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WikiLeaks' Document Dump Sparks Debate *Anti-Secrecy Agenda Raises Concerns for Safety, Security*

The website WikiLeaks published tens of thousands of classified U.S. military documents on the Internet on July 25, 2010, igniting a debate about leaks, law, ethics, journalism, and national security on the digital frontier.

The release of between 75,000 and 92,000 classified field reports filed by American troops in Afghanistan between January 2004 and December 2009 was coordinated by WikiLeaks with *The New York Times*, *The Guardian* of London, and German magazine *Der Spiegel*. The *Times* reported that WikiLeaks gave the news organizations access to the reports several weeks before posting them online on the condition that they not report on the material before July 25, the day the website went public with them. According to WikiLeaks, the reports were written by soldiers and intelligence officers and primarily describe lethal military actions, but also include intelligence information and reports of meetings with political figures. The *Times* described the documents as “an unvarnished, ground-level picture of the war ... a daily diary” of military actions in Afghanistan, documenting the war “in mosaic detail.” *The Guardian* said “the war logs—written in the heat of engagement—show a conflict that is brutally messy, confused and immediate. ... [I]n some contrast with the tidied-up and sanitised ‘public’ war, as glimpsed through official communiqués as well as the necessarily limited snapshots of embedded reporting.”

Drawing from the documents, the news organizations reported that the American military had long suspected that an ally, the Pakistani intelligence agency Inter-Services Intelligence (ISI), had secretly supported the insurgency in Afghanistan. The news organizations also disclosed the previously unreported fact that Taliban fighters have shot at allied aircraft using portable heat-seeking missiles, and that the use of unmanned drones was increasing in spite of a record of success that is not as impressive as military officials reported. Many of the documents also provided previously unreported details on incidents involving friendly fire accidents and the killing of Afghan civilians.

Some argued that although the documents provided unprecedented detail on the war in Afghanistan, they did not actually reveal news that had not previously been reported. According to *The Washington Post* on July 27, President Barack Obama said that the documents illustrated why he had urged a change in strategy there since before taking office, and that their release did not raise any fundamentally new issues. Howard Witt, senior managing editor of *Stars and Stripes*, said in a July 30 commentary on the *Editor & Publisher* website that “we didn’t pursue the WikiLeaks wares because we didn’t see much new or particularly revelatory that we and many others haven’t already been reporting for months.”

Nevertheless, the document release renewed a debate about the controversial nature of WikiLeaks and its broad anti-secrecy agenda. The organization, online at <http://wikileaks.org/>, calls itself “a multi-jurisdictional public service designed to protect whistleblowers, journalists and activists who have sensitive materials to communicate to the public.” It supports what it calls “principled leaking” in order to “help[] every government official, every bureaucrat, and every corporate worker, who becomes privy to embarrassing information that the institution wants to hide but the public needs to know. What conscience cannot contain, and institutional secrecy unjustly conceals, WikiLeaks can broadcast to the world.” The site has a nine-member international advisory board, but no formal ownership. Users anonymously submit documents to the site’s editors, who digitally encrypt them and scrutinize them for forgery before posting them and allowing users to disseminate and discuss them.

WikiLeaks has gained notoriety for other high-profile records releases. In April 2010, it released classified video from a U.S. military helicopter as it shot and killed a Reuters photographer in Baghdad in July 2007. WikiLeaks titled the video, posted via YouTube, “Collateral Murder.” The site has also released rules of engagement for U.S. troops and operating manuals for the Guantanamo Bay military prison. (For a recent look at media access at Guantanamo, see “Limits Persist on Media Access to Guantanamo Proceedings” on page 13 of this issue of the *Silha Bulletin*.) In February 2008 a federal judge in California issued and then reversed an injunction that required the company that registered WikiLeaks’ domain name to lock and disable the site. (See “Web Site Fights Off Federal Injunction” in the Winter 2008 *Silha Bulletin*.)

Julian Assange, WikiLeaks’ editor in chief and spokesperson, told *The Guardian* in an interview that the “nearest analogue” to the Afghan war documents the website published “is the Pentagon Papers”—the enormous



classified Department of Defense report on Vietnam that defense contractor Daniel Ellsberg leaked to *The New York Times* in 1971, exposing previously unknown details about how that war was conducted. However, Assange said a key difference is that the Afghan war reports are all online and immediately available worldwide, enabling people to comment on and discuss them via the Internet. According to *The Washington Post* on July 27, Ellsberg said “the parallels are very strong,” between the Pentagon Papers and the Afghanistan war reports, calling the release “the largest unauthorized disclosure since the Pentagon Papers. In actual scale, it is much larger, and thanks to the Internet, it has moved [around the world] much faster.”

Some commentators said the incident illustrated how WikiLeaks has emerged as a different and powerful type of media organization. Steve Myers, online managing editor for the Poynter Institute, in a July 28 post on Poynter.com, called WikiLeaks an “information broker that collects secrets and negotiates how they will be revealed.” This role, Myers argued, has created a shift in the balance of power between would-be sources of sensitive or classified information and the traditional news media that vet sources and publish secrets. According to Myers, “in inserting itself between source and publisher, WikiLeaks has shifted power away from the monoliths that once determined what is news and toward the people who, before the Web, would have been stopped in the newspaper lobby before they could see a reporter.” Media critic and New York University journalism professor Jay Rosen, in a July 26 post on his blog PRESSthink, said WikiLeaks’ intervention between the leak’s source and the *Times*, *Guardian*, and *Der Spiegel* created an “effective ... combination.” The information is released in a form that is “vetted and narrated to gain old media cred,” Rosen said, as well as in full text on the WikiLeaks website, “which corrects for any timidity or blind spot the editors at *Der Spiegel*, *The Times* or the *Guardian* may show.”

Commentators highlighted the role traditional news media play in the process of vetting documents. Ellsberg observed in an interview with *The Wall Street Journal Law Blog* posted July 26 that the size of the leak—which was much greater than the 7,000-page Pentagon Papers—meant that it might not have been vetted carefully. “To put out such a large amount of material is of some risk if you haven’t read it all,” said Ellsberg.

According to Myers, “in handing these [journalists] the raw material, WikiLeaks obviously made their job easier. But with WikiLeaks standing between them and the primary source, the journalists’ work was harder, too” because it limited what journalists could verify because the journalists did not have direct contact with the source. “And though they could check what was in the documents, they don’t know what was missing—documents that could have provided exculpatory evidence or presented a more mixed picture,” Myers wrote.

Myers wrote that *Times* Executive Editor Bill Keller told him the fact that a source might have

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— Steve Myers
Online Managing
Editor, Poynter Institute

an agenda “doesn’t invalidate the information they provide us. If we refused to work with sources whose motivations we didn’t share, a lot of important stories would go untold. The critical thing is what we do with the material—check its authenticity, draw our own conclusions from it, put it in context, and lay it all out for readers on our terms, not the source’s terms.”

In the *Times* coverage on its website, the newspaper shared details about how the information was obtained and was verified. The *Times* also provided a “note to readers” discussing the costs and benefits of publishing the information, explained what types of information it had decided to redact and why, and offered a separate story about WikiLeaks that provided details about the organization and its motivations. Similarly, *The Guardian* provided a video on its website titled “How to read the logs” that explained “what is in the logs and how the *Guardian* is using them.”

Meanwhile, Rosen observed that the “stateless” status of WikiLeaks—its servers are based all over the world, making posts and their sources nearly impossible to trace—means that “just as the Internet has no terrestrial address or central office, neither does Wikileaks. ... This is meant to put it beyond the reach of any government or legal system.”

Whether or not it is under the jurisdiction of U.S. courts, media law professors and lawyers said that WikiLeaks would probably not face a successful prosecution or lawsuit for publishing the classified documents. In a July 26 interview with the *Wall Street Journal Law Blog*, First Amendment scholar Fred Schauer said that important U.S. Supreme Court rulings “all go in the direction” of the conclusion that WikiLeaks could probably avoid criminal or civil liability unless the site was “involved in getting the material in the first place.” The *Law Blog* cited *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), two cases that support the proposition that a publisher cannot be held liable for publishing information in the public interest illegally obtained by a third party. However, Schauer said “there’s gray area on what’s proper and improper.”

First Amendment scholar Jack Balkin told the *Law Blog* that even if the federal government were able to gain jurisdiction over the multinational WikiLeaks, it would be difficult to win a judgment that could survive a standard under the First Amendment, established in cases like the Pentagon Papers case, that demands that the government prove that the prevention or compelled removal of information is “absolutely necessary to prevent almost immediate and imminent disaster. It’s an extremely high standard.”

In a July 28 interview, *Wall Street Journal* editor Alan Murray asked prominent First Amendment lawyer Floyd Abrams whether WikiLeaks is “protected by the First Amendment.” Abrams said, “I think most of what they do would be. [But] I don’t know and I bet they don’t know if this mass of material is genuinely harmful to national

security. That's one of my problems with their *modus operandi*. ... My concern is that there are no editors apparently involved here; this is not a journalistic process."

Most critics did not focus on legal concerns, but rather on political or ethical ones, based either on the potential for harm created by the publication of the documents or on WikiLeaks' motives and methodology. *The Washington Post* reported July 26 that White House national security adviser James Jones said "the United States strongly condemns" the disclosure because it "could put the lives of Americans and our partners at risk, and threaten our national security." Defense Department Press Secretary Geoff Morrell asked WikiLeaks to "do the right thing" and "honor ... and comply with our demands" to remove the documents from its website and return them to the U.S. military, according to *The New York Times* on August 5.

The Wall Street Journal reported on August 9 that five human rights groups—the Afghan Independent Human Rights Commission, Amnesty International, The Campaign for Innocent Victims in Conflict, the Open Society Institute, and the International Crisis Group—sent a letter to Assange and WikiLeaks asking them to remove the names of Afghan civilians published in the documents in order to protect people who have helped U.S. and allied forces from reprisals. Assange responded by asking that the human rights groups provide resources to help with a review and removal of names, the *Journal* reported.

On August 12, international press freedom group Reporters sans Frontières (RSF or Reporters without Borders) posted an "open letter" to Assange on its website, which said "revealing the identity of hundreds of people who collaborated with the coalition in Afghanistan is highly dangerous." The letter also disputed WikiLeaks' motive, to "end the war in Afghanistan" by publishing the documents. "[T]he US government has been under significant pressure for some time as regards the advisability of its military presence in Afghanistan, not just since your article's publication. ... Meanwhile, you have unintentionally provided supposedly democratic governments with good grounds for putting the Internet under closer surveillance," the letter said.

Steven Aftergood, director of the Federation of American Scientists' Project on Government Secrecy and author of the blog Secrecy News, criticized WikiLeaks along similar lines as the U.S. government and rights groups. In an August 16 blog post, Aftergood quoted Rep. Rush Holt (D-N.J.), whom he called "a persistent critic of overclassification" and who voted against funding for the Afghanistan war, as saying he had reviewed the leaked documents and, after doing so, "I have concluded that their release could indeed cause real harm to real people."

Moreover, Aftergood said, "one initial response to WikiLeaks' clumsy disclosure has been to bolster public support of the classification system, which was presumably not the intended result." Aftergood

cited a July 30-31 Rasmussen poll wherein 67 percent of respondents endorsed the view that "when media outlets release secret government documents relating to the War in Afghanistan [they are] hurting national security."

Aftergood also criticized WikiLeaks' overall approach. In a July 30 interview on WNYC radio's "On The Media," Aftergood said, "I think they have a long ways to go in developing a code of conduct. I would also say that in the U.S., the political process is still flexible enough that it is possible to put forward an argument for a change in policy [toward declassification] and to see that change put into practice. ... I look with a little bit of concern at the broadsides that WikiLeaks is launching at the classification system. They seem oriented not towards fixing it but towards defeating it."

The New York Times reported that before writing about the documents or publishing them, editors told the Obama administration about its intent to do so. Yahoo! News blogger Michael Calderone reported in a July 26 post that *Times* Washington Bureau Chief Dean Baquet said, "we did it to give them the opportunity to comment and react. They did. They also praised us for the way we handled it, for giving them a chance to discuss it, and for handling the information with care. And for being responsible."

In a July 25 "Talk to the Newsroom" online column on the *Times* website, Keller, responding to a reader query about the discussions, said "White House officials, while challenging some of the conclusions we drew from the material, thanked us for handling the documents with care, and asked us to urge WikiLeaks to withhold information that could cost lives. We did pass along that message."

Although WikiLeaks did not discuss the initial reports it published with the White House or Pentagon prior to their publication, when it later announced that it was preparing to publish 15,000 more documents, it sought some government input. *The New York Times* reported August 18 that Assange told The Associated Press (AP) that the Pentagon had shown interest in the group's request for help vetting the new documents in order to protect Afghans who had assisted in the war effort. But according to the *Times*, Pentagon officials denied any plans to help vet material, directing reporters to an August 16 letter from Pentagon General Counsel Jeh Johnson to WikiLeaks lawyer Timothy Matusheski. "The Department of Defense will not negotiate some 'minimized' or 'sanitized' version of a release by WikiLeaks of additional U.S. government classified documents," Johnson wrote. The letter also said Matusheski missed an August 15 conference call on the issue. The *Times* reported that Morrell said the Pentagon's position had not changed: "We are willing to discuss with them how they can return the stolen documents and expunge them from their records."

Another result of the WikiLeaks controversy may be a narrowing of the federal journalists' shield law currently before Congress. The bill, S. 448, titled The Free Flow of Information Act of 2009, would provide a qualified limit on the federal

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— Floyd Abrams
First Amendment lawyer

government's power to compel journalists to testify or disclose their confidential sources or information in civil or criminal proceedings. It was passed by the Senate Judiciary Committee in December 2009. The AP and First Amendment Center reported August 5 that Sen. Charles Schumer (D-N.Y.), one of the bill's sponsors, announced plans to add an amendment that would ensure that a website like WikiLeaks would be exempt from the bill's protection. "Neither WikiLeaks, nor its original source for these materials, should be spared in any way from the fullest prosecution possible under the law," Schumer said in an August 4 press release, available on his website. "Although the bill in no way shields anyone who broke the law from prosecution, we are going the extra mile to remove even a scintilla of doubt." The Reporters Committee for Freedom of the Press (RCFP) reported August 4 that "it is not clear that a U.S. federal subpoena could even be served on the website, which bases its operations in Iceland, Sweden and other locations." (For more information on the federal shield law, see "Shield Law Bills Introduced Again in U.S. House and Senate" in the Winter 2009 issue of the *Silha Bulletin*, and "House Passes Federal Reporter Shield Law" in the Fall 2007 *Bulletin*.)

Paul Boyle, senior vice president of the Newspaper Association of America, told the RCFP, "under the [original] bill, if the federal government could somehow claim jurisdiction over WikiLeaks and issue a subpoena to find out more information about a source, WikiLeaks would not be able to quash the subpoena as there are broad national security exceptions to the protection."

Although the federal government is unlikely to prosecute or sue WikiLeaks over the publication of the classified documents, it is currently seeking to identify their source. *The Wall Street Journal* reported July 28 that a Department of Defense investigation has focused on Pfc. Bradley Manning, a military intelligence analyst already in detention in Kuwait since May 2010 under charges that he was responsible for the leak of the "Collateral Murder" video.

According to a July 6 press release from the United States Division Center at Camp Liberty in Baghdad, Manning is charged with violating Article 92 of the Universal Code of Military Justice for "violating a lawful Army regulation by transferring classified data onto his personal computer and adding unauthorized software to a classified computer system" and Article 134 for general misconduct—breaking federal laws against disclosing classified information.

The Wall Street Journal reported that although he was based in Iraq, according to a "defense official familiar with the investigation" Manning would have had access to the information published by WikiLeaks. The *Journal* reported that Manning had "Top Secret/SCI" clearance—which is above the "Secret" level—the level of the Afghanistan war documents and a clearance held by hundreds of thousands of people.

On June 7, Aftergood reported on Secrecy News that Manning's arrest was the "third known apprehension of a suspected leaker during the Obama Administration," which he contended "seems to reflect an increasingly aggressive response to unauthorized disclosures of classified information."

— PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

SILHA CENTER STAFF

JANE E. KIRTLEY

SILHA CENTER DIRECTOR AND SILHA PROFESSOR

PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

RUTH DEFOSTER

SILHA RESEARCH ASSISTANT

GEOFF PIPOLY

SILHA RESEARCH ASSISTANT

SARA CANNON

SILHA CENTER STAFF

Supreme Court News

Kagan Confirmed; Provides Few Hints on Media Law Views

The summer of 2010 once again included the nomination and confirmation of a new U.S. Supreme Court justice. But like Justice Sonia Sotomayor's ascent to the Court in the summer of 2009, the proceedings involving Justice Elena Kagan provided fodder for ample news coverage but little more than hints about her position on issues of media law.

On Aug. 5, 2010, the Senate voted 63 to 37 to confirm Kagan to succeed retiring Justice John Paul Stevens; she was sworn in at the Supreme Court on August 7. Kagan was serving as U.S. Solicitor General at the time of her nomination on May 10, 2010, a position she had held since March 2009. Kagan was dean of Harvard Law School beginning in 2003 and previously taught at Harvard as well as the University of Chicago Law School. During the Clinton administration Kagan served as Associate White House Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. Clinton also nominated Kagan to the U.S. Court of Appeals for the D.C. Circuit in 1999, but the Senate Judiciary Committee allowed the nomination to lapse after Clinton left office.

Kagan's views on media law and the First Amendment have proven difficult for journalists or commentators to ascertain. She has no experience as a judge, and offered few specific answers to questions about media law topics in her confirmation hearings. Much of the coverage focused on Kagan's academic publications and the cases on which she worked as a litigator in private practice and for the government. Reporters were careful to caution, however, that because her experience as an attorney was work on behalf of a client, her arguments could not be considered as insight into her personal views on a given matter. Although Kagan's academic work on the First Amendment was considered by many to be high caliber, it did not advocate for particular legal doctrines or approaches. In a report on Kagan's media law background, the Reporters Committee for Freedom of the Press (RCFP) observed that the nominee "has worked on free-speech and free-press issues more than any recent high court nominee, but her writings tend to explore the underpinnings of current doctrines and standards, rather than argue for or against any particular approach."

For example, in a 1996 University of Chicago Law Review article titled "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," Kagan argued that the practice of examining government motives when regulating speech has been an important undercurrent to U.S. Supreme Court First Amendment jurisprudence, even if the Court has not acknowledged it. To illustrate her point, Kagan observed that laws prohibiting specific content—like racist speech—are subject to higher standards of review than those that are content-neutral, because the content-based restrictions suggest the government is favoring one message over another, something she called "illicit motive."

Kagan's article resisted sweeping conclusions and did not recommend a change in direction or doctrine for the Supreme Court. "What I provide is simply a reading—I think the best reading—of the Court's First Amendment cases," Kagan wrote. She called her conclusions "primarily a descriptive theory" and added, "I make no claim that a sensible system of free speech should be concerned exclusively with governmental motivation."

One issue Kagan addressed directly in her nomination hearings, however, was whether cameras should record oral arguments at the U.S. Supreme Court, telling the Senate Judiciary Committee "I have said that I think it would be a terrific thing to have cameras in the courtroom. ... I think it would be a great thing for the institution, and more important, I think it would be a great thing for the American people." The answer is likely to encourage camera advocates such as Sen. Arlen Specter (D-Pa.), who has sponsored a bill that would require the court to allow video coverage of oral arguments unless a majority of justices opposed it because it would violate the due process rights of the parties involved. Specter's bill is S. 446, titled "A bill to permit the televising of Supreme Court proceedings." In August 2009, then-nominee Sotomayor also offered support for cameras in the Court, saying she had "positive experiences" with cameras as a lower court judge and would serve as a "new voice" in the Court's ongoing debate on the issue. (See "Critics, Commentators, and Cases Offer Few Glimpses at How Sotomayor can be Expected to Rule on Media Law" in the Summer 2009 issue of the *Silha Bulletin*.) The nine justices have offered a variety of views on the topic, with most expressing ambivalence or opposition. C-Span offers many of the justices' public comments on the issue on its website at <http://www.c-span.org/CamerasInCourt/default.aspx>.

