represents the Commonwealth of Virginia in lawsuits, such as this one. The Solicitor General, William Hurd, argued this case for the state.

The professors are contesting Virginia Code Section 2.1-805 (the "Act"), which states, "except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content." The statute also defines "sexually explicit" content in section 2.1-804, as: "content having as its dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in section 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in section 18.2-390, copraphilia, urophilia, or fetishism."

This year, the Virginia General Assembly amended the 1996 "sexually explicit" definition after the district court in Alexandria, Virginia sided with the plaintiffs. They added the following words: "content having as its dominate theme...any lascivious description of or (ii) any lascivious picture..." to the prior definition. Attorney General Hurd stated that Virginia had always interpreted the statute this way, and after the decision, he encouraged the General Assembly to make the textual adjustment to reflect that longstanding intent. Although the prior definition of sexual content was at issue in the district court proceedings, the plaintiffs contend that their free speech rights continue to be infringed even under the amended Act.

The term "lascivious" was defined by the Virginia Supreme Court in the 1979 case *Penderson v. City of Richmond*[1], to mean, "a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite." Additionally, the court held that "lewd" is synonymous with "lascivious" and "indecent."

The Virginia statute creates a situation in which any state employee who needs to access this type of information on the Internet must receive prior written approval from his respective agency head. The details of the approval are then available to the general public through the Freedom of Information Act, Va. Code § 2.1-340 et seq. ("FOIA"), so that the public can observe and examine what the employee is accessing.

The professors complain in the brief to the court[2] that they do not even know what or which communications on sexually explicit subjects violate the Act. Some university officials gave their professor employees blanket approvals for any research. But, a University of Virginia administrator explained that she would only approve exceptions on a case-by-case basis.

"The truly significant thing about this case is that the Act is so very limited in what it applies to, number one, it only applies to state employees who are using state-owned computers and number two it provides for the very same kind of work-related exception that the plaintiffs were saying that they needed, " Hurd said. "Perhaps what they were concerned about was that they as academics were being required to consult with their institutions about what they really needed, and for whatever reason they disdained having to be subject to that kind of institutional oversight," he added.

The plaintiffs in this case did not seek prior approval from their agency heads for researching potentially sexually explicit material online. They also have not shown that a request would have been rejected, had they submitted. They say that this licensing requirement undermines their intellectual autonomy and is similar to receiving permission before getting books from the library. The plaintiffs claim that the statute is unduly vague both in its definition of what is banned, as well as in the standards for approval.

Another constitutional argument the plaintiffs made is centered around academic freedom for university professors. Academic freedom is the right of teachers and researchers to investigate fields of knowledge and to express views without fear of restraint or dismissal. "Academic freedom was a footnote kind of concern in the District Courts opinion, after the panel opinion the plaintiffs filed petition for rehearing that focused heavily on the Academic Freedom and broke out the research and publication part of the argument from the curriculum part," Hurd stated.

According to the Commonwealth, the professors are not all so innocent in their claim of ignorance of lascivious materials, as the Commonwealth asserts in its brief submitted to the federal district court. The Commonwealth points out that Paul Smith, a professor at George Mason University, in Fairfax, Virginia, created a website with a George Mason University URL address, on which there were pictures of a naked man in bondage, the bare buttocks of a woman whose hands were chained and locked behind her, and other similar pictures - all without any explanatory text. Many students and faculty complained and the website was eventually censored as a result of the Act.

The plaintiffs explain that this website was a personal site, and that it was under construction, but that it is just one example of how the Act chills the professors' free speech. They point out that Professor Smith is internationally recognized for his longstanding academic interest in the cultural ramifications of pornographic imagery, in defense of the motivations and intentions behind the page's construction.

The plaintiffs filed suit on May 8, 1997, stating that the statute violates First Amendment rights of state employees and is unconstitutionally overbroad and vague. In February 1998, they won the case without going to trial, as the district court judge awarded the plaintiffs with summary judgment.

