COMMITTEE REPORT

Newsgathering Committee Memo:

A Controversial Federal Law May Impede Public Health Reporting When it is Most Needed*

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A reporter learns that a suspicious package has arrived at a senator's office and that medical teams have arrived to test people for Ricin exposure. The reporter goes to the scene. He finds a doctor. He asks what happened. The doctor turns the reporter away. She says that if she talks, she will be fined up to $250,000 and imprisoned for up to a year. The doctor then warns the reporter that he also will be fined and jailed if he obtains or discloses information about the medical condition of the victims of the incident.

This could happen today. When Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPAA), it may not have intended to create such serious impediments to reporting about matters of paramount public importance, but the Act is having just such an effect, especially in light of the regulations adopted by the Department of Health and Human Services to implement the act. This article briefly explains what HIPAA and the implementing regulations do and offers several alternative strategies for members of the media who are prevented from newsgathering or threatened with prosecution under HIPAA.

HIPAA Chills Newsgathering and Reporting

HIPAA's goals are simple and, for the most part, laudable: to improve the availability and portability of health insurance coverage, prevent health care fraud and abuse, and simplify the administration of health care plans. To this end, the statute requires the Department to promulgate standards that would provide uniformity for health plans' recording and reporting financial and administrative transactions. For example, HIPAA requires the Department to adopt standards that

will provide a unique "health identifier" for each individual, which, presumably, stays with that individual throughout his odyssey from health plan to plan, including Medicare. Recognizing that uniformity of electronic data could increase the accessibility of individually identifiable health information, Congress provided in 42 U.S.C. § 1320d-6(a):

> A person who knowingly and in violation of this part—
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> (1) uses or causes to be used a unique health identifier;
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> (2) obtains individually identifiable health information relating to an individual; or
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> (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.

Congress also prescribed penalties in 42 U.S.C. § 1320d-6(b) as follows:

> A person described in section (a) of this section shall—
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> (1) be fined not more than $50,000, imprisoned not more than 1 year, or both;
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> (2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and
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> (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

Congress explained in the legislative history that this section "reflects the Committee's concern that an individual's privacy be protected." 5 U.S. Code Cong. & Admin. News, 1865, 1903, 104th Cong. (1996). Nothing in the legislative history indicates that Congress contemplated First Amendment issues or made any attempt to balance the public's interest in access to information against the value of patients' privacy in their medical information.

The Implementing Regulations

The dangers that this law posed to journalists became more apparent when, in November, 1999, the Department published the first proposed regulations implementing the Act. The regulations did nothing to dispel press concerns that the threatened criminal sanctions could be applied not only to prevent improper disclosures of personally identifiable medical information for commercial gain and to damage individuals, but also to stop the reporting of critical information concerning public health risks and public officials. On the contrary, the implementing regulations further closed accessibility to protected health information, especially in the Department's adoption of a complete ban on a covered entity's releasing any protected health information except under certain circumstances delineated in the rules and its failure to adopt adequate rules protecting whistleblowers. See 42 U.S.C. § 164.502 (2002). In February 2000, the Society of Professional Journalists and the Reporters' Committee for Freedom of the Press objected to the regulations and called for their revision because of the likelihood that they would interfere with news gathering and reporting. Their protests were not heeded, and in December 2000, the Department published a proposed final "Privacy Rule" that would establish "Standards for Privacy of Individually Identifiable Health Information."

Just before the regulations were to go into effect, Allied Daily Newspapers of Washington, Inc., implored the Bush administration to revise the regulations "to take into account the public interest in health information." In an extensive letter to the Department, Allied Daily Newspapers explained how the proposed regulations "eliminate hundreds, if not thousands, of matters of public interest that are reported daily in newspapers across the country." Allied Daily Newspapers offered numerous examples where reporting of critical information would be eliminated, "everything from detailed coverage of the Oklahoma City federal building bombing to follow-up on victims' injuries

in massive multicar pileups on freeways." The privacy regulations could eliminate investigative reports such as the *New York Times*' 1978 exposure of a physician's allegedly poisoning his patients that would have continued but for the news coverage. Gone too would be investigations such as that of the *Orange County Register*, which won the Pulitzer Prize in 1995 for uncovering fraud by fertility doctors at the University of California-Irvine because the investigation initially relied on a list of name-by-name egg donors who had not consented to their donations. Reporters could be denied access to medical conditions of public figures and victims of accidents, natural disasters, products liability, environmental disasters, widespread illness, or terrorists attacks.