In the June 30 session of the confirmation hearings, Sen. Amy Klobuchar (D-Minn.) asked Kagan about a 1993 book review in which Kagan said the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), had a "dark side" in that it "allows grievous reputational injury to occur without monetary compensation or any other effective remedy." *Sullivan* was a unanimous decision that established that public officials must prove a defamatory message was published with "actual malice": knowledge that the message was false or "reckless disregard" for whether it was false or not. Kagan told the committee that "even as we understand the absolute necessity ... for protection of speakers ... from defamation suits, we should also appreciate that people who did nothing to ask for trouble ... can be greatly harmed when something goes around the Internet, and everybody believes something false about a person. ... That's a real harm, and the legal system should not pretend that it's not." The article Klobuchar referenced was a review of Anthony Lewis' *Make No Law: The Sullivan Case and the First Amendment* that appeared in vol. 18,

Kagan, continued on page 6

"I have said that I think it would be a terrific thing to have cameras in the courtroom. ... I think it would be a great thing for the institution, and more important, I think it would be a great thing for the American people."

— Justice Elena Kagan
U.S. Supreme Court

issue 1 of *Law and Social Inquiry*. (Lewis delivered the 2002 Silha Lecture. See “Silha Lecturer Anthony Lewis Speaks to Packed House” in the Fall 2002 issue of the *Silha Bulletin*.) In the review, Kagan also wrote that “the adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far.” But Kagan also wrote that the questions she raised “in no way prove that the Court decided *Sullivan* incorrectly or that the Court now should reconsider its holding.”

Senators also asked about the Supreme Court’s controversial January 2010 decision in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010). The Court ruled that a federal campaign law impermissibly discriminated against the First Amendment rights of corporations to support political candidates for political office through financial contributions. Critics of the decision, including President Barack Obama, have claimed it will lead to too much corporate influence on the election process. Kagan, as Obama’s solicitor general, led the federal government’s defense of the law that was struck down. In the nomination hearings, Kagan refused to directly answer whether she agreed with the *Citizens United* decision, saying only “I did believe we had a strong case to make. I tried to make it to the best of my ability.” The Associated Press (AP) reported May 18 that Specter said Kagan had criticized the Court’s ruling in a closed-door meeting. “She said she thought the Court was not sufficiently deferential to Congress,” Specter said. (For *Bulletin* coverage of the *Citizens United* case, see “Supreme Court Strikes Down Campaign Finance Regulation for Corporations” in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

Another significant case that came before the U.S. Supreme Court during Kagan’s tenure as solicitor general was *United States v. Stevens*, 130 S. Ct. 1577 (2010), in which the Court struck down a federal law that imposed criminal penalties for the creation, sale, or possession of “depiction[s] of animal cruelty” saying it was overly broad and violated the First Amendment right to free speech. (See “Supreme Court Strikes Down Law Banning Depictions of Animal Cruelty, Citing ‘Alarming Breadth’ of Statute” in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

In its briefs and oral argument before the Supreme Court, Kagan’s office defended the constitutionality of the statute, observing that the Court had found that the First Amendment does not protect other categories of speech, such as obscenity, libel, and “fighting words” because those categories “are of such slight social value ... that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” The government argued that the speech banned by the law failed “a categorical balancing analysis, comparing the expressive value of the speech with its societal costs.”

The Court’s opinion, written by Chief Justice John Roberts, rejected the government’s argument.

Roberts wrote that the Court did not have “a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” He continued, “the First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. ... The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”

On the *Stevens* case, the RCFP report said, “the solicitor general is charged with defending all federal laws before the court. But in the brief on the merits of the case ... the office went farther than just defending this particular law, and instead argued that Congress can create entire categories of unprotected speech any time it finds that the value of the speech does not outweigh its cost to society. Such a broad standard would surely open the door for a wide range of speech restrictions, and is almost impossible to reconcile with the plain meaning of the First Amendment.” The RCFP report is available online via <http://www.rcfp.org/newsitems/index.php?i=11431>.

Another case that the solicitor general’s office argued before the Supreme Court under Kagan was *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). There the Court upheld a federal law that bans “knowingly provid[ing] material support or resources to a foreign terrorist organization.” In that case, the Court ruled that the law could survive an application of “strict scrutiny”—the most demanding standard applied to government restrictions of speech. The government had argued that the Court should instead apply a lower standard, “intermediate scrutiny,” since it argued that the statute primarily regulated conduct and only “impose[d] an incidental burden on expression.” (For more on the *Holder* case, see “In *Holder*, Court Upholds Ban on Speech Supporting Terrorism” on page 9 of this issue of the *Silha Bulletin*.)

Meanwhile, the AP reported June 22 that “Kagan sought secrecy in 4 of 5 FOIA cases” as solicitor general, a position that was “at odds with a promise of transparency made by her boss and top client, President Barack Obama.” However, the AP report observed that although “the solicitor general generally determines which cases to take to the Court and what to argue,” the positions she argued on behalf of the federal government were not necessarily indicative of her personal views on the law, and may not reflect how she would rule on similar cases.

In the most high profile case involving the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, Kagan asked the U.S. Supreme Court to reverse a 2nd Circuit U.S. Court of Appeals decision that ordered the release of 44 photographs depicting detainee mistreatment by U.S. troops. In the government’s petition for writ of *certiorari*, Kagan argued, “in the judgment of the president and the nation’s highest-

ranking military officers, disclosure of the photographs at issue here would pose a substantial risk to the lives and physical safety of United States and allied military and civilian personnel in Iraq and Afghanistan.” The Court ultimately vacated and remanded the 2nd Circuit decision after Congress passed the Protected National Security Documents Act of 2009, which specifically exempted the photos from release under FOIA. (See “Supreme Court Vacates and Remands Detainee Photo Case after Congressional Action” in the Fall 2009 issue of the *Silha Bulletin*.) The Court’s order is *Department of Defense v. ACLU*, 130 S. Ct. 777 (2009); the 2nd Circuit decision was *ACLU v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008).

Another case, *Consumers’ Checkbook v. Dept. of Health and Human Services*, involved the question of whether releasing Medicare data on claims paid would violate physicians’ personal privacy. Consumers’ Checkbook, which describes itself as “a nonprofit consumer information and service resource,” argued that the information could be paired with other publicly available data to measure physician experience, quality, and efficiency. In January 2009, the D.C. Circuit U.S. Court of Appeals ruled that the information could be withheld under FOIA Exemption 6, which applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In a brief urging the U.S. Supreme Court not to hear Consumers’ Checkbook’s appeal of the 2nd Circuit ruling, Kagan wrote “the fact that some arithmetic, using publicly available fee schedules, might be necessary to compute the precise amount of a physician’s income is no privacy protection for the physician at all.” The Court denied Consumers’ Checkbook’s petition for *certiorari* on April 19, 2010. *Consumers’ Checkbook v. Dept. of Health and Human Services*, 554 F.3d 1046 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 2140 (2010)

According to the AP on June 22, Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington (CREW), said the government’s position in the *Consumers’ Checkbook* case was “kind of a ridiculous argument.” Sloan said the government did not argue that the information Consumers’ Checkbook sought was private, but rather that the information, combined with other things, could permit people to figure out something the government does not want public. “That’s really going outside the four corners of the [FOIA] statute,” Sloan said.

The AP cited two other cases in which Kagan, in her capacity as solicitor general, fought the disclosure of records under FOIA by urging the Supreme Court not to grant *certiorari* when a lower court had ruled the records should not be released. In *Loving v. Department of Defense*, 550 F.3d 32 (D.C. Cir. 2008), a federal appeals court upheld a lower court’s finding that documents relating to the president’s review of a military death sentence were covered by FOIA Exemption 5, which applies to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” In *Berger v. Internal Revenue Service*, 288 Fed. Appx. 829 (3rd Cir. 2008), a federal appeals court upheld a lower court’s ruling that an IRS officer’s time sheets were exempt from FOIA under Exemption 6 and also could not be released without consent under the Privacy Act, 5 U.S.C. § 552a. The U.S. Supreme Court denied *certiorari* in both cases. *Loving v. DOD*, 130 S. Ct. 394 (2009) and *Berger v. IRS*, 129 S. Ct. 2789 (2009)

However, the AP observed that Kagan’s office has urged the Supreme Court to review a case in which the 3rd Circuit ruled that a telecommunications company could claim the FOIA personal privacy exemption. The government’s petition for *certiorari* said the 3rd Circuit ruling is at odds with traditional interpretations of the law, and that it threatens to block the release of information “concerning corporation malfeasance in government programs that the public has a right to review.” The Court has not decided whether to hear the case, *AT&T Inc. v. Federal Communications Commission*, 582 F.3d 490 (3d Cir. 2009). If it does, Kagan will probably recuse herself due to her earlier involvement in the case.

Stacy Allen, a partner with law firm Jackson Walker in Austin, Texas wrote in a blog post on the firm’s website that “Kagan cannot be faulted for doing her job as Solicitor General by vigorously defending the statutes which were ultimately declared unconstitutional, nor does her advocacy for the government necessarily reveal her own views about speech.” Allen continued, “the question of how a *Justice Kagan*—freed from the constraints of her client’s position or the classroom—would impact the Roberts Court’s ... approach to free speech thus remains tantalizingly unanswered.”

— PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

Supreme Court News

Court Declines to Set Privacy Standard on Electronic Devices

Scalia Concurr, but Criticizes Majority for 'Opaque' Opinion

On June 17, 2010, the Supreme Court handed down *Ontario v. Quon*, in which it unanimously declined to articulate a clear rule governing Fourth Amendment expectations of privacy in work-issued electronic communication devices, instead narrowly holding that a particular employee's rights were not violated.

The City of Ontario, Calif., issued police department employees pagers equipped with text-messaging capabilities. Each employee was given an allotment of text messages per month. SWAT team officer Jeff Quon exceeded his quota repeatedly, and as a result his text message records were audited by the city over Quon's objections. The audit revealed that many of Quon's text messages were "not work related, and some were sexually explicit." Quon was disciplined for sending personal text messages on a work-issued pager. He sued the city in federal district court in the Central District of California under 42 U.S.C. §1983, alleging that the audit violated his Fourth Amendment right against unreasonable searches.

On Quon's summary judgment motion, the district court concluded that the audit was legitimate only if the city wanted to audit the pager to determine the efficacy of the department's policy regarding text messaging limits, and not if the city wanted to simply see if Quon was "wasting time." At trial, the jury concluded that the city's intent in conducting the audit was legitimate, and the court granted the city's summary judgment motion on the ground that it did not violate the Fourth Amendment. The 9th Circuit reversed in 2008, holding that Quon had a reasonable expectation of privacy in his text messages, and that the search was not reasonable even if conducted for legitimate, work-related purposes because the city could have assessed its text messaging policy in a less intrusive way. In 2009, the 9th Circuit denied a petition for rehearing *en banc*, with eight circuit court judges dissenting.

The Supreme Court granted *certiorari* only on Quon's Fourth Amendment claim, leaving intact the 9th Circuit's holding that the wireless services provider, Arch Wireless, violated the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*, when it turned over records to the city.

In the majority opinion by Justice Anthony Kennedy, the Court declined to lay down a clear rule that would "define the existence, and extent, of privacy expectations enjoyed by employees when using employer provided communication devices," citing the constantly evolving nature of the technology and cultural attitudes towards such technology. The Court noted that the pervasiveness of electronic communication devices may "strengthen the case for an expectation of privacy," but also observed that the "ubiquity" and affordability of the devices may strengthen the argument that there is no expectation of privacy in a work-issued pager, because one could purchase a separate

pager for personal communication if need be. The Court found that a "broad holding concerning employees' privacy expectations vis-à-vis employer provided technological equipment might have future implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds." *Ontario v. Quon*, 130 S. Ct. 2619 (2010)

The Court assumed *arguendo* that Quon had an expectation of privacy with regard to his pager, and that the audit constituted a search under the Fourth Amendment.

Citing tests articulated in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court concluded that the audit was a reasonable search under the Fourth Amendment. In this case, Quon knew the pager could be audited at any time, and knowing whether the texting overages were the result of misuse by Quon or a reason to increase the monthly limit by the city was a "legitimate work-related rationale" for the city to perform the audit. Kennedy wrote that because the city issued the pager to Quon to help him respond to emergencies quickly, "Quon could have anticipated that it might be necessary to access" the messages to assess his team's performance. Kennedy also wrote that because the Supreme Court "repeatedly held" in previous cases that the government need not conduct searches in the "least intrusive" way, the 9th Circuit erred in concluding that the city needed to do so.

Justice Scalia concurred in the judgment, but disagreed with the majority's refusal to decide what constitutes a reasonable expectation of privacy in an employee's electronic communications. Scalia criticized his colleagues for what he viewed as shirking their responsibility as jurists. Scalia wrote "[a]pplying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication that where electronic privacy is concerned we should decide less than we otherwise would—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible."

Scalia also wrote that by not articulating a definitive privacy standard, the Court would leave litigants and lower courts without ascertainable and workable legal standards in future cases, cautioning that parties would take *Quon* as controlling, rather than as the "instructive" case Kennedy said it was.

News media advocates had expressed concerns about the case's implications for government transparency and newsgathering. The Reporters Committee for Freedom of the Press (RCFP) filed an *amicus* brief in support of Ontario, arguing that Quon had no reasonable expectation of privacy in a government-issued pager because, under the California Public Records Act (CPRA), Cal. Gov't Code § 6250, *et seq.*, text messages are public records because the law covers writings "transmitted through electronic mail or facsimile ... and every other means of recording upon any tangible thing

"The Court's implication that where electronic privacy is concerned we should decide less than we otherwise would—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible."

– Justice Antonin Scalia
U.S. Supreme Court

Supreme Court News

In *Holder*, Court Upholds Ban on Speech Supporting Terrorism

On June 21, 2010, the Supreme Court ruled 6 to 3 that the federal government may constitutionally block speech and other forms of advocacy supporting foreign groups that have been labeled terrorist, even if the support is directed toward the groups' humanitarian or peaceful activities.

However, the majority opinion in *Holder v. Humanitarian Law Project*, written by Chief Justice John Roberts, held that advocacy must be "coordinated with or under the direction of a designated foreign terrorist organization" in order for the government to proscribe it. In the dissent, Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, argued that the majority's limitation was meaningless, writing that "there is no way to organize ... without 'coordination.'" *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)

Holder was a First Amendment challenge to 18 U.S.C. § 2339B, commonly known as the "material support for terrorism" statute. Section 2339B prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization." The statute considers a group to be a "foreign terrorist group" if so defined by the Secretary of State. "Material support or resources" is defined as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel ... and transportation, except medicine or religious materials."

The Humanitarian Law Project, a nonprofit organization, and two private individuals challenged the constitutionality of section 2339B as applied to their desire to support the Partiya Karkeren Kurdistan (PKK) in Turkey and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka in federal district court in the Central District of California in 1998. Both the PKK and the LTTE are designated terrorist organizations that have carried out violent attacks, but they also engage in political and humanitarian activities. The plaintiffs said they wanted to provide money, political advocacy, and legal training to the groups' peaceful wings, but feared prosecution under section 2339B if they did so.

The district court granted the plaintiffs' request for a preliminary injunction on the grounds that the terms "material support," "training," and "personnel" in the statute were vague, but held that the plaintiffs had not established a probability of success on their First Amendment claim.

At the Supreme Court, the plaintiffs argued that to prosecute them under section 2339B would unconstitutionally infringe on protected political speech. The government argued that "the only thing truly at issue ... is conduct, not speech."

The Supreme Court concluded that the statute regulates speech on the basis of content because the "[p]laintiffs want to speak to the PKK and LTTE, and whether they may do so [under the statute] depends on what they say." The Court therefore applied the strict scrutiny standard of review, and for the first time in the free speech context, the Court found that standard was met because § 2339B was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."

Roberts wrote that whether the plaintiffs' speech was punishable under section 2339B depended on the nature of the speech. If plaintiffs provided specific knowledge to the PKK or LTTE (for example, on how to petition the United Nations), their speech is punishable as "coordination," and therefore as "material support." On the other hand, the Court said the plaintiffs' "speech is not barred if it imparts only general or unspecialized knowledge." The Court found that because the type of aid the plaintiffs wanted to give to the LTTE and the PKK included money and legal advice on how to petition the U.N., that behavior counted as "coordinating" with those groups, which the plaintiffs knew were designated as terrorist. Therefore, the Court held, the government could prosecute the plaintiffs without violating the First Amendment.

Deferring heavily to the executive and legislative branches, Roberts rejected the plaintiffs' argument that supporting an organization for its humanitarian and political purposes is separate from supporting it for its terrorist activities. Roberts wrote that if the plaintiffs gave money to the LTTE, for example, they could still end up "supporting" the LTTE's terrorist activities because Congress had concluded that "money is fungible," and there is no evidence that the LTTE would not divert funds from its humanitarian wing to its terrorist wing.

In his dissent, Breyer argued that "there is no natural stopping point" for the argument that aiding an organization's peaceful arm might also aid its violent arm. "It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to 'legitimacy' to increased support for the group to an increased supply of material goods that support its terrorist activities," he wrote, adding, "even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, 'chill' protected speech beyond its boundary."

Roberts retorted that "Congress has settled on ... a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered."

The Court found that the statute met the strict scrutiny standard because it was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."

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Holder, continued from page 9

The majority emphasized the narrowness of its holding, observing that even though the activities in which the plaintiffs wanted to engage could be proscribed, that did not mean “any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny.”

Some constitutional scholars criticized the *Holder* ruling. On June 21, Professor Steve Vladeck of American University Law School wrote in a forum discussion on *The New York Times*’ Room For Debate blog that “in [the majority’s] view, the material support statute doesn’t impose guilt by association; the defendant had to do something to support the group. But almost anything can be that something.” A lead attorney for the plaintiffs, Professor David Cole of the Georgetown University Law Center, wrote in the same forum that the court had, for the first time, made non-violent political activities a crime punishable by up to 15 years in prison.

In a post on the First Amendment Center website, legal correspondent Tony Mauro quoted Cole as saying “this is the first time that the Supreme Court has applied strict scrutiny and found a statute to satisfy that strict standard,” adding, “The Court came to this conclusion without the kind of demanding scrutiny the doctrine requires.”

– GEOFF PIPOLY
SILHA RESEARCH ASSISTANT

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any form of communication or representation.” If the Court found a strong Fourth Amendment right to privacy in Quon’s text messages, the scope and effectiveness of the CPRA—and analogous statutes in virtually every other state—would diminish because government employees could claim a similar right to privacy in other documents, the brief contended.

Reactions to the *Quon* decision were mixed. Professor Joshua Dressler, an Ohio State University Law School professor who specializes in the Fourth Amendment, told *The Washington Post* that the Court was wise to “punt” on the issue of electronic privacy and not “make broad announcements regarding our rights in this new world in which we live.” Others criticized the Court for failing to establish clear standards for privacy. Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, said in a June 22 letter to the editor of *The New York Times* that *Quon* could have been the 21st Century’s equivalent of *Katz v. United States*, 389 U.S. 347 (1967), in which the Supreme Court ruled that a wiretap of a public pay phone violated the an individual’s reasonable expectation of privacy under the Fourth Amendment. Rotenberg said that in *Quon*, the Court “missed an important opportunity ... to update the law and protect privacy as new technologies evolve.”