The Commonwealth appealed and the two judges writing the majority opinion for the Fourth Circuit Court of Appeals in *Urofsky v. Gilmore* [3], reversed the district court, finding that the professors' speech, including researching and publishing of information on state-owned computers did not constitute a "matter of public concern," and therefore, was not protected by the First Amendment.

The plaintiffs then filed for a rehearing and the full court granted the motion. The main issue, as stated by the plaintiffs, is whether state-employed academics and other professionals engaged in such intellectual inquiry possess First Amendment rights to write, publish, engage in research, and exchange information with colleagues and the public.

In order to find a First Amendment violation, the item published or "spoken" by the government employee must be a matter of public concern. Then, the court balances the interests of the employee, as a citizen, in commenting upon matters of public concern with the interests of the

State, as an employer, in promoting the efficiency of the public services it performs through its employees. There are many factors weighed in this determination, as discussed by the United States Supreme Court in the 1983 case, *Connick v. Myers*[4]. The Connick Court required an evaluation of the "content, form, and context of the statement as revealed by the whole record" to determine if the speech met the public concern standard. Hurd added, "the Fourth Circuit has said that if, in context, the speaker speaks primarily as his role as an employee it is by definition not a matter of public concern, even though it is something very interesting."

The Commonwealth stated in their brief to the Fourth Circuit that, "the plaintiffs are manifestly confused about what constitutes government speech." The Commonwealth accuses the professors not only of overstating what the Commonwealth considers government speech but also of understating what the case law shows to be included in this category. Specifically, when a government employee speaks in order to perform the duties he was hired to perform, that is government speech and subject to government supervision, explains the Attorney General. "But, contrary to how plaintiffs mischaracterize the Commonwealth's position, when an employee speaks, not to do his job, but to speak about his job, or about the agency that hired him, that is either citizen speech or employee speech, depending on whether or not it addresses a matter of public concern," the Commonwealth wrote.[5]

If the statute is deemed unconstitutional it will not carve out an exemption for just academic state-employees, but it will be deemed unconstitutional for all Virginia state employees. Solicitor General Hurd said that the statute is necessary for the state to exert control over its employees. But, "Virginia can control its employees' actions without violating its citizens' rights", opposing counsel Heins said in defense.

Solicitor General Hurd, as appellant, elegantly answered questions first during the oral arguments in front of the twelve judges. The judges focused in their questioning on what type of control the state has over employees and their access to information. Chief Judge J. Harvie Wilkinson, III, inquired as to the state's ability to limit use to whomever they want. Chief Judge Wilkinson asked, as an example, can the state disallow AIDS research on hospital-owned computers? Hurd answered the inquiry by responding that the state can control computers just as it controls any other resource.

Some of the questions were presumably for the purpose of gathering information as to the actual effect of this legislation on the professors. Judge Diana Gribbon Motz asked Hurd about the nature of the actual process of obtaining access to the materials. Hurd answered that if the employee is researching anything in the library and any of these materials is germane to his research, he only needs prior permission to obtain access.

During the ACLU's argument, the judges were tough in assessing whether

the professors had suffered any real damages. Chief Judge Wilkinson, at one point, interrupted Heins' bellicose argument to ask if this conduct at issue was really discrimination, since the statute was uniformly applied to all employees, from those conducting medical research as well as those in legal research or art studies. Heins answered that the Virginia statute created content discrimination when it directly interfered with the primary research tool - online browsing - for thousands of state employees.

Judge J. Michael Luttig interjected that the public might want to know what kind of smut professors are accessing in their roles as professors, so the professors should, in turn, be required to obtain agency head approval before accessing that information. Chief Judge Wilkinson pointed out that there is a real problem for the state as an employer in controlling access to sexual materials which disturb the working environment and harass other employees. Heins responded that the state already had a statute that controlled all state-owned property, and subsequently they singled out the Internet when there was no need to do so. Heins stated afterwards that, "Judge Luttig throws this very subjective disapproval of smut into the mix but the statute applies to very specific content and to professors who are researching subjects such as history and art and there is plenty of research material that wouldn't be categorized as smut. And what is lascivious is anyone's guess."