In a sharp departure "from the common law's longstanding recognition that traditional privacy rights die with the person," the regulations even extend to protect health information of deceased individuals. Letter of Allied Daily Newspapers; see also 45 C.F.R. § 164.502(f). The statute and regulations also criminalize whistleblowers' reporting problems to anyone other than a health oversight agency, a public health authority, a health care accreditation organization, or, in limited circumstances, to his or her attorney. See 45 C.F.R. § 164.502; 42 U.S.C. § 1320d-6. Thus, whistleblowers who receive no response from reporting to these authorities have no recourse to correct evils without exposing themselves to the possibility of prosecution, incarceration, and enormous fines.

Once again, the concerns of the media fell on deaf ears; the Bush administration adopted Clinton's regulations more or less as its own. Then on March 21, 2002, the Department announced further revisions to the medical privacy rules. Although the changes take into account a number of issues that the public -- especially health care providers -- had raised, the new regulations completely ignored the concerns expressed by the press organizations. Alarmed by the Department's continued disregard of the constitutional infirmities of the regulations, the Newspaper

Association of America ("NAA") and the National Newspaper Association ("NNA") built on the prior record established by the Allied Daily Newspapers of Washington, Inc. to reiterate the media's "serious objections to the HIPAA privacy rules." Letter of the Newspaper Association of America and the National Newspaper Association to Secretary Thompson (Apr. 26, 2002) available at http://www.hipaadvisory.com/news/2002/0509naa.htm (last visited on Jan. 16, 2003). In their comments, the NAA and NNA stated: "Unless the rules are substantially revised to accommodate the public interest in receiving and reporting health information to preserve journalists' longstanding access to such information, they will continue to offend First Amendment values and traditions of openness and will prevent disclosure of basic, non-private information that should be available to the public. Particularly in times of public emergency, disaster and other events of high public importance, a certain amount of identifiable health information traditionally has reached -- and should continue to reach -- the public through the press." The NAA and NNA stated that the privacy rules had already begun to chill speech as it "is becoming virtually impossible for journalists and other interested members of the public to obtain health information on matters of public interest that have been routinely available in the past."

Again, the concerns of the press were ignored, and the Bush administration adopted the new regulations despite their constitutional infirmities and their deleterious impact on the press's ability to gather news. Notably, the Administration retained 45 C.F.R. § 164.502, which prohibits a covered entity from using or disclosing protected health information except as permitted or required under the provisions expressly laid out in the rules and did not clarify, as the press associations requested, the definitions of "covered entity," "health care," or "health information." The new regulations continued to protect information about people who have died, to prohibit disclosure of information without first obtaining the patient's consent, and to require a patient's consent before

information could be released. The regulations did not spell out that the criminal penalties under 42 U.S.C. § 1320d-6 do not apply to non-covered entities such as the news media.

Reducing Speech

HIPAA and its privacy regulations have, indeed, already reduced access to information and chilled speech even though the regulations do not go into effect until April, 2003. The regulations have stripped the effectiveness of many states' public records laws that require that the public have access to information regarding births, deaths, admissions, and discharges from hospitals that are considered public entities. The states' open records laws are pre-empted by HIPAA and the regulations,[1] which prohibit these hospitals, once fully subject to public records statutes, from releasing such information.

Under the regulations, a hospital may develop a facility directory[2] that contains only the patient's name, location, and condition described in general terms that does not communicate specific information, and the hospital may release this information only if the person requesting the information asks after the patient by name. And no more information than is contained in the directory can be released, even if the person calling knows other details about the patient and even if the hospital has released the information to governmental agencies such as the police or the health department.

[1] HIPAA expressly provides that it preempts state statutes that are less stringent than HIPAA. See 45 C.F.R. §§ 160.202-205.

[2] Under the regulations, patients may opt out of being included in any directory, effectively prohibiting the hospital from releasing any information on them.

