SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

Bulletin

Volume 14, Number 4 Summer 2009

Inside this Issue

SCHOOL OF JOURNALISM & MASS COMMUNICATION
COLLEGE OF LIBERAL ARTS
UNIVERSITY OF MINNESOTA

Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts

Subpoenas involving anonymous online speakers are testing the limits of the journalist's privilege and state shield laws, while courts across the country continue to develop standards for when anonymous speakers should be unmasked.

News Media and Anonymous Web Site Commenters

News organizations in several states have fought to keep Web site users' identities concealed from government officials and trial courts in criminal and civil matters.

On May 15, 2009, a judge in Illinois' 3rd Judicial Circuit declined to quash a subpoena to *The Alton Telegraph* issued by law enforcement authorities investigating the murder of a child. The subpoena sought the names, addresses, and IP addresses of five individuals who had posted comments on a story detailing the arrest of a suspect. According to Judge Richard Tognarelli's order, some of the comments accused the suspect of a history of child abuse and arson.

The Telegraph moved to quash the subpoena in September 2008, arguing that the Illinois reporter shield law, 735 Ill. Comp. Stat. 5/8-901 to 909, protects the identities of the commenters as "sources" of information. It argued that, "in the digital age," receiving information via an anonymous online commenter "is no different from anonymous tips provided to newspaper reporters telephonically or in written form." Moreover, the newspaper argued that law enforcement failed to meet the shield law's requirement that "all other available sources of information have been exhausted and … disclosure of the information sought is essential to the protection of the public interest involved."

Tognarelli disagreed with *The Telegraph*, however, ruling in *Illinois v. Alton Telegraph*, 08-MR-548 (Ill. Cir. Ct. Madison Co. May 15, 2009), that the five commenters were different from the traditional anonymous sources covered by the law. Tognarelli wrote that because the commenters had posted their comments after the article was published, they could not be considered "sources" under the Illinois shield law. "It is clear that the reporter did not use any information from the [commenters] in researching, investigating, or writing the article," Tognarelli wrote. "Comments were … made between various [commenters], between themselves, without comment, input or discussion from the reporter. It would not appear that the [commenters] were 'sources' for the Telegraph news article."

Tognarelli ruled that the state had met its burden in showing it had exhausted "all other available sources of information," writing that the state's investigation had been "thorough and comprehensive," and that no other alternatives apparently existed for learning about the suspect's alleged history of child abuse.

In balancing *The Telegraph*'s interest in protecting the anonymity of its commenters and the state's interest in "prosecuting someone who has allegedly murdered a child," Tognarelli ruled that "It cannot be said that forcing The Telegraph to reveal what information it has about voluntary, unsolicited online commentators, in this case, will make the public unwilling to express their opinions or to provide information during the course of a reporter's actual investigation, in future cases, nor does it deny the public the right to receive complete unfettered information in this and future instances." He upheld the subpoena for two of the five commenters, finding that the comments of the other three were not relevant enough to further the state's interest in its investigation. Tognarelli was reluctant to broadly discuss whether the shield law should apply in other online contexts, however, saying to do so "is for the legislature, not this Court, to determine."

The Illinois trial court decision was the first to find that a newspaper could not claim that a state shield law extended to the anonymous commenters on its Web site. Trial courts in Oregon, Montana, and Florida came to the opposite conclusion in fall 2008. (See "State Trial Courts Hold Shield Laws Protect Anonymous Reader Comments on Web Sites" in the Fall 2008 Silha *Bulletin*.)

Meanwhile, a ruling involving the identities of anonymous newspaper Web site commenters in a Texas murder trial went in favor of the *Abilene Reporter-News*.

According to the *Reporter-News* on June 19, defense lawyer David Thedford sought the identities of people who commented on the newspaper's online stories about the murder victim and a teenage suspect, in order to exclude the commenters from the jury pool for the underlying criminal trial, *Texas v. Martinez*, No. 17042-B (Tex. Dist. Ct. Taylor Co. 2009).

Online Anonymity, *continued on page 2*

Online Anonymity, *continued from page 1*

"People have an agenda, and some want to get on a jury," Thedford argued before District Court Judge K. Lee Hamilton in a June 19 hearing, according to the *Reporter-News*.

Ken Leggett, attorney for the newspaper, argued that the identity of the commenters is protected by the First Amendment and the new Texas shield law, Tex. Civ. Prac. & Rem. Code §§ 22.021-.027 and Tex. Code Crim. Proc. art. 38.11, which was passed by the state legislature and signed into law in May 2009.

According to the *Reporter-News*, Thedford argued that his client's right to a fair trial should "trump" the news organization's right to claim the statutory privilege. However, Hamilton agreed with Leggett, ruling that the law, which extends to "any confidential or nonconfidential unpublished information, document, or item obtained or prepared while acting as a journalist," or the source of that information, protected the identities of anonymous commenters on the *Reporter-News* Web site.

In Nevada, the *Las Vegas Review-Journal* agreed to turn over information on two anonymous commenters after federal prosecutors narrowed a subpoena issued to the newspaper.

Review-Journal Editor Thomas Mitchell reported in a June 7 column that a May 26 *Review-Journal* story covering an ongoing federal tax evasion trial had drawn over 100 comments, many of which were severely critical of the trial's prosecutor, Assistant U.S. Attorney J. Gregory Damm. The underlying tax evasion case, *United States v. Kahre*, No. 2:05-CR-121 (D. Nev. 2009) is before U.S. District Judge David Ezra.

Mitchell reported that the week after publishing the May 26 story, the *Review-Journal* received a federal grand jury subpoena signed by Damm, demanding every record pertaining to comments attached to the story, including "full name, date of birth, physical address, gender, ZIP code, password prompts, security questions, telephone numbers and other identifiers ... [including] the IP address." Mitchell also reported that the subpoena warned, "You have no obligation of secrecy concerning this subpoena; however, any such disclosure could obstruct and impede an ongoing criminal investigation."

In his June 7 column, Mitchell wrote that fighting the subpoena would be expensive and probably unsuccessful because there is no federal shield law, but the newspaper's attorneys would work with the government to limit the scope of the subpoena.

On June 17, the *Review-Journal* reported that U.S. attorneys had agreed to limit the subpoena, focusing on two anonymous commenters whose comments "might be construed as threatening to jurors or prosecutors." One of the comments called jury members "12 dummies" and said they "should be hung" if they found in favor of the government, and the other commenter wanted to bet "quatloos" – a form of money from the television show "Star Trek" – that one of the federal prosecutors would not reach his next birthday, the *Review-Journal* reported.

Mitchell said in the June 17 story that he was more satisfied with the narrower second subpoena, which was signed by Assistant U.S. Attorney Eric Johnson. "We want to be good citizens and do the proper thing," Mitchell said, adding, "We will give them what we have, which frankly isn't much, since most postings are anonymous."

In his earlier column, Mitchell had said that it is the *Review-Journal*'s policy not to require users to register in order to comment on stories on its web site. "A person could use a fictitious name and e-mail address, and most do. We have no addresses or phone numbers," Mitchell wrote.

The *Review-Journal* reported June 17 that the American Civil Liberties Union (ACLU) of Nevada would take up the case on behalf of the two commenters on the new subpoena, citing concerns over a chilling effect on future commenters. The ACLU is seeking a court order declaring the original subpoena unconstitutional, the *Review-Journal* reported, since the group does not consider the targeted comments "true threat[s]," which it said would show "a clear danger of imminent action."

> "It cannot be said that forcing The Telegraph to reveal what information it has about voluntary, unsolicited online commentators, in this case, will make the public unwilling to express their opinions or to provide information during the course of a reporter's actual investigation, in future cases, nor does it deny the public the right to receive complete unfettered information in this and future instances."
>
> – Judge Richard Tognarelli
> Illinois 3rd Judicial Circuit

Unmasking Other Anonymous Web Users

The District of Columbia's highest court released a decision on August 13 that established a new standard in the district for plaintiffs seeking to obtain the identities of anonymous Internet users.

In *Solers, Inc. v. Doe*, 2009 WL 2460862, 2009 D.C. App. LEXIS 342 (D.C. Aug. 13, 2009), a three-judge panel ruled that when a court is presented with a subpoena seeking the identity of an anonymous tort defendant, "the court should: (1) ensure that the plaintiff has adequately pleaded the elements of the ... claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit."

According to the judgment, the case arose from a complaint sent via the Web site of the Software & Information Industry Association (SIIA), a group that fights software piracy. The user submitted a complaint anonymously to the SIIA accusing Solers, a software development company, of using pirated computer programs. After an investigation, the SIIA declined to pursue a lawsuit against Solers, and Solers filed suit alleging defamation and "tortious interference with prospective advantageous business opportunities" against the anonymous tipster, called "John Doe" in the suit. Solers then issued a subpoena to the SIIA demanding that it reveal Doe's name, but the SIAA filed a motion to quash, citing the First Amendment and its policy of source confidentiality.

In establishing its new test for unmasking anonymous Internet users, the D.C. Court of Appeals relied heavily on the Delaware Supreme Court case *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) to help it settle the "tension between a speaker's desire for

Online Anonymity, *continued on page 4*

Supreme Court News

Critics, Commentators, and Cases Offer Few Glimpses at Sotomayor's Position on Media Law

New Justice Expresses Support for Cameras in the U.S. Supreme Court

Examinations of the career of recently confirmed U.S. Supreme Court Justice Sonia Sotomayor provide mixed answers to the question of whether she will be a friend or foe to journalists and media organizations in her interpretation of the First Amendment and freedom of information laws.

Sotomayor, who replaces retiring Justice David H. Souter, was sworn in on August 8 after being confirmed by the Senate in a 68 to 31 vote. She served as a District Court judge in New York City for six years before becoming a judge for the 2nd Circuit U.S. Court of Appeals in 1998.

A report issued May 27, 2009 by the Reporters Committee for Freedom of the Press (RCFP) noted that despite Sotomayor's vast experience as a judge, "it is surprising to see that no clear standard on First Amendment issues has emerged from her cases." Given the small number of her judicial opinions concerning media law, the RCFP concluded that "it is difficult to know how she will decide the cases that concern journalists." The RCFP's extensive report on Sotomayor's media law-related decisions can be found online at http://tinyurl.com/rcfp-sotomayorreport.

In a May 28, 2009 report for the First Amendment Center, resident scholar Ronald K.L. Collins described Sotomayor as a jurist who is "more concerned with context than with concepts, more attentive to discerning facts than with announcing new doctrine, and one who is more focused on applying law than developing it." Collins said Sotomayor's record gives reason to be cautiously optimistic about her stance on First Amendment values, and predicted that although her "First Amendment legacy is unlikely to be significant ... she might surprise us." Collins' report can be found online at http://www.firstamendmentcenter.org/commentary.aspx?id=21637.

Journalists are likely to be encouraged by Sotomayor's willingness to serve as what she described as a "new voice" in the Court's ongoing discussion about allowing cameras in its courtroom for oral arguments. Her view sharply contrasts with that of Souter, who once told a House appropriations subcommittee that "the day you see a camera come into our courtroom, it's going to roll over my dead body," according to a March 30, 1996 report in *The New York Times*.

During a July 14, 2009 Senate confirmation hearing, Sotomayor responded to a question from Sen. Herb Kohl (D-Wis.) by saying she has had "positive experiences with cameras" in courtrooms.

The Supreme Court announced that part of Sotomayor's oath-taking would be broadcast live from a Supreme Court conference room. An August 10 story in *The National Law Journal* said it was the first time an oath-taking had been broadcast live from the Court, although it was unclear from where the idea came. Previous oath-taking ceremonies have been broadcast, but they took place at the White House, not the Court.

In looking at her judicial record, media law experts praised Sotomayor's 2005 decision involving a prior restraint against the media in *United States v. Quattrone*, 402 F.3d 304 (2d Cir. 2005). Sotomayor, writing for a three-judge panel, struck down a district court gag order prohibiting journalists from publishing the names of prospective or selected jurors discussed in open court during the criminal retrial of former Credit Suisse First Boston executive Frank Quattrone. (See "Gag Order on Juror Names Ruled Unconstitutional," in the Winter 2005 issue of the Silha *Bulletin*.)

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, lauded Sotomayor's approach in *Quattrone* in a May 28, 2009 First Amendment Center report by resident scholar David L. Hudson Jr. "I would characterize this opinion as the textbook example or primer of how an appeals court should review a gag order, not only because I agreed with the outcome but also because her analytical process was just how an appeals court should do this," Kirtley said. "She very clearly looked at the Nebraska Press case [*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)] and applied it very thoughtfully and set out in a very straightforward way how she did that." Hudson's report can be found online at http://www.firstamendmentcenter.org/analysis.aspx?id=21629.

Meanwhile, three Sotomayor rulings on freedom of information have largely gone against disclosure. In *Dow Jones & Co. v. U.S. Dept. of Justice*, 880 F. Supp. 145 (S.D.N.Y. 1995), Sotomayor upheld the non-disclosure of investigative reports concerning the death of former deputy White House counsel Vincent W. Foster, but ordered the release of Foster's apparent suicide note, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

A few months later, however, at the request of Foster's wife and the Justice Department, Sotomayor vacated her order to release the note after *The Wall Street Journal* published an authentic copy it received from a confidential source. In *Dow Jones & Co. v. U.S. Dept. of Justice*, 907 F.Supp. 79 (S.D.N.Y. 1995), Sotomayor wrote that her order had been mooted because the newspaper had already "obtained and published exactly what their Complaint had sought" through different means.

The Silha Center filed an *amicus brief* with the U.S. Supreme Court in another case stemming from the Foster suicide. See *Brief for Silha Center for the Study of Media Ethics and Law as Amicus Curiae Supporting Respondent, Office of Independent Counsel v. Favish*, 541 U.S. 157 (2004) (No. 02-

Sotomayor, *continued on page 4*

"[Sotomayor's] First Amendment legacy is unlikely to be significant. Then again, she might surprise us."

– Ronald K.L. Collins
Scholar, First Amendment Center

Sotomayor, *continued from page 3*

954). In *Favish*, the Supreme Court prevented the release of death-scene photographs of Foster's body under FOIA exemption 7(C). Exemption 7(C) protects disclosure of "information compiled for law enforcement purposes" that could constitute "an unwarranted invasion of personal privacy." The brief is available online at http://www.silha.umn.edu/silharesources.html.

In two other FOIA rulings, Sotomayor invoked exemption 5, the work product exemption. In *Tigue v. U.S. Dept. of Justice*, 312 F.3d 70 (2d Cir. 2002), she affirmed a district court ruling that an internal memo written by an assistant U.S. Attorney detailing how the Internal Revenue Service (IRS) should conduct criminal tax investigations did not have to be released. In *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005), she found that the FBI and Justice Department were justified in withholding documents sought by the *Journal Inquirer* in Manchester, Conn., in the investigation of FBI special agents who had been accused of misrepresenting information on arrest warrant affidavits.

Sotomayor's rulings on restrictions on freedom of expression by schools and employers led some comentators to observe that the judge is not an ideologue.

In *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), Sotomayor joined in a decision that upheld the authority of a Connecticut public high school to prevent a student from running for senior class secretary after calling school administrators "douchebags" on her personal blog. (See "2nd Circuit Rules School Can Punish Teen for Online Criticism of Administrators" in the Summer 2008 issue of the Silha *Bulletin*.) The court decided that a student could be disciplined for speech that occurs off school grounds if the expressive conduct "would foreseeably create a risk of substantial disruption within the school environment."

Paul Smith, a former classmate of Sotomayor at Yale Law School, cited *Doninger* and *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), in which Sotomayor joined in a unanimous opinion that upheld the right of a 13-year-old Vermont middle school student to wear a T-shirt criticizing George W. Bush at school, to respond to critics who said she is a judge with a tendency to decide cases based on her personal ideology. In a May 31 report in *Newsday* of Long Island, N.Y., Smith said that the student speech cases demonstrate that Sotomayor "is a careful person who could go either way, but is focused on not just broad doctrine but how the doctrine applies to particular factual situations."

According to a June 7 report in *The Washington Post*, Scott Moss, a University of Colorado law professor, pointed to Sotomayor's dissent in *Pappas v. Giuliani*, 290 F.3d 143 (2d. Cir. 2002), as evidence that Sotomayor is not an ideologue. The majority in *Pappas* upheld the firing of a New York City police officer who anonymously distributed anti-black and anti-Semitic material on his own time. Sotomayor disagreed with her colleagues for entering "uncharted territory" in First Amendment decisions. She found the speech "patently offensive, hateful and insulting," but she advised against glossing over settled constitutional freedoms because the court was "confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated."

Moss said, "If she were really a judge who ruled on personal or ideological preference, Pappas is about the last guy you'd want to stretch the law for."

– Cary Snyder
Silha Research Assistant

Online Anonymity, *continued from page 2*

anonymity and the right of the plaintiff to protect his reputation or property." The final test, the court stated, would provide a certain minimal degree of protection for Internet users, yet still leave room for plaintiffs with a legitimate need to protect their reputation. For more on the *Cahill* case, see "Defamation News: John Doe No. 1 v. Patrick Cahill and Julia Cahill" in the Fall 2005 issue of the Silha *Bulletin*.

After instituting the new test, the court remanded the case to the district court level to determine whether Solers could establish that it had met each of the test's five factors.

Meanwhile, in New York, model Liskula Cohen obtained a court order in a state trial court forcing Google to reveal the identity of a blogger who Cohen claimed defamed her by calling her a "skank" and a "ho" on an anonymously-authored Web site hosted by Google's Blogger.com.

"The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions," Judge Joan Madden wrote in her August 17 order granting Cohen's petition, *Cohen v. Google,* No. 100012/09 (N.Y. Sup. Ct. Aug. 17, 2009).

According to an August 20 AP story, Cohen's attorney Steven Wagner said Google complied on August 18 by releasing the blogger's IP address and e-mail address. Google had initially refused Cohen's request, saying that she needed to first get a court order.

The AP reported that the blogger was "an acquaintance" of Cohen's, and that after discovering her identity, Cohen told the blogger she forgave her, although she has not ruled out pursuing a defamation lawsuit.

The blogger, Rosemary Port, told the New York *Daily News* on August 23 that she plans to sue Google for $15 million dollars for violating her "expectation of anonymity."

– Patrick File
Silha Fellow and *Bulletin* Editor

– Jacob Parsley
Silha Research Assistant

Journalist Subpoenas and Shield Laws

Blogger Cannot Claim New Jersey Shield Law

In a case of first impression, a New Jersey trial court judge ruled June 30, 2009 that a blogger and online commenter who was sued for defamation could not claim the state's journalist shield law to protect the confidential sources she used as a basis for publishing allegedly defamatory statements about a corporation.

Too Much Media, a computer software company that provides advertising programming for the online pornography industry, sued Shellee Hale, a Washington state-based blogger, licensed private investigator, and "life coach," for statements she made in an Internet forum that accused the company and two of its officers of engaging in criminal behavior, including making physical threats and profiting from a security breach that jeopardized the privacy of subscribers to pornography Web sites. The company said it plans to compel her to reveal her sources in a deposition.

Monmouth County Judge Louis Locascio ruled in *Too Much Media LLC v. Hale*, No. MON-L-2736-08 (N.J. Super. Ct. Law Div. Jun 30, 2009) that Hale could not claim the statutory privilege, N.J. Rev. Stat. §§ 2A:84A-21 to 21.8, because she did not show that she was "in any way involved with" any of the "news media" listed in the statute: "newspapers, magazines, press associations, news agencies, wire services, radio or television."

Moreover, Locascio ruled that Hale's online forum statements did not display accepted practices of journalism that the law was meant to protect. "There is no fact-checking required, no editorial review and so little accountability for the statements posted that it is virtually impossible to discern the author or source of the posts," Locascio wrote. "To extend the newsperson's privilege to such posters would mean anyone with an email address, with no connection to any legitimate news publication, could post anything on the internet and hide behind the Shield Law's protections. Certainly, this was not the intention of the Legislature in passing the statute." (For more on anonymous Web site commenters and whether state shield laws apply to them, see "Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts" on page 1 of this issue of the Silha *Bulletin*.)

According to the opinion, Hale decided to investigate criminal activity in the pornography industry after she became aware of the practice of "cyber flashing," or exposing oneself to another person via a webcam. Hale uses a webcam – a web-based camera used for two-way communication on the Internet – as part of her work as a "life coach."

In January 2008, Too Much Media suffered a security breach of a product called NATS, which allows Web sites to collect commissions for linking to each other via hyperlinks. The security breach allegedly allowed a hacker to access the subscriber lists of several pornographic Web sites.

Hale made comments regarding the NATS security breach in an Internet forum called Oprano, accusing Too Much Media of fraud, "illegal and unethical use of technology," violating New Jersey's Identity Theft Protection Act, and profiting from stolen e-mail addresses. She also said the company's principals, Charles Berrebbi and John Albright, "may threaten your life if you report any of the specifics." Hale told the court that she made the comments in order to "inform the public about [the] alleged misuse of technology and … fraud and scams and to facilitate debate on these issues," the opinion said.

Hale also argued that she had launched a Web site, Pornafia, on which she intended to publish the results of her investigation into "technical and criminal activity in the adult entertainment industry." However, nothing was ever published on the Web site because Hale allegedly feared for her personal safety.

Locascio wrote that even if Hale's investigative findings existed "in final form," since they were never published "there is little evidence … that Hale actually intended to disseminate anything newsworthy to the general public." Locascio added, "The fact that she never contacted Too Much Media's representatives, to hear their side of the story, certainly does not suggest the kind of journalistic objectivity and credibility that courts have found to qualify for the protections of the Shield Law."