The Chief Judge also wanted to know if in practical terms anyone's free speech was being denied. Heins responded that several professors have been affected in such a limiting manner by the statute. She pointed out that even her opposing counsel, Hurd, was required to request from his agency head approval for access when he was researching this lawsuit. The Chief Judge then asked if the court should wait to decide these issues in a suit where there was a clear-cut denial of access and a better situation to claim a chilling of speech. The ACLU response was negative, that the court should not wait. "In this area of research and communication the extraction and distribution of ideas in an academic environment of which the Internet is the primary medium, there is a high threshold in favor of no restrictions," Heins stated.

Both sides said they are guardedly hopeful for the outcome of the full court's opinion to fall on their side. Heins added that a number of the Fourth Circuit judges seemed to understand that the panel decision was not right, at least with regard to research and publication. The full court's decision is expected in the next few months. Beyond that, the final step is the United States Supreme Court, should the non-prevailing party ultimately decides to appeal.

The Commonwealth is certainly not finished defending its Internet statutes. In October 1999, the Commonwealth of Virginia was sued on claims of violating the First, Fifth, and Fourteenth Amendments and the Commerce Clause of the United States Constitution.[6] The plaintiffs[7] claim that Virginia's legislature is attempting to reduce all Internet content to a level deemed suitable for juveniles, and to criminalize all

electronic files or messages that could be considered harmful to those juveniles. The statute attacked in this lawsuit is Virginia Code Section 18.2-391 (the "Act"). The Act bars the "knowing display" of material deemed "harmful to juveniles," if the display is "for [a] commercial purpose [and] in a manner whereby juveniles may examine or peruse" the materials. The statute does not provide any exemptions or affirmative defenses, and includes "electronic file or message" in the list of prohibited materials reached by the law.

The plaintiffs allege that the Act bans constitutionally-protected speech by and to adults. Any violation of the Act is a Class One misdemeanor, punishable by "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both."[8] The plaintiffs in the lawsuit include Internet service providers ("ISPs"), businesses that provide Internet connections, non-profit organizations, magazine and book publishers, educational sites, authors and other diverse groups.

The Fourth Circuit seems to favor limiting access to the Internet when that access includes research topics that the court finds to be lascivious in nature, as in the Urofsky case. It will interesting to see if this same rationale holds true when the court decides the newest case involving exposure so similar materials over the Internet to juveniles.

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[**]. **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

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[1]. 219 Va. 1061, 254 S.E.2d 931 (4th Cir. 1991).

[2]. See Brief for Appellees at 23, Urofsky v. Gilmore (4th Cir. 1999) (No. 98-1481) (arguments heard Oct. 25, 1999, decision pending).

[3]. 167 F.3 191 (4th Cir. 1999).

[4]. 461 U.S. 138 (1983).

[5]. Brief for Appellant at 11, Urofsky v. Gilmore (4th Cir. 1999) (No. 98-1481) (arguments heard Oct. 25, 1999, decision pending).

[6]. *See* Complaint, PSINet Inc. v. Gilmore (E.D.Va.. 1999) (No. 99-1497-A).

[7]. The plaintiffs include: PSINet Inc., The Commercial Internet, Exchange Association, Virginia ISP alliance; Rockbridge Global Village, American booksellers Foundation for Free Expression, The Periodical and Book Association of America, Inc., Freedom to Read Foundation, Sexual Health Network, Chris Filkins, Proprietor of the Safer Sex Institute, Harlan Ellison, The Comic book Legal Defense Fund, Susie Bright, A Different Light Bookstores, Lambda Rising Bookstores, Bibliobytes, People for the American Way.

[8]. Va. Code § 18.2-11(a).