Guidelines promulgated by hospitals and hospital associations in reaction to HIPAA and the privacy rules further restrict access.[3] For example, the "Media Advisory" released by Advancing Health in America prohibits, in bold-faced type, reporting the location of a patient if that information would embarrass the patient ("**Don't release information that could embarrass or endanger patients**" as when, for example, the patient has been admitted to a psychiatric unit or isolation room for treatment of a contagious disease) or if disclosure of the patient's location could "potentially endanger that individual (i.e., the hospital has knowledge of a stalker or abusive partner)."[4] Some of the guidelines reject the possibility that the medical records of public figures are exempt from HIPAA's restrictions,[5] as do the guidelines promulgated by St. Francis Hospital & Healthcare Centers, which explicitly state that "public figures and public officials are not subject to different

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[3] See, e.g., St. Francis Hospital & Health Centers, Guidelines for Releasing Information on Patients (2002), at http://www.media.stfrancishospitals.org/guidelines.shtml (last visited on Jan. 15, 2003); Advancing Health in America, Media Advisory: Guidelines for Releasing Information on the Conditions of Patients (2002), at www.aha.org/hipaa (last visited on Nov. 7, 2002); Missouri Hospital Association, Hospital Guidelines for Releasing Patient Information to the Media (2002), at http://web.mhanet.com/asp/reporters/patient_information. asp (last visited on Nov. 7, 2002); Media Guide for Hospitals in Ohio, General Guidelines for Hospitals and the News Media (2002), available at http://www.ohanet.org/mediaguide (last visited on Jan. 15, 2003); Children's Hospital Medical Center of Akron, Press Room: Media Guidelines, at http://www.akronchildrens.org/press/media_guide. Such guidelines and the states' attempts to enforce them could give rise to civil rights claims under 42 U.S.C. § 1983 as violations of free speech rights guaranteed under the First and Fourteenth Amendments of the United States Constitution.

[4] Advancing Health in America, Media Advisory: Guidelines for Releasing Information on the Conditions of Patients (2002), available at www.aha.org/hipaa (last visited Nov. 7, 2002).

[5] Richard D. Marks, HIPPA, Bartnicki, and Public Interest in Inherently Private Records, Special BNA Article (Aug. 1, 2001), available at www.dwt.com), suggests that on its face HIPAA ignores the national commitment to open and robust debate concerning public officials and figures that formed the basis of the First Amendment doctrine announced in New York Times v. Sullivan, 376 U.S. 254 (1964), but suggests that courts would use the rationale of Sullivan to interpret HIPAA as allowing access to information about public officials and figures that it does not allow to information about others. The privacy rules promulgated by the Department plainly do not pick up on the Sullivan cues. Rather, they totally ban disclosure of non-exempt individually identifiable health information irrespective of the status of the individual patient, sweeping presidents, actors, and criminals together with private persons. See 45 C.F.R. § 164.502.

standards than other patients when it comes to hospital policies for releasing information to media."[6] Advancing Health in America warns covered entities against the knowledgeable reporter when it expressly proscribes releasing information on patients who are involved with matters of public record, such as having been transported by a public entity from a crime scene or an accident, saying: "These public records may prompt media calls to the hospital requesting a patient's condition. Only the one-word condition should be given. For many hospitals, this may represent a change from previous policies."

The Act Does Not Apply to Reporters

Although some of the analyses of HIPAA and the regulations suggest that reporters themselves could be incarcerated and such warnings should not be taken lightly (see, e.g., Letter of Allied Daily Newspapers; Richard D. Marks, HIPPA, Bartnicki, and Public Interest in Inherently Private Records, Special BNA Article (Aug. 1, 2001), available at www.dwt.com), the plain language of the statute indicates otherwise. By its own terms -- and by constitutional necessity, as discussed below -- the criminal and civil sanctions available under HIPAA do not apply to reporters, to other members of the media, or to anyone else who is not a "covered entity" as defined by the statute.[7] HIPAA and the regulations aim only at defined health care agencies, which are required

[6] St. Francis Hospital & Health Centers, Guidelines for Releasing Information on Patients (2002), at http://www.media.stfrancishospitals.org/guidelines.shtml (last visited on Jan. 15, 2003). See also Advancing Health in America, Media Advisory: Guidelines for Releasing Information on the Conditions of Patients (2002), at www.aha.org/hipaa (last visited on Nov. 7, 2002); Missouri Hospital Association, Hospital Guidelines for Releasing Patient Information to the Media (2002), at http://web.mhanet.com/asp/reporters/patient_information.asp; Media Guide for Hospitals in Ohio, General Guidelines for Hospitals and the News Media (2002), available at http://www.ohanet.org/mediaguide (last visited on Jan. 15, 2003); Children's Hospital Medical Center of Akron, Press Room: Media Guidelines, at http://www.akronchildrens.org/press/media_ guide.