Locascio also ruled that because Hale does not qualify as a journalist or "media defendant," New Jersey common law does not require Too Much Media to show that she made the allegedly defamatory statements with "actual malice, i.e. 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"

"Hale is neither a journalist nor a member of the media; she is a private person with unexplained motives for her postings," Locascio wrote, adding that she was not in commercial competition with Too Much Media, nor does the issue of "membership in adult websites" rise to a sufficient level of "public concern" to require a showing of actual malice under New Jersey common law.

On July 22, Hale filed a motion for reconsideration in Monmouth County Court.

Sam Bayard, Assistant Director of the Citizen Media Law Project at Harvard's Berkman Center for Internet and Society, wrote in a July 9 blog post that it would be "a mistake … to read Judge Locascio's opinion broadly as saying that New Jersey's shield law categorically does not protect bloggers."

Bayard pointed to several "peculiar facts" in *Too Much Media LLC v. Hale*, including the fact that Locascio appeared to discount some of Hale's testimony because she could not provide specifics about articles in newspapers and trade journals she claimed to have published, and because she apparently lied in a previous court document in the case.

Moreover, Bayard observed, "the court focused its analysis on Hale's message board posts, not her blog or her status as a blogger. This makes the court's expressed concern about opening the floodgates to those who 'shout[] from atop a digital soapbox' more understandable and less worrisome to bloggers with a bona fide news/commentary agenda."

– Patrick File
Silha Fellow and *Bulletin* Editor

> "To extend the newsperson's privilege to such posters would mean anyone with an email address, with no connection to any legitimate news publication, could post anything on the internet and hide behind the Shield Law's protections. Certainly, this was not the intention of the Legislature in passing the statute."
>
> – Judge Louis Locascio
> Monmouth County
> New Jersey

Journalist Subpoenas and Shield Laws

California Court Rules State Shield Law Protects Student Photojournalist

A California judge ruled on July 15, 2009 that a student photojournalist who witnessed a murder on a San Francisco street is covered by California's reporter shield law and does not have to turn his photos over to police.

According to a July 16 Associated Press (AP) story, San Francisco Superior Court Judge Tomar Mason ordered San Francisco police to return the photos they seized from the student's apartment. The student, who said he fears for his life and whose identity has not been reported, was with 21-year-old Norris Bennett, taking photographs for a project on life in the San Francisco neighborhood of Bayview, when Bennett was shot and killed while playing a dice game on April 17.

A May 19 *San Francisco Chronicle* story said that the San Francisco State University student had been seen taking photos while paramedics treated Bennett. The story also said that, according to police, the student phoned Bennett's family members shortly after the shooting and told them to come to the scene.

The *San Francisco Chronicle* reported July 16 that the 22-year-old student had refused to talk with police about what he saw when Bennett was killed. San Francisco police obtained a search warrant for his apartment in May and seized photos and other items, but the student argued that he was a journalist covered by California's shield law, Cal. Const. art. I, § 2(b), and Cal. Evid. Code § 1070, and demanded that the warrant be quashed and the items returned to him.

California's shield law states in part that "a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication … cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose … the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."

Michael Ng, an attorney for the student, had argued that his client was a freelance journalist, and that California courts have previously ruled that freelancers and bloggers are also protected under the state's shield law. (See "Appeals Court Finds That Bloggers Have Same Protection As Journalists, Newsgatherers" in the Summer 2006 issue of the Silha *Bulletin*.)

> "Our state has given one of the most broad protections available to journalists. The people of the state of California have decided to draw a line around the newsgathering process, so we don't have to decide these matters on a case-by-case basis."
>
> – Michael Ng
> Attorney for student photojournalist

Ng told the court that the student was trying to sell his project to *The Wall Street Journal* and the Bay Area News Group, publisher of the *San Jose Mercury News*, *Oakland Tribune*, and *Contra Costa Times*. "I don't think we'd be here if the police executed a search warrant on the *San Francisco Chronicle* or on a CNN van," Ng argued before Mason, according to a June 14 *Chronicle* story. "Our state has given one of the most broad protections available to journalists," Ng said. "The people of the state of California have decided to draw a line around the newsgathering process, so we don't have to decide these matters on a case-by-case basis."

The June 14 *Chronicle* story reported that the district attorney's office argued that simply hoping to sell a project did not qualify someone for coverage under the shield law. "He was working on a school project," Laura Zunino, a lawyer for the district attorney's office, argued. Extending the shield law to him, she said, would "in essence, eviscerate the rule." Zunino added that the student lacked an established freelance relationship with a media outlet that courts have recognized as a condition for protection under the shield law.

The July 16 *Chronicle* story reported that no arrests have been made in Bennett's killing. "We're just going to try to find another angle – we're just going to find some witnesses who aren't cowards, like this student is, hiding behind the shield law," said Lt. Mike Stasko of the police homicide detail.

The May 19 *Chronicle* story noted that the student was not the first non-mainstream media reporter to claim California's shield law as a means of protection from official interrogation. Josh Wolf, a political activist and blogger, spent 226 days in jail after he posted video of a 2005 protest in San Francisco, then refused to turn over additional footage to federal authorities looking for evidence that demonstrators had committed crimes.

Wolf was denied protection under the California law when the 9th Circuit U.S. Court of Appeals affirmed a federal district court decision concluding that Wolf had produced no evidence he was connected or employed by a media organization as required by the statute. (See "Freelance Journalist and Blogger Released After 226 Days in Prison" in the Spring 2007 Silha *Bulletin*.)

– Jacob Parsley
Silha Research Assistant

FOIA and Access

Obama and Courts Seek Balance between National Security and Transparency in Terrorism Cases

The Obama administration continued to fight the release of some Bush-era classified detainee treatment materials, while releasing redacted versions of others in response to FOIA requests. In the meantime, federal courts faced decisions about whether certain materials involved in terrorism trials should be made public.

President Barack Obama continued to retreat from a previous stance that government photographs depicting detainee mistreatment at U.S. military facilities in Iraq and Afghanistan should be made public, and his administration is appealing a September 2008 2nd Circuit U.S. Court of Appeals ruling that ordered their release to the Supreme Court.

"It was my judgment – informed by my national security team – that releasing these photos would inflame anti-American opinion, and allow our enemies to paint U.S. troops with a broad, damning and inaccurate brush, endangering them in theaters of war," Obama said in a May 21 speech, according to his prepared remarks published on *The Washington Post*'s Web site. "Nothing would be gained by the release of these photos that matters more than the lives of our young men and women serving in harm's way."

"I had to strike the right balance between transparency and national security," Obama said in his speech. "I ran for President promising transparency, and I meant what I said. That is why, whenever possible, we will make information available to the American people so that they can make informed judgments and hold us accountable. But I have never argued – and never will – that our most sensitive national security matters should be an open book."

The American Civil Liberties Union (ACLU) sued for the release of the photos under the Freedom of Information Act, 5 U.S.C. § 552, and won both at the federal district court and at the 2nd Circuit U.S. Court of Appeals in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008). (See "Detainee Abuse Photos Ordered Released" in the Fall 2008 Silha *Bulletin* for more on the case.)

Obama first announced his intention to resist releasing the detainee photos on May 13, 2009, about a month after the administration told a federal district court judge it would not oppose an order to release the photos. Under an agreement between the Justice Department and the ACLU, the photos were supposed to be made public by May 28. (See "Obama's Policies Promote Openness; Some Secrecy Persists" in the Spring 2009 Silha *Bulletin*.)

On May 28, the Department of Defense and the Department of the Army filed a motion in the 2nd Circuit to recall the court's mandate that the photos be released, allowing the government to keep the photos secret while filing a petition for a writ of *certiorari* with the Supreme Court. The motion also mentioned the possibility that Congress could pass legislation during the government's appeal that would exempt the photos from the FOIA.

"We recognize that this motion comes after the government initially determined not to seek certiorari and government counsel informed [the ACLU] that the photographs would be released. But the time for seeking Supreme Court review has not expired, and extraordinary circumstances have intervened," the Defense Department motion said.

The ACLU filed a response opposing the government's motion on June 1. "A unanimous panel of this court has already addressed and rejected the Government's argument that the photographs may lawfully be suppressed because they could be used to incite violence and generate propaganda," the response said. "In seeking to further delay disclosure of these images, the Government's motion is fundamentally inconsistent with FOIA's basic purpose."

According to a June 12, 2009 Associated Press (AP) story, the 2nd Circuit issued a one-paragraph ruling on June 11 that allows the government to keep the detainee pictures secret while it is seeking to take its case to the Supreme Court.

ACLU lawyer Amrit Singh said in the AP story that the ruling "further delays the disclosure of photographs that are critical to informing the debate about the treatment of U.S. prisoners."

Meanwhile, the U.S. Senate passed The Detainee Photographic Records Protection Act of 2009 on June 17, which would allow the government to withhold the detainee photos from FOIA requests. A similar bill, H.R. 2875, was introduced in the House of Representatives on June 15 and referred to the Armed Services Committee. If passed into law, the bill would specifically exempt the detainee photos from the FOIA.

In a separate FOIA lawsuit, the Obama administration has continued to resist the release of CIA documents that describe the contents of 92 destroyed videotapes that depicted prisoner interrogations at secret CIA prisons. The ACLU sued to obtain the materials in 2004, in *American Civil Liberties Union v. Department of Defense*, No. 1:04-cv-04151-AKH (S.D.N.Y. filed June 2, 2004).

According to a June 9 story in *The Washington Post,* the Obama administration objected to the release of the documents, saying that making them public would endanger national security and benefit al-Qaida's recruitment efforts.

In a June 8 declaration filed with the U.S. District Court for the Southern District of New York, CIA Director Leon Panetta defended the classification of records describing the contents of the videotapes and their destruction by the CIA in 2005.

"I have determined that the disclosure of intelligence about al-Qaeda reasonably could be expected to result in exceptionally grave damage to the national security by informing our enemies of

Terrorism Cases, *continued on page 8*

> "Nothing would be gained by the release of these photos that matters more than the lives of our young men and women serving in harm's way."
>
> – President Barack Obama

Terrorism Cases, *continued from page 7*

what we knew about them, and when, and in some instances, how we obtained the intelligence we possessed," Panetta wrote in the declaration.

According to *The Washington Post*, the Panetta statement represented "a new assertion" by the Obama administration that the CIA should be allowed to keep information from the previous administration secret.

The Post reported that the materials the CIA is seeking to withhold include detainee photographs, notes taken after reviewing the videotapes, an account by a CIA lawyer detailing agency policy and legal guidance about the destruction of the videotapes, an e-mail to CIA managers that summarizes agency opinions about the tapes, and e-mails discussing what the CIA should say publicly about their destruction.

Panetta argued that none of the CIA documents at issue in the case should be released, and that there should be a distinction between the administration's April release of Justice Department memos authorizing the interrogations and the CIA's desire to keep its own documents pertaining to the specific handling of detainees classified.

The "disclosure of explicit details of specific interrogations" would provide al-Qaida "with propaganda it could use to recruit and raise funds," Panetta said in the declaration. Panetta also submitted a classified statement to the court along with his declaration, which he said explains why detainees could use the documents to evade questions in the future.

Jameel Jaffer, director of the ACLU's national security program, said in *The Washington Post* story that it is "grim" and "troubling" for the Obama administration to say that the information about purported abuse should be withheld because it might be used against the United States. Jaffer said that such an argument amounts to an assertion that "the greater the abuse, the more important it is that it should remain secret." The ACLU is convinced that the public should have "access to the complete record of what took place in the CIA's prisons and on whose authority," Jaffer said.

The Post reported that district court Judge Alvin Hellerstein, to whom Panetta submitted his declaration, has repeatedly denied CIA motions requesting that the case be dismissed. Hellerstein has ordered the CIA to surrender some of the records and provide details of others it is withholding. The agency responded by giving the documents to the court under seal.

Panetta said in the declaration that his goal in withholding the documents was "in no way driven by a desire to prevent embarrassment for the U.S. government or the CIA, or to suppress evidence of any unlawful conduct," but that his "sole purpose is to prevent the exceptionally grave damage to the national security reasonably likely to occur from public disclosure of any portion of these documents."

On August 24 the Obama administration released multiple documents from the CIA inspector general and the Department of Justice's Office of Legal Counsel detailing enhanced interrogation techniques used between 2002 and 2007, in response to the 2004 ACLU lawsuit.

An August 25 story in *The New York Times* reported that, although large portions of the 109-page inspector general report were blacked out, "it gives new details about a variety of abuses inside the C.I.A.'s overseas prisons."

In an August 25 column on the Web site Findlaw.com, attorney Joanne Mariner said too much information was redacted from the documents. "If we live long enough to see the report's full declassification, we may learn a lot more. Some 35 pages of the 109-page report were almost entirely blacked out, including long sections on waterboarding," Mariner wrote. "One longs to know precisely what 'activities' were mentioned – what activities could merit redaction even when so many other abuses were revealed."

The ACLU released a statement on August 24 that said it will "fight for the disclosure of the torture files that are still secret."

"Accountability for torture is a legal, political, and moral imperative," the statement said.

Federal Judges Order Release of Allegations, Evidence in Terror Cases

On June 1, 2009 a federal district court judge in Washington, D.C. ordered the federal government to release unclassified versions of allegations and evidence that the government said justified the continued imprisonment of more than 100 Guantanamo Bay detainees.

Judge Thomas Hogan, of the U.S. District Court for the District of Columbia, wrote in *In re Guantanamo Bay Detainee Litigation*, 624 F.Supp.2d 27 (D.D.C. 2009), that the government was attempting "to usurp the Court's discretion to seal judicial records" with its arguments in the case.

"The issue of what to do with the detainees at Guantanamo Bay remains a source of great public interest and debate," Hogan wrote. "Providing the public with access to the charges levied against these detainees … ensures greater oversight of the detentions and these proceedings."

According to a June 2 AP story, the Justice Department had been filing unclassified versions of its legal documents under seal, so that the documents could only be seen by judges, attorneys, and government officials working on the cases. Justice Department officials said the practice was necessary to protect national security after they discovered that some unclassified records mistakenly contained some classified information.

According to the AP, defense lawyers in the case objected to the government's method of filing, and *The New York Times,* the AP, and *USA Today* all "joined the fight," arguing that the government was keeping valuable information from the public.

Hogan agreed. "As long as public access does not come at the expense of the litigation interests of petitioners or national security, the court believes the public has a common law right to access the returns," he wrote in his opinion.

Terrorism Cases, *continued on page 9*

Terrorism Cases, *continued from page 8*

The opinion included a judicial order that, if the government wished to keep any unclassified factual returns secret, it must specifically request to do so by "highlighting with a colored marker the exact words or lines the government seeks to be deemed protected" and also include "a memorandum explaining why each word or line should be protected."

Justice Department spokesman Dean Boyd said in the June 2 AP story that the documents were never meant to be sealed indefinitely. He said the government had limited resources for classification and was using them to create declassified versions of the documents that detainees' attorneys could share with their clients and witnesses.

Media attorneys said the order struck the right balance. "A court doesn't have to accept the government's word that keeping court records secret protects important security interests," said AP general counsel Dave Tomlin in the June 2 story. "The government must try to prove it, and it's the court's job to decide if they've succeeded."

Meanwhile, several news organizations successfully petitioned a federal judge in Georgia to release audio and video evidence in a domestic terrorism trial in Atlanta.

Judge William Duffey of the U.S. District Court for the Northern District of Georgia issued a minute order on June 1, 2009 requiring the government to make one copy of all the audio and video evidence available to the media. Atlanta attorney Thomas Clyde, who represented the media groups in the matter, said Duffey made statements from the bench indicating that, because the evidence had been used in prior hearings, the law strongly supported its disclosure.

The AP, *The Atlanta Journal-Constitution*, the Canadian Broadcasting Corporation, CNN, and WSB-TV filed a joint motion on May 28 seeking access to audio interviews with defendant Syed Haris Ahmed, as well as videotape that Ahmed and his co-defendant allegedly created in an effort to research potential terrorism targets.

According to a May 29 AP story, Ahmed's attorneys had asked that the videotapes be sealed after they were filed as evidence in January 2008. A federal magistrate judge rejected the request, but said the order was under review by Duffey.

The news organizations' May 28 petition in the case, *United States v. Ahmed*, 2009 WL 1370936, 2009 U.S. Dist. LEXIS 41188 (N.D. Ga. May 14, 2009), said the audio recordings of Ahmed's interviews "communicate the demeanor, tone and conduct of Defendant Ahmed and the FBI agents during approximately 12 hours of interviews which were followed by Defendant Ahmed's arrest and indictment. Just as this information was relevant to the Court in determining whether Defendant Ahmed's interviews were voluntary, it is relevant to the public's understanding of this case."

The memorandum requesting access said the First Amendment guaranteed the public a right of access to judicial proceedings in criminal cases, citing cases such as *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). The media groups argued, and Duffey agreed, that the right of access "extends to all records filed with the court."

– Jacob Parsley
Silha Research Assistant

FOIA and Access

White House Continues to Resist Open Government Group's FOIA Requests

Some Agencies Seek Public Input on More Openness

The U.S. Circuit Court of Appeals for the District of Columbia ruled on May 19 that the White House Office of Administration (OA) is not subject to the Freedom of Information Act (FOIA).

The court's unanimous opinion in *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 566 F.3d 219 (D.C. Cir. 2009), said the office was not subject to the FOIA "because it performs only operational and administrative tasks in support of the President and his staff and therefore, under [D.C. Circuit] precedent, lacks substantial independent authority."

The FOIA, at 5 U.S.C. § 552(a), requires covered federal entities to disclose information to the public unless the requested information falls within one of the statute's exemptions.

Circuit Judge Thomas Griffith authored the opinion, which will allow the OA to keep information about millions of missing e-mails from the George W. Bush Administration secret. The e-mails were lost during Bush's first term when the administration failed to install electronic record-keeping for e-mail as it switched to a new system.

Citizens for Responsibility and Ethics in Washington (CREW) filed the federal lawsuit after the OA failed to comply with CREW's April 2007 FOIA request for all available information surrounding the missing e-mails, including reports analyzing potential problems with the system, records of retained e-mails and possibly missing messages themselves and other documents discussing plans to find the missing e-mails. The OA initially said it would comply with the request, but did not turn over any information, or provide a timetable for when it would do so.

According to the court opinion, the OA eventually produced some of the records, but only "as a matter of administrative discretion." OA refused to turn more than 3,000 pages of potentially responsive records.

The D.C. district court, in *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 559 F. Supp. 2d 9 (D.D.C. 2008), had previously granted OA's motion to dismiss CREW's complaint for lack of subject matter jurisdiction after concluding that the OA is not an agency under FOIA because it "lacks the type of substantial independent authority … indicative of agency status for other [Executive Office of the President] components." However, on CREW's motion for a stay pending appeal, the district court ordered the OA to preserve any records that might be responsive to CREW's original FOIA request.

Griffith wrote in the circuit court opinion that "By its terms, FOIA applies only to an 'agency,' and the key inquiry of this appeal is whether the Office of Administration is an agency under the Act." Citing prior cases such as *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980), Griffith stated that the test for whether a particular executive entity was an "agency" for FOIA purposes is whether that entity "wielded substantial authority independently of the President."

"Because nothing in the record indicates that OA performs or is authorized to perform tasks other than operational and administrative support for the President and his staff, we conclude that OA lacks substantial independent authority and is therefore not an agency under FOIA," the opinion concluded. "OA need not comply with CREW's requests because it is not an agency under FOIA."

The Bush administration had been the original defendants in the lawsuit, and the Obama administration sided with Bush in trying to prevent the recovery of the missing e-mail information. According to a May 19 Associated Press (AP) story, Anne Weismann, CREW's chief counsel, said the group was disappointed by the ruling but was negotiating with the White House to get access to the OA documents anyway.

"Every president except for George W. Bush has treated OA as an agency subject to the FOIA and we are counting on President Obama to do the same," Weismann said.

In a May 14 letter to Counsel to the President Gregory Craig, Weismann and representatives from 36 other organizations that advocate for government transparency asked that the Obama administration reconsider its position that the FOIA does not apply to the OA. "[T]he Bush administration abruptly changed course and declared OA is not an agency and therefore need not comply with CREW's or any other information requests under the FOIA," the letter said. "This radical departure from the policies and practices of all prior administrations rests on a flawed legal theory that fails to properly consider OA's role within the Executive Office of the President and its lack of proximity to the President … [and we] urge the administration to reverse the Bush administration's policy and confirm OA's status as an agency within the meaning of the FOIA."

On June 16, CREW filed a new lawsuit in D.C. district court in an attempt to gain access to White House visitor logs detailing visits from coal industry executives. "We're suing because the Obama Administration has made it clear that they are continuing the policies and practices of the Bush administration and claiming that White House visitors' records are off limits to the public," Weismann said in a June 16 ABC News story. The Obama administration also refused FOIA requests from cable network MSNBC seeking access to all White House visitor records since Obama took office.

FOIA Requests, *continued on page 13*

> The Office of Administration is not subject to the FOIA "because it performs only operational and administrative tasks in support of the President and his staff and therefore, under [D.C. Circuit] precedent, lacks substantial independent authority."
>
> – Judge Thomas Griffith
> U.S. Court of Appeals, D.C. Circuit

FOIA and Access

College Sports Programs Cite FERPA in Withholding Information

An extensive and ongoing investigation by *The Columbus* (Ohio) *Dispatch* has reported that the nation's biggest athletic programs interpret a federal law meant to guard students' privacy in widely different ways. The newspaper's findings have sparked a debate over a statute that has long created obstacles for journalists reporting on public higher education institutions.

