LOS ANGELES
Daily Journal
www.dailyjournal.com
FRIDAY, JANUARY 25, 2013

PERSPECTIVE

Smoldering embers in Belfast may soon reach US justices

By M.C. Sungaila and John DeStefano

By day, protestors turn out by the hundreds, waving flags and blocking traffic across the region. By night, bands of rioters take their place, wielding hatchets, bricks and petrol bombs against the police assembled to meet them. These riots, spurred by a decision to reduce the number of days the Union Jack flies at Belfast City Hall, have rattled the delicate peace process in Northern Ireland since early December. It has been 15 years since the Good Friday peace accord spelled the official end to the 30-year period of conflict known as the Troubles. Yet this is still a population divided along ethnic, political and religious lines, and the overarching question of whether to remain part of the U.K.

The U.S. Supreme Court will soon decide whether to hear a different controversy arising from the Troubles, *Moloney v. United States*, a case which pits First Amendment rights against the investigative powers of foreign law enforcement. At issue is the ability of journalists and researchers whose materials are located in the U.S. to object both as a matter of First Amendment law and international discovery procedure to the enforcement of a foreign subpoena for confidential source material. The Supreme Court stands as the arbiter between the U.S. and British law enforcement on the one hand and, on the other, two researchers, Ed Moloney and Anthony McIntyre, who seek to protect their U.S.-based research into the history of the Troubles.

Moloney and McIntyre worked in conjunction with Boston College over a period of five years to compile an oral history of the Troubles. This research effort, known as the Belfast Project, involved interviews conducted between 2001 and 2006 with former members of paramilitary groups from both republican and loyalist factions, including the Provisional Irish Republican Army (IRA) and the Ulster Volunteer Force (UVF). Although conducted after the official end of the Troubles, the research posed risks to the safety of both the researchers and their participants. Paramilitarism had survived the signing of the 1998 Good Friday Agreement. Those perceived as informers (or "touts") — a label that could apply to the researchers and their sources — had long been targets of paramilitary violence in Ireland. Because of the sensitive nature of this research and the potential risks that it posed to the researchers and participants, the interviews were given based on a promise that each interviewee's statement would remain confidential in an archive at Boston College until the interviewee died. The statements remained in the archive, undisclosed, for several years.

Near the end of the decade, two of the project participants died, and their interviews were released. In 2010, a book was published, and another project participant spoke to a newspaper about her involvement with the Belfast Project. These events caught the attention of the Police Service of Northern Ireland, which initiated two requests for discovery under a U.S.-U.K. Mutual Legal Assistance Treaty ("U.S.-U.K. MLAT"). Pursuant to that request, the U.S. Department of Justice served two subpoenas upon Boston College for the confidential materials.

The first of these requests sought the undisclosed interview described in the newspaper. The second request sought all remaining interviews concerning an unsolved Troubles-related murder-disappearance that took place in Northern Ireland in 1972. Boston College moved to quash these requests in part.

Researchers Moloney and McIntyre moved to intervene, objecting under the First Amendment. They argued that the subpoenas were not issued in good faith and posed a threat to the lives of the Belfast Project researchers and participants. The researchers also argued that the subpoenas violated the terms of the MLAT because they related to the investigation of pre-Good Friday offenses of a political character.

The district court in Boston refused to permit intervention and dismissed a separate complaint which the researchers filed. On appeal, the 1st Circuit affirmed both rulings, holding that the researchers had no First Amendment right to object and no right to object under the terms of the MLAT itself. In a separate concurrence, Judge Juan R. Torruella expressed regret that First Amendment doctrine was not more responsive to the researchers' dilemma.

Moloney and McIntyre petitioned for a writ of certiorari, seeking to clarify the right of journalists and researchers to protect the confidentiality of their sources and materials. The decision in *Branzburg v. Hayes,* 408 U.S. 665 (1972), which governs the ability of reporters (and, by extension, academics) to resist discovery of confidential source material by law enforcement, has driven continual debate and split the circuits. Moloney and McIntyre's objections raise an additional First Amendment and due process issue: should their assertions of privilege and safety concerns have been rejected out of hand, before allowing them to fully establish the evidentiary basis for their claims? The researchers also argue that the 1st Circuit misread the MLAT to grant the executive carte blanche to prosecute subpoenas on behalf of foreign governments, free of judicial scrutiny.

Four amicus briefs submitted in support of the petition further buttress the researchers' positions. The Reporters Committee for Freedom of the Press filed a brief which highlights the confusion over *Branzburg* under U.S. law, noting the conspicuous failure of the Supreme Court to offer needed guidance in this area. A second brief filed by a group of social science scholars addresses the common First Amendment interests that journalists and researchers both enjoy, as well as the additional policies that favor the protection of academic research into conflict areas. Several Irish-American advocacy groups submitted briefing on the history of the conflict in Northern Ireland and the threat that the subpoenas pose to the peace process. Their brief discusses the workings of the MLAT and related statutes, challenging the conclusion that the legislature intended to eliminate judicial review of international discovery requests. Finally, the brief of ARTICLE 19: Global Campaign for Free Expression paints the Supreme Court as a national and international outlier in its failure to establish a clear standard of source protection, including a right to be heard on objections to disclosure. The special concerns of journalists and researchers working internationally, particularly those working in conflict and post-conflict areas, demonstrate the need to respect and protect confidential sources and information so that U.S.-based researchers and their sources are not exposed to violence and retaliation from abroad.

The 1st Circuit's decision may present challenges for other interest groups to the extent it grants foreign governments a subpoena power that appears to be immune from third-party challenge. For instance, individual Internet users may be unable to challenge MLAT requests for confidential or private information held by a web provider or cloud service. In turn, U.S.-based web businesses may find that consumers' privacy concerns about using such services will increase, forcing these businesses to challenge discovery requests that their customers are unable to challenge.

The government's response to the Petition is due at the end of this month, and the Supreme Court will determine whether to grant certiorari this spring. Meanwhile, protests over the removal of the union flag continue. For all the good that has come from the 1998 Good Friday Agreement, many unresolved issues remain. The number of "peace walls" separating Protestant and Catholic neighborhoods has multiplied to almost 90. New paramilitary groups have coalesced. Flames of sectarian violence have died down, but the embers still smolder.

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