– GEOFF PIPOLY
SILHA RESEARCH ASSISTANT

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FOIA and Access

BP, Government Accused of Restricting Media Access to Spill

As efforts continued in the Gulf of Mexico to stanch the worst oil spill in U.S. history, news organizations accused British Petroleum (BP) of denying access to news agencies attempting to document the disaster.

BP, a multinational energy company headquartered in London, is responsible for leasing the Deepwater Horizon well near the Louisiana coast that exploded on April 20, 2010, leading to the catastrophic spill. The company faced increasing pressure from both the U.S. government and the public to contain the spill, and was dogged since the disaster's first days by accusations that it was attempting to control the information and images emerging from the disaster. Critics have claimed that BP was slow to allow access to video of the spill itself and blocked media from entering areas affected by it.

According to a June 9 story in *The New York Times*, three weeks elapsed between the explosion of the oil rig and the release of images of oil gushing from an underwater pipe on the ocean floor. When BP finally released video of the spill on May 12, it provided only a 30-second clip. More detailed images and longer video of the spill did not become public until two weeks later, when members of Congress shared video that BP had provided to them with news networks. Experts swiftly seized upon the new images and estimated that the amount of oil spilling from the well was far more than early BP estimates of 1,000 to 5,000 barrels per day. By early June, scientists suggested that a more accurate estimate was between 35,000 and 60,000 barrels a day, according to a June 20 story in the *Christian Science Monitor*.

"I think they've been trying to limit access," said Rep. Edward J. Markey (D-Mass.), who pushed BP to release more video of the spill, in the June 9 *Times* story. "It is a company that was not used to transparency. It was not used to having public scrutiny of what it did."

On May 27, media organizations criticized BP for withholding for several hours the fact that its attempted "top kill" procedure to contain the spill had stalled. Several hours after BP suspended the operation to plug the well with drilling mud, government and BP officials gave the impression that the efforts were working, according to a May 27 story in *The New York Times*. The following day, as efforts to carry out the procedure continued, the *Times* reported that BP's public statements again seemed to suggest progress. But later in the day on May 28, the *Times* reported, it became clear that both BP and the Coast Guard had failed to acknowledge a 12-hour suspension of operations, contradicting government and company statements that the procedure was progressing well.

As criticism mounted over the delay in releasing images and video of the spill, the first reports of journalists being denied access to airspace above the spill and oil-covered beaches emerged in late May, along with allegations that BP discouraged its employees and the many out-of-work Gulf

coast fisherman in its employ from speaking with media.

On May 18, a CBS news crew reported that it was threatened with arrest as it tried to film an oil-covered beach, turned away by BP contractors and Coast Guard officials who cited "BP's rules" in ordering the news crew to leave. The CBS crew had been trying to film a beach covered in oil in South Pass, La., when they were ordered to leave, according to a May 19 report on the CBS evening news. According to a June 9 story in *The New York Times*, the Coast Guard later said it was "disappointed" that the incident had occurred.

The following week, on May 24, *Mother Jones* reporter Mac McClelland reported she was denied access to Elmer's Island, La., turned away by sheriff's deputies brought in to supplement local police at Grand Isle, La. McClelland reported that she was told she could only access Elmer's Island with a BP escort. Spill workers staying at her hotel later told her that they had been specifically instructed by BP not to talk to any news media. McClelland reported that when she asked BP representative Barbara Martin about the relationship between local police and BP, Martin said that BP was in charge because "it's BP's oil."

Newsweek reported that both BP and government officials were preventing photojournalists from accessing oil-covered beaches either by boat or by air. "The problem, as many members of the press see it, is that even when access is granted, it's done so under the strict oversight of BP and Coast Guard personnel," the May 26 *Newsweek* story said. "Reporters and photographers are escorted by BP officials on BP-contracted boats and aircraft. So the company is able to determine what reporters see and when they see it." Jared Moossy, a Dallas-based photographer, told *Newsweek* "you could tell BP was starting to close their grip, telling fisherman not to talk to us. They would say that BP had told them not to talk to us or cooperate with us or that they'd get fired."

On May 29, a blog called Powering a Nation, based at the University of North Carolina, posted scanned photos of a contract between BP and vessels it chartered that forbade the owners of chartered boats to make "public statements," according to a June 3 story in *The Washington Post*. Specifically, the fifth paragraph of the agreement instructed vessel owners and subcontractors to keep all data (photos, sketches, maps, reports, information) discovered in the service of BP "confidential." Article 22 of the contract stated that vessel owners and employees were not to "make news releases, marketing presentation[s], or any other public statements [about] this charter, charterer, or the services performed under this charter without the charterer's written approval. Vessel owner agrees that such approval is at the sole discretion of charterer." The May 29 post on the Powering a Nation blog reported that some subcontractors

"You could tell BP was starting to close their grip, telling fisherman not to talk to us. They would say that BP had told them not to talk to us or cooperate with us or that they'd get fired."

– Jared Moossy
Dallas-based
photographer

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later received a notice that the fifth paragraph and Article 22 had been deleted from their contract. The document is available at <http://news21.com/2010/06/unc-news21-reveals-bp-restraints/>.

BP responded to criticism of the language in the contracts by saying that the wording was standard language designed to protect proprietary information, and that BP had allowed news media access to its “Vessels of Opportunity Program,” a program that employs local boat owners to aid in cleanup, according to the June 3 story in the *Post*.

Retired Coast Guard Admiral Thad Allen, assigned to oversee the federal response to the disaster, issued a memo on May 31 exhorting BP and all response organizations to afford swift and complete access to media attempting to cover the spill. The best way to describe the federal policy approach to accommodating media in such a situation, Allen wrote, is “maximum disclosure with minimum delay.” In an Associated Press (AP) story on June 7, Allen said that there are only two reasons why media should be prohibited from an area in covering the spill: “If it’s a security reason or a safety reason because of personal protective equipment.”

In the June 9 *New York Times* story, BP and government officials coordinating the response to the spill called the instances of denied and restricted media access “anomalies,” and said that both the federal government and the company have gone to great lengths to accommodate journalists covering the story. The *Times* also reported that the Federal Aviation Administration (FAA) revised its flight restrictions over the gulf to allow news media flights on a case-by-case basis in response to criticism about the inaccessibility of flights for journalists.

“Our general approach throughout this response, which is controlled by the Unified Command and is the largest ever to an oil spill, has been to allow as much access as possible to media and other parties without compromising the work we are engaged on [sic] or the safety of those to whom we give access,” said BP spokesman David H. Nicholas in the June 9 *Times* article.

However, after the release of the Allen memo and public assurances of openness from BP, media reports of denied and restricted access continued. A June 16 AP story detailed several incidents in which reporters were threatened with arrest or turned away from covering the spill in the weeks after both BP and the government promised more openness. The AP story criticized a “temporary flight restriction” put in place by the FAA, barring aircraft from flying below 3,000 feet—low enough to photograph the spill and cleanup. Before this limit was imposed, the AP reported, aircraft carrying media often flew as low as 500 to 1,000 feet. The June 16 story listed incidents that AP Senior Managing Editor Michael Oreskes included in a letter to White House Press Secretary Robert Gibbs demanding that the Obama administration improve media access to the spill. Among the incidents that Oreskes said violated Allen’s May 31 directive was a June 5 incident in which sheriff’s deputies threatened an AP photographer with arrest for trespassing after speaking with BP employees and taking photographs

of cleanup workers on a public beach, a June 10 CNN video of a bird rescue worker telling news crews that he signed a contract with BP stating that he would not talk to the media, and incidents on June 11 and 12 in which private security guards patrolling the beaches of Grand Isle, La., repeatedly attempted to prevent a New Orleans television crew from walking on a public beach and speaking with cleanup workers.

Other news organizations and media watchdog groups followed with detailed rebukes of BP’s handling of media access. In a June 17 story titled “BP, Government Still Thwarting Press Access,” the *Columbia Journalism Review* called upon reporters to “continue their valiant efforts to cover the spill and remove the barriers that inhibit their work.” Salon.com’s Glenn Greenwald interviewed McClelland on June 28, who accused BP of working with local police and federal officials to “harass, impede, and even detain journalists who are covering the impact of the spill and the clean-up efforts.” McClelland also described an incident involving an activist who was filming across the street from BP’s spill cleanup headquarters in Houma, La. The man was told by an off-duty police officer employed by BP security to stop filming because “BP didn’t want him filming.” The man was subsequently pulled over in his car by the same officer and interrogated by a BP security official for 20 minutes, McClelland said.

The Committee to Protect Journalists published a report on July 7 that photographer Lance Rosenfield, who was on assignment for *ProPublica* and PBS’s “Frontline,” was detained by Texas City, Texas police and released only after his photographs were reviewed by authorities and his personal information, including his social security number, was collected.

In a July 13 press release, the Society of Professional Journalists (SPJ) called for open, unrestricted journalistic access to the Gulf disaster. The release also announced an executive committee meeting held in New Orleans on July 24 to discuss the issues arising from concerns about access. Citing incidents in which photographers and news crews were prevented from filming and taking photographs, including the detention of Rosenfield, the SPJ news release said, “These are deeply troubling incidents that must stop if journalists are to do their jobs unfettered. News that is not filtered or skewed through government or company officials is essential to an informed citizenry. However, in times of national and natural disaster—such as now in the Gulf—the need for a fully functioning free press is even greater.”

Greenwald called reports of photographers being pulled over and threatened with detention “true police state tactics,” adding, “This is clearly a deliberate and systematic pattern of preventing access that has been going on since the beginning of the spill. And, as we find in so many realms, it is impossible to know where government actions end and corporate actions begin because the line basically does not exist.”

A June 14 *USA Today* editorial said that secrecy

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FOIA and Access

Limits Persist on Access to Guantanamo Proceedings, Records

The expulsion of four reporters from the U.S. military detention center at Guantanamo Bay, Cuba, along with two court rulings related to detainees and the hearings being conducted there—all of which occurred in the summer of 2010—highlighted the strained relationship between the Pentagon and U.S. media over coverage of the controversial base.

Pentagon Bans Four Reporters from Guantanamo

On May 6, the Pentagon banned four reporters from covering military hearings at the Guantanamo Bay base. The reporters, Carol Rosenberg of *The Miami Herald*, Michelle Shephard of the *Toronto Star*, Paul Koring of the *Toronto Globe and Mail*, and Steven Edwards of Canwest Newspapers, were accused of having violated the Pentagon's ground rules for covering Guantanamo by publishing the name of a witness in the hearing of Canadian detainee Omar Khadr. The reporters had been instructed to identify the witness, former Army Sgt. Joshua Claus, as "Interrogator No. 1."

The ground rules, which all reporters are required to sign in order to be allowed to cover proceedings at Guantanamo Bay, stipulate that interviews must be approved in advance, military personnel must escort journalists everywhere they go on the base, and that, among other things, journalists are not allowed to chew gum or communicate with Cuban or Haitian migrant workers on the base. In a commentary on the McClatchy website, Rosenberg contended that the rules change daily and "without rhyme or reason." A version of the ground rules is available via the *Columbia Journalism Review* website at http://www.cjrarchive.org/img/posts/Gitmo_Ground_Rules.pdf

The banned reporters argued that the name of the interrogator in the Khadr case had been public knowledge for years and that no rules were broken. Claus was publicly identified as Khadr's interrogator in a hearing at Guantanamo in 2008, and gave an on-the-record interview soon afterward to Shephard for the *Toronto Star*, according to a story posted online May 6 by McClatchy Newspapers' Washington bureau.

Media organizations and transparency advocates criticized the journalists' expulsion. "That reporters are being punished for disclosing information that has been publicly available for years is nothing short of absurd—any gag order that covers this kind of information is not just overbroad but nonsensical," said Jameel Jaffer, the deputy legal director for the American Civil Liberties Union, in the May 6 McClatchy story. "Plainly, no legitimate government interest is served by suppressing information that is already well known."

Joel Simon, the executive director of the Committee to Protect Journalists, said the expulsion of the journalists represented "a long history of lack of access for journalists covering military tribunals and other events at Guantanamo Bay," adding that banning the four reporters was a "very drastic step,"

according to the May 6 McClatchy story.

The Pentagon responded by defending the ban, emphasizing that the reporters had violated the written ground rules they had agreed to follow. In a letter to David Schulz, an attorney representing Rosenberg, Bryan G. Whitman, a principal deputy assistant secretary of defense for public affairs, said that although the Department of Defense was "correct" to ban the reporters, the department would "consider lifting the coverage ban on these reporters if they individually request reinstatement," according to a June 15 story in *The Miami Herald*.

On July 3, a coalition of media organizations including McClatchy Newspapers, The Associated Press, Dow Jones & Co., *The New York Times*, Reuters, and *The Washington Post* sent a letter to Pentagon General Counsel Jeh Johnson challenging the expulsion of the journalists as unconstitutional and urging that the reporters be reinstated. In the letter, the organizations argued that the Pentagon's application of the ground rules in barring the reporters is "plainly illegal" because it prevents publication of information that is already publicly available, according to a June 3 story in *The Miami Herald*. The letter emphasized the urgency of lifting the ban immediately, noting that the hearing the reporters were covering was slated to resume on July 12, and that the reporters needed time to return and revise the 13-page agreement they are required to sign before being allowed to report on Guantanamo proceedings.

On July 9, the Pentagon reinstated two reporters, Rosenberg and Shephard, after they acknowledged in writing that they had broken military rules and pledged to abide by the Pentagon's ground rules, according to a July 9 story in *The New York Times*. The *Times* reported on July 20 that Steven Edwards was also reinstated after he wrote a letter indicating that he understood why he had been banned. Paul Koring refused to write the letter and remains unable to return to the base, according to the July 20 story in the *Times*.

Schulz told the *Times* on July 9 that he intended to continue fighting for looser restrictions on journalists covering Guantanamo hearings, noting that the reinstatement of the reporters was conditional and left many issues unresolved. "Reporters are operating under these unconstitutional and illegal guidelines," Schulz said. "And the only reason Carol is able to go back is she agreed she would abide by the guidelines as they're currently constructed."

The July 20 story in *The New York Times* said the episode raised broader questions about the constitutionality of requiring reporters to agree to ground rules in their coverage of the detention camp at Guantanamo Bay and the Obama administration's record on transparency and openness in regard to military proceedings. Lawyers for media companies quoted in the *Times* story argued that many of the rules to which reporters are required to agree are unnecessary and impede news organizations' ability

"Reporters are operating under these unconstitutional and illegal guidelines. And the only reason Carol is able to go back is she agreed she would abide by the guidelines as they're currently constructed."

– David Schulz
Attorney for Carol
Rosenberg

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to report on Guantanamo. “I really think there’s a failure to believe that access is important,” said Andrea Prasow, a senior counsel for Human Rights Watch and former defense lawyer for Guantanamo detainees, in the July 20 *Times* story. “I can go down there because I have been cleared by the Defense Department to get on a government plane and attend the hearings. But the rest of the world can’t do that. These trials aren’t public. And so it’s that much more important that the government be as open as possible.”

For background on reporters previously barred from covering Guantanamo Bay detention facilities, see “Pentagon Bars Reporters from Attending Guantanamo Hearings” in the Spring 2007 *Silha Bulletin*, and “Reporters Forced to Leave Guantanamo Bay” in the Summer 2006 *Silha Bulletin*.

Court Orders Release of Guantanamo Detainee Photos

In a ruling on a Freedom of Information Act (FOIA) suit filed by International Counsel Bureau and law firm Pillsbury Winthrop Shaw Pittman LLP, a federal judge on July 12, 2010, ordered the release of 47 photographs of four Kuwaiti Guantanamo detainees, leaving open the possibility that the government may also be required to disclose up to 500 hours of video of them. *International Counsel Bureau v. Dept. of Defense*, Civil Action No. 08-1063 (JDB), 2010 U.S. Dist. LEXIS 69488 (D.D.C. July 12, 2010)

In the ruling, D.C. District Judge John Bates rejected the Defense Department’s arguments that the photographs of the detainees should be withheld under FOIA Exemption 6, which covers “the disclosure of [records] which would constitute a clearly unwarranted invasion of personal privacy.” Bates noted that the Pentagon argued that releasing the photos might violate the detainees’ privacy because it could lead to reprisals, but wrote that in order to assess a claim under Exemption 6, the focus “must be solely upon what the requested information reveals, not upon what it might lead to.” However, Bates ruled that the government could withhold portions of videotapes showing “forced cell extractions” of the four detainees, Fawzi Al Odah, Khalid Al-Mutairi, Fouad Al Rabiah and Fayiz Al Kandari, under FOIA Exemption 1, which prevents disclosure of records that would harm national security. Bates wrote that the Pentagon was correct that these portions of the videotapes, “if released, would permit individuals ‘to develop counter-tactics,’ thus ‘placing military members at risk.’”

In a July 12 post on Politico.com, Ronald Schechter, the lawyer who brought the suit, said two of the four detainees included in the FOIA request have been released. He said the suit was filed on behalf of the detainees’ family members, who had not seen them in years.

For more on the release of photographs of detainees in U.S. military custody, see “Supreme Court Vacates and Remands Detainee Photo Case After Congressional Action” in the Fall 2009 issue of the *Silha Bulletin* and “Detainee Abuse Photos Ordered Released” in the Fall 2008 *Bulletin*.

Military Judge Seals Guantanamo Plea Agreement

On August 10, 2010, a U.S. military judge sealed the plea agreement in the first conviction at Guantanamo Bay since President Barack Obama took office. The details of the agreement included the maximum sentence possible for Guantanamo detainee Ibrahim Al-Qosi, a former cook for al-Qaida who pleaded guilty in July to conspiracy and material support for terrorism, according to an August 10 post on the website of the Reporters Committee for Freedom of the Press.

Navy Capt. David Iglesias, a spokesman for the military commission’s prosecutors, declined to comment in detail on why Judge Nancy J. Paul, an Air Force lieutenant colonel, sealed the agreement, according to an August 10 story in *The Washington Post*. Iglesias said that the plea raised “security issues” and that sealing it was beneficial to both the government and al-Qosi. Iglesias said al-Qosi’s sentence would be made public after military officials review the record of the trial, a process that could take several weeks.

According to an August 10 story by The Associated Press, the sealing of the sentence is a first for the military tribunal system, which Obama pledged to make more transparent during his first week in office.

For more on Obama’s early pledges of transparency, see “Obama Promises More Government Openness; Skeptics Demand Immediate Results” in the Winter 2009 issue of the *Silha Bulletin* and “Obama’s Policies Promote Openness; Some Secrecy Persists” in the Spring 2009 *Bulletin*.

– RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

BP, continued from page 12

had been a part of BP’s “game plan” since the first days of the disaster in April. Although BP maintains that instances of denied and restricted access are anomalies, the editorial said, “every such attempt deepens the impression that BP, having caused the worst environmental disaster in U.S. history, is now trying to manipulate what the public sees about it.” Requiring media to be “embedded” with BP or government officials is an unnecessary restriction, the editorial said, pointing out that the oil spill is “not a war.”

In the June 16 AP story, Oreskes agreed that many of the constraints placed on media seemed designed only to impede media coverage. “We think a lot of the restrictions are way tighter than they need to be,” Oreskes said. “So far, I think the government has done a better job of controlling the flow of information than of controlling the flow of oil in the Gulf.”

– RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

FOIA and Access

Transparency Advocates Protest SEC's New FOIA Exemption

A provision in the financial regulatory reform act drew criticism over the charge that it unnecessarily exempts Securities and Exchange Commission (SEC) information and records from federal Freedom of Information Act (FOIA) requests.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, was signed into law on July 21, 2010 and lists as one of its purposes to “promote the financial stability of the United States by improving accountability and transparency in the financial system.” However, journalists and open government advocates have seized upon Section 929I of the act, which protects the “confidentiality” of materials submitted to the SEC, and allows the agency to refuse to comply with FOIA requests that seek records and information related to the SEC’s “surveillance, risk assessments, or other regulatory and oversight activities.”