The Dispatch's initial story, published May 31, 2009, reported that responses to public records requests by the 119 colleges and universities in the NCAA's Football Bowl Subdivision revealed that the schools applied a variety of interpretations of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g). Also known as the Buckley Amendment, FERPA was passed in 1974 to require educational institutions that receive federal funds to meet privacy requirements regarding the "education records" of students. Generally, FERPA requires a school to obtain written permission from a student or parent before releasing any information from a student's education record, unless the requesting party is a qualified school official, law enforcement agency, or other party specifically listed in the regulation at 34 C.F.R. §§ 99.1-.65.

The Dispatch reported that it requested records that generally would not pertain to student athletes' grades or academic performance, but could "shed light on the inner workings of college sports programs, including identifying the people who have access to athletes – some of whom are boosters and agents who, if acting improperly, can bring shame and fines to an entire athletic department." The newspaper requested airplane flight manifests for football team travel to road games, lists of people designated to receive athletes' complimentary admission to football games, football players' summer employment documents, and reports of NCAA rules violations.

Sixty-nine of the 119 schools responded to *The Dispatch*'s request. Of those, more than 80 percent released unedited information about ticket lists, about half did not censor flight manifests, 20 percent gave full information about football players' summer jobs, and 10 percent provided unedited information about rules violations. Although most schools handed over the information for free or for a "nominal copying fee," *The Dispatch* reported, 14 schools requested fees over $100. The University of Maryland asked for $35,330 for copies of its records. The complete report is available online at http://tinyurl.com/ColumbusDispatchFERPA.

The Dispatch reported that the primary cause for the disparity in disclosure, sometimes even among different schools in the same state, came from the schools' interpretations of what qualifies as "education records" for the purposes of FERPA.

According to 20 U.S.C. § 1232g(a)(4)(A), "education records" are records that "contain information directly related to a student" and "are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A) and 34 C.F.R. § 99.3 state that "education records" do not include administrative or instructional notes or records that are not available to anyone aside from their creator; records maintained by the institution's law enforcement unit; employee records that "relate exclusively to the individual in that individual's capacity as an employee" (as opposed to a student's work-study records, which are considered "education records" under 34 C.F.R. § 99.3); medical records; "records created or received by an … institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student;" or "grades on peer-graded papers before they are collected and recorded by a teacher."

In December 2008, the Department of Education modified its interpretation of "education records," expanding the definition of "personally identifiable information." The introduction to the rule change states that the amendments were made in order to implement provisions of the USA Patriot Act and the Campus Sex Crimes Prevention Act, in response to two U.S. Supreme Court decisions interpreting FERPA, "and [to] make necessary changes identified as a result of the Department's experience administering FERPA and the current regulations." The entire rule, including summaries and examples, is available at http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf.

In the rule change, the Department of Education modified the definition of "personally identifiable information" under 34 C.F.R. §§ 99.3 and 99.31(b) to include not only a student's name, address, and social security number, but also any "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," and "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."

In one example, the Department explained that officials at a school where a student was caught bringing a gun to school should not release information about the incident "even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student."

The Society of Professional Journalists sent a letter Jan. 6, 2009 to members of Congress who served on education-related committees, stating that the new regulations would hinder school accountability and diminish public safety. For more on the December 2008 rule change, see "FERPA Expanded; Critics Call New Rules 'Irrational'" in the Winter 2009 Silha *Bulletin*.

College Secrecy, *continued on page 12*

"Things have gone wild. These are ridiculous extensions. One likes to think common sense would come into play. Clearly, these days, it isn't true."

– Former Sen. James L. Buckley (R-N.Y.)

College Secrecy, *continued from page 11*

According to *The Dispatch*, the University of New Mexico did not censor or redact information on flight manifests or ticket lists, because it did not consider that information "education records." A University of New Mexico legal consultant told *The Dispatch*, "FERPA is so clear. We have no discretion." Meanwhile, records received from Texas Tech related to ticket lists and summer employment were heavily redacted, but flight manifests were not. When *The Dispatch* asked Texas Tech senior associate general counsel Victor Mellinger about the disparity between the two schools' approaches, he said, "[The University of New Mexico] made a mistake. If they've got student names, they're protected by FERPA."

The Salt Lake Tribune, in a June 7 story prompted by the *Dispatch* investigation, reported that the University of Utah was among 23 schools that redacted student names from every single record it provided to *The Dispatch*, while Utah State University was among three that did not censor any information at all. *The Tribune* reported it faced similar discrepancies in approaches to applying FERPA when it investigated student-athlete drug testing in 2007.

Utah State assistant athletic director Jeff Crosbie told *The Tribune* that, as a state-funded institution, all of Utah State's information is open to the public unless it involves grades. But a spokeswoman for University of Utah associate general counsel Robert Payne said, given the broad statutory definition of "education records" under FERPA, "We see no exceptions or exclusions under FERPA that would allow the University of Utah to disclose the records in question without redacting student names from the records."

Jeff Hunt, a Salt Lake City attorney and founder of the Utah Freedom of Information Hotline, told *The Tribune* the differences in FERPA interpretations often depend on the schools' lawyers. "The bottom line of if the information gets released or not is up to each general counsel," Hunt said.

According to a June 16 editorial in *The Tribune*, the problems stemming from public universities relying on FERPA to keep information secret reach beyond athletics programs. "The [University of Utah] policy clearly applies to all records that involve students. Such a secretive approach to sharing public documents poorly serves a public institution which should be accountable to taxpayers who pay its bills."

According to *The Dispatch* on June 17, FERPA has also been cited recently by the University of Alabama for concealing the names of athletes who defrauded the university in a textbook-buying scheme, resulting in NCAA sanctions including a $43,000 fine for the university and the removal of 14 football victories.

The Dispatch reported May 31 that former Sen. James L. Buckley (R-N.Y.), for whom the Buckley Amendment was named, was "stunned" by the investigation's findings. Buckley told *The Dispatch* that extending the law to athletes who have gambled or cheated, coaches who have broken recruiting rules, or boosters who offer free meals or no-work jobs to players is "not what we intended."

"Things have gone wild," Buckley said. "These are ridiculous extensions. One likes to think common sense would come into play. Clearly, these days, it isn't true." Buckley added, "The law needs to be revamped. Institutions are putting their own meaning into the law."

The *Dispatch* investigation has drawn the attention of some lawmakers and open government advocates. *The Dispatch* reported June 17 that Sen. Sherrod Brown (D-Ohio) sent a letter to the Assistant Education Secretary Carmel Martin, while Ohio Attorney General Richard Cordray sent letters to the Education Department as well as the state's congressional delegation, calling for reforms in FERPA. Brown's letter asked the department to "take additional steps to clarify for students, parents, colleges, universities, and the public what is an educational record," *The Dispatch* reported.

The New York Times reported June 30 that Paul Gammill, head of the Education Department's Family Policy Compliance Office, said the *Dispatch* investigation led his office to take a closer look at how schools apply FERPA. "There seems to be some difference in the way the law is interpreted," Gammill said, adding that his office advises institutions on compliance, but any changes to the law would have to be made by Congress.

The Times reported that journalists and free press advocates have long been frustrated by universities' use of FERPA to deny information requests. "Over the years, FERPA has morphed into kind of a catch-all excuse for schools and colleges to deny just about any open-records request that they're motivated to refuse," said Frank LoMonte, Executive Director of the Student Press Law Center.

In Illinois, the *Chicago Tribune* filed a lawsuit, *Chicago Tribune Co. v. University of Illinois Board of Trustees*, No. 2009-MR-000431 (Ill. Cir. Ct. Sangamon Cty. 2009), on June 16 against the University of Illinois, seeking the release of grade-point averages and standardized-test scores of hundreds of applicants who were placed on an internal list of well-connected students.

The *Chicago Tribune* has reported in an ongoing series called "Clout Goes to College" that unqualified applicants have gained admission to the university through the backing of state legislators and university trustees over the last five years. The *Tribune* reported June 17 that the initial reporting was based on about 1,800 pages of documents released by the university following a public records request. However, university officials have declined to release the high school grade-point averages or ACT test scores of those "clout list" applicants without written consent from parents or the applicants themselves, citing FERPA. The *Tribune* has said it only wants information about the applicants' academic credentials, not their names or identifying information.

Meanwhile, in *Associated Press v. Florida State University Board of Trustees*, No. 2009-CA-2298 (Fla. Cir. Ct. 2009) Florida Circuit Judge John

College Secrecy, *continued on page 13*

College Secrecy, *continued from page 12*

Cooper ruled that documents related to a Florida State University appeal of NCAA sanctions that were issued for academic cheating in 10 different sports departments at the university are public information. *The Dispatch* reported June 22 that the NCAA barred Florida State from releasing its response to the university's appeal because of a confidentiality agreement the NCAA initiated with member schools about five years ago. The NCAA places information about rules violations on a secure Web site that is only available to NCAA members.

Cooper granted the joint petition of 24 media organizations from the bench on August 20, and ordered that the records must be made public after student names are blocked out. Cooper agreed with the organizations that the documents were covered by Florida's public records law: Fla. Const. Art. I § 24 and Fla. Stat. § 119.01. "The NCAA's position is clearly contrary to the broad interpretation given to the definition of public records in Florida courts and legislative language," Cooper said when issuing his ruling, according to an August 21 story in the South Florida *Sun Sentinel*.

According to an August 21 Associated Press (AP) story, David Berst, NCAA vice president for Division I, said the ruling would discourage the reporting of NCAA violations, speculating that few witnesses other than school officials and employees would be willing to tell what they know about cheating without the promise of confidentiality. "We could see copycat efforts in other states," Berst said. "I believe that would rip the heart out of the NCAA." The AP reported August 22 that the NCAA plans to appeal Cooper's order and ask Florida's 1st District Court of Appeals to block the release of the documents until it can hear the case.

– Patrick File
Silha Fellow and *Bulletin* Editor

FOIA Requests, *continued from page 10*

However, in response to the threat of another FOIA lawsuit from CREW, the administration released a list of visits by health care executives, the AP reported on July 23. The list included only names and dates, not the visitors' titles or employers.

Craig said in a July 22 Bloomberg News story that Obama decided to release the lists because of "the president's goal of increasing transparency in government."

Melanie Sloan, executive director of CREW, said the list "in no way satisfies" its request because the group is seeking the actual visitor records, not a summary. "There is a lot of information in those records that is not in the letter," Sloan said in a July 23 *Washington Times* story. "Releasing names for political expediency is not the same thing as transparency. This is not the type of transparency they promised."

When asked by reporters about the administration's refusal to release the records, Obama said that "most of time you guys have been in there taking pictures, so it hasn't been a secret," the AP reported.

National Archives Appoints First FOIA Ombudsman

The National Archives appointed Miriam Nisbet to be the first director of the Office of Government Information Services (OGIS) on June 10, where she will "provide policy guidance and mediation services for FOIA activities government-wide," the National Archives said in a press release announcing the appointment.

Nisbet, referred to in a June 11 AP story as a "veteran open-government advocate," said she was excited to be part of "a new approach to make the Freedom of Information Act work better."

In an interview broadcast June 19 on NPR's "On the Media," Nisbet said her office had the "authorization to mediate as an alternative to litigation when there are disputes between a government agency and a FOIA requester." Although the OGIS's opinions are not binding, Nisbet said an opinion from the office "would be part of the administrative record going to court if the case did go to court." A transcript of the interview is available online at http://www.onthemedia.org/transcripts/2009/06/19/06.

Rick Blum, coordinator of the Sunshine in Government Initiative, a coalition of media groups, said Nisbet "is a longtime advocate for open government, and this is a promising start for those who want the FOIA to work better."

According to the AP, Nisbet most recently worked for the United Nations Educational Scientific and Cultural Organization (UNESCO). Before joining the U.N. in 2007, she was legislative counsel of the American Library Association, special counsel for information policy at the National Archives, and deputy director of the Justice Department's Office of Information and Privacy, where she provided guidance to the entire federal government on how to implement the FOIA.

The OGIS was created by Congress in 2007 to serve as a monitor and mediator for FOIA disputes. (See "President Signs, then Rewrites, OPEN Government Act" in the Winter 2008 Silha *Bulletin*.)

On August 5, 2009, The Justice Department's Office of Information Policy (OIP) hosted a "FOIA Requester Roundtable." A press release announcing the event said it was meant to help FOIA requesters and the OIP's "FOIA professionals" collaborate to "make the FOIA more user-friendly in this new era of open government."

In May, the White House solicited public input on open government via the Internet. A notice published in the Federal Register on May 21 invited "members of the public to participate in the process of developing recommendations [by] offering comments, ideas, and proposals about possible initiatives and about how to increase openness and transparency in government." Comments were due by June 19.

– Jacob Parsley
Silha Research Assistant

FOIA and Access

Courts, Police Decline to Extend Privileges to Reporters

No Special First Amendment Right of Access for Members of the Media

State and federal courts declined to extend a First Amendment right of access to accident scenes, protests, and school property for members of the media in the spring and summer of 2009.

Oakland Tribune *Photographer Loses Suit against City Police*

Ray Chavez, a staff photographer from the *Oakland Tribune*, lost a civil suit against the city of Oakland and its police department on June 22, 2009 when Charles Breyer, U.S. District Court Judge for the Northern District of California, ruled that Chavez had no First Amendment right to photograph a highway crash scene. Chavez sued under 42 U.S.C. § 1983, which allows citizens to sue government officials for civil rights violations.

Charles Breyer, U.S. District Court Judge for the Northern District of California, cited Supreme Court precedent to support the proposition that "the press has no First Amendment right to access accident or crime scenes if the general public is excluded."

According to the court order in *Chavez v. City of Oakland*, 37 Media L. Rep. 1905 (N.D. Cal. 2009), Chavez was driving down a California highway when he and several other motorists came upon the scene of a traffic accident. Chavez got out of his car and began taking photographs of the scene, wearing his press pass around his neck. Before leaving his vehicle Chavez placed his Oakland Police Department-issued press parking pass in the windshield.

After approximately 15 minutes at the scene, Chavez was asked by Kevin Reynolds, a member of the Oakland police department, if he had witnessed the accident. Chavez responded that he had not, and Reynolds told Chavez to get in his car and leave. After Chavez responded that he had a right to cover accident scenes as a member of the press, he was told by Reynolds that "he didn't care, that [Chavez] had to go back to [his] car and leave because [he] didn't 'need to take these kind of pictures.'"

While returning to his car, Chavez continued to take pictures of arriving highway patrol officers. According to Breyer's order, Reynolds and another officer then grabbed his camera and handcuffed him, forcing him to sit down on the highway near the overturned car for approximately 30 minutes. When the police released Chavez, he was warned by the officers "not to ever come there again and take those kind of pictures."

In the order granting summary judgment in favor of the city of Oakland, Breyer cited *Houchins v. KQED*, 438 U.S. 1 (1978) and *Branzburg v. Hayes*, 408 U.S. 665 (1972) to support the proposition that "the press has no First Amendment right to access accident or crime scenes if the general public is excluded." Breyer stated that Chavez had failed to prove that the general public had a legal right of access to accident sites and stated that "common sense dictates that members of the general public are not allowed to exit their cars in the middle of the freeway to view an accident scene."

Breyer also stated that the police acted reasonably in arresting Chavez for violating Cal. Veh. Code § 22400(a), a traffic statute directing that "[n]o person shall bring a vehicle to a complete stop upon a highway so as to impede or block the normal and reasonable movement of traffic unless the stop is necessary for safe operation or in compliance with the law." Breyer stated that "the Vehicle Code does not provide an exception for people who briefly exit their car on the freeway to take photographs – it prohibits the stopping of the car period."

In a June 3 *Tribune* story, Chavez, who was named photojournalist of the year in 2008 by the National Association of Hispanic Journalists, said he was disappointed by the decision, saying it was "unfair, not only for me, but for all journalists, because it can happen to them, too."

Chavez's attorney, Terry Gross, told the *Bulletin* his client filed a notice of appeal of the federal judge's decision on July 2. According to a June 4 *San Francisco Chronicle* story, Gross said Chavez also plans to file a suit in state court, noting that Breyer did not address the issue of whether police might have violated California state law. Cal. Penal Code § 409.5 allows law enforcement and other emergency responders to close an area where "a menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster." However, the law also states that "[n]othing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section."

West Virginia Judge Rules Journalists Cannot Trespass to Cover Environmental Protests

Two photographers covering environmental protests on a rural West Virginia mountaintop mine were appropriately included in a restraining order barring the protesters from entering the mining company's property, a judge ruled June 1.

Raleigh County Circuit Judge Robert Burnside held that photojournalists who accompanied protesters should not be excluded from a preliminary injunction obtained by mining company Massey Energy against the protesters. Burnside rejected the journalists' First Amendment claims to a newsgathering privilege, saying that trespassing laws applied equally to reporters and protesters, according to a June 1 story in *The Charleston* (W. Va.) *Gazette*.

Massey lawyer Sam Brock had urged Burnside to put a stop to "people just willy-nilly coming onto (Massey) property just to get their picture taken," and said that the activists should not "be allowed to run roughshod over the countryside," the June 1 *Gazette* story said.

The photographers, Chad Stevens and Antrim Caskey, who have been covering mountaintop removal in West Virginia for several years, were both given trespass citations after separate February

Reporter Cases, *continued on page 15*

Reporter Cases, *continued from page 14*
protests on the mine's property were broken up by police. The mining company later successfully filed for restraining orders against the journalists and protesters, *The Gazette* reported.

Caskey, a photojournalist who has been reporting on the work of environmental activist group Climate Ground Zero since 2008, considers herself "embedded" in the group, according to a May 2 story in the Beckley, W.Va. *Register-Herald*. Her photographs of the group have been published on the Climate Ground Zero Web site, as well as on a *Charleston Gazette* blog called Coal Tattoo. Caskey said her relationship with the group is sometimes misunderstood. "I'm just lumped together with the activists because of my reporting and it's sympathetic, apparently," Caskey said in a March 23 story from the Reporters Committee for Freedom of the Press (RCFP). "But I'm just talking to people. I'm just pointing my camera."

Caskey has been cited three times for trespassing at Massey Energy sites while accompanying Climate Ground Zero to protests. On April 16, after the initial restraining order naming her had been issued, Caskey again accompanied members of the group to a protest on Massey property. The entire group was arrested and charged with violating the temporary restraining order. "I was not causing any harm," Caskey said in a June 3 RCFP story. "I was not stopping any traffic. I was not protesting. I was shooting an event."

On May 1, Burnside found Caskey and four protesters guilty of violating their restraining order, according to a May 2 story in *The Register-Herald*. At the hearing, Roger Forman, the attorney for Caskey and several protesters, argued that she should not be held in contempt and that as a journalist she had a privilege to document Climate Ground Zero's work. But Burnside disagreed. "No such privilege exists," he said, according to the story.

Stevens was initially cited while covering a February 3 protest on Massey property as part of an alternative energy documentary he had been working on, according to the February 27 complaint. Stevens photographed members of Climate Ground Zero as they chained themselves to a bulldozer and an excavator. When police arrived to break up the protest, Stevens was given a trespass citation.

On June 1, Burnside began a two-day hearing addressing whether to grant a preliminary injunction that would essentially extend the duration of the restraining orders to keep the protesters and journalists off Massey property, *The Gazette* reported. Burnside rejected claims from both Caskey and Stevens that the court orders would infringe on their First Amendment right to gather news, and granted the preliminary injunction. Both Caskey and Stevens said they would appeal Burnside's opinion.

Massey attorney Niall A. Paul said in the March 23 RCFP story that it was unclear that Caskey was a photojournalist when the citation was issued. However, she was still trespassing, he argued, and was standing in the middle of a road, putting herself and others in an unsafe situation. "It's not that she's been prohibited from taking pictures," Paul said. "As long as she's not trespassing."

Appellate Court Permits School to Ban Reporter from Property

A federal appeals court panel dismissed a reporter's lawsuit claiming that his exclusion from school property in Buchanan County, Va., violated his First Amendment rights.

Earl Cole of *The Voice* newspaper of Buchanan County claimed the ban was imposed in retaliation for stories he had written that were critical of the county school board, but a unanimous three-judge panel of the 4th Circuit U.S. Court of Appeals ruled on May 14 in *Cole v. Buchanan County School Board*, 37 Media L. Rep. 1787 (4th Cir. 2009), that school boards have broad authority to control access to school property, and that the exclusion of Cole was reasonable.

According to the opinion, the school board voted to ban Cole from the school property in October 2006 for repeatedly taking pictures and conducting interviews at schools without first signing in at the principal's office. Cole then brought a claim under 42 U.S.C. § 1983, alleging the board violated his First Amendment rights in retaliation for his writing critical reports and opinions about the school board.

The board resolution stated that Cole would be banned from school property "during operational hours while school is in session and students are present, except upon express written invitation or to attend a public board meeting or to exercise his right to vote," because he had been observed "on school property on multiple occasions hiding around trees and/or bushes either loitering and/or taking photographs and has repeatedly ignored posted signs informing all visitors that they must report to the office upon arrival … many parents and teachers have expressed concern about Mr. Cole's actions … especially when children are present while school is in session."

The unanimous 4th Circuit opinion by Judge Allyson Duncan reversed a federal district court decision that denied the school board's motion to dismiss Cole's suit. The 4th Circuit said that it was "skeptical that Cole's First Amendment rights were in fact chilled, as required to establish a First Amendment retaliation claim." The court noted that Cole owned the newspaper he wrote for and said he could have assigned other reporters to cover stories requiring entry onto school property. The court also said that Cole remained free to watch or take photographs from the public spaces outside the school grounds, and that Cole was not prohibited from interviewing individuals associated with the school when not on school property. Duncan also said that reporters in the "rough and tumble" political arena do not necessarily have a legal remedy when government officials are unwilling to talk.