[7] In March, 2001, and again in April, 2002, the press requested the secretary to include in the regulations a statement "that the criminal penalties in 42 U.S.C. § 1320d-6 do not apply to the news media or any other noncovered entity" and "that publishers and broadcasters may not be subjected to civil or criminal sanctions for publishing information regarding newsworthy information they receive from a

to implement specified standards to protect the massive electronic data that these entities will gather, create, and disseminate. The Act and regulations are not blanket regulations restricting the use, collection, and dissemination of medical records on the part of members of the public, including the press.

To draw on the language of the statute itself, HIPAA's proscription on using, obtaining or disclosing individually identifiable health information applies only to anyone who does so "knowingly and in violation of this part." "This part" refers to "Part C - Administrative Simplification," which requires the Department to "adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically" for appropriate financial and administrative transactions as set forth in the statute. 42 U.S.C. § 1320d-2(a). The statute also provides that "[a]ny standard adopted under this part shall apply, in whole or in part, to the following persons: (1) A health plan. (2) A health clearing house. (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title." 42 U.S.C. § 1320d-1(a). By the plain language of the statute, a reporter who uses or publishes all the information he is able to lay his hands on has done nothing "in violation of this part," and cannot be prosecuted under the terms of the statute.[8]

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third party, even if the third party may have violated HIPAA in disclosing the information." Letter of NNA and NAA to Secretary Thompson, April 26, 2002.

[8] In contrast, the wiretapping statute at issue in Bartnicki v. Vopper, 121 S. Ct. 1753 (2001), discussed below, expressly penalizes "any person who…intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through interception of a wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(c).

Interpreting HIPAA and the Privacy Rule Broadly Would Violate the First Amendment's Proscription Against Prior Restraint

It is less clear that those all-important sources of information -- the firefighters, police officers, sheriffs, and emergency health care provider -- escape the reach of HIPAA. A broad reading of the statute could, for example, create a covered entity out of a "health care provider who transmits any health information in electronic form in connection with a transaction" with respect to the "[f]irst report of injury." 42 U.S.C. § 1320d-1(a); 42 U.S.C. § 1320d-2(a)(2). The Department could have removed this ambiguity if it had adopted Allied Daily Newspapers' recommendation that it "make clear that a 'covered entity' does not include public agencies, including fire, police and law enforcement departments and providers of 911 emergency services."[9] Even without the express language of exclusion, these entities nonetheless should not ordinarily be regulated as subject to HIPPA because they do not in many circumstances provide healthcare and they do not transmit health information in electronic form. For example, a police officer who arrives at the scene of a shooting may take some measures to treat a victim while healthcare workers are summoned, but that action alone should not convert a police officer into a health care provider. His or her primary role is to protect public safety. Incidental delivery of emergency aid in some circumstances does not subject a police officer to HIPPA. Had Congress intended a different result, it would have made its intention clear.

Nonetheless, guidelines promulgated by public agencies and individuals who have been warned about the consequences of a covered entity's disclosing protected health information, may so worry police officers, firefighters, emergency medical personnel, and others that they refrain from sharing information with reporters. But publishers and broadcasters are not without recourse.

[9] In their letter of April 26, 2002, the NAA and NNA renewed the press associations' March, 2001, request to define "covered entity" so that it would "clearly exclude public agencies, including fire, police and law enforcement departments and providers of 911 emergency services."

Government action that prohibits non-governmental personnel,[10] such as journalists and private providers of health services, would constitute a prior restraint, that is, "official restrictions upon speech or other forms of expression in advance of publication." Forbes v. Seattle, 785 P.2d 431, 434 (Wash. 1990) (en banc). Any prior restraint on expression is presumptively unconstitutional. See New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968); Freedman v. Maryland, 380 U.S. 376 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

A prior restraint on expression is constitutional only if it fits "within one of the narrowly defined exceptions to the prohibition against prior restraints." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975). The burden falls on the one seeking to impose the prior restraint to articulate the purpose of the action. See New York Times, 403 U.S. 713. Generally, a state action that merely protects individual privacy will not overcome the proscription against prior restraint. See Organization for a Better Austin, 402 U.S. 415 (invalidating an order proscribing distribution of leaflets accusing real estate agent of being a blockbuster); see also In re King World Productions, Inc., 898 F. 2d 56 (6th Cir. 1990) (invalidating order restraining the broadcast of videotape obtained