Fox Business Network (FBN) raised concerns about the FOIA implications of the act, reporting on July 28 that the SEC had invoked the 929I provision the previous day in rejecting FBN’s FOIA request seeking records related to the Bernie Madoff case. In the July 28 online story, Steven Mintz, an attorney for FBN, called the provision a “backroom deal that was cut between Congress and the SEC to keep the SEC’s failures secret. The only losers here are the American public.” FBN reported that SEC spokesman John Nester defended the language of the act, saying that the provision was necessary to protect businesses that register with the SEC from the release of information they may not want made public. In a July 29 post on the website for the Reporters Committee for Freedom of the Press, Nester said the 929I provision “protects highly sensitive and proprietary information such as customer account information and trading algorithms.”

On August 3, a consortium of 10 government transparency groups, including the American Library Association, Citizens for Ethics and Responsibility in Washington, Project on Government Oversight, OMB Watch (which monitors the White House Office of Management and Budget), and the Sunlight Foundation, sent a letter to Sen. Christopher Dodd (D-Conn.) and Rep. Barney Frank (D-Mass.), co-sponsors of the Dodd-Frank Act. In the letter, the groups called for the immediate repeal of 929I, characterizing it as overly broad and “unnecessary.” The letter also pointed to more extensive concerns with the SEC’s record on openness, highlighting a 2009 audit conducted by the SEC Office of Inspector General (OIG), which uncovered a wide range of problems related to the SEC’s FOIA operations and concluded that the SEC’s FOIA release rate was “significantly lower when compared to all other federal agencies.”

The letter to Dodd and Frank argued that transparency in the wake of the recent financial crisis was essential. “The SEC’s ongoing effort to withhold vital records from the public undermines the spirit of the transparency reforms in the Dodd-Frank Act,

and flies in the face of President Obama’s guidance instructing agencies to adopt a ‘presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government,’” the letter said.

In a July 29 blog post on the website of the Project on Government Oversight, reporter Michael Smallberg wrote that problems with the act may be broader than initially thought, pointing to a provision in Section 404 that “makes any information, reports, documents, or records provided by investment advisers of private funds to the SEC and the Financial Stability Oversight Council non-public.”

Smallberg’s post and the transparency groups’ letter argued that exempting the SEC from disclosure under FOIA is unnecessary because the FOIA already carves out sufficient exemptions for proprietary and sensitive information. Exemption 4 of the FOIA applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” and Exemption 8 applies to matters that are “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” The federal FOIA is codified at 5 U.S.C. § 552.

“If nothing else,” Smallberg wrote, “the SEC’s ongoing efforts to withhold information in the Fox Business lawsuit and other cases would appear to undermine the overall spirit of the Wall Street reform bill, which seeks to improve transparency and accountability across the financial system.”

Two bills have been introduced to repeal 929I: H.R. 5970, on July 29, sponsored by Rep. Ron Paul (R-Texas), and H.R. 6038, on July 30, sponsored by Reps. Darrell Issa (R-Calif.), Edolphus Towns (D-N.Y.), and Spencer Bachus (R-Ala.). Issa, the ranking member on the House Committee on Oversight and Government Reform, was an early critic of the 929I provision. In a July 28 post to the Oversight and Government Reform website, Issa asked the Obama administration to justify the 929I provision. “For all their talk about transparency and accountability, the one thing that the President’s financial reform bill has done is allow the very regulatory body that failed to catch Allen Stanford’s fraud and Bernie Madoff’s ponzi scheme to operate in secrecy, without ever having to be held accountable to the American people,” Issa said. “More and more the American people are seeing that transparency and accountability to the Obama Administration is a rhetorical illusion.”

In an August 2 post on Politico.com, Josh Gerstein quoted Frank as saying that he was surprised by the wave of criticism that accompanied the 929I provision. “[The amendment] was in the text that we were working on from the beginning,” Frank said. “Darrell Issa has raised questions about it, but he sat there for two weeks and didn’t offer an amendment ... That was why we had a public conference.”

– RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

“[Section 929I is a] backroom deal that was cut between Congress and the SEC to keep the SEC’s failures secret. The only losers here are the American public.”

– Steven Mintz
Attorney for Fox
Business News

International

Canadian Justices Say No to Privilege, Yes to Publication Ban

The Supreme Court of Canada handed down two rulings in May and June of 2010 that could have a significant impact on newsgathering there.

Court Rules Against a Journalist's Privilege

On May 7, 2010, the Court ruled 8 to 1 that journalists do not have a constitutional right to shield the identity of their sources and said that such a privilege should instead be determined on a case-by-case basis, with courts applying a four-part balancing test before requiring disclosure. *R. v. National Post*, 2010 SCC 16 (Can.)

The Toronto-based *National Post* and reporter Andrew McIntosh had asked the Supreme Court to throw out a search warrant issued by the Ontario Court of Justice on July 4, 2002, which authorized the Royal Canadian Mounted Police to seize from the newspaper allegedly forged bank records and the envelope in which they were received from a confidential source. The documents implicated then-Prime Minister Jean Chrétien in what the Court called “a serious financial conflict of interest”—accusations of profiting from real estate deals and government policies in his hometown of Shawinigan, Quebec. The Ontario Court of Appeal upheld the search warrant in February 2008, after a lower court had struck it down as a violation of the freedom of expression guarantees of the Canadian Charter of Rights, which is roughly equivalent to the U.S. Constitution’s Bill of Rights.

In an opinion that cited, and in some ways reflected, the landmark U.S. Supreme Court decision on journalist’s privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972), Justice William Ian Corneil Binnie wrote that although “[t]he courts should strive to uphold the special position of the media and protect the media’s secret sources where such protection is in the public interest,” the “general rule” is that “the public has the right to every person’s evidence.” Like Justice Byron White’s opinion in *Branzburg*, Binnie acknowledged the importance of anonymous sources as an important investigative newsgathering tool, but declined to find protection for it in Charter of Rights’ freedom of expression clause. The Court also emphasized, however, that the balance between the public interest in keeping a source’s identity secret and the interest in disclosure should not always favor a government investigation, because government actions could arise out of what U.S. courts would call “bad faith.”

“There may be circumstances where the criminal investigation appears to be contrived to silence improperly the secret source, and in such cases the court may decline to order production,” Binnie wrote. He added that although the Court declined to recognize a “class privilege” for journalists in the common law, it “is likely that in future such ‘class’ privileges will be created, if at all, only by legislative action.” A May 7 post on the Canadian Media Lawyers Association website Ad IDEM said

Binnie’s comment was “perhaps an invitation to journalists to lobby for ... statutory protection.”

Binnie observed that Canadian “courts have long accepted the desirability of avoiding where possible putting a journalist in the position of breaking a promise of confidentiality or being held in contempt of court.” The Court listed important news stories in Canada that might not have otherwise been reported without confidential sources, but said a “proper balance” must be struck “between ... the public interest in the suppression of crime and the public interest in the free flow of accurate and pertinent information. Civil society requires the former. Democratic institutions and social justice will suffer without the latter.”

“Viewed in this light,” Binnie wrote, “the law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests—including criminal investigations. In those circumstances the courts will recognize an immunity against disclosure of sources to whom confidentiality has been promised.” However, Binnie also observed that “it carries the argument too far, in my view,” to suggest that any particular newsgathering technique “should itself be regarded as entrenched in the Constitution.”

Moreover, Binnie expressed reservations about creating “a constitutional immunity” for journalists, in light of the fact that “the protection attaching to freedom of expression is not limited to the ‘traditional media’, but is enjoyed by everyone ... who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the ‘news’ at passing pedestrians or publishing in a national newspaper.” Binnie added, “To throw *constitutional* immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.”

The Court adopted a “case-by-case” approach to determine whether a journalist should be able to claim a privilege not to disclose confidential sources or information, wherein it applied a four-part test, called the “Wigmore criteria” for the author of 1961 law treatise that outlined the test.

Under the four-part test, a court must determine first whether the communication “originate[d] in a confidence that the identity of the informant will not be disclosed”; second, whether the confidence is essential to the relationship in which the communication arises; third, whether the relationship is one which should be diligently, deliberately, and consciously fostered in the public good; and “finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.” The Court cautioned

“The law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests—including criminal investigations. [However,] it carries the argument too far, in my view [to suggest that the privilege] should itself be regarded as entrenched in the Constitution.”

– Justice William Ian
Corneil Binnie
Supreme Court of
Canada

that the test is not “carved in stone” but should “provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court.”

As applied to the *Post*’s appeal, the Court ruled that the first three criteria were met, but “the dissemination of forged bank entries designed to ‘prove’ an egregious conflict of personal financial interest on the part of the Prime Minister involving public funds is of sufficient seriousness to justify amply the decision of the police to investigate the criminal allegations within the limits of their ability and resources,” and therefore the public interest in disclosure outweighed the public interest in nondisclosure.

The Court also addressed competing arguments between the government and media about which party should bear the burden of proof on the fourth part of the test. Binnie rejected the media’s argument that once the first three criteria are met, the Charter of Rights’ protection of freedom of expression required the government to establish the necessity for disclosure. On the other hand, Binnie also rejected the government’s argument that the existence of any crime would shift the balance automatically in its favor, writing “the weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist’s promise of confidentiality. The Crown argues that the existence of any crime is sufficient to vitiate a privilege but that is too broad a generalization. The Pentagon Papers case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest.”

The *Post* also argued that, failing recognition of a privilege, the Court should find that the search and seizure was unreasonable, which Binnie declined to do, because the judge issuing the search warrant “allowed a period of a month between its issuance and its execution to ensure the appellants’ ability to move to quash it before any seizure occurred.” However, Binnie said “when an application for a search warrant is made, there should ... be a presumptive requirement of notice to the affected media organization.” Binnie wrote that in circumstances in which an applicant for a search warrant believed the situation was “urgent ... the authorizing judge [should] determine whether the requirement should in fact be waived and ... craft conditions that would, so far as possible, limit interference with the operations of the affected media organization.”

Justice Rosalie Silberman Abella dissented. She wrote that she “respectfully part[ed] company” with Binnie on whether the balance should tip in favor of the media on the fourth part of the Wigmore test, and argued that “where, as here, the journalist has taken credible and reasonable steps to determine the

authenticity and reliability of his source, one should respect his professional judgment and pause before trespassing on the confidentiality which is the source of the relationship.”

Abella also raised concerns over how much relevant information would actually be provided by the documents and envelope sought in the instant case. “The only possible evidence the envelope could yield, and that only remotely, is the identity of [the source], not of the alleged forger. This would mean that the only purpose for learning the confidential source’s identity is to discover who had created this public and awkward controversy. Curiosity about the identity of a confidential source may be understandable, but is never, by itself, an acceptable basis for interfering with freedom of the press.” Abella also contended that the alleged crime at issue “is far from sufficiently significant to outweigh the public benefit in protecting a rigorously thorough and responsible press.”

The May 7 Ad IDEM post identified “a few silver linings in the judgment,” including “formal recognition that the journalist-source relationship is an important one, deserving of protection in many situations” and “the clear inference that if this were not a case involving physical evidence of a crime, considerations favouring protection of sources would be stronger in the balance.” The post also hailed the Court’s endorsement of a requirement that media be given notice of court orders, “so their concerns can be raised in advance of these orders being issued by a judge.”

However, a May 7 *Toronto Star* story quoted *Star* lawyer Bert Bruser saying “it’s a sad day for investigative journalism because the court has refused to provide constitutional protection for the relationship between a journalist and a source, and that in my view is an incredibly important relationship that needs greater protection.”

Court Upholds Statutory Publication Ban

On June 10, the Supreme Court of Canada upheld a federal law that prevents journalists from reporting on evidence presented at bail hearings. *Toronto Star v. Canada*, 2010 SCC 21 (Can.)

The law, known in the press as the “automatic publication ban,” is codified in Section 517 of the Canadian Criminal Code, and requires that, in a bail hearing, a judge must grant an order banning the publication of any evidence and information produced as well as any reasons given for the order if one or more accused individuals requests the ban. *Toronto Star v. Canada* arose after various media organizations challenged the constitutionality of the law in the context of high profile murder case in Alberta and a terrorism-related case in Ontario, arguing that the mandatory aspect of the law violates the freedom of expression clause of the Canadian Charter of Rights. Two appeals courts had split on the issue.

In the majority opinion in the 8 to 1 ruling, Justice Marie Deschamps applied a multi-part test—known as the “*Oakes* test”—to the law, finding that Section 517 “infringes freedom of expression but that the

“Curiosity about the identity of a confidential source may be understandable, but is never, by itself, an acceptable basis for interfering with freedom of the press.”

– Justice Rosalie Silberman Abella
Supreme Court of Canada

limit can be demonstrably justified in a free and democratic society.” Following *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.), a law that limits rights and freedoms will be upheld if it can be “demonstrably justified in a free and democratic society.” Under the test, “the government must justify its action by identifying a pressing and substantial objective ... [and] show that it is reasonable to suppose that the limit may further the goal, not that it will do so.” In determining whether the limit is proportional to the objective, the government must show that the law is rationally connected to its objective, impairment of rights is minimal, and the impairment of rights is outweighed by the benefit derived from the legislation.

Deschamps first found that the objectives of the ban—to safeguard the right to a fair trial and ensure expeditious bail hearings—were “pressing and substantial.” Quoting from the dissent in a lower court decision on the case, Deschamps wrote, “The interest in a fair trial embraces not simply the narrow interest of preventing potential jurors from being influenced by prejudicial material that might be disclosed at a bail hearing, but other interests intended to safeguard the accused’s and society’s interest in a fair trial. ... The objectives of ensuring expeditious bail hearings, avoiding unnecessary detention of accused and allowing accused to retain scarce resources to defend their cases are all inextricably linked to the objective of ensuring a fair trial.”

In analyzing the connection of the law to its objectives and its proportionality in comparison to the infringement of free expression rights, Deschamps focused on the fact that, at bail hearings, evidence can be presented that would not satisfy the standard for admissibility in a jury trial. The “rational connection” was therefore established because “the ban prevents the dissemination of evidence which, for the sake of ensuring an expeditious hearing, is untested. ... the publication of proceedings at the preliminary hearing may result in a one-sided view of the case that could have an impact on trial fairness.”

Turning to the ban’s impact on the right of free expression, Deschamps wrote “it would be difficult to imagine a measure capable of achieving Parliament’s objectives that would involve a more limited impairment of freedom of expression.” She noted that Section 517 “is not an absolute ban either on access to the courts or on publication. ... the media can publish the identity of the accused, comment on the facts and the offence that the accused has been charged with, and that an application for bail has been made, as well as report on the outcome of the application.” Deschamps also noted that the ban is not permanent: “the information it covers can eventually be made public once more complete information produced in accordance with the standards applicable to criminal trials is available.”

The Court also dismissed alternatives to the mandatory nature of the ban that the media had proposed, such as allowing the judge the discretion to determine whether the ban was necessary.

Deschamps argued that to hold a hearing on the ban prior to the bail hearing would have a negative effect on the presentation of evidence in the bail hearing, and that “accused persons might have to make decisions they would not otherwise have made at a time when they can only speculate on what the Crown intends to adduce at the bail hearing. Such decisions would take time, would require them to make strategic choices and could compromise their rights to silence and to liberty.”

In weighing the benefits and drawbacks of the ban, Deschamps focused on the plight of the accused, observing that “a day in the life of an accused person may have a lifelong impact. ... the ban means that accused persons can focus their energy and resources on their liberty interests rather than on their privacy interests ... [including] information relevant to the character of the individual accused and not to the crime ... what kind of person he or she is, and whether he or she is likely to be a danger for society or to appear at trial.” Moreover, Deschamps wrote, “A large part of the evidence taken at the bail hearing is presumptively inadmissible at trial. Thus, criminal records, prior consistent statements and post-offence conduct, which may be mentioned at the bail hearing, might not be admitted in evidence at trial. While it is true that all information about the accused might arouse the public’s curiosity, such information is often irrelevant to the search for truth in relation to the offence, which is the actual purpose of the criminal trial.” Deschamps also noted that leaving the ban to the discretion of a judge would “entail additional issues and adjournments, and would result in longer hearings.”

Deschamps acknowledged that “Section 517 bars the media from informing the population on matters of interest which could otherwise be subject more widely to public debate and ... prevents full public access to, and full scrutiny of, the criminal justice process.” She also observed that when bail hearings “attract considerable media attention” their “outcomes may not be fully understood by the public ... [and] the media would be better equipped to explain the judicial process to the public if the information they could convey were not restricted.” However, “the limits on the publication of information are outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information.”

Deschamps concluded, “although not a perfect outcome, the mandatory ban represents a reasonable compromise.”

Justice Abella, again the lone dissenter, observed that “the public’s ability to engage in meaningful discussion about what a judge decides, depends primarily on knowing why the particular decision is made.”

Abella called the ban “a profound interference with the open court principle.” She observed that although nobody is prevented from attending bail hearings, “what is mandatorily prohibited is the public dissemination of what is disclosed there until the trial is complete, a chronology that can take years

Subpoenas and Reporter Privilege

Appeals Court Narrows, Upholds Subpoena for Film Outtakes

On July 16, 2010, a federal appeals court limited a subpoena for 600 hours of raw footage from a documentary about an international lawsuit between Chevron Corp. and Ecuadorian citizens who allege the oil company is responsible for environmental contamination.

The three-judge panel of the 2nd Circuit U.S. Court of Appeals ordered filmmaker Joseph Berlinger—whose film “Crude” was released in September 2009—to turn over to Chevron all outtakes that show the Ecuadorians’ lawyers, “private or court-appointed experts” involved in the lawsuit, or “current or former officials of the Government of Ecuador.” *Chevron Corp. v. Berlinger*, Nos. 10-1918-cv, 10-1966-cv (2d Cir. July 15, 2010)

NPR’s “All Things Considered” reported June 4 that Chevron requested the footage because it believed it will help show that lawyers suing the company have acted unethically—associating with government officials and pressuring Ecuadorian judges when Chevron lawyers were not present.

In May 2010, U.S. District Judge Lewis Kaplan ordered Berlinger to hand over all of his unused footage to Chevron. Berlinger had claimed that the footage was protected by a qualified journalists’ privilege recognized in the 2nd Circuit. In a May 6 memorandum opinion, Kaplan ruled that under 2nd Circuit precedent, the privilege—which is not reserved exclusively for “member[s] of the institutional press”—applied to Berlinger because he was “involved in activities traditionally associated with the gathering and dissemination of news.” However, Kaplan wrote, Berlinger failed to demonstrate that the information contained in the footage was confidential. Berlinger “has not sustained his burden of demonstrating confidentiality for purposes of the journalist privilege. . . . He does not identify any source or subject with whom he had . . . [a confidentiality] agreement. He docs [sic] not identify any particular footage allegedly covered by such agreements,” and therefore Berlinger’s subjects did not have a reasonable expectation of confidentiality, Kaplan wrote. Because the raw footage was not confidential, Chevron needed only to show it was relevant to the case and not easily obtainable from other sources to compel its disclosure—a burden it clearly met, Kaplan ruled. *In re Application of Chevron Corp.*, 2010 U.S. Dist. LEXIS 47042 (S.D.N.Y., May 6, 2010)

On appeal, the case attracted *amicus* briefs on both sides of the question. One brief was filed by prominent First Amendment attorney Floyd Abrams on behalf of media corporations and advocates including ABC, CBS, NBC, The Associated Press (AP), Dow Jones & Company, Gannett Co., the National Press Photographers Association, The New York Times Company, *The Washington Post*, the Reporters Committee For Freedom of the Press, and the Society of Environmental Journalists. The brief argued that the subpoena—and Kaplan’s ruling—was too broad because it included footage that was irrelevant to Chevron’s case.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told Reuters for a June 25 story that documentary outtakes ought to have the same protections as a journalist’s notebook. However, she said, “it’s often a tough argument to make because it really does require a judge to buy into the idea that what you’re protecting here is editorial and journalistic independence.”