Duncan also cited Supreme Court precedent supporting the proposition that public schools are not deemed public forums, based on *United States v. Kokinda,* 497 U.S. 720 (1990), and that a school board has inherent authority to restrict access to the property that it controls, based on *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Reporter Cases, *continued on page 16*

Reporter Cases, *continued from page 15*

"The appropriate inquiry here is whether a reasonable Board member could have believed that banning Cole from the Buchanan County school grounds was lawful, in light of clearly established law and the information Board members possessed," Duncan wrote. "Given the breadth of the Board's authority to control access to school grounds and the factual information the Board possessed [about Cole] at the time it passed the resolution at issue, a reasonable Board member may well have believed it was his or her duty to ban Cole from school grounds in order to protect both the safety of the students and the integrity of the educational process."

U.S. District Court Judge James P. Jones had previously turned down the board's request to dismiss Cole's suit before trial, but the appellate court ordered Jones to dismiss the suit.

Detroit Reporter Convicted of Resisting and Obstructing Police

A Michigan jury convicted reporter Diane Bukowski on May 1 of two felonies for her actions at the scene of a fatal motorcycle accident involving state troopers. According to a June 2 *Detroit Free Press* story, Bukowski was sentenced to one year probation, a $4,000 fine, and 200 hours of community service.

Bukowski, a freelance reporter for the weekly independent publication *The Michigan Citizen,* was convicted of two counts of "resisting, obstructing, opposing, and endangering two Michigan state troopers" at the scene of the crash on November 4, 2008. Each count was a felony punishable by up to two years in prison, the *Detroit Free Press* reported May 2.

According to the *Free Press*, Bukowski said she had identified herself as a reporter and showed her credentials to three state troopers at the scene of the crash and was taking photos of two yellow tarps and a crushed motorcycle when police arrested her and deleted some of her photos. Advocacy group the Committee to Protect Journalists (CPJ) reported May 6 that Maria Miller, an assistant prosecutor for Wayne County, said Bukowski "was resisting by not complying with the police order" not to enter the crime scene area, "and she was asked not to take pictures of the two deceased men." The aftermath of the scene, including most of Bukowski's arrest, was captured on video, and is available on a local FOX affiliate's Web site at http://tinyurl.com/Bukowski-Arrest.

CPJ reported that a Michigan state trooper admitted in court that he had seized Bukowski's camera after her arrest and, while still at the scene of the incident, erased two pictures. The judge orally reprimanded the state trooper who deleted the images, CPJ reported, but no charges were filed.

Bukowski's report of the accident in *The Citizen* included an anonymous witness who said that "The police rear-ended the motorcycle and the man on the motorcycle lost control and hit [a pedestrian], then the driver flew off the motorcycle into a pole." The eyewitness report conflicted with police reports that the motorcycle ran a red light before hitting a pedestrian.

The Michigan chapter of the American Civil Liberties Union (ACLU) filed an *amicus* brief in support of Bukowski's motion to dismiss the charges. "The case at bar raises important issues, including whether the First Amendment rights to freedom of the press are being abridged by a prosecution that is pursued for retaliatory or other improper purpose," the brief said.

The case against Bukowski is particularly troublesome, the group wrote, because of her "long, distinguished history of exposing government irregularities and corruption." The ACLU specifically noted that Bukowski has reported on allegations of illegal strip and cavity searches by Detroit police and the refusal of Wayne County prosecutors to prosecute police involved in killings.

"The danger is real that any ruling or verdict by the court that is adverse to the defendant's interest (whether deserved or not), will be perceived by many as retaliation for her journalistic work," the ACLU wrote. "These suspicions can be bolstered by questions about why the defendant is being prosecuted zealously given the absence of allegations that any real harm in the way of physical injuries or property damage resulted from her actions."

Miller, in a February 20 story in the *Michigan Messenger*, said "We do not bring cases to retaliate," adding, "[Bukowski's] case was charged and is being prosecuted because we believe we can prove beyond a reasonable doubt the charge in this particular case."

Wayne County Assistant Prosecutor Thomas Trzcinski said in the CPJ story that by taking pictures at the accident scene Bukowski endangered state troopers who were trying to control the area. "It is more likely that peace is going to be maintained if these images are destroyed," Trzcinski said.

Citizen publisher Catherine Kelly said in the May 2 *Free Press* story that Bukowski will appeal, calling the verdict "dangerous for all of us."

In a May 21 *Free Press* story, Bukowski said she had turned down an offer to plead guilty to two misdemeanors because she believed she had done nothing wrong. "I feel there's clearly a motivation behind the severity of these charges," Bukowski said. "I thought this all was a misunderstanding. I told the police that I would leave and there was no need to arrest me."

– Jacob Parsley
Silha Research Assistant

Endangered Journalists

North Korea Releases American Journalists; Iran Detains Freelancer

On August 4, 2009, American journalists Laura Ling and Euna Lee were granted a "special pardon" by the North Korean government and released from custody after being detained for over four months. News of the pardon came immediately following a meeting between former U.S President Bill Clinton and North Korean leader Kim Jong Il. During his visit, Clinton participated in what North Korean news agency KCNA called a "wide-ranging exchange of views on matters of common concern." By 7:30 p.m. on August 4, The Associated Press (AP) reported that the journalists were with Clinton on a plane back to the United States.

Reuters reported August 4 that KCNA stated, "Clinton expressed words of sincere apology to Kim Jong Il for the hostile acts committed by the two American journalists against the [Democratic People's Republic of Korea] after illegally intruding into it." However, on August 5, Reuters reported that Secretary of State Hillary Clinton denied there was an apology. At an August 5 news conference in Nairobi, Kenya, Clinton said of the apology report: "That's not true. That did not occur."

Ling and Lee were arrested by North Korean border guards March 17 when they allegedly crossed the border from China while filming a report for the San Francisco-based cable television station and Web site Current TV. Cameraman Mitch Koss and a Chinese guide, who were with the women when they were apprehended, escaped into China. Current TV was launched in 2005 with backing from former Vice President Al Gore, who is now the organization's chairman. For more on the arrest, see "Two American Journalists Arrested, to Face Trial in North Korea" in the Spring 2009 issue of the Silha *Bulletin*.

On June 8, Ling and Lee were charged with crossing the border between China and North Korea illegally, and committing "hostile acts," according to *The Washington Post* on June 9. The two were sentenced to 12 years of hard labor in a North Korean work camp by the Central Court of North Korea, the nation's highest court. The Committee to Protect Journalists reported June 17 that no outside observers were allowed to attend the trial, and that the North Korean government had not disclosed any of the evidence it used to try the case.

The journalists' families had refrained from talking with the press prior to the sentencing, but they released a joint statement June 8 which, according to the AP on June 9, asked North Korea to "to show compassion and grant Laura and Euna clemency and allow them to return home to their families."

On August 4, FOX News reported that the families released a second joint statement, saying they were "grateful to our government … for their dedication to and hard work on behalf of American citizens."

Current TV remained silent on the subject of its journalists' arrest and trial until after their release. Gore also refrained from making any official statement on their situation until they were freed. *The Post* reported on June 18 that "media observers said Current TV's decision not to air anything related to the situation could be justified when dealing with an unpredictable nation such as North Korea." FOX News reported August 4 that once the journalists' release was secured, Gore and Current TV co-founder Joel Hyatt released a joint statement saying "Our hearts go out to them and to their families for persevering through this horrible experience."

The Post reported June 18 that Tala Dowlatshahi, New York director of the advocacy group Reporters sans Frontieres (RSF or Reporters without Borders), "warned against blaming the journalists or Current TV's 'backpack journalism' approach." Dowlatshahi told *The Post* that "to say that this type of guerilla journalism is putting journalists in more risk than traditional journalism is not the issue. The issue is these women are not criminals, they're journalists, and they were not given proper legal treatment."

Speculation that Ling and Lee would be released persisted throughout their imprisonment. The AP reported on June 9 that Jeong-ho Roh, the director of the Center for Korean Legal Studies at Columbia Law School, supported the theory that Ling and Lee would not have to serve their sentence. "I don't think the reporters will do hard labor," Roh said, noting that it was "not in the North Koreans' interests to make them go through that."

The New York Times and *The Post* both reported August 5 that North Korea had been waiting for a "high profile" envoy to secure the journalists' release. *The Post* wrote that Gore "may not have been acceptable because he was viewed as their boss and thus not an appropriate symbol of the United States." On August 4, FOX News quoted Jim Walsh, a research associate at the Massachusetts Institute of Technology who studies international security, as saying that Clinton was a "rock star" who would have more influence than Gore. According to *The Times* on August 5, Hillary Clinton became a less likely candidate for a visit following her comments on ABC's "Good Morning America" on July 20 that compared North Korea's nuclear tests to the attention-seeking behavior of a child. KCNA quoted North Korea officials who called Clinton "by no means intelligent" and a "funny lady" in response, according to CNN on July 23.

According to the AP on June 9, Secretary of State Clinton said that the Obama administration was treating Ling and Lee's imprisonment and North Korea's recent testing of nuclear weapons as "entirely separate matters," but news organizations suggested that the two situations were politically linked. *The Times* cited "analysts" in reporting June 8 that the women were "pawn[s] in a rapidly deteriorating confrontation between the United States and North Korea – a potential bargaining chip for the Pyongyang regime and a handicap for Washington in its efforts to pressure the government over its recent missile and nuclear tests."

Journalists Freed, *continued on page 19*

> "To say that this type of guerilla journalism is putting journalists in more risk than traditional journalism is not the issue. The issue is these women are not criminals, they're journalists, and they were not given proper legal treatment."
>
> – Tala Dowlatshahi
> New York director,
> Reporters sans
> Frontieres

Endangered Journalists

Russia: Politkovskaya Murder Trial to be Reheard; Prominent Activist and Reporter Killed

Russia's Supreme Court overturned the acquittals of three men accused of involvement in the 2006 murder of journalist Anna Politkovskaya on June 25, 2009, ordering a retrial. Meanwhile, the kidnapping and murder of another prominent human rights activist and journalist in Chechnya on July 15 showed that the country remains treacherous for reporters challenging authority.

"The most important thing for us is that we not only have some secondary characters answer for their actions, but have the real culprits – the killer and the mastermind of the crime – called to the stand."

– Sergei Sokolov
Deputy Editor,
Novaya Gazeta

The Russian Supreme Court cited procedural violations by the judge and the defense in ordering that the case against four men – Sergei Khadzhikurbanov, brothers Dzhabrail and Ibragim Makhmudov, and Pavel Ryaguzov – be retried on the same charges in the same Moscow military court, *The New York Times* reported June 26. The Supreme Court sided with government prosecutors, who had appealed the acquittals alleging numerous procedural problems. In contrast, Russian President Dmitri A. Medvedev blamed the acquittals on the prosecution's errors and unfamiliarity with the jury system, which is relatively new in Russia, *The Times* reported.

On Feb. 19, 2009, a jury unanimously acquitted Khadzhikurbanov and the two Makhmudov brothers, who were accused of helping to organize the 2006 killing. Ryaguzov was acquitted of having criminal ties to the other three, but was not accused of playing a role in the murder itself. A June 25 Associated Press (AP) story said the acquittals were "an embarrassment" for a Russian government that "has appeared eager to fend off charges that journalists and Kremlin critics can be murdered with impunity."

For more on the first Politkovskaya trial, see "Accused Politkovskaya Conspirators Acquitted" in the Winter 2009 issue of the Silha *Bulletin*. For more on Politkovskaya's murder, and the subsequent investigation, see "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 issue, "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 issue, and "Charges Filed in Politkovskaya Murder, Killer Still at Large" in the Summer 2008 issue.

The circumstances of Politkovskaya's death led many to speculate that she was killed in retaliation for her outspoken criticism of Russian government officials and policies targeting Chechnya, which was the topic of much of the reporting for which she was renowned.

Politkovskaya's family and former colleagues expressed satisfaction at the Supreme Court's decision to retry the men accused of helping carry out the murder, but they remain focused on the fact that the suspected killer remains at large, and that the people suspected of ordering the killing have also not been found.

The Times reported that investigators believe a third Makhmudov brother, Rustam, carried out the murder, shooting Politkovskaya with a pistol in the hallway of her apartment building on Oct. 7, 2006. Rustam Makhmudov is reportedly thought to be hiding abroad.

Sergei Sokolov, deputy editor of Moscow's *Novaya Gazeta*, Politkovskaya's former employer, told the Committee to Protect Journalists (CPJ) in a June 25 story on its Web site, "The most important thing for us is that we not only have some secondary characters answer for their actions, but have the real culprits – the killer and the mastermind of the crime – called to the stand."

Karinna Moskalenko, a lawyer for Politkovskaya's family, told *The Times,* "That is the mechanism of impunity – to punish those who might be concerned with the case or maybe not – but not the real figures. This impunity will allow for the same type of crime to be committed in the future."

Human Rights Activist Killed in Chechnya

On July 15, prominent human rights worker and journalist Natalya Estemirova was kidnapped and murdered.

The Times reported July 15 that a co-worker said several men pushed Estemirova into a white vehicle as she left her home in Grozny, the capital of Chechnya, at about 8:30 that morning. Witnesses said she yelled that she was being kidnapped. The prosecutor general's investigative wing told *The Times* her body was found later that day in a wooded area alongside a highway about 50 miles away, near the city of Nazran, with gunshot wounds in the head and chest.

According to CPJ, Estemirova had been an activist with the Moscow-based human rights group Memorial since 1999 and a consultant for the New York-based international rights group Human Rights Watch. She was also a regular contributor to *Novaya Gazeta* and the Caucasus news Web site Kavkazsky Uzel. According to CPJ, Estemirova reported on extrajudicial killings, abductions, and punitive arsons for *Novaya Gazeta*, writing under a pseudonym after she began to receive threats from Chechen authorities. Reuters reported July 15 that Estemirova and Politkovskaya had been close friends. In 2007 Estemirova was the first recipient of an award given in Politkovskaya's honor by the rights organization Reach All Women in War (RAW in WAR).

The Times reported Estemirova "had become a central source of information on abuses in Chechnya," focusing her work on kidnappings that she believed had been carried out under the authority of Chechen president Ramzan A. Kadyrov, who has been publicly supported by the Russian government. Her work was denounced by Chechen authorities and brought threats, *The Times* reported. Tatyana Kasatkina, a co-worker at Memorial, told *The Times* that in March 2008, after Estemirova criticized a new Chechen law requiring women to wear head scarves,

Russia Update, *continued on page 19*

Russia Update, *continued from page 18*

Kadyrov summoned her and threatened her, leaving her so frightened that she went abroad for months. Estemirova eventually returned, despite friends' attempts to persuade her to stay away.

According to *The Times*, colleagues at Memorial said that as threats to her life became more frequent and more serious, Estemirova had become increasingly torn between staying in Grozny to work and the safety of her 15-year-old daughter, Lana, whom she was raising alone.

The Times reported July 17 that a "chorus of accusation" has followed the Estemirova killing, most of which has been directed at Kadyrov. Kasatkina said in the July 15 *Times* story, "There have been threats for a while, and now Kadyrov hopes to lower the curtain. With [Natalya's] murder, Kadyrov drew the line and sent a message to human rights groups: 'I won't tolerate you.'"

Kadyrov released a statement the day of Estemirova's killing, *The Times* reported July 15. He said he would "spare no expense" to find the killers, and that he believed the murder was meant to divert law enforcement attention from counterterrorism operations.

A statement from Medvedev also condemned the murder, adding, "Unfortunately, it is apparent that this premeditated murder may be related to Natalya Estemirova's human rights activities." *The Times* reported July 17 that Medvedev has dismissed theories that implicated Kadyrov, calling them "primitive." Kadyrov also placed a personal call to Memorial director Oleg P. Orlov, telling him the accusations must stop. Orlov told *The Times* "We had a conversation, man to man. There was a reproach. He said that the accusations I have been making against him were baseless. He said he had no need to kill ... Estemirova, that she did not represent a threat to anyone."

The Times reported that on July 16, police halted Estemirova's funeral procession in Grozny after it had traveled about 200 yards. The mourners were told they had to have a permit.

Four other *Novaya Gazeta* journalists have been killed in work-related murders since 2000. In addition to the 2006 murder of Politkovskaya, part-time *Novaya Gazeta* reporter Anastasia Baburova was killed on Jan. 19, 2009, as she walked on a Moscow sidewalk with human rights lawyer Stanislav Markelov, who was also killed. Deputy Editor Yuri Shchekochikhin died from a suspicious poisoning in 2003, and reporter Igor Domnikov was beaten to death with a hammer in 2000. No one has been charged or convicted for any of the murders.

– Patrick File
Silha Fellow and *Bulletin* Editor

Journalists Freed, *continued from page 17*

The AP reported on August 4 that former President Clinton's visit could open the door to new nuclear talks with the nation. "This is a very potentially rewarding trip," said Mike Chinoy, author of "Meltdown: The Inside Story of the North Korean Nuclear Crisis," adding "it could be a very significant opening and breaking this downward cycle of tension and recrimination between the U.S. and North Korea." According to *The Times* on August 5, Obama administration officials said Clinton went to North Korea as a private citizen, did not carry a message from President Obama to Kim Jong Il, and only had the authority to negotiate for the women's release.

According to *The Times* on August 5, Gore said that "President Obama and countless members of his administration have been deeply involved," in the effort to bring the women home. "To everybody who's played a part in this," he said, "we are so grateful."

Journalist, Companions Detained in Iran

On August 1, Iranian authorities arrested an American freelance journalist and his two companions and accused them of spying after they crossed the border from Iraqi Kurdistan. Friends and family members of Shane Bauer, Sarah Shourd, and Joshua Fattal say that the group was simply out for a scenic hike when they wandered across the border by mistake.

Bauer is a freelance journalist, and Shourd and Fattal have both written extensively about their travels in the Middle East, said Shon Meckfessel, a fourth member of the group who did not go along on the hike because he said he was not feeling well. In a letter published August 6 in *The Nation*, Meckfessel called his friends' presence in Iran "a simple and very regrettable mistake."

In an August 4 interview for NPR's "All Things Considered," Sandy Close, who had recently worked with Bauer in her role as the executive editor of New American Media, said she had "no idea" how Bauer ended up crossing into Iran. "Never in the year we have been in correspondence has he indicated any interest in covering Iran," Close said. "He didn't know Farsi. It's unthinkable to me that he would have decided on some crash adventure."

According to an August 5 story in the *Los Angeles Times*, Mohammed Karim Abedi, a member of the Iranian parliament's National Security Committee, told Al-Alam, Iran's state-run Arabic language TV channel, that it would be up to the "relevant authorities" to decide how to handle the case. "This issue is condemnable, and an apology from the U.S. side will not be acceptable, because the area is a very sensitive one," Abedi said. "We can definitely say that they have come as spies."

– Sara Cannon
Silha Center Staff

– Jacob Parsley
Silha Research Assistant

International

Irish Supreme Court Upholds Journalists' Right to Keep Source Confidential

"For the first time the right of journalists to protect their sources is enshrined in Irish law."

– Geraldine Kennedy
Editor, *The Irish Times*

The Supreme Court of Ireland has unanimously upheld the right of two *Irish Times* journalists to refuse to appear before a government tribunal and reveal their source for a 2006 report on a government corruption investigation.

The July 31, 2009 ruling in *Mahon Tribunal v. Keena*, [2009] IESC 64 (S.C. Ireland 2009) overturned a lower court ruling that said, in consideration of the journalists' "outstanding and … flagrant disregard of the rule of law," *Times* reporter Colm Keena and editor Geraldine Kennedy could be compelled to appear before the tribunal and answer questions about the source of a letter that was anonymously sent to the newspaper. Instead, in an opinion by Justice Nial Fennelly, the five-judge Supreme Court ruled that compelling the journalists' testimony was not justified by "an overriding requirement in the public interest" as required by Irish law and the European Convention on Human Rights. Fennelly wrote that the lower court "devalued the journalistic privilege so severely" in its decision that it failed to strike the proper balance between the tribunal's right to confidentiality in its investigation and the journalists' right to protect their source.

The case arose out of a Sept. 21, 2006 *Irish Times* report that Ireland's then-Taoiseach, or prime minister, Bertie Ahern, was the subject of an investigation for secretly taking payments of between 50,000 and 100,000 euros ($70,000 to $140,000) from business leaders when he was Ireland's finance minister in the early 1990s. The *Irish Times* report was based on a confidential letter that the government tribunal investigating possible corruption sent to one of the businessmen targeted by the investigation.

An Aug. 1, 2009 Associated Press (AP) story reported that the scandal involving payments to Ahern – which he initially said were unrepaid "loans" – eventually led the tribunal to uncover a series of even larger payments made to Ahern at a time when he kept no bank accounts and "operated exclusively from cash kept in personal safes." Ahern resigned in May 2008 after 11 years as Taoiseach.

According to Fennelly's opinion, tribunal chairman Justice Alan Mahon sought to compel Keena and Kennedy to turn over the letter and disclose its source on Sept. 25, 2006. Keena and Kennedy, in response to Mahon's order, said they had destroyed their copies of the letter, and in appearing before the tribunal declined to answer "any questions which in their view would give any assistance in identifying the source of the anonymous communication," citing their professional duty to protect confidential sources. The opinion said the journalists also refused to say whether the letter was an original (with letter heading) or a copy, which might help investigators determine its source. The AP reported that Mahon said the *Irish Times* report led to suspicions that its staff were behind the leak, undermining the tribunal's public credibility.