[10] To the extent that the restriction limits governmental personnel from disclosing information in the possession of a governmental entity, it is unlikely that the prior restraint doctrine or First Amendment access doctrines will be of much utility because rational restrictions on access to government information have not usually been regarded as violating any constitutional principles. See Los Angeles Police Dep't v. United Reporting Publ'g Corp., 120 S. Ct. 483 (1999). However, where the governmental entity imposing the restraint is not the employer of the governmental personnel subject to the restraint, it is not nearly so clear that the First Amendment is not implicated. See United States v. Amer. Library Ass'n, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (invalidating federal law conditioning receipt of federal library funds on use of filtering software as invalid content-based restriction in traditional public forum without deciding whether law also constituted invalid prior restraint), cert. granted, No. 02-361 (U.S. Nov. 12, 2002); Creek v. Village of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) (suggesting municipalities may assert constitutional rights against the federal government or another state); Nadel v. Regents of the Univ. of Cal., 28 Cal. App. 4th 1251, 1262 (1994) ("With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is media or not, and government or not").

by journalist posing as a patient to expose diet doctor's alleged malpractice on grounds that doctor "failed to show the type of irreparable harm or injury that would tip the scale toward justifying a prior restraint of Inside Edition's first amendment freedoms to broadcast the video tapes").[11]

Many states have enacted laws that prohibit private medical providers and others, such as employers, from disseminating patient or employee health information without consent or compliance with other restrictions.[12] The constitutionality of these sweeping medical privacy laws has not been widely challenged, but in one case, Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1243 (2000), a California appellate court held that even if disclosure of confidential patient information might give rise to tort claims against or professional discipline of a healthcare provider, patients' statutory privacy rights could not justify a prior restraint. "'While [a party] may be held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship,'" the court stated. "This rationale applies with equal force to speech which is violative of a privilege or which subjects the speaker to administrative or professional sanctions.

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[11] Challenges to prior restraints justified on the basis of national security, as opposed to privacy, may meet with less success, especially after the terrorist attacks of September 11, 2001. If a court finds that the prior restraint is the least restrictive means of directly furthering a compelling government interest, it may conclude that the action is an exception to the prohibition against prior restraints. See, e.g. Haig v. Agee, 453 U.S. 280 (1981) (upholding revocation of passport where Secretary of State had determined that United States citizen's activities abroad caused or would likely cause injury to United States security or foreign policy); Brown v. Glines, 444 U.S. 348 (1980) (upholding United States Air Force regulation prohibiting circulations of petitions on base without obtaining prior approval).

[12] See, e.g., Cal. Civil Code § 56 (2002) (generally requires healthcare providers, employers, and insurers to obtain written authorization from patients prior to disclosure of identifiable information); Fla. Stat. Ann. § 456.057 (2002) (patients' records may not be disclosed without the written consent of the patient nor may their medical conditions be discussed); 410 Ill. Comp. Stat. 50/3(d) (2002) (establishes patient right to privacy and confidentiality in healthcare); N.Y. Pub. Health Law § 18 (2002) (When healthcare providers disclose any patient information to anyone other than the patient, the providers must add to the patient's records a copy of the patient's written consent or the purpose and information of the party requesting that information); Tex. Health & Safety Code art. 4495b, sec. 5.08(a) and (b) (physician may not disclose health information about a patient without the patient's written consent). A summary of all state health privacy laws is maintained by the Health Privacy Project of the Institute for Health Care Research & Policy at Georgetown University at http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat.htm (last visited Feb. 11, 2003).

And indeed, respondent can point to no case where any court in the nation has held a threatened violation of the physician-patient privilege, or any other privilege, justifies a prior restraint on speech." Id.

Journalists must be ready to counter the arguments of public agencies and officers who may view themselves as "covered entities" and refuse to provide journalists information that has traditionally been available on a daily basis.[13] Any resistance is highly understandable given the steep penalties for violation of HIPAA, but a reporter and his or her counsel should attempt to convince the potential news source that he or she is not in fact a covered entity as defined by the statutes and the regulations. Neither the language of the Act nor its legislative history suggests that Congress intended to affect the relationship of such sources with journalists. No one should interpret HIPAA and the regulations any more broadly. Such expansive readings of the statute or regulations would impose an impermissible prior restraint that would subject HIPAA and the regulations to constitutional attack.