Dole Food Company also filed an *amicus* brief, arguing that the footage should be released, and that Berlinger and the media corporations were “pressing for an expansive interpretation of” the 2nd Circuit’s decisions on journalist’s privilege in order to “recast” the court’s standard for compelling disclosure. Dole’s brief explained in its “statement of interest” that, “like many other large U.S. companies, [Dole] finds itself facing lawsuits brought in foreign countries or on behalf of foreign citizens by U.S.-based lawyers. . . . part of a growing global tort business in which U.S. lawyers partner with lawyers in foreign jurisdictions to recruit plaintiffs and manufacture evidence in support of fraudulent lawsuits aimed at U.S. companies.”

The 2nd Circuit’s order also specified that the footage be used “solely for litigation, arbitration, or submission to official bodies,” and ordered Chevron to pay any expenses related to the duplication or sorting of the footage.

Although the 2nd Circuit did not overturn the lower court’s order, Berlinger said he was pleased with the ruling because it limited what he must disclose, the AP reported on July 16.

“Furthermore, the court has expressly prohibited Chevron from using any footage we do turn over in their public relations campaigns, a goal that was extremely important to me,” Berlinger said. “The courts have affirmed that documentary filmmakers are journalists deserving of First Amendment protection.”

However, the AP reported that Karen Hinton, a representative for the Ecuadorians’ lawyers, decried the decision. “This ruling undermines investigative journalism during a time when more aggressive inquiry is sorely needed in the oil industry,” she said.

The 2nd Circuit’s order noted that a full opinion was forthcoming; when the *Bulletin* went to press it had not been released.

“The court has expressly prohibited Chevron from using any footage we ... turn over in their public relations campaigns, a goal that was extremely important to me.”

– Joseph Berlinger
Documentary
filmmaker

– PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

Libel

Federal ‘Libel Tourism’ Law to Nullify Anti-Free Speech Rulings

On August 10, 2010, President Barack Obama signed the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, meant to protect U.S. writers and speakers against “libel tourism,” a practice whereby libel plaintiffs sue Americans—and often win large damages—in countries with weaker speech protection laws than those of the United States.

Citing the growing prevalence of libel tourism and its threat to “not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit,” the SPEECH Act, Pub. L. No. 111-223, forbids U.S. courts to recognize or enforce foreign libel judgments that are inconsistent with the free speech guarantees of the First Amendment or applicable state constitutions or laws. Under the Act, an American citizen, legal resident, legal alien, or business who loses a foreign libel suit or is prosecuted under a foreign criminal libel law can obtain an order from a federal district court that declares the foreign judgment unenforceable if it “is repugnant to the Constitution or laws of the United States.”

The Act places the “burden of establishing unenforceability” on the party requesting the declaration, and if the court finds that, despite a lower foreign standard for defamation, the person challenging the foreign libel ruling would have been found liable by the applicable American standard, then the foreign ruling can be upheld.

The Senate Judiciary Committee approved the bill on July 13, and it was approved unanimously by the U.S. Senate on July 19 and sent to the House of Representatives. The House passed its version of the bill by voice vote on July 28 and sent it to Obama.

A version of the bill was first introduced in Congress by Rep. Steve Cohen (D-Tenn.) in fall 2008, who cited the case of author Rachel Ehrenfeld as its inspiration. In 2008, the 2nd Circuit U.S. Court of Appeals ruled that Ehrenfeld, author of a book titled “Funding Evil: How Terrorism is Financed – and How to Stop It” linking Saudi billionaire Khalid bin Mahfouz to terrorist financing, could not stop bin Mahfouz from enforcing a British libel verdict against her in the United States. *Ehrenfeld v. bin Mahfouz*, 518 F.3d 102 (2d Cir. 2008). Illinois and New York have also passed libel tourism statutes.

For more *Bulletin* coverage of libel tourism and the Ehrenfeld case, see “Libel Tourism Bills Introduced in U.S. House and Senate” in the Winter 2009 issue of the *Silha Bulletin*, “House Passes Libel Tourism Bill; Illinois Enacts Its Own Law” in the Fall 2008 issue, “New York Law Protects Authors from Libel Tourists” in the Summer 2008 issue, “New York High Court Rules in Libel Tourism Case” in the Winter 2008 issue, and “‘Libel Tourism’ Suit Leads Publisher to Destroy Book on Terrorism Funding, Pay Damages and Apologize” in the Fall 2007 issue.

The passage of the SPEECH Act in the United States stirred ongoing concerns in the United Kingdom, where plaintiff-friendly libel laws frequently result in large judgments against defendants. An August 13 *Washington Post* editorial said that “Libel tourists flock to London, where suits can result in judgments of millions of pounds, effectively placing some wealthy figures outside the reach of journalism because writing about them might prove too costly.”

According to an August 11 blog post by *Guardian* of London media critic Roy Greenslade, Jonathan Heawood, English director of free speech organization PEN, called the passage of the SPEECH Act “hugely embarrassing.” Heawood said, “English libel lawyers claim that libel tourism is not a problem, [sic] if this is the case why has President Obama just signed into law a measure to protect his citizens from our courts?” Greenslade quoted Index on Censorship editor Jo Glanville as saying that “the U.S.’s response to our libel laws has already played a key role in advancing the campaign for reform in the UK.” *The Washington Post* editorial reported that “all three major [U.K.] parties have declared libel reform a priority, and the British Ministry of Justice has announced it will move forward with legislation in the coming year.”

– SARA CANNON
SILHA CENTER STAFF

Libel tourism threatens to “not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit.”

– The SPEECH Act
Pub. L. No. 111-223

Digital Media

Online Anonymity Continues to Challenge Courts, Plaintiffs

In spring and summer of 2010, courts around the country issued rulings on whether websites must reveal the identities of anonymous commenters in response to subpoenas, adding to the growing jurisprudence on an evolving legal problem. Meanwhile, a 9th Circuit Court of Appeals ruling might limit First Amendment protection for anonymous online speech that can be considered “commercial speech.”

New Hampshire Supreme Court Favors Right to Speak Anonymously

On May 6, the New Hampshire Supreme Court followed a recent judicial trend toward protecting the identities of anonymous commenters under the First Amendment, ruling that a mortgage industry website did not have to remove a document it had published online or reveal the document’s anonymous source or the identity of an anonymous website commenter.

In 2008, mortgage lender The Mortgage Specialists, Inc. sued Implode-Explode Heavy Industries, Inc., which operates the website The Mortgage Lender Implode-O-Meter (Implode-O-Meter), after the website published an article that detailed the New Hampshire Banking Department’s administrative actions against The Mortgage Specialists and provided a link to a financial document the company had allegedly submitted to state banking authorities. On March 11, 2009, a New Hampshire state trial court granted The Mortgage Specialists’ request that Implode-O-Meter remove the document and several posts by commenter “Brianbattersby” from its website, identify the source of the document, and disclose the identity of the commenter, pursuant to claims that publication of the document violated state laws and that the commenter’s posts were false and defamatory.

In an opinion by Justice Carol Ann Conboy, the state Supreme Court vacated and remanded the lower court’s order that Implode-O-Meter disclose the identity of “Brianbattersby,” “including his full name, address, email address, phone number, and any other personal information [Implode-O-Meter] possesses.” Conboy’s opinion rejected the lower court’s assertion that “the maintenance of a free press does not give a publisher a right to protect the identity of someone who has provided it with unauthorized or defamatory information.” Instead, the Supreme Court ruled that New Hampshire trial courts must “strike the balance between a defamation plaintiff’s right to protect its reputation and a defendant’s right to exercise free speech anonymously.” Accordingly, the court adopted a four-part test based on the New Jersey appellate court’s ruling in *Dendrite International, Inc. v. Doe Number 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), a case that involved a corporation’s motion to compel the disclosure of the identity of an anonymous online critic pursuant to a defamation claim. Under the *Dendrite* standard, courts must 1) require the plaintiff to attempt to notify anonymous commenters that they are the subject of a subpoena or application for an order of disclosure, 2) require

the plaintiff to identify the exact statements that constitute actionable speech, 3) review the plaintiff’s complaint to determine whether it has set forth a *prima facie* cause of action that can also withstand a motion to dismiss and provides sufficient evidence to support each claim, and 4) balance the defendant’s First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed. The high court remanded the case back to the trial court for an application of the *Dendrite* test. *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 2010 N.H. LEXIS 41 (N.H. May 6, 2010)

The court also vacated and remanded the lower court’s order that Implode-O-Meter identify the source of the document, and reversed the lower court’s injunction prohibiting republication of the financial document and comments by “Brianbattersby.” In ruling that Implode-O-Meter did not have to identify its anonymous source, the court cited New Hampshire’s qualified common law journalist’s privilege. “Although our cases discussing the newsgathering privilege have involved traditional news media, such as newspapers,” Conboy wrote, “we reject Mortgage Specialists’ contention that the newsgathering privilege is inapplicable here because Implode is neither an established media entity nor engaged in investigative reporting. ... The fact that Implode operates a website makes it no less a member of the press. ... Implode’s website serves an informative function and contributes to the flow of information to the public. Thus, Implode is a reporter for purposes of the newsgathering privilege.” The high court remanded the issue of whether the anonymous source should be disclosed, ordering the lower court to balance “the potential harm to the free flow of information that might result [from disclosure] against the asserted need for the requested information.”

The court also ruled that the lower court’s injunction was an unconstitutional prior restraint. Mortgage Specialists argued that publication of the financial document was illegal because it violated the confidentiality requirements of a state law pertaining to “investigations and reports of examinations by the banking department” and constituted an invasion of privacy, and because the “Brianbattersby” comments did not qualify for First Amendment protection because they were false and defamatory. Conboy cited numerous U.S. Supreme Court decisions that found that prior restraints violated the First Amendment “even when confidential information has allegedly been obtained unlawfully by the publisher,” including *Near v. Minnesota*, 283 U.S. 697 (1931) and *New York Times Co. v. United States*, 403 U.S. 713 (1971) (“the Pentagon Papers case”). Conboy wrote that “Mortgage Specialists’ interests in protecting its privacy and reputation do not justify the extraordinary remedy of prior restraint.

“While it may be true that Mortgage Specialists’ loan information is ‘confidential,’ such information is certainly not more sensitive than the documents at issue in the Pentagon Papers case. Nor are the [document] and postings more inflammatory than the anti-Semitic publications at issue in *Near*.”

– New Hampshire Supreme Court
The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.

Anonymity, continued on page 22

While it may be true that Mortgage Specialists' loan information is 'confidential,' such information is certainly not more sensitive than the documents at issue in the Pentagon Papers case. Nor are the [document] and postings more inflammatory than the anti-Semitic publications at issue in Near."

Illinois Court Requires Disclosure

On June 1, a state appellate court in Illinois ordered Ottawa Publishing Co., publisher of the Ottawa, Ill. *Times*, to disclose the identity of a commenter on its website, Mywebtimes.com.

The decision reversed a trial court's ruling that granted the publisher's motion to dismiss Donald and Janet Maxon's pre-litigation petition for discovery. In fall 2008, the Maxons filed the petitions for discovery under Illinois Supreme Court Rule 224, which allows a would-be plaintiff to engage in discovery before filing a lawsuit to uncover the identity of "one who may be responsible in damages." The Maxons alleged that commenter "FabFive from Ottawa" had defamed them on Mywebtimes.com by claiming they had bribed a city commission, leading it to favor an ordinance that would allow bed and breakfasts to operate in residential areas. "FabFive from Ottawa"'s comments included, "How much is Don and Janet from another Planet paying [the commission] for [its] betrayal????"

In granting the publisher's motion to dismiss, the trial court applied a standard based on *Dendrite* and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), finding that the Maxons failed to state a *prima facie* cause of action for defamation because the commenter's statements were statements of opinion. The Illinois Appellate Court for the Third District ruled 2 to 1 to reverse the trial court's order.

Rejecting the lower court's finding that "FabFive from Ottawa"'s statements were opinions, Judge William E. Holdridge wrote that the majority found "nothing in the content or the forum to indicate that the allegations that the Maxons bribed a public official could not reasonably be interpreted as stating an actual fact," adding, "the mere fact that a statement of fact is couched in the rhetorical hyperbole of an opinion does not render it nonactionable." *Maxon v. Ottawa Publishing Co.*, 929 N.E.2d 666 (Ill. App. Ct. June 1, 2010)

Holdridge also wrote that since Rule 224 requires a trial court to ensure that the would-be plaintiff's petition 1) is verified, 2) states particular facts that would establish a cause of action, 3) seeks only the identity of the potential defendant and no other information, and 4) is subjected to a hearing, "trial courts in Illinois possess sufficient tools and discretion to protect any anonymous individual from any improper inquiry into his or her identity." Therefore, Holdridge argued, a separate analysis of the constitutional protections for anonymous speech using *Cahill*, *Dendrite*, or any other standard would be redundant and unnecessary.

"Moreover," Holdridge wrote, "given that there is no constitutional right to defame, we find no need for the additional requirements articulated in the

Dendrite-Cahill test. ... [O]nce the petitioner has made out a *prima facie* case for defamation, the potential defendant has no first-amendment right to balance against the petitioner's right to seek redress for damage to his reputation, as it is well settled that there is no first-amendment right to defame."

Judge Daniel L. Schmidt dissented, saying that the majority "misse[d] the point" in its opinion because "the protection of the anonymity of speech is a separate issue from the defamatory nature of the speech. In other words, no one suggests that an anonymous speaker deserves a higher degree of protection from claims of defamation than an individual whose identity is known. Rather, it is the anonymity itself that is equally worthy of protection."

Schmidt wrote that the *Dendrite-Cahill* test "adds a crucial extra layer of protection to anonymous speech The additional procedural requirements articulated in the *Dendrite-Cahill* test are not designed to protect defamatory anonymous speech. Rather, they are designed to protect the identity of those participating in nonactionable anonymous speech. Once an anonymous speaker's identity is revealed, it cannot be 'unrevealed.'" Schmidt also disagreed with the majority's decision that a reasonable person would construe the "FabFive from Ottawa" comments to be statements of fact, rather than "the venting of one's spleen by someone disgruntled by the decision of a local body politic."

Ottawa Publishing Co. attorney Michael Schmidt told the *Bulletin* July 23 that the newspaper chose not to appeal the case to the Illinois Supreme Court.

North Carolina Trial Courts Split on Whether to Unmask Commenters

A North Carolina trial court judge ruled August 16 that the *Gaston Gazette* did not have to disclose the identity of an anonymous commenter because the state's shield law protected that information.

According to Gaston County Superior Court Judge Calvin Murphy's order, the attorney for a murder suspect subpoenaed the *Gazette* and publisher Julie Moreno to reveal the identity of commenter "justicen2010." The Associated Press (AP) reported August 2 that, according to the newspaper's attorney, the comment included information related to a lie-detector test the murder suspect took.

In a three-page order, Murphy ruled that the suspect's attorney failed to overcome the qualified journalist's privilege established by N.C. Gen. Stat. § 8-53.11, which states "A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist."

Murphy wrote that the commenter's identity qualified as "confidential information related to [t]he *Gazette*'s and Moreno's newsgathering and news publishing activities" and "therefore, [t]he *Gazette* and Moreno have a qualified privilege against compelled disclosure of Internet posters'

"No one suggests that an anonymous speaker deserves a higher degree of protection from claims of defamation than an individual whose identity is known. Rather, it is the anonymity itself that is equally worthy of protection."

– Judge Daniel L. Schmidt
Illinois Court of Appeals, dissenting in *Maxon v. Ottawa Publishing Co.*

IP addresses, e-mail addresses, names, physical addresses, and other identifying information” they collect. *North Carolina v. Mead*, 10-CRS-2160 (Gaston Cty. Sup. Ct. June 28, 2010)

Murphy ruled that the suspect’s attorney failed to show, as the statute requires, that the commenter’s identity is “relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought; cannot be obtained from alternate sources; and is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.”

In an earlier case, on June 28, Vance County Superior Court Judge Howard E. Manning ordered the editor of a Henderson, N.C. community news blog to disclose the names and addresses of six commenters who allegedly defamed a candidate for county commissioner.

Jason A. Feingold, editor of the Home in Henderson blog, posted an article on Aug. 14, 2009 titled “Arrest made in elder abuse case” concerning the arrest of a woman who had subleased a house to eight tenants between ages 45 and 88. Feingold reported that living conditions in the house were extremely poor, and tenants were without electricity or running water. Commenters identified Thomas S. Hester, a former county commissioner and candidate for the same office, as the owner of the property, and criticized him for allowing the conditions in the house. The article and comments are available online at <http://www.homeinhenderson.com/?p=9317>. Hester filed a “John Doe” lawsuit for defamation against 20 of the commenters, and subpoenaed Feingold to disclose their identities.

In his June 28 order, Judge Howard E. Manning observed that under U.S. Supreme Court cases such as *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) and *Talley v. California*, 362 U.S. 60 (1960), “the right of free speech provided by the First Amendment is protected when the speech is anonymous” but “the right to speak anonymously, on the internet or anywhere, is not absolute and there is no right to freely defame other persons.” *Hester v. Jane or John Doe*, 10-CVS-361 (Vance Cty. Sup. Ct. June 28, 2010)

Manning said the *Dendrite* standard “provides a reasoned step by step test of the complaint, some of which this Court will use in its determination.” Ultimately, however, Manning’s analysis eschewed central aspects of the *Dendrite* test, including a determination of whether the plaintiff presented a *prima facie* case for defamation, saying that to require a specific evidentiary showing would be “way too stringent and premature, especially where there is no dispute that the blogs were posted and that the blogs [sic] content are [sic] out there for all the world to read.” Manning identified six statements that were libelous *per se*, or defamatory on their face, and ordered that the commenters be identified. The judge determined that the statements of 14 other commenters were not libelous “and despite their unflattering references, if any, to Hester, are protected by the First Amendment.”

In his motion to quash the subpoena, Feingold had also argued that the commenters’ identities were protected by North Carolina’s shield law, but Manning did not address that issue.

9th Circuit Ruling Proposes Lower Standard for Commercial Speech

In a July 12, 2010 ruling on a procedural issue, a three-judge panel of the 9th Circuit U.S. Court of Appeals suggested that the standard for unmasking an anonymous commenter could be lower when the commenter’s speech qualifies as commercial speech, as opposed to “political, religious, or literary speech.”

The underlying case involves a long-running dispute between Quixtar, Inc., also known as Amway, and Signature Management TEAM, LLC, (TEAM) which sells books, seminars, and motivational speaker appearances to Independent Business Operators (IBOs) selling Quixtar products. Quixtar has sued TEAM for tortious interference with contracts and business relations, alleging that TEAM carried out an online “smear campaign,” encouraging IBOs to end their contracts with Quixtar. Quixtar has sought information about the identity of five anonymous online speakers allegedly responsible for criticizing Quixtar management, but a TEAM employee refused to identify them in his deposition. Quixtar claims that the online critics can be linked to TEAM and therefore support its claims of tortious interference.

The Nevada District Court applied the *Cahill* standard and ordered the TEAM employee to identify three of the five anonymous speakers. The anonymous speakers and Quixtar appealed to the Circuit Court to issue a writ of *mandamus* requiring the District Court to abandon its order. Quixtar asked that the District Court be compelled to order all five speakers to be identified; the anonymous speakers asked that the District Court be compelled to allow all the speakers to remain anonymous.