On Oct. 23, 2007, a three-judge panel of the High Court, an appeals court that sits below the Irish Supreme Court, ruled in favor of the tribunal and ordered Keena and Kennedy to appear before the tribunal and give testimony. The court called the journalist's destruction of the letter "reprehensible" and explained that, because it had been destroyed, "the most that can be achieved" is for the journalists to be able to indicate, based on whether the letter bore a header from the tribunal itself, whether "as a matter of probability" the source was a member of the tribunal. "Beyond that the source will remain, as of course the source always intended, shrouded in impenetrable mystery with its anonymity safely beyond the reach of forensic inquiry."

Fennelly, however, said the High Court's logic was "difficult to follow." Fennelly observed that the source would, "in all probability, have wished to disguise" the letter by using a photocopier or other device to mask the letter head if it had originated with the tribunal. "On the contrary hypothesis that it did not come from a Tribunal source, but was, as the High Court expressed it 'shrouded in impenetrable mystery,' it clearly would not be possible to justify the making of the order," Fennelly wrote.

Fennelly continued, "if the apparent anonymity of the source weakens the [journalists'] case for resisting the order, it must correspondingly weaken the Tribunal's case for obtaining it. If … the source was a person known to the journalist, it could, at the least, be argued that there was some concrete benefit to be obtained from the making of the order. Where the source is anonymous, the benefit is speculative at best."

The Supreme Court ruled that the High Court had failed to identify a logical link between the newspaper's destruction of the letter and the central issue – whether Irish and international law required them to reveal the source at all. The Supreme Court cited Article 40, section 6,1º of the Irish Constitution, which guarantees freedom of expression, as well as an earlier journalist's privilege case, *Goodwin v. United Kingdom*, (1996) EHRR 123 (European Court of Human Rights 1996), in which the court recognized a "vital public interest in the protection of the … journalist's source," to support its ruling that the High Court failed to strike a proper balance between the public interest derived from compelling Keena and Kennedy to testify and the public interest in the journalists protecting their source.

According to the AP, Kennedy said the ruling was "a very good judgment for investigative journalism," adding, "For the first time the right of journalists to protect their sources is enshrined in Irish law." She and Keena had faced potential imprisonment if they continued to refuse to reveal the source, the AP reported.

According to *The Irish Times* on August 1, Séamus Dooley, Irish secretary for the National Union of Journalists, a British and Irish professional journalists' union, said that although it was unfortunate that Kennedy and Keena had to go to the Supreme Court to defend a core journalistic value, the decision was a "victory for press freedom, for journalism and for common sense."

– Patrick File
Silha Fellow and *Bulletin* Editor

International

Northern Irish Reporter can Keep IRA Sources Secret; British High Court Rules Blogger Cannot Remain Anonymous

In June 2009, one British court upheld a print journalist's request to keep her sources secret, while another court refused to grant an injunction that would have prevented the unmasking of an anonymous blogger.

A judge in Belfast, Northern Ireland, ruled June 18 that print journalist Suzanne Breen could refuse to disclose to police interview notes and other information related to the killing of two British soldiers.

Judge Tom Burgess of the Belfast Laganside Court rejected an application by the Police Service of Northern Ireland (PSNI) to force Breen, the Dublin *Sunday Tribune*'s Northern Ireland correspondent, to hand over materials related to her reporting on the March 7, 2009 shooting at Massereene Barracks in Antrim, Northern Ireland. Under Britain's Terrorism Act of 2000, Breen could have faced up to five years in prison if Burgess had upheld the PSNI application and Breen continued to refuse to turn over the materials, which the *Sunday Tribune* reported she was prepared to do.

According to Burgess's opinion, Breen was contacted the day after the Massereene attack by a member of the Real IRA, who claimed responsibility for the shooting. Real IRA is a paramilitary terrorist organization that supports the reunification of Ireland and Northern Ireland. The opinion in *In the Matter of an Application By D/Inspector Justyn Galloway, PSNI, Under Paragraph 5, Schedule 5 of the Terrorism Act 2000*, [2009] NICty 4 (Belfast Laganside Court, 2009) is available online at http://tinyurl.com/BreenDecision.

PSNI made several inquiries to Breen about her sources and reporting before seeking a court order under Schedule 5(1) of the Terrorism Act, demanding that she provide "all notes, records, photographs and other material whether electronic or otherwise (including computers, disks or other such media) relating to claims of responsibility and contact with paramilitary groups in connection with these investigations."

Breen argued in court that members of the Real IRA had issued a warning that she would be killed if she cooperated with authorities, and that to comply with a court order would violate her right to life under Article 2 of the European Convention on Human Rights. She also argued that journalists have a general duty to protect confidential sources, referencing the code of conduct of the National Union of Journalists (NUJ), a British and Irish professional journalists' union. Rule 7 of the NUJ conduct code states, "A journalist protects the identity of sources who supplies information in confidence and material gathered in the course of her/his work."

According to the *Sunday Tribune* on June 14, a series of witnesses testified on Breen's behalf during the June 11 hearing, including British and Irish journalists who offered evidence in support of Breen's contention that her life was in serious danger and that the values of press freedom and professional journalism ethics compelled her to protect her sources and unpublished materials.

BBC television journalist John Ware testified that Breen faced a credible threat against her life. "[The Real IRA] would have no hesitation, none at all in my view, in killing her. These guys are the Taliban of the republican movement," Ware said.

Guardian media critic Roy Greenslade connected promises of confidentiality to "credibility and trust," the *Sunday Tribune* reported. "These two things go together, and any attempts to break that in any way means that you lose both. That then breaks the whole nature of journalism."

The *Sunday Tribune* reported that Tony McGleenan, lawyer for the PSNI, argued that the NUJ code of conduct for journalists "carries no legal force," and that Breen's subjective fears for her life did not constitute a verifiable threat.

Breen's lawyer Arthur Harvey argued that journalists enjoy a "privileged" position, as does their material, be it confidential or not, the *Sunday Tribune* reported. Harvey called the risks to Breen's life "objectively real and … immediate and they will be triggered by a breach of ethics that could be imposed upon her."

Burgess's June 18 ruling focused heavily on the threat to Breen's life and the PSNI's failure to produce evidence contradicting it. The judge referred to a recent report by the Independent Monitoring Commission overseeing paramilitary ceasefires in Ireland and Northern Ireland, which stated that the Real IRA "remain … highly dangerous and active." Burgess said that the threat to the lives of Breen and her family "is not just real and immediate. It is continuing," and therefore must outweigh the public interest in compelling Breen to hand over her reporting materials in order to assist in the PSNI's investigation into the murder of the two soldiers. "I determine that a positive obligation arises on the part of the State, and indeed on the part of this court as a public authority under the provisions of the Human Rights Act, to take such steps as it believes right and proper for the protection of the life of Ms Breen," Burgess wrote.

Burgess also wrote that he respected the professional obligations of journalists, and that he recognized the "uncomfortable position" created by confidential relationships with sources, "and I believe that discomfort and concern is real in the case of Ms Breen."

British free press advocates like the NUJ called the ruling a "victory for press freedom," according to *The Guardian* on June 18, and Breen called the decision "an absolute landmark … that hopefully will set a precedent. I would like to think that no other journalist would find themselves hauled before the courts like I have found myself, that no other journalist will potentially face five years in prison."

A June 21 *Sunday Tribune* editorial said the decision "copperfastens the argument that journalists cannot

British Anonymity, *continued on page 22*

> "I determine that a positive obligation arises on the part of the State, and indeed on the part of this court as a public authority under the provisions of the Human Rights Act, to take such steps as it believes right and proper for the protection of the life of Ms Breen."
>
> – Judge Tom Burgess
> Belfast Laganside Court

British Anonymity, *continued from page 21*

be used as witnesses or gatherers of information for the police, even though the crime being investigated can be vile indeed."

However, Greenslade observed in a June 18 blog post on guardian.co.uk that the "less good news" of the decision was that "it is not a definitive judgment on a journalist's right not to disclose all information received in confidence." Greenslade also interpreted the ruling narrowly, saying it "sets a precedent on behalf of journalists who receive confidential information from paramilitaries/terrorists, whether in the form of an interview or when taking a phone call in which the caller is claiming responsibility for a bombing or shooting."

High Court: Anonymous Bloggers can be Unmasked

On June 15, 2009, the British High Court turned down Richard Horton's request for an injunction against *The Times* of London to prevent the newspaper from identifying him as the author of the blog NightJack. Horton is a Lancashire detective constable, and his blog, now defunct, was described by *The Daily Telegraph* of London as "a behind-the-scenes insight into policing." Horton was often critical of police officials and politicians, advising "decent" members of the public under police investigation to "complain about every officer … show no respect to the legal system or anybody working in it." According to the *Telegraph*, NightJack attracted up to 500,000 readers per entry, and won an Orwell Prize for political reporting in April 2009.

The Times reported June 17 that some of Horton's most widely read blog posts were anecdotes drawn from real cases he had worked on. Although the people and places involved in the cases were made anonymous and the details changed, the cases could still be traced back to real prosecutions. According to *The Times*, the legal case arose after its media correspondent, Patrick Foster, tracked down the identity of the anonymous NightJack blogger. Horton then secured an interim injunction preventing Foster or *The Times* from revealing his identity, arguing that he could be subject to disciplinary actions from the Lancashire Constabulary for disclosing confidential information.

However, High Court Justice Sir David Eady overturned the injunction in a decision that *The Times* and *The Guardian* of London both described as "a landmark." Eady wrote that Horton had "no reasonable expectation of privacy" because "blogging is essentially a public rather than a private activity."

"I do not accept that it is part of the court's function to protect police officers who are, or think they may be, acting in breach of police disciplinary regulations from coming to the attention of their superiors," Eady wrote, adding that the fact that Horton wanted to remain anonymous did not mean that *The Times* was under an enforceable legal obligation to maintain that anonymity.

According to *The Times*, Eady wrote that even if Horton had argued that he had a right to anonymity, he would have overturned the injunction on public interest grounds. "It would seem to be quite legitimate for the public to be told who it was who was choosing to make, in some instances quite serious criticisms of police activities and, if it be the case, that frequent infringements of police discipline regulations were taking place," Eady wrote.

The Times reported that Horton's lawyer, Hugh Tomlinson, had argued that "thousands of regular bloggers … would be horrified to think that the law would do nothing to protect their anonymity if someone carried out the necessary detective work and sought to unmask them." *The Daily Telegraph* said the decision "could have implications for thousands of other anonymous bloggers."

Meanwhile, *Times* lawyer Antony White argued that there was public interest in a police officer not complying with his obligations under the statutory code governing police behavior and also with a more general duty of police officers not to reveal confidential information obtained in the course of a police investigation.

The Times reported that the Lancashire Constabulary issued Horton a written warning in response to his blogging.

Both the court ruling and *The Times* have drawn criticism. In a June 18 column for *The Guardian*, pseudonymous blogger "Belle de Jour," author of the popular blog Diary of a London Call Girl, called the ruling "a dangerous precedent" and the identifying of Horton "ruthless."

"While certain content on [Horton's blog] was ethically questionable … the content of his writing in no way justifies a blanket ruling that blogging is a public act and therefore cannot be anonymous …. Tell that to whistleblowers in any industry," Belle de Jour wrote, adding, "I think it is clear that any other police officers who might have thought about revealing what truly went on in their department will now think twice. And that, in case you need reminding, is a loss in a democratic society."

According to *The Daily Telegraph*, Horton was "one of about a dozen police officers to have run popular blog sites, along with scores of other public servants, which anonymously document their daily life."

Belle de Jour also lamented the fact that the NightJack blog had been pulled down as a result of Horton being unmasked by *The Times*. "I am suspicious when any organisation cracks down hard on an individual. … I, like many others, would appreciate a second reading – to figure out what exactly was so incendiary about his writing that the Times felt it necessary to destroy his career."

Daniel Finkelstein, Chief Leader Writer and a political columnist at *The Times*, responded to the criticism with a June 17 blog post on *The Times*' Web site. "When a public servant decides to reveal the confidences of their colleagues and details of their work, especially on police cases, then their identity becomes a legitimate matter of interest. And other journalists might reasonably investigate the matter. What, say, if it turned out that NightJack wasn't actually a detective at all? Or that he was [former London police commissioner] Sir Ian Blair? Are we really saying that his identity isn't a public matter?" Finkelstein wrote.

– Patrick File
Silha Fellow and *Bulletin* Editor

Digital Media

Blogger Charged with Inciting Attacks on Judges, Lawmakers

Judge also Acquits Blogger Accused of Soliciting Violence against Juror

New Jersey blogger and Internet radio host Hal Turner is facing state and federal charges for separate inflammatory posts on his blog: one regarding Connecticut state legislators and another involving three judges on the 7th Circuit U.S. Court of Appeals.

The New York Times reported June 24 that Turner was arrested in North Bergen, N.J., after federal officials charged that posts on his now-defunct blog, turnerradionetwork.com, amounted to death threats against judges. The posts denounced a 7th Circuit ruling that upheld two local handgun bans in Chicago. Turner pleaded not guilty to the charge on July 28, the *Chicago Tribune* reported.

"Let me be the first to say this plainly: These judges deserve to be killed," Turner wrote June 2, according to the June 24 indictment. "Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions."

Turner also wrote that if the three judges, William Bauer, Frank Easterbrook, and Richard Posner, "are allowed to get away with this by surviving, other Judges will act the same way." Turner posted the judges' photographs, phone numbers, work addresses, and courtroom numbers on his blog. Each of the three judges has served as chief judge of the 7th Circuit, and according to a June 25 *Chicago Tribune* story, Posner is one of the best-known appellate judges in the country and a prolific author. Bauer is a former U.S. attorney.

According to the indictment, the blog entry also referenced the 2005 murders of the mother and husband of U.S. District Judge Joan Humphrey Lefkow in Chicago. "Apparently, the 7th U.S. Circuit court didn't get the hint after those killings. It appears another lesson is needed," Turner wrote.

Although *The Times* reported in the June 24 story that there was no indication that Turner or anyone else acted on his warnings, the FBI said in the affidavit that it believed his comments constituted "a threat to assault or murder a United States judge," in violation of 18 U.S.C. § 115(a)(1)(B).

According to a June 25 Associated Press (AP) story, Turner was initially denied bail by U.S. Magistrate Michael Shipp, who ordered that Turner be transferred to Illinois to face the charge, which carries a maximum prison sentence of 10 years and a $250,000 fine.

The AP reported that attorneys on both sides had reached a tentative agreement that would have allowed Turner to be released on $200,000 bail, as long as he remained confined to his New Jersey home and barred from the Internet. Shipp, however, expressed reservations about the bail package, noting that federal agents had discovered three pistols, a shotgun, and several hundred rounds of ammunition at Turner's apartment.

"Quite frankly, after reading all the information I'm concerned about the defendant's threat to the community," Shipp said, according to a June 30 *New York Times* story.

Turner's defense attorney Michael Orozco argued before U.S. Magistrate Judge Martin Ashman at a July 28 bond hearing in Chicago that Turner was not dangerous, and claimed that Turner should be allowed to post bond because he had served as an FBI informant in the past, the *Chicago Tribune* reported in the July 28 story.

According to an August 11 story in *The National Law Journal*, Ashman issued a one-sentence order denying Turner bail and stating that he should be "detained as a danger to the community pending further court proceedings."

In an August 19 AP story, Orozco said Turner should be shown leniency because he worked for the FBI from 2002 to 2007 as an "agent provocateur" and was taught by the agency "what he could say that wouldn't be crossing the line." Prosecutors have acknowledged that Turner was an informant in the past, but at the time of the alleged threats, he was no longer with the FBI. But Orozco said that Turner's posts are consistent with his FBI work. "If you compare anything that he did say when he was operating, there was no difference. No difference whatsoever."

Prior to the federal charges, Turner had surrendered to Connecticut authorities on state charges of inciting violence against two of the state's lawmakers by waiving extradition on June 8. He was then released after posting $25,000 bail, according to a June 10 AP story. Turner had been taken into custody June 3 by North Bergen police at the request of Connecticut law enforcement officials, who said Turner's blog posts were in violation of Conn. Gen. Stat. § 53a-179a(a), which criminalizes "inciting injury to persons or property."

According to the AP, Connecticut police said that Turner's blog posts amounted to incitement against Connecticut state lawmakers Sen. Andrew McDonald (D-Stamford) and Rep. Michael Lawlor (D-East Haven), who introduced a controversial bill that would have given lay members of Roman Catholic churches more control over their parishes' finances.

The AP reported that Turner's June 2 post urged "Catholics in Connecticut take up arms and put down this tyranny by force. … It is our intent to foment direct action against these individuals personally. These beastly government officials should be made an example of as a warning to others in government: Obey the Constitution or die."

According to the AP, a Connecticut police officer said in the arrest warrant affidavit that Turner took responsibility for what he wrote. "I did an article on it, and then posted some very terse commentary at the bottom," Turner told the officer. "It's certainly my intent to motivate the public to get involved in this, and certainly we hope that nobody's going to go off the deep end and do something terrible, but ... you never can tell."

According to the June 10 AP article, Turner's

Blogger Charged, *continued on page 24*

The FBI said that it believed Turner's comments constituted "a threat to assault or murder a United States judge," in violation of 18 U.S.C. § 115(a)(1)(B).

Blogger Charged, *continued from page 23*

activity has drawn scrutiny before. The FBI questioned him in 2005 regarding the Lefkow case, because years earlier he had said on his radio show that Lefkow "was worthy of being killed." Two years ago, local police increased security for several New Jersey Supreme Court justices after Turner revealed their addresses in the wake of the court's ruling that gay couples were entitled to the same rights as married couples. Turner was not charged in either instance.

Frank Askin, a professor of constitutional law at Rutgers University, said in the June 30 *New York Times* story that even statements as "obnoxious and offensive" as Turner's are still protected by the First Amendment. "In order to convict him, the U.S. Supreme Court is going to have to overrule earlier doctrine," Askin said. "I don't think he can be convicted of incitement. People who listen to him have time to think."

Gene Policinski, vice president and executive director of the First Amendment Center, mentioned Turner in a June 14 post on the center's Web site, concluding that "judgment on public pundits and broadcast provocateurs is – and should be – rendered in the court of public opinion." Policinski also cited other recent events, such as the accusations that conservative FOX News commentator Bill O'Reilly was directly responsible in the May 31 shooting death of Kansas doctor George Tiller, who performed late-term abortions.

Policinski wrote that the principles upheld in the Supreme Court case *Brandenburg v. Ohio*, 395 U.S. 444 (1969), should preclude any criminal charges against commentators such as Turner or O'Reilly. In *Brandenburg*, the Court held that the First Amendment protected statements advocating use of force or illegal activity "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The June 25 *New York Times* story, however, compared Turner's situation to that of the defendants in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), in which the 9th Circuit U.S. Court of Appeals upheld a district court decision by a 6 to 5 vote that the American Coalition of Life Activists (ACLA), and several individuals associated with it were not protected by the First Amendment for maintaining a Web site called The Nuremberg Files, which included a list of names of doctors who performed abortions, along with judges, politicians, police officers, and others that the group identified as being abortion supporters. Some of the names were linked to "wanted" posters that included the person's work and home addresses, photographs, telephone numbers, spouse's names, and children's names and school addresses. The site crossed out names of individuals who had been killed, listing them as "fatalities."

"ACLA was aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community," the *Planned Parenthood* opinion said. "ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head."

Blogger Acquitted of Soliciting Harm to Juror, Remains in Custody

A federal judge in Chicago dismissed a charge against a Roanoke, Va., blogger accused of using his Web site to encourage harm to a juror. The judge ruled on July 21, 2009, that the First Amendment protects the blogger's post. However, the blogger remains in custody awaiting a hearing in a case stemming from other threats.

In *United States v. White*, 2009 WL 2244639, 2009 U.S. Dist. LEXIS 65085 (N.D. Il. July 21, 2009), District Judge Lynn Adelman said that William White's blog posts about the juror did "not solicit violence" themselves and his history of encouraging violent behavior through his Web site failed "to provide the strong corroboration necessary for a lawful prosecution under … the First Amendment."

White was indicted on Oct. 21, 2008, on allegations that he had violated 18 U.S.C. § 373, which makes it a crime to solicit or persuade another person to commit a felony involving physical force. According to the order, White published several items on Sept. 8, 2008 on his Web site, overthrow.com, criticizing the 2004 conviction of white supremacist Nathan Hale for soliciting the murder of a federal judge in Chicago. White's post included the photograph, name, address, and phone number of the jury foreperson, whom White referred to as "gay" and "anti-racist."

The indictment alleged that White's posting of the juror's personal information, combined with his history of violent writing on the site, made his intent to cause harm to the juror clear, even though he did not directly state that any action should be taken against the juror. The indictment included several previous quotations from White's blog, such as a March 26, 2008 post where White wrote that an unnamed Canadian civil rights lawyer "is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree… ." White also posted the lawyer's address.

Adelman's order said, "In a democratic society, it is axiomatic that the [First] Amendment's protections are not limited to the genteel, the enlightened or the tasteful." He cited cases such as *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which the Supreme Court stated that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."

"The fact that defendant knew that white supremacists sometimes viewed his Web site and sometimes harmed people they perceived as enemies is insufficient to transform his lawful statements about [the juror] into criminal advocacy," Adelman wrote. "The posting of personal information about an individual involved in a judicial proceeding, even under circumstances that are intimidating or unsettling, cannot, absent a true threat or an incitement to imminent lawless action, be

Blogger Charged, *continued on page 27*

Digital Media

Judge Dismisses Ruling against Mother in MySpace Suicide Case

In July 2009, a federal judge in Los Angeles threw out a criminal case against a Missouri woman convicted of computer fraud stemming from a 2006 hoax on the Web site MySpace targeting a teenage girl, who later committed suicide.