Reporters May Disclose Information That They Legally Obtain Even Where the Source Illegally Obtained the Information

Whether applied to whistleblowers, providers of emergency services, or members of the public, if HIPAA or the privacy regulations were interpreted as imposing sanctions on reporters who legally obtain and then publish information that was originally transmitted in violation of the Act, HIPAA could be attacked as violating the First Amendment in precisely the same manner that the federal wiretap law violated the First Amendment, as the Supreme Court concluded in Bartnicki v.

[13] Such government opposition to disclosure may also take the form of refusals to provide information in response to public records requests. Further, as Rebecca Daugherty of the Reporters Committee for Freedom of the Press has pointed out, HIPAA and the Privacy Rule may encourage states to adopt even more stringent privacy guidelines. See "Oversight, renewed opposition halt new medical privacy rules," www.freedomforum.org (Mar. 7, 2001).

Vopper, 121 S. Ct. 1753 (2001).

In Bartnicki, the Supreme Court held unconstitutional that portion of the federal wiretapping statute, 18 U.S.C. § 2511(1)(c) and 18 U.S.C. § 2511(5), that created a civil cause of action against anyone who intentionally discloses to another the contents of a wire, oral, or electronic communication when he knows or has reason to know that the information was obtained in violation of the statute. Vopper, a radio show host, had broadcast the tape of an illegally intercepted cellular phone conversation between a teacher's union president and a labor negotiator, some of which could be interpreted as threats of violence against school officials. The tape of the conversation was left anonymously in the mailbox of a third party who delivered the tape to Vopper. The Court accepted the proposition that Vopper "had reason to know" that the interception was unlawful, but nonetheless concluded that the government could not punish the publisher of information where the publisher had obtained the information in a manner lawful in itself but from a source who has obtained it unlawfully. The Court reasoned that privacy, which is an "important interest," gave way when balanced against the interest in publishing matters of public importance. The Court relied in part on Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102, which held that "if a newspaper obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need…of the highest order." Bartnicki v. Vopper, 121 S. Ct. at 1761.

Although Bartnicki represents a departure from the Smith v. Daily Mail factors, which include a determination of whether the information was legally obtained from the government itself, Bartnicki does not resolve the question of whether a reporter who unlawfully acquires information may be punished. See Bartnicki, 121 S. Ct. at 1762 (quoting Florida Star v. B.J.F., 491 U.S. 524 (1989); citing New York Times v. United States, 403 U.S. 713 (1971) (per curiam) (raising but not

resolving this question); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) (also reserving the question)).[14] Given that the statute and regulations apply only to "covered entities," however, it is difficult to see how a reporter could "unlawfully" acquire the protected information. Unlike the wiretap statute at issue in Bartnicki, which expressly included within its ambit "any person who…intentionally discloses" the information at issue, 18 U.S.C. § 2511(1)(c), neither HIPAA nor the Privacy Rule include anyone other than the defined covered entities.

Conclusion

Undoubtedly HIPAA and the privacy regulations are hampering journalists' efforts to gather news. Whistleblowers, hospital personnel, police officers, firefighters, providers of emergency medical services, and other state and private agents are increasingly unwilling to divulge information that traditionally had been available to reporters. Private and public agencies may prohibit employees from disclosing medical information, even information that is not covered by HIPAA, the regulations, or other statutes. Following Congress's lead, states may attempt to regulate further the collection and dissemination of all medical information.

In response to these developments, reporters and their counsel may challenge a specific denial of access to information allegedly protected by HIPAA or the implementing regulations or, more broadly, may bring a facial attack against the statute. Without such challenges, the public record will undoubtedly shrink, perhaps "to include only sterile statistical reports and dry recitations of events stripped of the human element," as the NAA and NNA warned, and news reporting may well become incomplete, unclear, and inaccurate. Now, while health care and the industry around it are undergoing enormous transformations, while Americans are daily under the shadow of

[14] Justice Breyer, in his concurrence, joined by Justice O'Connor, expressly limited the holding to the circumstances before the court. See Bartnicki, 121 S. Ct. at 1766.

potential terrorist attacks at home and abroad, and while recent events have stripped the world's confidence in corporate America, it is essential that news reporting be complete, clear, and accurate. It is up to reporters, publishers, broadcasters, and their counsel to thwart the efforts of those who would allow HIPAA and the regulations to impede access to essential information that the public has a right to know and that the public should know in order to make decisions and to protect themselves.