Writing for the 9th Circuit, Judge M. Margaret McKeown denied both parties’ petitions, calling *mandamus* an “‘extraordinary’ remedy limited to ‘extraordinary’ causes.” However, McKeown also wrote that the lower court’s application of the *Cahill* standard for unmasking anonymous online speakers was “understandable,” but “in the context of commercial speech balanced against a discretionary discovery order ... *Cahill*’s bar extends too far.” *In re: Anonymous Online Speakers*, 2010 U.S. App. LEXIS 14166 (9th Cir. July 12, 2010)

McKeown characterized the anonymous online posts, which included allegations that Quixtar had “secretly ... acknowledged that its products are overpriced and not sellable,” “refused to pay bonuses to IBOs in good standing” and “currently suffers from systemic dishonesty” as commercial speech, or “expression related solely to the economic interests of the speaker and its audience” as defined by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the U.S. Supreme Court ruled that truthful, non-misleading commercial speech is entitled to

Anonymity, *continued from page 23*

some First Amendment protection, but less than other constitutionally protected expression.

McKeown wrote that “in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle” and that “we suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.” To support these propositions, McKeown cited *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir. 2009), a federal appeals court decision allowing the deposition of an anonymous speaker in a securities fraud class action, and *Doe v. Reed*, 103 S. Ct. 2811 (June 24, 2010), in which the U.S. Supreme Court held that individuals who sign referendum petitions generally do not have a constitutional right to keep their identities secret, but that courts should consider on a case-by-case basis whether a particular referendum presents unique circumstances requiring anonymity.

A July 20 Citizen Media Law Project (CMLP) blog post called the ruling “troubling” because “the court’s sense of what qualifies as commercial speech seems unduly broad.” The post observed that under the 9th Circuit’s interpretation, almost any comment on any review website or “gripe site” could be considered “related solely to the economic interests of the speaker and its audience.”

In a post on the Consumer Law & Policy Blog, attorney Paul Alan Levy observed that “it is not clear how the Ninth Circuit satisfied itself that the speech at issue was commercial. To be sure, it is commercial on Quixtar’s theory of the case (derogatory comments posted by a rival for the purpose of stealing business), but the same could be said in any *Cahill*-type case—on the plaintiff’s legal theory, the Doe’s speech is unprotected by the First Amendment because, for example, it is false statements of fact made with actual malice. Yet that has never been enough to overcome the right of anonymous speech. Hopefully there was some basis in the record other than the plaintiff’s say-so for finding the speech commercial.”

The CMLP post extended Levy’s point to argue that “[t]he court’s circular reasoning could tilt the scales in favor of disclosure in every defamation case, where plaintiff[s] by definition claim that the speech in question is not entitled to any First Amendment protection at all. . . . The whole point of the *Dendrite* and *Cahill* tests is to make sure that plaintiffs can support such allegations with at least some minimal factual basis before they get what they want.”

— PATRICK FILE
SILHA FELLOW AND *BULLETIN* EDITOR

Canadian Supreme Court, *continued from page 18*

to unfold. This has the effect, for all but the handful of people who are present in the courtroom, of denying access to information surrounding a key aspect of the criminal justice system—the decision whether or not to release an accused back into the community pending his or her trial.”

Abella also said the ruling contradicted the Court’s doctrine on publication bans in the context of pre-trial publicity. Previous cases had established a high threshold for imposing a discretionary ban: “where they are ‘necessary’ to protect against ‘real and substantial’ risks to an accused’s fair trial rights,” she said. The ruling in *Toronto Star* “completely collapses the constitutional framework . . . leaving out of the balance entirely the public’s presumptive right to know what goes on in a courtroom,” Abella said, concluding, “public confidence in the justice system requires relevant information delivered in a timely way. A mandatory ban on the evidence heard and the reasons given in a bail application is a ban on the information when it is of most concern and interest to the public.”

In a June 10 story in the *Edmonton Journal*, Dan Burnett, a lawyer for the intervening Canadian Newspaper Association, called the ruling “quite a clash with the pretty proud tradition of the Supreme Court’s rulings on publication bans. Burnett said such bans were “ordered quite easily 20 years ago” but now they require a threat to the administration of justice as justification.

A June 10 post on Ad IDEM speculated that “the only immediate solution” to the *Toronto Star* ruling would be an amendment to the Canadian Criminal Code.

It has been active year for the Canadian Supreme Court on media law issues. In December 2009, the Court created a new libel defense for members of the public or media who engage in “responsible communication.” See “Canadian Supreme Court Creates New ‘Responsible Communication’ Defense” in the Winter/Spring 2010 issue of the *Silha Bulletin*.

— PATRICK FILE
SILHA FELLOW AND *BULLETIN* EDITOR

Copyright

News Media Seek Legal Tools to Protect Original Content

Battle Lines Drawn in 'Hot News' and Copyright Lawsuits

Legal battles continue between traditional news producers and online sources like blogs and so-called news aggregators, which take original content and republish it without payment or attribution to the original source. Copyright law—and particularly “hot news” claims—have been at the forefront of the issue.

Appeals Court Halts Injunction against Financial News Website in 'Hot News' Case

On May 20, 2010, the 2nd Circuit U.S. Court of Appeals stayed an injunction against financial news website *Theflyonthewall.com* (Fly), which had imposed strict time limits for the site’s publication of stock information. The appeals court ordered expedited briefing on the case, and enjoined the lower court ruling in the meantime.

On March 18, Judge Denise L. Cote of the U.S. District Court for the Southern District of New York ruled that Fly had misappropriated the financial recommendations of investment firms Barclays, Merrill Lynch, and Morgan Stanley by combining those recommendations with other financial news items and making them available to Fly subscribers. In *Barclays Capital, Inc. v. Theflyonthewall.com*, 2010 U.S. Dist. LEXIS 25728 (S.D.N.Y. March 18, 2010), Cote ruled that the stock recommendations and reports the firms created for investors were “hot news,” and that Fly’s consistent and timely redistribution of them, sometimes verbatim, violated the New York common law of unfair competition, creating a disincentive for the firms to produce the reports.

“Fly’s core business is its free-riding off the sustained, costly efforts by the Firms and other investment institutions to generate equity research that is highly valued by investors,” Cote wrote. The injunction forbade Fly to publish recommendations issued by the firms when the stock market was closed until after 10 a.m. the following day. When the market was open, Fly could not publish recommendations for two hours after their release. (For more on the injunction, see “Federal Judge Orders Website to Delay Posting of Stock Recommendations” in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

The “hot news” doctrine was recognized by the U.S. Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918), in which the court held that a news organization can claim that “hot news” is its “quasi property,” and thus can be protected against a competitor’s appropriation. This is in contrast to copyright law, which permits a news organization to claim a copyright to the words and structure of a news story, but not to its underlying facts. “Thus,” Judge Cote observed in her March 18 ruling, “in *INS*, the misappropriation doctrine was developed to protect costly efforts to gather commercially valuable, time-sensitive information that would otherwise be unprotected by law.” Although the Supreme Court later held in

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) that federal common law does not apply to state law claims, the “hot news” doctrine persists in several states, including New York. (The *Silha Bulletin* has covered “hot news” claims previously. See “Federal Judge Recognizes AP’s ‘Hot News’ Claim in Suit over Online Use of Content” in the Winter 2009 issue.)

Numerous interested parties submitted competing *amicus curiae* briefs in the expedited *Barclays* case. Fourteen news media companies submitted a brief arguing that the “hot news” doctrine is an important tool in protecting themselves against “free-riding” aggregators. The brief, filed June 21 by Agence France-Presse, The Associated Press (AP), the E.W. Scripps Company, Gannett Company, the McClatchy Company, Newspaper Association of America, Time Inc., The New York Times Company, *The Washington Post*, and others argued that “free-riders” like Fly threaten their ability to make money doing journalism. “The vulnerability of news originators has grown exponentially in the Internet era,” the brief said. “Today, originators make most news stories available on the Web as soon as they leave the editor’s desk. With a simple computer program and a few keystrokes, a free-rider can immediately copy that valuable news content from the Internet. The free-rider can then republish the originator’s news while it is still ‘hot,’ in a product that competes for public attention and revenue from such sources as advertising, subscriptions, and paid applications.”

Meanwhile, in an *amicus* brief urging the 2nd Circuit to reverse Judge Cote’s ruling, Google Inc. and Twitter Inc. argued that the “hot news” doctrine is unconstitutional and violates the Copyright Act, 17 U.S.C. §§ 101-810. The brief said the U.S. Constitution’s copyright clause “demands that, in order to ‘promote the Progress of Science and useful Arts,’ non-original works such as facts are available to any person to use and exploit, regardless of who discovered those facts or at what expense.” Further, Google and Twitter argued that the “hot news” doctrine is “not compatible with constitutional principles enunciated” in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In *Feist*, the U.S. Supreme Court ruled that the names, towns, and telephone numbers in a white and yellow pages directory were facts not protected by copyright, regardless of how much work was expended compiling and organizing them. According to the brief, *Feist* rejected the logic of *INS*—that “newsgatherers may secure property rights in facts and block competitors from repeating them.” In other words, the brief argued, “the freedom to use facts—even to ‘free-ride’ on facts gathered by others through great effort—is constitutionally protected.”

The Google and Twitter brief also claimed that “in an age of instantaneous, global dissemination

“The freedom to use facts—even to ‘free-ride’ on facts gathered by others through great effort—is constitutionally protected.”

– *Amicus* brief filed by Google and Twitter in *Barclays Capital, Inc. v. Theflyonthewall.com*

Hot News and Copyright, continued on page 26

of factual information over the Internet, cable, and satellite, a tort of ‘hot news’ misappropriation is obsolete.” Moreover, granting a “temporary monopoly” over news facts undermines the public interest in receiving timely news, the brief argued, and “foster[s] uncertainty among news outlets as to how long they must ‘sit’ on a story before they are free of a potential ‘hot news’ claim. ... How, for example, would a court pick a time period during which facts about the recent Times Square bombing attempt would be non-reportable by others?”

The Citizen Media Law Project, Electronic Freedom Foundation, and Public Citizen also submitted an *amicus* brief on the case, encouraging the 2nd Circuit to consider its First Amendment implications. In the brief, the groups observed that following its recognition in the *INS* case, “no court has explored carefully the speech implications of the hot news doctrine.” Although the brief did not support either party in the *Barclays* case, the *amici* argued that the “hot news” doctrine threatens to “impede traditional First Amendment protections for truthful speech on matters of public concern” and “could chill the development of online expression.”

The AP reported August 9 that a three-judge panel of the 2nd Circuit court held a hearing on the injunction August 6. In the hearing, Bruce Rich, an attorney for the financial firms, claimed that the suit was not “speech directed” or an attack on the First Amendment. Asked whether the firms would be damaged if news organizations like *The New York Times* or CNBC reported the firms’ recommendations, Rich said, “The difference is that Fly does it for a living. CNBC delivers a broad spectrum of news reporting.”

Newspapers Sue and Threaten Blogs over Copyright

Newspapers in Nevada and Colorado have used copyright law to protect their original content and the revenue it generates. On June 14, the Reporters Committee for Freedom of the Press (RCFP) reported that since March 2010, the *Las Vegas Review-Journal* had sued 37 different website owners and bloggers for using its content without permission. Mark Hinueber, general counsel for Stephens Media, which owns the *Review-Journal*, told the RCFP that the impetus for the suits was the threat of reduced traffic to the paper’s website and harm to online ad revenue. When websites reproduce *Review-Journal* stories and post them online, they eliminate any reason for readers to visit the newspaper’s website, Hinueber said.

Bloggers sued by the *Review-Journal* have said they feel unfairly targeted because they do not compete with the newspaper for ad revenue or readers. In a June 1 response to a lawsuit filed against madjacksports.com, Jack Wooden, who lives in Columbus, Ind., and runs the site, explained that a user posted a *Review-Journal* story on a discussion board on his site. Wooden claimed the story was removed when he received the newspaper’s complaint, and that the page had been viewed only 29 times while the article was

online. Wooden calculated the financial damage to the *Review-Journal* to be \$85.55, because access to the article on the newspaper’s online archive cost \$2.95 per view. In his response, Wooden assailed Righthaven, L.L.C., the Nevada company acting on the newspaper’s behalf, claiming that in many of the cases of infringement “actual damages, if any, are in the \$3 to \$100 range and could be cured with a phone call or an email.” According to the *Las Vegas Sun* on June 10, the lawsuits typically demand \$75,000 in damages.

In a May 28 blog post on the newspaper’s website, *Review-Journal* publisher Sherman Frederick called Righthaven “a local technology company whose only job is to protect copyrighted content. It is our primary hope that Righthaven will stop people from stealing our stuff. It is our secondary hope, if Righthaven shows continued success, that it will find other clients looking for a solution to the theft of copyrighted material.”

On June 9, *Los Angeles Times* columnist James Rainey reported that “Righthaven was founded by an intellectual property attorney funded in part by a company connected to Stephens Media, which owns the *Review-Journal*.” Rainey chronicled the story of another website sued by the *Review-Journal* via Righthaven, the City Felines Blog, owned by Allegra and Emerson Wong. According to Rainey, the Wongs were sued after they posted a *Review-Journal* story about a fire at a wildlife sanctuary. Rainey said he “suggested to the Vegas crew that [the City Felines Blog]—a homey little site, bereft of advertising—appeared to be less than a menacing opponent.” Although Righthaven CEO Steve Gibson told Rainey that whether a site’s use was commercial or non-commercial was not relevant to an infringement claim, Rainey said Hinueber, Stephens Media general counsel, “seemed to have a sense that his paper effectively had blasted a small tabby with a howitzer. He didn’t promise to drop the suit, but offered: ‘I just learned about the filing on the cat thing. I’m going to talk to [Righthaven] about that.’”

In Colorado, the website ColoradoPols.com reported July 7 that it received a cease and desist demand on May 21 from an attorney representing Media News Group, Freedom Communications Inc., and Swift Communications Corp., which publish daily newspapers in Colorado including *The Denver Post*, *The Gazette* of Colorado Springs, the Boulder *Daily Camera*, and *Greeley Tribune*. In the letter, Christopher P. Beall of Levine, Sullivan, Koch and Schulz, L.L.P. accused ColoradoPols.com of “flagrant and persistent theft of our clients’ intellectual property” by “wholesale, and unjustified, use of the news content published by our clients, which is produced at significant expense by them and from which your firm is deriving advertising revenue everyday [sic].”

According to Denver alternative weekly *Westword*, Beall drafted the letter after reporters at the *Post* noticed that the number of paragraphs excerpted with links and attribution to *Post* stories on

“It is our primary hope that Righthaven will stop people from stealing our stuff. It is our secondary hope, if Righthaven shows continued success, that it will find other clients looking for a solution to the theft of copyrighted material.”

– Sherman Frederick
Publisher, *Las Vegas Review-Journal*

ColoradoPols.com had been increasing. “There had been a gentleman’s understanding between the political desk at the *Post* that Colorado Pols would take no more than two paragraphs” from articles it was referencing, Beall told *Westword*. “That had been the *Post*’s expectation and understanding. But at some point this year, it appeared to the *Post* that something had changed, and Colorado Pols had been going well beyond two paragraphs.”

But Jason Bane, the ColoradoPols.com principal to whom the letter was addressed, said he had heard of no such agreement, and he disputed Beall’s assertion that posts and links on ColoradoPols.com did not generate traffic to the original stories on the newspaper websites.

In its July 7 post, ColoradoPols.com also disputed the claim that the website’s use of the newspaper’s content violated the Copyright Act and the “hot news” doctrine. The post said “you can’t steal something that is already given away for free” and noted that posts always included a link and attribution to the original author and source. Moreover, the website contended, “the stories that we have referenced from the *Post* are not ‘exclusive stories,’ and thus they have no claim to the ‘hot news doctrine.’ If we reference a *Denver Post* story about the winners at the state convention, we’re doing so as a way to quickly catch up a reader at Colorado Pols as to a subject we are about to discuss. But we could just as easily do the same thing by using another news outlet as the source, or by not using another news outlet at all. It’s not exactly a big secret when the winners are announced at the Democratic or Republican state conventions, and we get all the same press releases [the newspapers] do. We also get a tremendous amount of breaking news and inside information directly, just like the *Post* and other news outlets.”

Nevertheless, ColoradoPols.com reported that it stopped posting any content from the newspapers shortly after the letter was received. Bane told *Westword* “we haven’t linked to the *Post* in six weeks and nobody even noticed. Nobody mentioned it online. And that bears out what we’re saying. The *Denver Post* and these other outlets think they’re so valuable that websites like Colorado Pols have to link to them, have to use their content. But there are so many outlets out there, and so many people out there discussing the same things. Which isn’t to say they don’t provide value. But it doesn’t mean anything to the future of Colorado Pols to not use their content.”

For more on news organization lawsuits over copyright and “fair use,” see “AP Challenges Web Sites over Fair Use, Limits Still Unclear” in the Summer 2008 issue of the *Silha Bulletin*.

FTC Staff Report Raises Discussion on Federal ‘Hot News’ Law, Amendments to Copyright Act

On May 24, 2010, upon announcing the last of a series of Federal Trade Commission (FTC) hearings on the future of the news media to be held on June 15, the commission released a staff report that included discussion of the copyright and “hot

news” issues. The report discussed proposals to amend the Copyright Act to explicitly recognize a claim of “hot news” misappropriation, to amend the Copyright Act to clarify that it does not preempt state law claims of “hot news” misappropriation, and to restrict or clarify the “fair use” defense to copyright infringement to exclude the types of activities engaged in by aggregators and other online sources, such as the routine copying and reposting of original content. The report is available online at <http://www.ftc.gov/opp/workshops/news/index.shtml>.

According to the report, supporters of a clearer, more easily enforced “hot news” doctrine are divided over whether federal law should provide a uniform nationwide standard or encourage development at the state common law level. Advocates of a uniform federal approach “are concerned that state law evolution cannot provide the clarity or uniformity required for interstate news media,” the report said, while proponents of state law development “worry that the uncertainty surrounding the preemption issue discourages some news organizations from filing state law hot news claims” and “argue that specific statutory hot news protections would likely be too rigid to deal efficiently with the rapid evolution of news media and markets.”

The FTC also reported that media attorneys and newspaper groups like the Newspaper Association of America had suggested that the “fair use” defense be limited or clarified. According to Section 107 of the Copyright Act, the limited use of another’s copyrighted work in news reporting or commentary on news reporting generally constitutes “fair use” and therefore does not infringe copyright. Under the U.S. Supreme Court’s decision in *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), to decide whether a use is “fair,” courts must consider the purpose of the use of copyrighted material, the nature of the copyrighted material, the “amount and substantiality of the portion used,” and the effect the use has on the market.

According to the staff report, “statutory amendment of fair use raises difficult questions about unintended consequences. News organizations themselves rely on fair use in multiple ways to support news reporting and commentary. Fair use also protects copying done for purposes other than news reporting, such as ‘criticism, comment, ... teaching ... scholarship, or research,’ subject to the balancing of the four factors.”

The report prompted some criticism among media commentators. Media critic Jeff Jarvis, in a May 29 post on his blog BuzzMachine, said the report was biased against digital and online media sources. “The FTC defines journalism as what newspapers do and aligns itself with protecting the old power structure of media,” Jarvis wrote. In a June 3 op-ed in the *New York Post*, Jarvis called the discussion of revisions to copyright law “most dangerous of all,” saying the FTC was considering “a doctrine of ‘proprietary facts,’” adding, “copyright law protects the presentation of news but no one owns facts—and if anyone did, you could be forbidden from sharing them. How does that serve free speech?”