According to a July 2 *Los Angeles Times* story, Lori Drew, of Dardenne Prairie, Mo., was convicted on Nov. 26, 2008, of three misdemeanor counts of illegally accessing a protected computer. She was scheduled to be sentenced in May, but U.S. District Court Judge George H. Wu delayed the sentencing in *United States v. Drew*, No. 08-582-GW (C.D. Cal. 2009) to consider the defense's motion to dismiss the case. Wu issued a directed acquittal on all three convictions on July 2.

Drew had been accused of participating in a cyber-bullying scheme in Missouri against 13-year-old Megan Meier. Drew created a fictitious profile on the social networking site of a young man, which she used to contact, flirt with, and later reject and insult Meier, a former friend of Drew's daughter. Meier hanged herself in her home in October 2006. (See "5th Circuit Holds MySpace Not Responsible for User Misuse" in the Summer 2008 Silha *Bulletin*.)

Wired.com's Threat Level Blog said in a July 2 post that the government argued that violating MySpace's terms of service agreement was the legal equivalent of computer hacking, a premise that Wu said he found troubling.

"It basically leaves it up to a website owner to determine what is a crime," Wu said, according to the July 2 Threat Level post. "And therefore it criminalizes what would be a breach of contract."

MySpace's user agreement requires registrants to provide, among other things, factual information about themselves, and to refrain from soliciting personal information from minors and using information obtained from MySpace services to harass or harm other people, Threat Level reported. By allegedly violating the "click-to-agree contract," Drew committed the same crime as any hacker, prosecutors claimed.

Drew had been charged with four potential felony counts of unauthorized computer access under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Instead, the jury convicted her of three misdemeanor charges. U.S. Attorney Thomas O'Brien filed the case in Los Angeles because that is where MySpace's servers are based. The Associated Press (AP) reported May 19, 2008 that authorities in Missouri did not file charges against Drew following the suicide because there was no applicable state law.

Drew had faced a maximum sentence of three years and a $300,000 fine under the federal statute. Although prosecutors sought the maximum, Threat Level reported that probation authorities, in a pre-sentencing report sent to the court, had recommended probation and a $5,000 fine.

The ruling is not official until Wu releases a written decision. Prosecutors will then have the option of appealing.

According to a July 3 Associated Press (AP) story, O'Brien said in a press conference that after prosecutors see the written ruling they will consider options, including an appeal to the 9th Circuit U.S. Court of Appeals.

"I'm proud of this case," O'Brien said. "This is a case that called out for someone to do something. It was a risk. But this office will always take risks on behalf of children."

According to Threat Level, Megan Meier's mother Tina said she was "extremely upset with the decision" and that the family was still considering whether to bring a civil case against Drew.

"As Megan's mom, I wanted to see her go to jail, because I think it needed to set a precedent," Tina Meier said On NBC's "Today" show July 3. "I think it needed to let people know: You get on the computer, you use it as a weapon to hurt, to harm, to harass people, this is not something that people can just walk away from."

Drew's attorney, H. Dean Steward, said in the July 2 AP story that the U.S. attorney's office in Los Angeles should not have brought the charges in a case that originated in Missouri but was rejected by prosecutors there. "Shame on the U.S. attorney for bringing this case. The St. Louis prosecutors had it right," Steward said. According to the July 2 Threat Level post, Steward expressed a hope that prosecutors "will just let this case end now."

New York defense attorney Scott Greenfield had criticized the November 2008 jury verdict on his blog, Simple Justice. "Under the [jury] verdict in the Drew case, the internet is replete with misdemeanants. People provide less than 100% accurate information in filling out their profiles all the time," Greenfield wrote in a Nov. 28, 2008 post. "This makes many, even a majority perhaps, of Americans criminals. It's bad when a law is interpreted in such a way that most people are criminals."

George Washington Law School Professor Orin Kerr, who worked with Drew's legal team during the case, also criticized the charges. "The indictment is not charging Drew with harassment. Nor are they charging her with homicide. Rather, the government's theory in this case is that Drew criminally trespassed onto MySpace's server by using MySpace in a way that violated MySpace's Terms of Service," Kerr wrote in a May 15, 2008 post on the Volokh Conspiracy law blog. "She didn't comply with these terms, the theory goes, so she was criminally trespassing onto MySpace's computer when she was logging into her account. … I figured it was only a matter of time before a sympathetic case came along and some aggressive prosecutor would try the argument and see if it flew."

In a July 1, 2009 Threat Level post, Rep. Linda Sanchez (D-Calif.) praised the efforts of prosecutors. "What Lori Drew did was egregious, and it is time that she be brought to justice," Sanchez said in a statement. Sanchez introduced the Megan Meier

MySpace Suicide Case, *continued on page 27*

> "As Megan's mom, I wanted to see [Drew] go to jail, because I think it needed to set a precedent. I think it needed to let people know: You get on the computer, you use it as a weapon to hurt, to harm, to harass people, this is not something that people can just walk away from."
>
> – Tina Meier
> Mother of Megan Meier

Digital Media

Courts Rule Leagues Cannot Keep Stats Out of Fantasy Sports

A federal judge in Minnesota ruled on April 28, 2009 that CBS does not have to pay to use the names and statistics of National Football League players in its fantasy football league because the information is in the public domain.

The decision in *CBS Interactive Inc. v. National Football League Players Ass'n Inc.*, 2009 WL 1151982, 2009 U.S. Dist. LEXIS 36800 (D. Minn. April 28, 2009) further limits the influence that professional sports leagues and players unions have over fantasy sports. Yahoo! Inc. settled a similar lawsuit against the NFL Players Association (NFLPA) in July, although terms of the settlement were not disclosed.

U.S. District Court Judge Ann D. Montgomery granted summary judgment for CBS on the basis that the players' names and statistics constituted a form of "speech" entitled to First Amendment protection.

In *CBS Interactive*, U.S. District Court Judge Ann D. Montgomery granted summary judgment for CBS on the basis that the players' names and statistics constituted a form of "speech" entitled to First Amendment protection. CBS Interactive operates CBSSports.com, a Web site that hosts the corporation's fantasy football league.

Fantasy football is a popular and lucrative form of entertainment. An estimated 15 million people play the online game each season, generating more than $1 billion a year in revenue, according to figures cited in *CBS Interactive*. In a fantasy league, participants act as managers of their own teams comprised of professional athletes acquired through a draft and trades with other managers. The success of a team is based on the statistics of real players throughout the season. In order to succeed, managers often consult sports news information such as performance statistics, player reviews and injury updates contained on the Web site.

In her ruling, Montgomery relied on and extended the decision in *C.B.C. Distribution and Marketing Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007), in which the federal appeals court decided that a fantasy baseball provider did not have to pay to use the names and statistics of Major League Baseball players. C.B.C. Distribution and Marketing (CBC), a Missouri-based company, sells fantasy sports products via the Internet, mail, and the telephone. The products incorporate the names along with performance and biographical data of actual Major League Baseball players. Participants in CBC's fantasy baseball games pay fees to play and additional fees to trade players during the season.

The 8th Circuit had found that the use of the information for commercial gain violated the players' rights of publicity under Missouri law. However, the court concluded that based on Supreme Court guidance that requires rights of publicity based on state law to be balanced against First Amendment considerations, "the former must give way to the latter." The court noted that the information used in fantasy baseball "is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone." The court reiterated that speech that informs and speech that entertains, such as the disputed fantasy sport information, are both protected by the First Amendment.

In the lawsuits filed against the NFLPA in federal district court in Minneapolis, CBS Interactive and Yahoo! both sought declarations that they should not have to pay royalties to use players' statistics, photos, and other data in their online fantasy football leagues because the information is widely available to the public. NFL Players Inc., the licensing arm of the players association, countersued CBS, arguing that players deserved to be compensated for the use of the material. Yahoo! claimed the players union threatened a similar lawsuit if it did not pay to use the information.

Prior to the 2008-2009 NFL season, CBS Interactive had a licensing agreement with NFL Players Inc. that allowed CBS to use the names, statistics and likenesses of the players, including jersey numbers, photos, and other biographical information. After that agreement expired in February 2008, NFL Players Inc. demanded CBS continue to pay licensing fees for the continued use of the names and statistics, but CBS refused and filed suit. Yahoo's similar agreement expired March 1 and it filed suit on June 1.

CBS Interactive most likely decided to file its suit in Minnesota "to avail itself of Eighth Circuit precedent established by *C.B.C. Distribution*," Montgomery wrote in denying a motion by NFLPA and NFL Players Inc. to transfer the case to the Southern District of Florida, which would not be bound by 8th Circuit precedent. The Associated Press noted in a Sept. 5, 2008 report announcing the lawsuit that federal courts in Minneapolis have been a frequent venue for cases involving the NFLPA, including a ruling in February 2008 that allowed suspended quarterback Michael Vick to keep $16.5 million in bonuses.

In her opinion, Montgomery disagreed with NFLPA's argument that the package of football-related information CBS Interactive uses is more comprehensive than that used by C.B.C. Distribution and Marketing for fantasy baseball. Both services use player names, profiles, statistics, injury reports and biographical information. "The Court discerns no difference between the package of information at issue here and that which was at issue in *C.B.C. Distribution* that would impact the balancing of publicity rights against First Amendment considerations," Montgomery wrote. Montgomery also rejected a claim by NFLPA that the manner in which CBS presents the package of player information gives the false impression that the pictured players endorse the CBS fantasy league.

The NFLPA also argued that it is not clear whether the public has as much interest in football statistics as it does in baseball statistics, so there may be weaker First Amendment interests at stake in the former case. Montgomery declined "to indulge in a philosophical debate about whether the public is more fascinated with baseball or football." The 8th

Fantasy Football Lawsuit, *continued on page 27*

Fantasy Football Lawsuit, *continued from page 26*

Circuit in *C.B.C. Distribution* noted that baseball is the "national pastime" and the public has "an enduring fascination" with the records and statistics of the sport. Montgomery wrote that it is "a distinction without a difference" that one case involved football and the other baseball. "Suffice it to say," she wrote, "that there is no dispute that both professional baseball and professional football and the statistics generated by both sports are closely followed by a large segment of the public."

The NFLPA is appealing the decision in *CBS Interactive*. In June, the Supreme Court refused to consider the decision in *C.B.C. Distribution*. In that case, the NFL, National Basketball Association, National Hockey League, NASCAR, the PGA Tour, and the Women's National Basketball Association filed a brief in support of Major League Baseball.

Yahoo! spokeswoman Nicol Addison confirmed that a settlement had been reached with the NFLPA, but she declined to provide specifics, according to July 8 report in the *Minneapolis Star Tribune*. According to July 7 Reuters report, Addison said Yahoo! is "going to explore other opportunities with the NFL players union to work together."

– Cary Snyder
Silha Research Assistant

Blogger Charged, *continued from page 24*

criminalized consistent with the First Amendment."

Adelman, a federal district court judge from Wisconsin, was assigned the case after the judges from the Chicago-based U.S. District Court were recused because the Hale case involved a Chicago-based judge.

According to a July 23 AP story, White is the "self-styled" founder and leader of the American National Socialist Workers Party. His writing regularly attacked non-whites, Jews, and homosexuals and expressed approval of violent acts. His Web site is no longer online. At the time of White's September 8 post, the jury foreperson's name had not previously been made public.

According to the AP, White's attorney, Nishay Kumar Sanan, said Adelman "obviously followed the law and made the right decision." He also said the government had already sought to stay the ruling while it decides whether to appeal. The AP reported that the government was reviewing the ruling and would consider what steps to take next.

According to the AP, White also faces federal charges in Virginia for making online threats to several other people, including the Canadian civil rights lawyer and a New Jersey mayor. White cannot be released until there is a bond hearing in the Virginia case, Sanan said.

According to a July 26 story in *The Roanoke Times*, three different courts have declined to release White on bond, saying that his writings indicate that he is a danger to the community. The story cited a post from White's site in which he wrote about waking up every morning with the urge to "kill, kill, kill," and another in which he said he had developed a "very intricate plot for the murder of about a score of Roanoke city's Negro nuisances and their annoying counterparts at *The Roanoke Times*."

– Jacob Parsley
Silha Research Assistant

MySpace Suicide Case, *continued from page 25*

Cyberbulling Prevention Act before Congress in April 2009. "I applaud the work of the U.S. attorneys who have worked hard to bring Ms. Drew to justice, despite the absence of a federal anti-cyberbullying statute. … This case sheds light on how our laws need to catch up with new crimes like cyberbullying, so that people like Ms. Drew will think twice before using the internet to bully and harass innocent victims like Megan Meier."

In a July 2 post on the technology Web site ZDNet.com, former Assistant U.S. Attorney and current Loyola Law School professor Laurie Levenson also said federal legislation was needed to deal with cyber-bullying. "Ultimately I think Congress has to deal with this issue," Levenson said, adding, "The challenge is to draft legislation that . . . isn't so broad that it chills people's First Amendment rights and is enforceable."

– Jacob Parsley
Silha Research Assistant

Copyright

Juries Assess Large Damages against Music File Sharers in Minnesota and Massachusetts

Separate juries in Minneapolis and Boston assessed statutory damages totaling over $2.5 million against people accused of illegally downloading and sharing music in the first two file-sharing copyright cases to go to trial.

On June 18, 2009, a Minneapolis jury decided on a $1.9 million verdict against a woman accused of downloading and sharing 24 songs in violation of federal copyright law, in a retrial of the first such copyright lawsuit to go before a jury.

> "The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court."
>
> – Judge Michael Davis
> District of Minnesota

Jammie Thomas-Rasset, of Brainerd, Minn., was initially assessed $222,000 in damages on Oct. 5, 2007 in *Capitol v. Thomas*, C.V. 06-1497 (D. Minn. Oct. 5, 2007). However, according to the Minneapolis *Star Tribune* on June 18, 2009, U.S. District Judge Michael Davis granted a retrial because the initial jury was wrongly instructed that under the Copyright Act, 17 U.S.C. § 101 *et seq.*, the "act of making copyrighted sound recordings available" is a violation of federal law "regardless of whether actual distribution has been shown." The jury in the second trial, which concluded June 18, was told that either reproducing or distributing copyrighted material is infringement, but that merely "making sound recordings available" via the Internet without proof that other users actually downloaded the files does not constitute distribution.

The second verdict of $1.9 million amounts to $80,000 per song. The Copyright Act's statutory damages system, codified at 17 U.S.C. § 504, allows a jury or judge to award anywhere between $750 and $150,000 for each work infringed.

The *Star Tribune* reported July 7 that in ordering the retrial, Davis also urged Congress to change the copyright law. "The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court. The Court does not condone Thomas's actions, but it would be a farce to say that a single mother's acts of using [file-sharing program] Kazaa are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market."

The Recording Industry Association of America (RIAA) has sued about 35,000 people since 2003 for illegally downloading and sharing music through file sharing software. Thomas-Rasset's case was the first to go to trial, as most people accused of infringement settled the suits outside of court for an average of $4,000, *The New York Times* reported in fall 2007.

In December 2008, the RIAA announced that it would abandon lawsuits against individual file-sharers in favor of an approach working more closely with Internet service provider companies to limit the practice. (See "Music Industry to Abandon Mass Copyright Lawsuits" in the Winter 2009 Silha *Bulletin*. For more on *Capitol v. Thomas*, see "Music Industry Wins First Internet Piracy Case" in the Fall 2007 issue.)

On July 7, the *Star Tribune* reported that lawyers for Thomas-Rasset asked the court to either reduce the "grossly excessive" and "unconstitutional" damages, or rehear the trial. Attorney Joe Sibley told the *Star Tribune* that damages for copyright infringement should match the amount of harm done, adding, "I don't know how they can justify [the $1.9 million verdict] based on that principle."

On August 1, Boston University graduate student Joel Tenenbaum was assessed $675,000 in damages – or $22,500 per song – for 30 songs he allegedly downloaded and shared. The trial, *Capital Records, Inc. et al v. Alaujan*, 1:03-cv-11661-NG (E.D. Mass. Aug. 1, 2009), received significant attention from the media, in part because Tenenbaum's defense team included Harvard Law School professor Charles Nesson, who was assisted by several of his students. In April, the 1st Circuit U.S. Court of Appeals barred a live webcast of the trial, citing a local rule in the District of Massachusetts which prohibits photography, recording, or broadcast of courtroom proceedings. For more on that decision, see "1st Circuit Blocks Live Webcast of File-Sharing Trial" in the Spring 2009 Silha *Bulletin*.

According to *The National Law Journal*, Nesson wanted to argue before the jury that Tenenbaum's downloading and sharing of songs was covered by "fair use," an exception under § 107 of the Copyright Act often used to cover material used for educational or newsgathering purposes. But District Judge Nancy Gertner ruled before the jury was selected that the "fair use" defense could not be applied. *The National Law Journal* reported that Nesson called Gertner's ruling on fair use "vulnerable," and said he plans to use it as the basis for an appeal.

"It's not a fair verdict because the jury never got to consider the fairness issue," Nesson said. "We had a pretty darn good argument."

The National Law Journal reported that while on the stand on July 30, Tenenbaum admitted liability for downloading and distributing the songs at issue in the case. Following that testimony, Gertner ruled that the jury no longer had to decide whether Tenenbaum was guilty of the infringement but rather only whether it was "willful," and then to determine how much Tenenbaum should pay in damages.

According to *The National Law Journal*, Nesson's closing arguments focused on trying to convince the jury to keep damages low. Plaintiffs "lobbed … numerous objections" during the closing argument, *The National Law Journal* reported, including when Nesson advised the jury that it had "the power not to fill in the boxes" on the jury form, which asks jurors to list damages for copyright infringement of each of the 30 songs. Nesson suggested damages of 99 cents per song would be appropriate, because "That's what he has to pay for it if he purchases it from Amazon."

Digital Copyright Verdicts, *continued on page 31*

Copyright

Judge Blocks Publication of Salinger Spinoff Book

A federal district judge prevented publication of a book promoted as a sequel to J.D. Salinger's *The Catcher in the Rye* (*Catcher*), finding it bears too many similarities to the classic novel without providing sufficient critique or parody. Fredrik Colting, a Swedish author writing under the pen name John David California, had sought to publish *60 Years Later: Coming Through the Rye* (*60 Years*) in the United States.

Salinger filed suit against Colting on June 1, 2009 in U.S. District Court for the Southern District of New York, seeking an order to permanently prevent publication of the book. He claimed copyright infringement and unfair competition under the Copyright Act of 1976, 17 U.S.C. § 101, and New York state law. The suit also named Colting's publishers as defendants.

District Court Judge Deborah A. Batts issued a preliminary injunction July 1 in *Salinger v. Colting*, 2009 WL 1916354, U.S. Dist. LEXIS 56012 (S.D.N.Y. July 1, 2009), prohibiting Colting from "manufacturing, publishing, distributing, shipping, advertising, promoting, selling or otherwise disseminating any copy of *60 Years*." Batts found that Colting took "well more from *Catcher*, in both substance and style, than is necessary for the alleged transformative purpose of criticizing Salinger and his attitudes and behavior."

The injunction was a temporary order that will remain in place until the merits of the lawsuit are decided. In issuing the order, Batts found that Salinger would be likely to succeed on his claims and that he would face irreparable harm if *60 Years* was published in the United States. The book has already been published in England, according to Salinger's complaint. Colting appealed the injunction on July 23 to the 2nd U.S. Circuit Court of Appeals.

In her order, Batts agreed with Salinger that there was enough "similarity between *Catcher* and *60 Years*, as well as between the character Holden Caulfield from *Catcher*, and the character Mr. C from *60 Years*," to constitute copyright infringement. *Catcher* was first published in 1951 and tells the story of the 16-year-old Caulfield wandering around New York city after being kicked out of prep school. The main character in *60 Years* is "Mr. C," a 76-year-old man who escapes from a retirement home and undergoes similar experiences to Caulfield's.

Batts rejected Colting's argument that the publication of *60 Years* should be allowed under the fair use doctrine of the Copyright Act, 17 U.S.C. § 107, because it is a parody of *Catcher* which criticizes Salinger and the original work. The fair use doctrine gives greater deference to works used for nonprofit educational purposes, and Colting did not contest that *60 Years* would be sold for profit. Batts noted that the parody argument was undermined by the original jacket of *60 Years,* which called the work "a marvelous sequel to one of our most beloved classics." "It is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents' previous statements regarding the book discuss no critique, and in fact reference various other purposes behind the book," Batts wrote.

Batts said the ratio of the "borrowed to the new elements" in *60 Years* is unnecessarily high. In addition to the main character, both works depend "upon similar and sometimes nearly identical supporting characters, settings, tone, and plot devices to create a narrative that largely mirrors that of *Catcher*," Batts wrote.

Salinger, who is 90 years old and lives in New Hampshire, has not published any writing since 1965, his complaint said. He has shown no interest in publishing or authorizing a sequel to *Catcher*. His complaint referenced a 1980 interview, where he said there is "no more to Holden Caulfield. Read the book again. It's all there. Holden Caulfield is only a frozen moment in time."

Batts acknowledged it is unlikely that *60 Years* would harm the market for *Catcher* itself, which has sold more than 35 million copies worldwide, but she found it "quite likely" that publishing *60 Years* would harm the market for a *Catcher* sequel or other derivative works. She noted the right not to produce a sequel is consistent with the purposes of copyright law. "Just as licensing of derivatives is an important economic incentive to the creation of originals, so too will the right *not* to license derivatives sometimes act as an incentive to the creation of originals," she wrote.

In response to the injunction, Edward H. Rosenthal, an attorney for Colting, called *60 Years* "an important critical work," in a news release from the New York law firm Frankfurt Kurnit Klein & Selz, where Rosenthal is a partner. "Because of the Court's decision banning the book, members of the public are deprived of the chance to read the book and decide for themselves whether it adds to their understanding of Salinger and his work," Rosenthal wrote.

In his appeal, attorneys for Colting wrote that *60 Years* is "a complex and undeniably transformative comment on one of our nation's most famous authors," according to a July 24 report in *The New York Times*. They added, "Had this commentary and criticism been published as an essay, a dissertation or an academic article, there is no doubt that it never would have been enjoined."

On August 2, the New York Times Co., the Associated Press, Gannett Co., and Tribune Co., filed an *amicus* brief with the 2nd Circuit on behalf of Colting, arguing the injunction represents an unconstituional prior restraint, and should be overruled.

"Prior restraint is our most unfavored remedy. Banning of speech, especially in a matter of general public interest is particularly heinous to our longstanding tradition of debate and commentary on matters factual or literary," the brief stated. The publishers' brief noted that prior restraints are illegal in situations involving obscenity, fair trial rights, and even most national security secrets, before concluding that "No prior restraint should have issued here."

– Cary Snyder
Silha Research Assistant

> "There is substantial similarity between *Catcher* and *60 Years*, as well as between the character Holden Caulfield from *Catcher*, and the character Mr. C from *60 Years*," to constitute copyright infringement.
>
> – Judge Deborah A. Batts
> Southern District of New York

Student Media

High School Administrators Hold Back Yearbooks, Magazines

With the close of another school year, several high school magazines and yearbooks around the country raised the ire of school administrators over their content and the conduct of their staff.

In Orange, Calif., high school principal S.K. Johnson confiscated copies of the Orange High School student-produced magazine, *PULP*, refusing to release them because he opposed the magazine's coverage of students with tattoos. On July 1, Johnson reversed his decision, allowing the magazine to be released.

The Student Press Law Center (SPLC) reported June 12 that Johnson said he thought the magazine "romanticized" tattoos in an unbalanced way, that the magazine's cover art promoted gang life and looked like an advertisement for a tattoo parlor. The cover features a photographic illustration of a person's back with a large tattoo of the word "PULP" written in "Old English" font, along with a panther, Orange High School's mascot. The cover art can be viewed online at http://www.citmedialaw.org/sites/citmedialaw.org/files/PULPcover.pdf.

Johnson told the SPLC that the city of Orange has a large Hispanic population and some gang activity, and that the magazine cover with "gangster-style writing and a full-body back tattoo would send the wrong message" and contribute to the school's reputation as a "gangster school." Johnson also opposed the magazine's inclusion of a list of "10 Things to do Before Graduation," which included activities like leaving campus for lunch, cutting class to go to the beach, and sneaking a "clothing optional" swim in the school's swimming pool, the SPLC reported.

Editor-in-Chief Lynn Lai told the SPLC that there was nothing controversial about the content of the student magazine. "All we're trying to do is report on the daily life and general life of our students," Lai said.

Nevertheless, Lai said the magazine staff had suggested a compromise, offering to rip out the "10 Things to do" list, which might encourage students to break school rules.

A California state law, Cal. Educ. Code § 48907, requires that school officials demonstrate that a student publication is "obscene, libelous, or slanderous" or "so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school" in order to censor it. This is a more stringent standard than the one set out by the U. S. Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which held that officials could censor a school-sponsored publication when the censorship is "reasonably related to legitimate pedagogical concerns."

In a June 24 press release, State Senator Leland Yee (D-San Francisco/San Mateo) said, "the principal's actions clearly violated state law. Administrators can not censor student press just because they do not like the content. It is completely inappropriate and illegal for the principal to confiscate the students' publication."

Yee reported on his Web site July 6 that Johnson reversed his decision, sending a letter to the magazine's editors on July 1 authorizing its release. According to Yee's Web site, Johnson wrote, "Since making my initial decision to prohibit distribution of the 2009 PULP magazine, I have sought input and advice from others whose insights and opinions may be more global than mine. I've re-reviewed the District Board Policy and Administrative Regulation regarding freedom of expression. In addition, interpretations of the California Education Codes 48907 and 48950 suggest that, with a compromise, the PULP 2009 magazine could be released for distribution." Yee's Web site reported that the editors of the magazine had already agreed to the compromise, which involved removing the "10 Things to do Before Graduation" list.

The principal at West Jordan, Utah's Copper Hills High School decided to require parental permission for students to purchase a copy of the school's annual literary magazine, *Chasms*, because it included some profanity and graphic artwork.

The Salt Lake Tribune reported that the magazine was supposed to go on sale during a student-organized benefit concert on Tuesday, May 19. Instead, Principal Todd Quarnberg spent a week reviewing the magazine and discussing it with student editors before allowing students to purchase a copy on the condition that they have a signature from their parents saying they were allowed to do so.

The National Scholastic Press Association has awarded *Chasms* two Pacemaker Awards, in 2009 and 2006, for excellence in high school journalism. In 2008 the magazine won a Gold Crown Award from the Columbia Scholastic Press Association.

Quarnberg told *The Salt Lake Tribune* that he originally withheld the magazine because he worried student editors might not have fully realized the reaction the art and words might evoke from a conservative community. According to *The Tribune*, the magazine included "profanity, sexual situations and dark, grotesque art."

"I'm very protective of my kids and the way they're judged by the community," Quarnberg said. "Sometimes kids publish or write things without seeing the ramifications of what it may do."

Student editors told *The Tribune* that they exercised restraint producing the magazine, and were relieved Quarnberg allowed it to be released unchanged. Prose Editor Cory Bobrowski and Director of Public Relations Cody Capson said profanity was only included if editors felt it was integral to a piece, and some pieces were toned down from their original versions.

"The whole is greater than the sum of its parts," Bobrowski said.

Quarnberg said he has confidence in class adviser

High School Censorship, *continued on page 31*

"The [Orange High School] principal's actions clearly violate state law. Administrators can not censor student press just because they do not like the content. It is completely inappropriate and illegal for the principal to confiscate the students' publication."

– State Senator Leland Yee (D-San Francisco/San Mateo)

High School Censorship, *continued from page 30*

Lou Jessop, but he and other administrators will be more involved with the magazine's production in the future. Quarnberg said he would not necessarily bar profanity or define what is appropriate, and he hopes to not require permission slips. "I can't draw that line in the sand, but I know when it's crossed," Quarnberg said.

Meanwhile, students involved in the production of yearbooks in Illinois and Ohio faced punishment for images they snuck into their publications.

Staff members of *Trevia* yearbook at New Trier High School in Winnetka, Ill., slipped a photo of a student holding a can of beer into the yearbook after the publication's adviser had reviewed and approved the pages, the SPLC reported June 16.

School spokeswoman Laura Blair told the SPLC the students responsible accessed a computer server containing the yearbook's pages after the adviser reviewed them, but before the pages were "locked." Blair would not elaborate on the punishment because she said it is a student disciplinary matter. The student holding the beer in the photo was not one of the students responsible for adding the photo, Blair added.

The SPLC reported that the school ordered stickers to cover the unauthorized photo in the yearbooks, some of which had already been distributed. The school is also changing its procedure for sending the yearbook to press, Blair said.

In Ohio, the artist who created the cover of Cleveland's Shaker Heights High School yearbook, *Gristmill*, issued a written apology, paid the school compensation, and was made to clean the school's art room after he admitted to hiding an offensive phrase in the book's cover artwork.

The SPLC reported June 18 that *Gristmill*'s cover featured a hand-drawn image of a crowd of "red raiders" – the school's Trojan-like mascot. When flipped upside down, the phrase "Fuck All Y'All" can be found hidden within a sea of red ink. The cover art can be viewed online at http://www.splc.org/pdf/Gristmillcover.pdf.

School spokeswoman Peggy Caldwell told the SPLC that Shaker Heights Principal Michael Griffith learned of the image through a teacher who had been shown the hidden message by friends of the artist. At that point, about half of the yearbooks had already been distributed.

Griffith halted the distribution of the yearbooks, issued a letter to parents explaining the circumstances, and directed an art teacher and two students to alter the remaining books in order to "camouflage the offensive language."

Caldwell said the yearbook's adviser and editors, who commissioned the cover artwork, could not be faulted for the inclusion of the offensive language because "There is no way the adviser or the editors could have seen the message in there."

Griffith's letter to parents also included an apology from the student, who officials declined to identify. "I cannot begin to explain the miserable feeling I brought upon myself, when I betrayed the trust of all of you. I apologize for offending anyone and everyone," the student wrote. "It is unfortunate that I did not recognize the big responsibility and honor given to me when asked to design the cover of the Shaker Heights yearbook."

In addition to the apology, the SPLC reported that the student was forced to pay the school compensation for the corrections made to the undistributed yearbooks and to clean the school's art room for one week. Caldwell said, "the consequences fit the circumstances, and he was remorseful."

– Patrick File
Silha Fellow and *Bulletin* Editor

Digital Copyright Verdicts, *continued from page 28*

Nesson also argued that Tenenbaum was "addicted" to downloading music, and that he was only taking advantage of technology available to him. "Progress happens, it's not Joel who is responsible," Nesson said. "There's no reason for [the industry] to put their calamity off on kids."

Blogger Accused of Streaming Unreleased Guns N' Roses Album Sentenced

A blogger who was arrested in August 2008 and charged by federal agents with illegally streaming nine tracks from the then-forthcoming Guns N' Roses album "Chinese Democracy" was sentenced to two months of home confinement, one year of probation, and must appear in an anti-piracy commercial, according to a plea deal reached July 14 in the federal district court in Los Angeles.

Kevin Cogill, a contributor to the music blog Antiquiet who wrote under the alias "Skwerl," pleaded guilty to one misdemeanor count of copyright infringement as part of a deal with prosecutors in December 2008. (See "Update: Blogger Pleads Guilty for Leaking Guns N' Roses Songs" in the Winter 2009 Silha *Bulletin* and "Blogger Arrested for Posting Unreleased Guns N' Roses Songs" in the Fall 2008 issue.)

Reuters reported July 14 that Cogill's anti-piracy public service announcement is expected to air during the Grammy Awards on January 31, 2010.

Cogill had faced a maximum of one year in federal prison, a $100,000 fine and five years' probation, but according to Reuters, U.S. Magistrate Judge Paul L. Abrams said there was no profit motive behind his posting the songs, they were available on the blog for a short period, and his cooperation proved useful.

– Patrick File
Silha Fellow and *Bulletin* Editor

Media Ethics

Ethical Questions Surround *Times* Decision to Keep Rohde Kidnapping Secret

"Sometimes decisions that seem easy and clear cut in an ethics seminar are a lot more complicated in real life."

– Bill Keller
Executive Editor,
The New York Times

Pulitzer Prize-winning *New York Times* reporter David Rohde and a fellow reporter escaped from their Taliban captors on June 19, 2009, after being held captive in the mountains of Afghanistan and Pakistan for over seven months. *The Times* persuaded dozens of news organizations around the world not to report on Rohde's kidnapping during his captivity, touching off an ethical debate within the news media industry about balancing a duty to inform the public with minimizing the risks posed to kidnapped reporters.

Rohde, Tahir Ludin, an Afghani reporter who has worked with *The Times* of London, and their driver, Asadullah Mangal, were abducted Nov. 10, 2008, outside of Kabul, Afghanistan, while on their way to interview a Taliban commander, *The New York Times* reported June 20.

The Times reported that Rohde told his wife that on the night of June 19, he and Ludin climbed over the wall of a compound where they were being held in the North Waziristan region of Pakistan. They found a nearby military base, and on the following day were flown to the American military base in Bagram, Afghanistan. Mangal did not attempt to escape with the others. *The Times* reported that Rohde was in good health, but that Ludin injured his foot in the escape.

The June 20 story was *The Times*' first mention of Rhode's ordeal. "Until now, the kidnapping has been kept quiet by *The Times* and other media organizations out of concern for the men's safety," the story said.

New York Times Executive Editor Bill Keller explained the newspaper's decision not to report Rohde's kidnapping. "The prevailing view among David's family, experts in kidnapping cases, officials of several governments and others we consulted was that going public could increase the danger to David and the other hostages. The kidnappers initially said as much," Keller said in the June 20 story. "We decided to respect that advice, as we have in other kidnapping cases, and a number of other news organizations that learned of David's plight have done the same. We are enormously grateful for their support."

The Times reported June 20 that Keller and Rohde's family declined to discuss details of the reporters' captivity, except to say that no ransom money was paid and no Taliban or other prisoners were released in exchange for Rohde. "Kidnapping, tragically, is a flourishing industry in much of the world," Keller said in the story. "As other victims have told us, discussing your strategy just offers guidance for future kidnappers."

Washington Post media columnist Howard Kurtz reported June 21 that some blogs and smaller news organizations covered the story of Rohde's kidnapping, and it was carried by Italian news agency Adnkronos International as early as Nov. 11, 2008. But the vast majority of media outlets that knew about the story did not report it. Kurtz reported that editors for The Associated Press (AP) and *Washington Post* said they decided to uphold the media blackout in the interest of Rohde's safety. The AP reported June 22 that Keller called the decision to keep quiet about the capture of Rohde "agonizing," and a "position that we revisited over and over again."

On June 28, *The Times* reported that information about Rohde was also kept from the user-edited online encyclopedia Wikipedia.com. Two days after the kidnapping, Michael Moss, an investigative reporter at *The Times* and a friend of Rohde, used an anonymous user name to alter the information page about Rohde to emphasize his work that could be seen as sympathetic to Muslims.

"I knew from my jihad reporting that the captors would be very quick to get online and assess who he was and what he'd done, what his value to them might be," Moss said. "I'd never edited a Wikipedia page before."

The Times reported that Moss had also made similar changes to Rohde's "topic page" on *The Times* Web site, and omitted the name of Rohde's former employer, *The Christian Science Monitor*, because it contained the word Christian.

After Wikipedia user-editors made several attempts to add information about the kidnapping to Rohde's page in mid-November 2008, Catherine J. Mathis, chief spokeswoman for The New York Times Company, called Jimmy Wales, the co-founder of Wikipedia, and asked for his help. Wales appointed an administrator to help monitor and control the page until Rohde escaped. *The Times* reported that Wikipedia administrators blocked the page periodically between November 2008 and June 20, 2009. Although users were still able to post information about the kidnapping dozens of times, each time it was removed. After Rohde's escape, *The Times* reported, Mathis e-mailed Wales, who unblocked Rohde's page himself. Users updated the page shortly thereafter.

In a July 10 interview for National Public Radio's "On the Media," Wales said the tactics were unusual. "The particular point of this kidnapping was presumably, as in the Daniel Pearl case, to create a bit of a media circus and to call attention, and denying that attention seemed useful," Wales said. "It's very puzzling. I hope we don't have to do it very often."

New York Times Public Editor Clark Hoyt reported in a column July 4 that Moss and Mathis had also persuaded a group of New England newspapers to remove Rohde's wedding notice and photos from their Web site so the kidnappers would not have personal information they could use to pressure him psychologically. Hoyt wrote that he found the removal "troubling" because *The Times* itself takes "a hard line against removing information from its own archive."

Rohde Kidnapping, *continued on page 33*

Rohde Kidnapping, *continued from page 32*

Kelly McBride, a faculty member of the Poynter Institute, a school for journalists in St. Petersburg, Fla., said on a June 22 segment of PBS' "The Newshour with Jim Lehrer" that the fact that "every major news organization in the world agreed to withhold the information" made her "pretty uncomfortable."

"As a journalist, you have a set of loyalties. And your first loyalty is to your audience," McBride said. "If you look at this on a continuum, at one end you have, 'Publish everything you know and endanger the reporter's life,' and at the other end, 'Publish absolutely nothing.' And in between those two points, you have many, many alternatives. And I don't know what type of alternatives were considered in the span of seven months for releasing some information about the kidnapping that maybe wouldn't have endangered Mr. Rohde's life."

Keller, also a guest on the June 22 "Newshour" show, responded that "sometimes decisions that seem easy and clear cut in an ethics seminar are a lot more complicated in real life."

New York magazine speculated on June 22 that one goal of the media blackout might have been to keep Rohde's ransom to a reasonable amount. The *New York* story quoted two anonymous sources involved in the rescue efforts as saying the paper had authorized as much as $2 million in ransom funds, and an anonymous American contractor who suggested that the guards might have been bribed to look the other way as Rohde and Ludin made their way out of the compound.

Asra Q. Nomani, a friend and former colleague of *Wall Street Journal* reporter Daniel Pearl, who was kidnapped and beheaded by Pakistani militants in 2002, defended *The Times*' decision to keep the kidnapping a secret in a June 22 story on the blog The Daily Beast. "In 2002, *Wall Street Journal* editors and Dow Jones officials chose to publicize [Pearl's] kidnapping with interviews on *Larry King Live* and regular headline alerts on CNN. Behind the scenes, some Pakistani investigators, FBI kidnapping specialists, and *Wall Street Journal* staffers didn't agree with the strategy, with one arguing: 'Get Danny's face off TV!'" Nomani wrote. "But media outlets learned from Danny's fate."

In a June 23 story, Greg Mitchell, editor of *Editor and Publisher* magazine, explained why his publication was among the more than 40 news organizations that chose to go along with what he called "the most amazing press blackout on a major event that I have ever seen."

"Editors [from *The Times*] explained that efforts were going on to free Rohde and it was so sensitive any news break might jeopardize this," Mitchell wrote. "Remember: when Jill Carroll was kidnapped, *The Christian Science Monitor* only managed to keep it a secret over a weekend. She was then held for months. Daniel Pearl's kidnapping also emerged fairly quickly–and we all know how that one ended."

However, Mitchell also said he had misgivings. "In keeping the story secret were we jeopardizing other reporters, or even other citizens, who might be traveling in the region of the kidnapping unaware of the dangers? I feared that we were all doing a disservice to many others for the sake of, maybe, helping the cause of one reporter."

In a June 20 post on *The Christian Science Monitor*'s Global News Blog, Poynter Institute ethics expert and Silha Center advisory board member Bob Steele said news organizations face "competing interests" when reporters are kidnapped. "We have the primary obligation of journalists to report in a timely, comprehensive manner on significant events, [b]ut I also believe that we also have an obligation to minimize harm." Steele said there are no hard and fast rules for such situations. "I think that rules imply rigidity, and rigidity greatly diminishes good ethical decisionmaking. The trick is to make journalistic and ethical decisions in a fashion that is not unduly influenced by, say, pressure from terrorists, the self-interest we have in protecting one of our own, or the potential connections we have with government agencies," he said.

Steele also said a double standard could arise when news media choose to remain quiet when a reporter is kidnapped. "We show a preference for one of our own in journalism generally by holding back a story or elements of a story compared to how we might cover the kidnapped oil field worker or diplomat or tourist. In those cases, we might not bring as serious a deliberative process to how we're going to cover it."

Matthew Ingram, an editor at Toronto's *The Globe and Mail*, wrote in a July 1 post on the Nieman Journalism Lab Web site that there was "no evidence whatsoever" that the media blackout saved Rohde's life, and that the situation created "an obvious double standard."

"Journalists, including those at *The New York Times* and other media outlets, routinely report on people who have been kidnapped by terrorists, without any obvious qualms about how that reporting might or might not affect the chances that they might be released or escape," Ingram wrote. "But when it is a journalist who is held, the process changes completely. That's a clear case of favouritism, and it makes the entire industry look bad."

Keller was quoted in Hoyt's July 4 column stating that *The Times* listens to appeals to keep kidnappings quiet. "I would apply the same policy to a journalist, to a non-journalist, to a civilian or to the military. We don't take life and death situations lightly," he said.

Edward Wasserman, a journalism ethics professor at Washington and Lee University and featured speaker at the Spring 2008 Silha ethics forum, wrote in a July 7 *Miami Herald* op-ed that *The Times*' handling of the Rohde kidnapping situation was part of "almost eight post-9/11 years during which major institutions have wavered from core principles out of fear of terrorist atrocities." Wasserman continued, "In such cases, it's right to ask if the fear is warranted, if the measures taken are reasonably related to it, and whether they're compatible with the duties and responsibilities we claim to live by. What's needed is some serious attempt to clarify just what principles journalists should derive from this."

Rohde Kidnapping, *continued on page 39*

Media Ethics

Uproar Follows Revelation of *Washington Post* 'Salons' Sponsored by Lobbyists

In early July 2009, an ethical controversy led *Washington Post* publisher Katharine Weymouth to cancel plans for a series of "salons" underwritten by lobbyists willing to pay as much as $250,000 for private, off-the-record access to lawmakers and journalists, saying that *The Post*'s business side misrepresented the newspaper's intent in hosting the events.

"By holding off-the-record events for money, it's hard to see how that generates any knowledge for the public. And it potentially undermines its claim that its first loyalty is to the citizen."

– Tom Rosenstiel
Director, Project for Excellence in Journalism

Reporters Mike Allen and Michael Calderone of the blog Politico broke the story about the proposed events, which were to be held in Weymouth's home, in a July 2 post that detailed the "astonishing offer" and quoted at length a flier *The Post* circulated to potential sponsors describing an upcoming salon as an "underwriting opportunity."

The one-page flier, which was provided to Politico by a healthcare lobbyist with qualms about possible conflicts of interest, offered sponsors the chance to "bring your organization's CEO or executive director literally to the table," according to Politico. The flier also promised a friendly, off-the-record setting for participants: "Spirited? Yes. Confrontational? No. The relaxed setting in the home of Katharine Weymouth assures it. What is guaranteed is a collegial evening, with Obama administration officials, Congress members, business leaders, advocacy leaders and other select minds …."