Copyright

Federal Judge Reads DMCA to Favor Google, Service Providers

In a decision that could have sweeping implications for copyright law, a federal judge in New York ruled on June 23, 2010 in favor of Google, which owns YouTube, dismissing a \$1 billion lawsuit in which the film and television company Viacom alleged widespread copyright infringement by the popular video-sharing website.

The suit, filed in 2007 in the U.S. District Court for the Southern District of New York, accused Google of copyright infringement, citing tens of thousands of Viacom-produced videos that had been uploaded to YouTube, according to a June 23 story in *The New York Times*. Viacom's media holdings include cable networks MTV, VH1, Nickelodeon, Comedy Central, and movie studios Paramount Pictures and Dreamworks Pictures. (For more on the suit, see "Internet Updates: Popular Web Site YouTube Faces Challenges in U.S. and Abroad," in the Spring 2007 *Silha Bulletin*.) The lawsuit accused YouTube of "brazen disregard of the intellectual property laws," but Google maintained that YouTube was protected under the 1998 Digital Millennium Copyright Act's (DMCA) "safe harbor" provision, found at 17 U.S.C. § 512, which protects Internet service providers from liability when copyrighted material is uploaded by users, so long as the provider moves swiftly to remove contested materials when notified of the infringement. Viacom argued that Google's claim of protection under the "safe harbor" provision amounted to shifting the burden of identifying videos that violate copyright laws onto the victims of copyright infringement.

Moreover, Viacom argued that YouTube's implementation of systems designed to flag content that violates copyright only helped prove that the website could have done more to keep copyrighted material off its site, according to a June 24 Associated Press (AP) story. An early version of the flagging system was established in 2005, before the sale of YouTube to Google. After the sale, the system evolved from being community driven, with users identifying potentially infringing material, to a more technologically sophisticated system, dubbed "Content ID," which enabled the owners of copyrighted material to provide YouTube with reference files of material they own. YouTube then uses the reference files to filter and track illegal uploads to the website.

In his 30-page opinion granting summary judgment for Google, U.S. District Judge Louis Stanton wrote that although a jury could find that YouTube and Google had "general" awareness of copyright infringement, the companies could not be held liable for "knowledge of specific and identifiable infringements of individual items," adding that when YouTube received "specific notice that a particular item infringed a copyright, they swiftly removed it." *Viacom International, Inc. v. YouTube, Inc.*, 2010 U.S. Dist. LEXIS 62829 (S.D.N.Y. June 23, 2010)

In the ruling, Stanton wrote that Google successfully stayed within the bounds of the DMCA's "safe harbor" provision, identifying several key criteria of the provision that Google met. Although Viacom showed that Google was aware of YouTube's high volume of copyright-infringing content by presenting internal e-mails from Google that acknowledged the existence of the material, Stanton interpreted the DMCA to mean that, because of the sheer amount of material posted to YouTube, Google could only reasonably be expected to identify instances of copyright infringement with the assistance of the copyright holders—in this case, Viacom. Stanton wrote that Google also succeeded in promptly removing clips that had been identified as infringing, and banning users who repeatedly uploaded copyrighted material.

Some commentators hailed the decision, which represents one of the highest-profile judicial interpretations of the DMCA, as a significant milestone that could have major implications for companies that host user-generated content, like YouTube, and those that produce their own content. Ian Ballon, a lawyer at Greenberg Traurig LLP, who represents technology and entertainment companies, said in a June 22 *Wall Street Journal* article that the decision "drew a distinction between pirate sites that have been held liable for inducing people to infringe on copyright and legitimate service providers" like YouTube.

Google called the decision a victory "for the billions of people around the world who use the web to communicate and share experiences," according to a June 23 story in *The Wall Street Journal*. Kent Walker, Google's general counsel, said in a June 23 interview with *The New York Times* that the decision "will let a whole new generation of creators and artists share their work online," calling the decision "an affirmation of the emerging legal framework" that "ratifies the rules we have all been living under." In the June 24 AP story, David Sohn, a lawyer for the Center for Democracy and Technology, said, "Without this decision, user-generated content would dry up and the Internet would cease to be a participatory medium."

Others, however, had reservations about the precedent set by the decision. In a June 28 editorial, the *San Francisco Chronicle* criticized the ruling, arguing that stronger copyright protections are needed for creators of content in a digital age. "We can't expect people to create things for free," the editorial said, "unless we believe that the only people in our society who can be creative are already rich."

Viacom's lawyers said they plan to appeal the ruling. Michael Fricklas, Viacom's general counsel, wrote in a June 23 blog post on Viacom's website that copyright protection is essential to the survival of creative industry, alleging that YouTube built its

"We can't expect people to create things for free unless we believe that the only people in our society who can be creative are already rich."

— *San Francisco Chronicle* editorial

Viacom v. YouTube, continued on page 30

Free Speech

Turner Convicted for Online Threat against Federal Judges

Two bloggers whose inflammatory posts landed them in legal trouble have found little relief from federal prosecutors or courts.

On Aug. 13, 2010, a federal jury in New York City convicted conservative New Jersey blogger and Internet radio host Hal Turner of threatening to kill three federal judges. The charge against Turner arose from posts on his blog on June 2 and 3, 2009, in which he wrote that 7th Circuit judges William Bauer, Frank Easterbrook, and Richard Posner “deserved to be killed” after they upheld local handgun bans in *N.R.A. v. Chicago*, 567 F.3d 856 (7th Cir. 2009). Turner was arrested at his North Bergen, N.J. home on June 24, 2009 and charged under 18 U.S.C. § 115 with threatening to assault and murder the judges with intent to retaliate against them for performing official duties, according to a June 24, 2009 press release from the U.S. Attorney’s Office for the Northern District of Illinois.

The attorney’s office press release said Turner’s June 2009 posts declared “outrage” over the handgun ban ruling, announcing, “Let me be the first to say this plainly: These Judges deserve to be killed.” Turner posted photographs of the judges, their phone numbers, work addresses, a photo of the building in which they work, and a map of its location. His post also noted that the 7th Circuit Court of Appeals also decided the case of Matt Hale, a white-supremacist who was imprisoned after being convicted of soliciting the murder of U.S. District Judge Joan Lefkowitz in Chicago, whose mother and husband were later murdered by a gunman in her home. “Apparently,” Turner’s post stated, “the 7th U.S. Circuit court didn’t get the hint after those killings. It appears another lesson is needed. ... If they are allowed to get away with this by surviving, other judges will act the same way.”

The August 2010 trial was prosecutors’ third try. Juries deadlocked without a verdict in December 2009 and March 2010. (See “Blogger White Convicted; Two Mistrials for Turner” in the Winter/Spring 2010 issue of the *Silha Bulletin* and “Blogger Charged with Inciting Attacks on Judges, Lawmakers” in the Summer 2009 issue.) On August 13, *The New York Times* reported that in the third trial the jury convicted Turner after less than two hours of deliberation.

According to the *Times*, Turner had testified that his statement that judges were deserving of death constituted an expression of critical opinion, not a directive. However, the judges—all three of whom testified in the trial—said they felt threatened by the post. The Associated Press (AP) reported August 12 that Bauer called it “a threat of violence ... [which] suggested that the country would be better off if we were killed.” According to the *Times*, Easterbrook testified, “My reaction was that somebody was threatening to kill me.”

The AP reported that Turner’s defense attorney Peter Kirchheimer said in his opening statements

that Turner “thought [the post] was political trash talk. ... It was the same thing he’d done many times before, only this time he was arrested.”

Turner had also testified that he was a paid informant for the Federal Bureau of Investigation (FBI), assigned to gather information on extremists who might act on his incendiary remarks. According to the *Times*, the FBI said Turner’s tenure with the agency was erratic and he was eventually let go because of “serious control problems.”

The *Times* quoted an August 13 statement from Patrick J. Fitzgerald, the U.S. Attorney whose office filed the charges: “We are grateful that the jury saw these threats for what they were and rejected any notion that they were acceptable speech.” Turner faces a maximum sentence of 10 years in prison and a maximum fine of \$250,000.

Charge Reinstated against Blogger William White

On June 28, 2010, the 7th Circuit U.S. Court of Appeals reinstated a charge against blogger William White for soliciting violence against a juror. The U.S. District Court for the Northern District of Illinois dismissed the charge on July 21, 2009. (See “Blogger Acquitted of Soliciting Harm to Juror, Remains in Custody,” in the Summer 2009 issue of the *Silha Bulletin*.) The three-judge panel of the 7th Circuit included Judges Posner, Joel Flaum, and Ann Claire Williams.

White was indicted on Feb. 10, 2009 for violating 18 U.S.C. § 373 by “soliciting a crime of violence” against the foreman of the federal jury—listed in court records as “Juror A”—that convicted Matt Hale in 2004. In 2005, White posted that “everyone associated with the Matt Hale trial has deserved assassination for a long time.” On Sept. 11 and 12, 2008, White posted the foreman’s previously unpublished name, photograph, home address, and phone number on his website, Overthrow.com.

In reversing the lower court, the 7th Circuit ruled in an unsigned opinion that the “potential First Amendment concern” identified by the district court “is addressed by the requirement of proof beyond a reasonable doubt at trial, not by a dismissal at the indictment stage.” The Court cited several cases, including the *Hale* case itself, to illustrate that section 373 indictments have been upheld even when the threats were not specific and no “further actions” were taken by “either the solicitor or the solicitee.” *United States v. White*, No. 09-2916, 2010 U.S. App. LEXIS 13166 (June 28, 2010)

The Court ruled that the First Amendment analysis turns on White’s intent in posting the information about the juror. “If White’s intent in posting Juror A’s personal information was to request that one of his readers harm Juror A, then the crime of solicitation would be complete. No act needed to follow, and no harm needed to befall Juror A.”

The Court concluded that the government’s factual

“We are grateful that the jury saw these threats for what they were and rejected any notion that they were acceptable speech.”

– Patrick J. Fitzgerald
U.S. Attorney,
Northern District of
Illinois

Turner and White, *continued from page 29*

allegations supported the indictment. “The question of White’s intent and the inferences that can be drawn from the facts are for a jury to decide, as the indictment is adequate to charge the crime of solicitation. The indictment is legally sufficient and should not have been dismissed.”

White is currently in federal prison in Beckley, W.Va. On Dec. 16, 2009 he was sentenced to 30 months in prison on an unrelated conviction of three counts of criminal threats and intimidation via the Internet, phone, and mail.

— PATRICK FILE
SILHA FELLOW AND *BULLETIN* EDITOR

Viacom v. YouTube, *continued from page 28*

fortune and success on pirated material before the site was sold to Google for \$1.65 billion in 2006. “YouTube and Google stole hundreds of thousands of video clips from artists and content creators, including Viacom, building a substantial business that was sold for billions of dollars,” Fricklas said in the June 23 story in *The New York Times*. In a statement to the AP on June 24, Fricklas added that “it is and should be illegal for companies to build their businesses with creative material they have stolen from others.”

— RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

Hot News and Copyright, *continued from page 27*

In a June 28 BuzzMachine post titled “There is no hot news. All news is hot news,” Jarvis called the doctrine “ridiculously obsolete,” and said “hot news limitations should be repellant to journalists, even desperate ones, because every journalist builds on the facts revealed by others. It should further be repugnant to them as it constitutes a form of court-supervised prior restraint. Hot news restrictions would be suicidal to news organizations—even though they foolishly think it would protect them—because it would restrict everyone’s ability to spread the news via links and send journalists audience [sic]. Hot news should worry every citizen because the free flow of information is vital to a democracy.”

At the June 15 FTC hearing, Gannett Co. Vice President and Senior Associate General Counsel Barbara Wall said Gannett “come[s] down somewhere in the middle from the local news gathering perspective. Our product is unique and we want to be able to protect it. That said, we believe there’s value in ... the First Amendment interests that need to be protected in any sort of fair use environment. And we also see in the Internet age value in what the journalists call curating the Web for our audiences.”

Wall said it was “premature” to propose a federal “hot news” statute. “I don’t think it’s time or even necessary at this point for the federal government to step in and say, ‘We need to legislate hot news,’” Wall said. “I do think there could be unintended consequences for free speech that those of us who care about journalism should be afraid of.”

— PATRICK FILE
SILHA FELLOW AND *BULLETIN* EDITOR

CONTACT INFORMATION:

SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW
SCHOOL OF JOURNALISM AND MASS COMMUNICATION
UNIVERSITY OF MINNESOTA
111 MURPHY HALL
206 CHURCH ST. SE
MINNEAPOLIS, MN 55455

PHONE: (612) 625-3421/FAX: (612) 626-8012/E-MAIL: SILHA@UMN.EDU
INTERNET: WWW.SILHA.UMN.EDU

Student Media

Update: Settlement Reached in Student Paper Search and Seizure

On May 31, 2010, the Commonwealth of Virginia and James Madison University's (JMU) student newspaper reached a settlement in a six-week dispute over access to hundreds of photos of a campus riot in April. Using a search warrant, the Commonwealth's Attorney had seized the photos in a raid on April 16.

As part of the settlement agreement, *The Breeze* student newspaper voluntarily turned over 20 photos after prosecutors convinced the paper's staff and attorney that it legitimately needed them to prosecute crimes. For its part, the Commonwealth agreed to reimburse the paper \$10,000 in legal expenses, and the Commonwealth's Attorney apologized to the paper for the incident, pledging to use subpoenas rather than search warrants in similar cases in the future. (For more on the initial newsroom raid, see "Police Raid Blogger's Home, College Paper's Newsroom," in the Winter/Spring 2010 issue of the *Silha Bulletin*.)

The incident that gave rise to the legal battle was Springfest, an April 11 block party on JMU's campus that attracted 8,000 attendees. A drunken riot erupted, including multiple acts of violence, physical assaults involving thrown beer bottles, and willful property damage like the burning of couches. Suppressing the riot required 200 police officers with riot gear and tear gas, according to an April 12 story in *The Breeze*. According to an April 13 report from the website *Uwire*, rioters also threw beer bottles and trash at police.

Staff photographers from *The Breeze* snapped 962 photos of the riot, which were then stored on newsroom computer hard drives. On April 16, five days after Springfest, Commonwealth's Attorney Marsha Garst phoned *The Breeze*'s Editor-in-Chief, Katie Thisdell. Garst explained that she was prosecuting some people arrested in the riot, and asked Thisdell to voluntarily turn over all 962 photos to her office. Garst told Thisdell that some of the photos could provide evidence of crimes her office was investigating. Thisdell declined to disclose the photos, according to an April 16 story in *The Breeze*. Thisdell said she believed that the Federal Privacy Protection Act (PPA), 42 U.S.C. § 2000aa, prevented Garst from compelling disclosure of the photos. The PPA states that, with certain exceptions, the government may not execute a search warrant for "documentary materials" when they are in the possession of a person who intends to disseminate them to the public. The statute's definition of "documentary materials" includes photographs.

Later that day, Garst obtained a search warrant for *The Breeze*'s newsroom, and executed it personally, along with several campus and Commonwealth police officers. Thisdell told the *Silha Bulletin* on June 25. Garst told Thisdell that if she did not produce the photos on disk, Garst's office would seize all computers in the paper's office and extract the photos. Thisdell chose to comply with the warrant, she said, to prevent the paper from halting operations due to lack of equipment.

The weekend after the seizure, Thisdell said she

contacted the Student Press Law Center (SPLC), which put *The Breeze* in touch with the attorneys who helped to negotiate the eventual settlement. On April 19, the Society of Professional Journalists (SPJ) sent a letter to Garst expressing outrage at the seizure. The letter said that SPJ acknowledged "the need to investigate an out-of-control public event where crimes may have been committed," but argued that "there are more appropriate tools available to law enforcement than to bully the student newspaper."

The parties in the dispute reached the settlement agreement on May 31. According to a June 1 story in *The Breeze*, under the agreement, "20 photos ... have been released to the Commonwealth's Attorney's office. The remaining 942 photos initially seized will be returned to *The Breeze* and not released to authorities." The 20 photos were also posted on *The Breeze*'s website for public viewing on May 31, according to a June 1 post on *The Washington Post* blog Campus Overload. According to *The Breeze*, the 20 photos were turned over because Garst "showed that she had exhausted all other sources and *The Breeze*'s photographs were the only sources of some information" needed to prosecute eight specific instances of violence including vandalism, destruction of property, and assault.

Virginia does not have a statutory shield law for journalists, but the state courts have recognized a qualified common law privilege. According to *The Breeze*, the paper's attorney, Seth Berlin, said the decision to release the 20 photos is consistent with Virginia law. Berlin said the paper decided to turn over the 20 photos voluntarily rather than request a subpoena because *The Breeze* was able "to get the Commonwealth's attorney to narrow down her target from every photo to only a few ... [and] because a subpoena might have led to possibly more photos being turned over."

According to a June 2 story by The Associated Press, the Commonwealth will pay \$10,000 to *The Breeze* to cover expenses the paper incurred fighting the seizure. In addition to the monetary settlement and the agreement regarding the photos themselves, Garst apologized in a statement for the "fear and concern that [she] caused *The Breeze* and its staff," as a result of the initial seizure, and pledged to use subpoenas rather than search warrants to obtain similar information from journalists in the future, unless the Commonwealth was faced with an "imminent need to prevent ... loss of life or the threat of imminent bodily injury."

Reactions to the settlement were positive on both sides of the dispute. Berlin told the *Waynesboro News-Virginian* that he commended Garst for apologizing, and Thisdell told *The Breeze* that she is "pleased we were able to reach this settlement." In her statement regarding the agreement, Garst said the dispute "enhanced [her] understanding and re-enforced the role of a free press in our democracy."

— GEOFF PIPOLY

SILHA RESEARCH ASSISTANT

Under the agreement, the state pledged to use subpoenas rather than search warrants to obtain similar information from journalists in the future, unless faced with an "imminent need to prevent ... loss of life or the threat of imminent bodily injury."

Media Ethics

A Reporter, a General, and the Ethics of Covering the War

In the wake of a controversial article in *Rolling Stone* that led to the dismissal of Gen. Stanley McChrystal, a debate emerged within the journalistic community about the unofficial rules that bind beat reporters, and the potential chilling effect the scandal may have on media coverage of the military.

On June 22, 2010, *Rolling Stone* published a feature on McChrystal, the top U.S. military commander in Afghanistan, titled “The Runaway General,” in which McChrystal and his aides were quoted being openly critical of civilian officials, including the president, the vice president, White House aides and a U.S. ambassador. The story, written by freelance reporter Michael Hastings, broke when *Rolling Stone* provided an advance copy of the story to The Associated Press (AP) on June 21. The AP published a story online highlighting McChrystal’s criticism of U.S. Ambassador to Afghanistan Karl Eikenberry. Early the following day, June 22, *Time* and Politico.com posted the full *Rolling Stone* piece to their websites, shortly before *Rolling Stone* itself published the story online.

According to the *Rolling Stone* story, McChrystal said he felt “betrayed” by a leaked cable from Eikenberry in which Eikenberry was critical of McChrystal’s strategy in Afghanistan and dismissive of Afghan President Hamid Karzai. “Here’s one that covers his flank for the history books,” McChrystal said in the *Rolling Stone* profile. “Now if we fail, they can say, ‘I told you so.’” In an opening anecdote, Hastings also reported on McChrystal and his aides’ disdain for a state dinner with a French minister. In an exchange with McChrystal, another aide was quoted as jokingly mishearing Vice President Joe Biden’s name as “Bite Me.”

On June 22, McChrystal offered a public apology for his statements in the piece, according to a June 22 post on Politico.com, saying they were “a mistake reflecting poor judgment and should never have happened.” On June 25, an ABC news broadcast quoted an unnamed senior military official as saying that Hastings broke “ground rules” established for the profile of McChrystal by publishing comments that took place during what McChrystal and his aides thought were off-the-record periods. On June 26, *The Washington Post* quoted “officials close to McChrystal” who said that Hastings quoted the general in situations that were understood to be off the record.

President Barack Obama fired McChrystal on June 23 after a brief meeting in the Oval Office, replacing him with Gen. David Petraeus, according to a June 23 story in *The New York Times*. In a statement to reporters shortly afterward, Obama said it was necessary to fire McChrystal to maintain unity in the war effort, emphasizing that the shift was a change in personnel, not policy.

In the aftermath of McChrystal’s dismissal and amid high-profile news coverage of the *Rolling Stone* feature, news media critics and commentators

theorized that Hastings’ identity as a freelance journalist, rather than as a beat reporter, enabled him to publish such a blunt and damning piece about a high-ranking general. In a June 25 edition of the WNYC radio program “On the Media,” host Bob Garfield asked Jamie McIntyre, former senior Pentagon correspondent for CNN, to describe the differences between a beat reporter who covers defense and a reporter who “just parachutes in for one story.”

“Well, the difference is the sort of one-off reporter doesn’t need to worry about whether he’s going to get future access or not,” McIntyre said. “Whereas the beat reporters, like I was at CNN, I needed access If you do what Michael Hastings does, they’re never going to talk to him again.” McIntyre explained the politics of cultivating ongoing relationships between reporters and military officials: “[T]he dirty little secret is yeah, we informally agree not to report a lot of things that we see and hear, some of it for legitimate security reasons, and some of it because it could just be embarrassing. And the tradeoff is we get a continued relationship with these people and we can get information.”

In a July 2 post on the Full Court Press blog of the Sidney Hillman Foundation, which supports and honors investigative journalism, Charles Kaiser compared the *Rolling Stone* McChrystal profile to other mainstream news outlets’ coverage of McChrystal, calling the other profiles “worshipful,” or “puff pieces.” The problem, Kaiser wrote, is that permanent Pentagon beat reporters wrote nearly all of the previous pieces on the general. Beat reporters “know from experience that anything resembling a tough article can make it a great deal more difficult for them to do their job in the future, if their Pentagon sources stop talking to them,” Kaiser wrote.

Others criticized Hastings for what they saw as a breach of journalistic ethics. *New York Times* columnist David Brooks, in a June 24 column, chalked the scandal up to a culture of overexposure and widespread “kvetching,” criticizing Hastings for featuring the general’s criticisms so prominently. “By putting the kvetching in the magazine, the reporter essentially took run-of-the-mill complaining and turned it into a direct challenge to presidential authority,” Brooks wrote. “He took a successful general and made it impossible for President Obama to retain him.” On June 25, Hastings responded via Twitter that Brooks’ criticisms amounted to an exhortation to young reporters not to report on what they observe for fear that it “might upset the powerful.”

In a June 27 appearance on CNN’s “Reliable Sources” program, CBS News Chief Foreign Correspondent Lara Logan criticized Hastings, who had appeared earlier in the program, for what she said was his deceitfulness in coaxing sources into revealing their real views to him. “What I find ... the most telling thing about what Michael Hastings said

McChrystal and Hastings, continued on page 33

“[T]he dirty little secret is yeah, we informally agree not to report a lot of things that we see and hear, some of it for legitimate security reasons, and some of it because it could just be embarrassing. And the tradeoff is we get a continued relationship with these people and we can get information.”

– Jamie McIntyre
Former senior
Pentagon
correspondent, CNN

in your interview is that he talked about his manner as pretending to build an illusion of trust and, you know, he's laid out there what his game is," Logan told host Howard Kurtz. "That is exactly the kind of damaging type of attitude that makes it difficult for reporters who are genuine about what they do I don't go around in my personal life pretending to be one thing and then being something else. I mean, I find it egregious that anyone would do that in their professional life."

In a June 28 post on his RollingStone.com blog, political writer Matt Taibbi defended Hastings, writing that Logan is "like pretty much every other 'reputable' journalist in this country, in that she suffers from a profound confusion about who she's supposed to be working for" and is more interested in retaining relationships with high-profile sources than reporting the truth. "Meanwhile, the people who don't have the resources to find out the truth ... your readers/viewers, you're supposed to be working for them—and they're not getting your help," Taibbi wrote.

Hastings responded to the military's allegations that he broke unwritten journalistic "ground rules" in a July 29 story on AOL's Daily Finance. "They were lying," Hastings said of the unnamed sources who accused him of reporting during situations that were understood to be off the record. "What they said to *The Washington Post*, and, I think, to the *Army Times*, is fiction. And they know that." Hastings also dismissed the idea that he took advantage of his subjects' trust or naiveté as a "fake controversy."

On July 2, Defense Secretary Robert Gates issued new orders clarifying the relationship between news media and the military. In a three-page memo, first reported by *The New York Times*, which obtained a leaked copy, Gates insisted that the military must be open and transparent, but said he was concerned that it had grown "lax" in its dealings with the media. The memo directed high-ranking Pentagon and military leaders to clear interviews with the Defense Department's public affairs office "prior to interviews or any other means of media and public engagement with possible national or international implications," according to the July 2 *Times* story.

Journalists expressed fear that military officials would become warier and less accessible to reporters, according to a July 6 story published by Yahoo News. ABC News Chief Foreign Correspondent Martha Raddatz said the order worried her. "When you add a layer like that, and when we're in the field and they have to get clearance from someone else, I think it does make it more difficult," Raddatz said. NBC News Chief Foreign Correspondent Richard Engel

described a "media blackout" that immediately followed the publication of the *Rolling Stone* piece, which Engel said forbade soldiers to discuss the McChrystal profile. Further, Engel said, the new rules are likely to produce a chilling effect that is widely felt among reporters. "General officers may be more reluctant to openly express their opinions if they know the Pentagon is tracking every interview," Engel said.

The Pentagon responded to criticism from reporters over the new rules by acknowledging that the rules were confusing, but insisting that the rules were not intended to inhibit press access, according to a July 6 Reuters story. "It will not have a chilling effect. It will not be an iron curtain. It will not change substantially how people deal with the media," said Pentagon spokesman Col. David Lapan.

On July 3, David Wood, a military correspondent and columnist for *Politics Daily*, wrote that the Gates memo would unnecessarily complicate military reporting. For example, Wood wrote, the new rules specify that "'all interviews with service members be on the record.' ... The problem, of course, is the definition of 'interview.' If a guy on the next seat in the latrine complains about his weapon misfiring, is that an interview? If you go on shore leave with [a] boisterous gang of Marines and end up in a drunken brawl in which allies are loudly insulted, is that off the record?"

However, Wood also wrote that Hastings overstepped the bounds of propriety in his reporting for the *Rolling Stone* piece, writing that he would not have included the controversial McChrystal quotes that led to the general's dismissal. "If McChrystal and his staff had deep and bitter disagreements with the White House, Hastings should have written that story," Wood wrote. "But he chose to go with the trash-talk as the more sensational story."

On August 4, the AP reported that Hastings was denied permission to embed with U.S. troops in Afghanistan. Lapan said the denial was "fairly rare," but added that the decision to allow a reporter to embed with troops is subjective.

"There is no right to embed," Lapan said. "It is a choice made between units and individual reporters, and a key element of an embed is having trust that the individuals are going to abide by the ground rules. So in that instance the command in Afghanistan decided there wasn't the trust requisite and denied this request."

– RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

Media Ethics

GLBT Magazine Walks Perilous Ethical Line by ‘Outing’ Pastor

A Twin Cities magazine’s “outing” of a controversial anti-gay rights pastor in June 2010 focused national attention on the issue of whether, when, and how the news media should report on hypocrisy among outspoken critics of gay rights.

On June 18, 2010, *Lavender* magazine, a publication focused on the gay, lesbian, bisexual, and transgendered (GLBT) community in the Minneapolis/St. Paul area, published a story “outing” Tom Brock, a pastor at Minneapolis’ Hope Lutheran Church, revealing that he attended a local anonymous support group for gay men “struggling with chastity.” In addition to preaching at Hope Lutheran, Brock hosts a radio program on KKMS AM 980, called “The Pastor’s Study,” where he has spoken out in opposition to same-sex marriage, and was a vocal opponent of the Evangelical Lutheran Church in America’s 2009 decision to relax its rules on allowing gays to serve as clergy.

The cover of the June 18 issue of *Lavender* featured a photo of Brock accompanied by the headline “Anti-Gay Lutheran Pastor Protests Too Much.” The cover story revealed that reporter John Townsend had clandestinely joined a Catholic support group for “gay men struggling with chastity” that Brock attended in order to determine the truth about Brock’s sexuality. *Lavender* reported that the group is operated by an organization called Faith in Action, which it called “Minnesota’s official arm of the global Catholic gay-chastity-maintenance organization called Courage.” According to *Lavender*, Courage describes itself as a “twelve-step style” program, where membership is meant to remain secret as the men meet and discuss their faith and struggles with sexuality. The article detailed Brock’s behavior and comments in the meetings, as well as his admission that on a preaching mission in Slovakia he “fell into temptation.”

Townsend explained in the article that although “virtually everyone holds privacy sacred” in GLBT activism, “the exception is if someone in a public position of political, social, or theological influence engages in homosexual or transgender activity while at the same time denouncing the basic civil rights of GLBT citizens.” The article is available online at <http://www.lavendermagazine.com/this-issue/featured-article/antigay-lutheran-pastor-protests-too-much/>.

Within days of the article’s publication, Townsend’s ethics and those of *Lavender* Media President and CEO Stephen Rocheford were the focus of criticism. The Minneapolis *Star Tribune* reported on June 23 that Townsend’s story had been widely reported on by GLBT websites nationwide, with online commenters alternately championing and condemning the reporting. Michael R. Triplett, of RE:ACT, the official blog of the National Lesbian and Gay Journalists’ Association, was quoted in the *Star Tribune* story as saying he found the ethics of Townsend’s reporting “suspect.”

In a June 22 post, MinnPost.com media blogger David Brauer observed that “not everyone in the gay community thinks the ends justified *Lavender*’s

means.” According to Brauer, the report could have a broader “chilling effect” on gays who go to support groups for chemical and other dependencies. Brauer quoted Twin Cities publicist and former journalist Karl Reichert: “people go to these programs and trust they are truly anonymous. As someone who’s participated in a support group, it’s not fair to anyone in the group” to betray that trust.

Pastor Tom Parrish, Brock’s supervisor at Hope Lutheran Church, lambasted *Lavender*, telling Brauer “there are no ethics for them To take on a public figure publicly, we expect that—Tom and I have gone through that before. But they’re killing a [12-step] process that has worked for 100 years. I think it’s criminal, and I can’t rationalize it in my mind.”

In a discussion on the Twin Cities Public Television (TPT) program “Almanac” on June 9, Rocheford said that the infiltration of the support group was acceptable because it is not a real 12-step program. In the June 23 *Star Tribune* story, Rocheford called the group “a Catholic perversion of an honest 12-step program.”

In the June 23 *Star Tribune* story, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, questioned *Lavender*’s approach to getting the story. “I’m a believer that the use of undercover reporting should be reserved only for the most important stories that you can’t get any other way,” she said. “Whenever you go undercover, you raise the question with the public: If you were prepared to misrepresent yourself to get the story, how can we be sure that the story is accurate?” Kirtley, also appearing on “Almanac” with Rocheford, called the controversy “a classic situation of means and ends,” adding, “whether it was an appropriate story to report—I don’t think there’s a lot of debate about that. It was the way it was obtained” that was ethically problematic.

On “Almanac,” Rocheford asserted that the approach was justified because Brock is a public figure. “We’re only interested in a public figure who makes his living attacking the gay community,” Rocheford said. Rocheford told the *Star Tribune* “we have a policy here that we don’t ‘out’ people, with one exception: public figures who make [anti-gay] pronouncements and then turn out to be homosexuals.”

Townsend responded to critics in a July 5 *Star Tribune* “counterpoint” piece explaining his motivations, methods, and a previous investigation into the Faith in Action-sponsored Courage group to which Brock belonged. “Faith In Action participants are required to refer to their same sex attraction as a ‘disorder,’” Townsend wrote, adding that homosexuality has not been classified as a mental illness since 1973. Townsend wrote that although the *Star Tribune* had described the support group as a “therapy group,” no therapist was present when he attended. Townsend also wrote that he had received tips that other members of the group had said they felt psychologically abused and considered suicide. Such groups are dangerous, Townsend asserted, stating that, to break the story

Lavender, continued on page 35

“We have a policy here that we don’t ‘out’ people, with one exception: public figures who make [anti-gay] pronouncements and then turn out to be homosexuals.”

– Stephen Rocheford
Lavender Media
President and CEO

Media Ethics

Robinson Joins Campaign; Critics Claim Conflict of Interest

After 20 years at Fox affiliate KMSP (Fox 9), Twin Cities news anchor Robyne Robinson announced her retirement from broadcast journalism on May 11, 2010, shortly before being named gubernatorial candidate Matt Entenza's running mate for lieutenant governor on May 27. The timing of Robinson's departure, as well as Fox 9's decision to allow her to remain on the air briefly without acknowledging the offer from the Entenza campaign, prompted criticism of both Robinson and her employer over a potential conflict of interest.

Robinson announced on air on May 11 that she would leave her position as an anchor of Fox 9's evening broadcast, "News at 9," on May 26, citing her growing jewelry business, ROX Minneapolis, as the impetus behind her decision. By Monday, May 24, local media were reporting that Robinson was considering running on the gubernatorial ticket with Democrat Farmer-Labor (DFL) candidate Entenza, according to a May 25 post on the Minneapolis/St. Paul *City Pages* blog, *The Blotter*. By Monday afternoon, Robinson confirmed rumors that Entenza's campaign had offered her the job, but said she had not made a decision, according to a May 24 story in the Minneapolis *Star Tribune*. A May 24 post on Fox 9's website mentioned that Robinson was considering Entenza's offer to run for lieutenant governor. However, that evening, Fox 9's 5 p.m. news broadcast failed to report the offer, even as Robinson's co-anchor, Jeff Passolt, presented a story about other gubernatorial candidates' choices for running mates. During a broadcast the following night, on May 25, Passolt mentioned the offer from the Entenza campaign. On May 27, the day after Robinson's final night as an anchor at Fox 9, Entenza made a formal announcement via Twitter that he had chosen Robinson as his running mate. Entenza dropped out of the race on August 10, after taking third in the state's DFL primary.

In a May 25 post on the Minnesota news website MinnPost.com, David Brauer commented on Robinson's confirmation that she had been offered the position, noting that Fox 9's contracts forbid journalists to become involved in politics. In a May 25 story broadcast by Minneapolis television station WCCO, Jane Kirtley, the director of the Silha Center and professor of media ethics and law at the University of Minnesota, said that if Robinson's plan was to become Entenza's running mate, she should have left Fox 9 immediately. "I know she is scheduled to leave, but she should leave right now as an ethical matter," Kirtley said. WCCO quoted a Fox spokesperson in New York speaking on behalf of Fox 9 who said, "there is a clear difference between being invited to be a candidate and announcing that you are a candidate."

Brauer called the decision "the very definition of a conflict of interest," identifying ethical mistakes Fox 9 made in its handling of the story before Robinson's final night anchoring the news. "Robinson should be sidelined as long as she's a political newsmaker in play," Brauer wrote. He also wrote that Fox 9's political reporter, Jeff Goldberg, should have pressed Robinson and the Entenza campaign for comment on early reports that she had been offered the position, and that Fox 9 should have been clearer and more straightforward in its coverage of all lieutenant governor choices.

In a May 26 post on the *Star Tribune* blog Artcetera, contributor Neal Justin wrote that, by aligning herself with Entenza, Robinson "showed her political colors as a Democrat." Justin also wrote that Robinson undermined her credibility as a journalist by blurring the line between journalist and political campaigner in interviews she gave to other Twin Cities media prior to her departure. "The minute she said openly that she'd think about it should have been the minute Fox officials thanked her for her service and showed her the door," Justin wrote.

Several media outlets, including *City Pages*, MinnPost, and the *Star Tribune*, identified another case that may have created a conflict of interest for Robinson. A March 29 story published online by *City Pages* said Robinson had designed jewelry for musician Beyonce Knowles. The story was written by Robinson's publicist, Kate Iverson, but ran on the *City Pages* website without acknowledgment of Robinson and Iverson's relationship. After the story attracted criticism, *City Pages* added a disclaimer that disclosed Iverson's relationship with Robinson: "It came to light after this post ran that the author is Robinson's publicist, but we are leaving the post online since it's an informational interview and the disclosure has been made."

In a May 25 story on *The Blotter*, Kelly McBride, a journalism ethics expert at the Poynter Institute, said Fox 9 should have hastened Robinson's retirement once it learned she was considering Entenza's offer. "While she's making the decision, take her off the air, especially since she's publicly known," McBride said.

— RUTH DEFOSTER
SILHA RESEARCH ASSISTANT

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about Brock, "becoming an embedded whistleblower was the only option left."

On August 2, The Associated Press (AP) reported that Brock had returned to work at Hope Lutheran Church. According to the AP, a church investigation found that although Brock admitted to having homosexual urges, task force members "could find no evidence Brock ever had sex with men." Parrish would not share the full report, but "confirmed that Brock sought counseling and enlisted another minister as an 'accountability partner' with whom he frequently discussed his struggles." The AP reported that Brock said he will step down as senior pastor at Hope Lutheran, but plans to continue ministering "on a national level" with a "new message: you can have this struggle with same-sex attraction, say no to it, and still follow Christ."

— SARA CANNON
SILHA CENTER STAFF

"The minute she said openly that she'd think about [joining the Entenza campaign] should have been the minute Fox officials thanked her for her service and showed her the door."

— Neal Justin
Contributor, *Star Tribune* Artcetera blog

Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612) 625-3421

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Silha Events

Silha Lecturer Paul Smith to Discuss Efforts to Ban Violent Video Games

In *Schwarzenegger v. Entertainment Merchants Association*, the U.S. Supreme Court will address whether the First Amendment bars the state of California from restricting the sale of violent video games to minors. This year's Silha Lecturer, Paul Smith, will argue on behalf of the video game dealers' group in that case. Smith's lecture, titled "Not Child's Play: The Misguided Effort to Regulate Violent Video Games" will take place on Monday, Oct. 18, 2010.

The 9th Circuit U.S. Court of Appeals struck down the California statute in February 2009, ruling that it was a constitutionally invalid content-based restriction on speech. The 9th Circuit ruling is *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, (9th Cir. 2009). At the 25th Annual Silha Lecture, Smith will discuss the constitutional challenges to regulating the media that minors consume and the case law precedent that could influence the future of those regulations.

Paul Smith is a partner in Jenner & Block's Washington, D.C. office and a member of the firm's Policy Committee. He is also Chair of the firm's Appellate and Supreme Court, Creative Content, and First Amendment practices. Smith has had an active Supreme Court practice for many years, making oral arguments in 13 cases, including *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. American Library Ass'n*, 539 U.S. 194 (2003). Smith also represents various clients in trial and appellate cases involving commercial and telecommunications issues, the First Amendment, intellectual property, and election law.

Smith graduated from Amherst College and Yale Law School, and clerked for Supreme Court Justice Lewis Powell. In 2008, *Legal Times* listed him as one of 30 "Champions" of the past 30 years in Washington, D.C., honoring attorneys who uphold the profession's core values of public duty and client service. In 2010, the *National Law Journal* named him one of the decade's 40 most influential lawyers.

The Silha Lecture begins at 7:00 p.m. in Cowles Auditorium at the Hubert H. Humphrey Center on the West Bank Campus of the University of Minnesota in Minneapolis, and will include an opportunity for audience Q&A. The event is free and open to the public. No reservations or tickets are required.

The Silha Center is based at the School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities, including the 25th annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

— SARA CANNON
SILHA CENTER STAFF