Journalists, media watchdogs, and bloggers responded swiftly to news of the planned *Post* salon. In a July 3 article in *The New York Times,* Richard Pérez-Peña wrote that *The Post* was flirting with becoming complicit in the cozy Washington power networks that it famously monitored. In a July 3 interview with the *Los Angeles Times,* Tom Rosenstiel, director of the Project for Excellence in Journalism, said that the problem with the proposed salons was that news organizations derive their credibility from operating in the public interest – gathering information and making it public. "By holding off-the-record events for money, it's hard to see how that generates any knowledge for the public," Rosenstiel said. "And it potentially undermines its claim that its first loyalty is to the citizen."

In a July 2 blog post, *Post* Ombudsman Andrew Alexander wrote that the controversy "comes pretty close to a public relations disaster," adding that reactions from readers ranged from anger to disappointment to disbelief. Weymouth and Executive Editor Marcus Brauchli responded to criticism by saying that the widely quoted flier was inconsistent with their understanding of the salons' purpose.

In a July 3 column in *The Post* by media critic Howard Kurtz, Weymouth was quoted as saying that she was disappointed, and that the controversy "never should have happened. The fliers got out and weren't vetted. They didn't represent at all what we were attempting to do. We're not going to do any dinners that would impugn the integrity of the newsroom." Kurtz wrote that the man responsible for the fliers' wording was a new hire, top marketing executive Charles Pelton, who called the fliers a "big mistake" on his part.

"You cannot buy access to a *Washington Post* journalist," Brauchli told Politico in its July 2 post, saying that although he knew that the business side of *The Post* planned on holding policy dinners and that he was scheduled to attend the July 21 dinner at Weymouth's home, he had not seen the material promoting it until that day. In a July 2 post by Greg Mark on the Web site of the *Columbia Journalism Review*, Brauchli said that he had no knowledge of the flier advertising the event until he received a call about it the night before the Politico story ran, adding that it would never have gone out with his knowledge. He later sent a memo to his staff saying that "the language in the flier and the description of the event preclude our participation," according to the July 3 *Times* article.

In the July 2 post on Politico, Brauchli emphasized that the newsroom had given specific parameters for the proposed salons to *The Post*'s business side, which were not followed. In order for newsroom staffers to participate in such events, he said, they would have to be able to ask questions and to "reserve the right to allow any information or ideas that emerge from an event to shape or inform our coverage," a direct contradiction of the flier's appeal to potential sponsors, which called the dinner "off-the-record."

Fallout from the scandal reflected both indignation and cynicism. Peter Kafka, of *The Wall Street Journal*'s All Things Digital blog, wrote July 2 that "this certainly wouldn't be the first time that the Post has been at the nexus of power, money and influence," pointing out that "publications of all stripes, including this one … frequently charge fees to attend networking events where their editorial staffs participate." In his July 3 column in *The Post,* Howard Kurtz was also quick to point out that other media companies "charge substantial fees for sponsored conferences with big-name executives and government officials," but noted that such sessions, unlike *The Post*'s proposed salons, are usually open for news coverage.

Other media outlets defended their own practices of hosting sponsored media events, distinguishing them from *The Post*'s proposed salons. In a July 3 blog post by Joshua Green on the Web site of the magazine *The Atlantic*, Green quoted his editor, James Bennet, as stating that the difference between dinners hosted by his magazine and what the *Post* fliers described "is that we have full editorial control, and if there's a corporate sponsor (and usually there is) we're very upfront about that with everyone involved. The draw is the participants and the quality of discussion, not a misguided promise that sponsors can influence coverage. What we don't do – and what I'm sure the *Post*'s top people didn't have in mind – is peddle influence over our journalism."

Salons, *continued on page 39*

Media Ethics

Murdoch-owned British Paper Embroiled in Phone Scandal

Media Mogul Denies Paying to Settle Suits

The British tabloid *News of the World*, published by a subsidiary of media mogul Rupert Murdoch's News Corporation, paid about $1.6 million to settle various lawsuits involving allegations of phone hacking by its reporters, *The Guardian* of London reported on July 8, 2009. Critics and other media outlets, however, have suggested that the *Guardian* report amounts to little more than media mud-slinging.

The July 8 *Guardian* story reported that *News of the World*'s publisher, News Group Newspapers, attempted to settle the lawsuits to avoid revealing evidence that *News of the World* journalists were repeatedly hiring private investigators to illegally hack into the mobile phone messages of numerous public figures. The story also alleged that the investigators illegally gained access to the public figures' confidential personal data, including tax records, social security files, bank statements, and itemized phone bills.

News Group Newspapers is a subsidiary of News International, which is owned by Murdoch's News Corporation.

According to *The Guardian*, cabinet ministers, members of Parliament, actors, and sports stars were all targets of the private investigators.

The Guardian claimed to have discovered the information by researching the 2006 criminal investigations of Clive Goodman and Glenn Mulcaire. Goodman is a former *News of the World* reporter who was convicted of hacking into the mobile phones of three royal staff members. Mulcaire is a private investigator who once worked for *News of the World*'s publisher and admitted to hacking into the phones of Gordon Taylor, the chief executive of the Professional Footballers' Association; member of Parliament (MP) Simon Hughes; celebrity publicist Max Clifford; model Elle MacPherson; and soccer agent Sky Andrew.

The Guardian reported that both Goodman and Mulcaire were convicted of violating the British Regulation of Investigatory Powers Act of 2000.

The Guardian cited a "senior source" at the Metropolitan police as saying that, during the Goodman investigation, officers found evidence of News Group staff hiring private investigators to hack into "thousands" of mobile phones, and "another source with direct knowledge of the police findings" put the figure at "two or three thousand" different phones.

The Guardian story also reported that law enforcement's investigation of Mulcaire had uncovered evidence that Mulcaire had provided voicemail recordings to a *News of the World* journalist who had transcribed and e-mailed them to a senior reporter, and that a *News of the World* executive had offered Mulcaire a substantial bonus for a story specifically related to the stolen messages.

The story alleged that, when faced with a lawsuit from Taylor, *News of the World* offered a cash payment to settle the case out of court, and eventually paid out 700,000 pounds, or approximately $1.1 million, in legal costs and damages to Taylor on the condition that he sign a confidentiality agreement to prevent him from speaking about the case. News Group then persuaded the court to seal the file on Taylor's case to prevent all public access, "even though it contained evidence of criminal activity," *The Guardian* story said.

The Guardian also alleged that *News of the World* and Mulcaire had been involved in hacking into the mobile phones of at least two other soccer figures who, after filing complaints, settled when News International paid them more than 300,000 pounds, or approximately $500,000, in damages and costs on the condition that they sign confidentiality agreements.

John Whittingdale, a Conservative Party MP who chairs the Culture, Media and Sport select committee, said in the July 8 *Guardian* article that the revelation "raises a number of questions that we would want to put to News International."

"The fact that other people beyond the royal family had their calls intercepted was well known," Whittingdale said. "But we were absolutely assured by News International that none of their journalists were aware of that, that Goodman was acting alone and that Mulcaire was a rogue agent."

Whittingdale said that the "committee will want to discuss [the issue] very urgently," and that the committee "would summon back witnesses and ask those questions."

Bloomberg News reported on July 9 that, in addition to Parliament, the Metropolitan Police would look into the allegations of phone hacking, according to a statement from Commissioner Paul Stephenson. But a later story in the July 9 *New York Times* said that the Metropolitan Police would not conduct another investigation. "No additional evidence has come to light since [the 2006 Goodman-Mulcaire investigation] has concluded," Assistant Commissioner John Yates said. Yates said that his research into the case indicated that many of the phone hacking cases cited by *The Guardian* never actually resulted in the tapping of the phones that were targeted.

Andrew Neil, former editor of the Murdoch-owned *Sunday Times,* said in the July 8 *Guardian* story that the phone hacking scandal was "one of the most significant media stories of modern times."

"It suggests that rather than being a one-off journalist or rogue private investigator, it was systemic throughout the *News of the World*, and to a lesser extent *The Sun*," Neil said, referring to another News Group publication. "Particularly in the *News of the World*, this was a newsroom out of control."

However, a July 8 *New York Times* story cautioned that the *Guardian* report could not be independently verified, noting that it had cited unnamed sources. The story also observed that *The Guardian* cited no

Phone Scandal, *continued on page 36*

> "The fact that other people beyond the royal family had their calls intercepted was well known. But we were absolutely assured by News International that none of their journalists were aware of that, that Goodman was acting alone and that Mulcaire was a rogue agent."
>
> – MP John Whittingdale
> Culture, Media and Sport Committee Chair

Phone Scandal, *continued from page 35*

sources for its claim that News International had paid $1.6 million in damages and legal costs, including the $1.1 million allegedly paid to Taylor.

Murdoch told Bloomberg News on July 9 that he knew nothing about any alleged settlement payments. "If that had happened I would know about it," Murdoch said.

But on July 21, Bloomberg reported that *News of the World* editor Colin Myler testified before a parliamentary committee that James Murdoch, Rupert's son, had authorized the payment of $1.1 million to Taylor to settle allegations against the paper. "It was an agreed collective decision," Myler told the committee, according to Bloomberg. "It's how newspapers work."

The July 8 *Times* story reported that *The Guardian* investigation and story had caused an immediate uproar in Great Britain, with demands from politicians that Prime Minister Gordon Brown order a police investigation to explain why earlier inquiries had not resulted in any action against the newspapers.

Hughes, a Liberal Democrat among those who allegedly had their mobile phone messages tapped, said that if *The Guardian*'s story was accurate, those responsible should be "severely punished." Hughes told the BBC that *The Guardian*'s revelations amounted to "a very big warning bell" of the damage that could be done by exploiting the possibilities of "the new data-centered age," *The Times* reported on July 9.

According to *The New York Times*, the controversy stirred by *The Guardian* could reach into the highest ranks of Murdoch's news empire, as several senior executives at News International or the *News of the World* were named by *The Guardian* as having denied knowledge of the phone hacking during the Goodman-Mulcaire trials.

According to Lorna Tilbian, a media analyst at Numis Securities in London, the story by the pro-Labour *Guardian* is an attempt to go after the opposition Conservative Party, the July 9 Bloomberg story reported. Tilbian also said that the allegations were not particularly surprising, given the "dog-eat-dog world" of British tabloids. "We always knew that journalists tried every trick in the book to get a scoop," said Tilbian. "This is just the electronic version."

A July 21 *New York Times* story reported that since the Goodman case, *News of the World* said it has enforced a code of conduct that prohibits reporters from hiring private investigators.

In a July 10 story in *The Guardian*, Rebekah Wade, editor of *The Sun* and chief executive elect of News International, said that the company would refute the allegations that phone hacking was a widespread practice at *News of the World*, and said that *The Guardian* "has substantially and likely deliberately misled the British public." Wade also said various British news outlets broadcast the story based on "specific and very limited evidence" from the investigations of Mulcaire and Goodman.

In a July 12 *Guardian* op-ed, columnist John Kampfner said he worried that the scandal would harm chances to revamp what he called England's "horrific" libel laws. "Britain has become the libel capital of the world," Kampfner wrote. "The Commons select committee on culture, media and sport is due in a few weeks to publish its report on 'press standards, privacy and libel' … They will be tempted to use the latest scandal to do the opposite of what they should. Instead of loosening libel, they are likely to harden rules on privacy."

Great Britain's civil libel laws, which require a defendant to prove the truth of an alleged defamatory statement, have made British courts an increasingly common destination for libel lawsuits. Some American states have passed laws shielding their citizens from so-called "libel tourism" judgments, and bills have been introduced in both houses of the U.S. Congress that would protect American defendants sued in foreign jurisdictions – including England – that provide less protection for speech than the First Amendment. (See "Libel Tourism Bills Introduced in U.S. House and Senate" in the Winter 2009 Silha *Bulletin*.)

A July 15 story in *The Times* of London reported that Great Britain is repealing its laws against criminal libel and criminal sedition. Justice Minister Lord William Bach said that criminal sedition and libel were "arcane offences [sic] from a bygone era when freedom of expression wasn't seen as the right it is today," and would be abolished.

The Times reported that, although the laws are not used often in modern Britain, lawmakers were concerned about the legitimacy the statutes provided to other countries seeking to suppress public criticism. "It may be decades late in coming, but the acceptance by the Government that our retention of these repressive laws causes much more harm than good is welcome," said MP Evan Harris, who first proposed the changes in the House of Commons. "The UK must set an example to the world in getting rid of anti-speech offences [sic]."

– Jacob Parsley
Silha Research Assistant

Media Ethics

Criticism and Praise after Web Site Publishes Hacked Twitter Corporate Information

A hacker accessed the e-mail account of a Twitter employee and forwarded detailed company information found there to at least two blogs, the technology Web site TechCrunch reported on July 14, 2009.

According to a July 15 post on *The New York Times* technology blog Bits, the stolen information about Twitter, a popular "micro-blogging" Web site where users post and read links and text-based messages of up to 140 characters, was sent to TechCrunch and a French blog called Korben.

According to the July 14 TechCrunch post, the hacker, known as "Hacker Croll," sent the blogs 310 documents, including employment agreements; company calendars; new employee interview schedules; phone logs and bills; alarm settings; financial forecasts; confidentiality agreements with companies such as AOL, Dell, Ericsson, and Nokia; floorplans and security passcodes; and company credit card numbers.

"There is clearly an ethical line here that we don't want to cross, and the vast majority of these documents aren't going to be published, at least by us," TechCrunch founder Michael Arrington wrote in the July 14 post. "But a few of the documents have so much news value that we think it's appropriate to publish them."

TechCrunch, a site that describes itself as "a weblog dedicated to obsessively profiling and reviewing new Internet products and companies," published several of the documents with additional TechCrunch commentary from July 14-16. The published documents revealed, among other things, Twitter's goal of becoming the first social networking site to reach 1 billion users, a pitch for a Twitter-based TV show, and plans for future revenue-producing models.

"It's important to note that we have been given the green light by Twitter to post this information – They aren't happy about it, but they are able to live with it, they say," a July 16 TechCrunch post accompanying the release of several new documents said. TechCruch emphasized that it would not post anything "personal in nature" or "too sensitive to share." The July 16 post specifically stated that "there are some details about partner discussions, particularly around Google and Microsoft, that we are just not going to publish."

Korben blogger Manuel Dorne told the *New York Times* for its July 15 Bits blog post that he chose only to release "relatively innocuous information" because he admires the company.

"I have a lot of respect for [Twitter founder] Evan Williams and a lot of respect for Twitter, so I'll never publish sensitive information about them that could cause them prejudice," Dorne said. "I don't know if TechCrunch has gone too far, but what I can say is that the Web is small, everybody knows everybody, and publishing this information shows a lack of respect for the Twitter team."

On July 15, a post on Twitter's own blog said that the leaked documents were "never meant for public communication, [and] publishing these documents publicly could jeopardize relationships with Twitter's ongoing and potential partners." The post also said that the site was "in touch with our legal counsel about what this theft means for Twitter, the hacker, and anyone who accepts and subsequently shares or publishes these stolen documents."

A July 16 post on Twitter's blog said "the publication of stolen documents is irresponsible and we absolutely did not give permission for these documents to be shared." The post said the company was concerned that the "rudimentary notes of internal discussions will be misinterpreted by current and future partners[,] jeopardizing our business relationships."

In a July 15 post, Arrington discussed some of the ethical ramifications of posting the selected documents, as well as the backlash from many TechCrunch readers who had expressed their disagreement with the decision to publish the documents in the comments sections of the various posts.

"We publish confidential information almost every day on TechCrunch. This is stuff that is also 'stolen,' usually leaked by an employee or someone else close to the company, and the company is very much opposed to its publication," Arrington continued. "In the past we've received comments that this is unethical. And it certainly was unethical, or at least illegal or tortious, for the person who gave us the information and violated confidentiality and/or nondisclosure agreements. But on our end, it's simply news … if it lands in our inbox, we consider it fair game."

In a July 18 column in the British newspaper *The Independent*, associate business editor Stephen Foley wrote that Arrington, whom he called "Silicon Valley's most prominent blogger," had "crossed a line" by publishing the information.

"Arrington's justification doesn't cut it. Leaking and hacking are not exactly the same thing; people and corporations do have an expectation of privacy; journalists have to justify using material obtained through subterfuge," Foley wrote. "Unless journalists rule out the routine use of deceitfully obtained information, a whole industry will spring up pursuing it for us."

Los Angeles Times columnist James Rainey, in a July 24 column, observed that digital communications technology has "supercharged the debate over what should be in the public domain" without providing clear answers. Rainey said that a central development is that the public can now immediately weigh in on news media decisions to publish leaked documents.

In spite of the amount of criticism TechCrunch received for deciding to publish some of the documents, Rainey wrote, "it seems to me that the

Twitter Hacked, *continued on page 39*

> "There is clearly an ethical line here that we don't want to cross, and the vast majority of these documents aren't going to be published, at least by us. But a few of the documents have so much news value that we think it's appropriate to publish them."
>
> – Michael Arrington
> Founder and blogger,
> TechCrunch

Media Ethics

White House Press Corps Resists Background Briefings

The Obama administration is facing criticism from White House correspondents and their news organizations for its practices in the White House briefing room, including the continued use of background briefings, or selective off-the-record meetings held with reporters, and Obama's decision to select and notify in advance some reporters before he calls on them in press conferences.

"I do think Team Obama has continued a distasteful and potentially damaging practice. ... Just because Washington culture has cornered reporters into occasionally accepting anonymous sourcing as a necessary evil, doesn't mean a 'change' administration should insist on reinforcing the same old ways."

– James Rainey
Columnist, *Los Angeles Times*

The use of background briefings, which require journalists in attendance to attribute information to an unnamed source, such as a "senior administration official," has drawn complaints from the Washington, D.C. press in the past, but the issue reemerged in May 2009 after Obama nominated Judge Sonia Sotomayor for the U.S. Supreme Court. Following the announcement of Sotomayor's nomination, two White House officials held a background briefing on May 26 to fill in a few details regarding the president's choice, prompting several journalists to object, according to a May 27 column by Howard Kurtz of *The Washington Post*.

The journalists protested that "there was no reason the officials couldn't speak on the record," Kurtz wrote. "One of the briefers, senior adviser David Axelrod, would be making a similar case on Fox News, CNN, MSNBC, and PBS within hours. But Press Secretary Robert Gibbs stood his ground. No names could be attached."

According to a May 27, 2009 article in *Editor & Publisher,* Jennifer Loven, an Associated Press reporter and president of the White House Correspondents' Association (WHCA), responded to the background briefing with a statement on behalf of the group.

"We protest in the strongest terms the Obama administration's frequent use of briefings done on a background basis, without specific names attached to the information, especially when the same officials briefing often appear ubiquitously on television shows with similar information. Details of the president's policies and decision-making should be given in the open, in part because it helps the public determine its level of confidence in those details," the statement said. According to Kurtz's column, Loven wrote that such openness was particularly important in the case of a Supreme Court nomination, "when the issue does not involve sensitive material such as national security information."

Gibbs responded to the WHCA letter, telling Kurtz it was "interesting" that, contrary to the complaints about background briefings, the AP had no qualms about relying on unnamed "officials" in its early articles on Sotomayor's nomination. "I'm not sure today is the day I'd make that argument," Gibbs said.

James Rainey, a columnist for the *Los Angeles Times*, wrote on May 27 that although the issue of background briefings has been a point of contention with White House correspondents for years, the trouble with the Obama administration continuing the practice is the inherent incongruity with its message of change. "Why would a White House that promised more transparency insist on anonymity for the two officials who spoke to the press?" Rainey wrote. "I do think Team Obama has continued a distasteful and potentially damaging practice. … Just because Washington culture has cornered reporters into occasionally accepting anonymous sourcing as a necessary evil, doesn't mean a 'change' administration should insist on reinforcing the same old ways."

The tension between White House reporters and Obama administration officials over background briefings began as early as January 22, 2009, the day Gibbs gave his first press briefing. A post written the same day by reporter Jeff Zeleny on *The New York Times* political blog, The Caucus, criticized the Obama administration for continuing the practice of background briefings with a briefing by an unnamed official about Guantanamo Bay, asking, "Does an administration that has pledged to be the most open and transparent one ever really need to have routine briefings be on background, by an official who can't be named?" (For more on reporters' early criticisms of Obama media management practices, see "Obama Promises More Government Openness; Skeptics Demand Immediate Results" in the Winter 2009 Silha *Bulletin*.)

In a May 29, 2009 column, *New York Times* Public Editor Clark Hoyt said Washington's competitive journalistic culture can inhibit reporters' ability to achieve transparency, calling it a "city steeped in the culture of anonymity."

"Pervasive anonymity enhances the credibility of neither the news media nor an administration that came to office promising transparency," Hoyt wrote. "It may seem naïve to think that an entrenched culture in which both sides have used each other for decades can change, but a similar effort four years ago produced some temporary improvement in the Bush administration, which was much less committed to openness."

A June 23 press conference with President Obama drew further criticism from the press when it appeared that the president prearranged a question from the Huffington Post's Nico Pitney.

According to a June 23 post by Michael Calderone, a writer for the blog Politico, Obama called on Pitney second, addressing him by name. "Nico, I know you and all across the Internet, we've been seeing a lot of reports coming out of Iran," Obama said. "I know there may actually be questions from people in Iran who are communicating through the Internet. Do you have a question?"

Pitney responded with a question from an Iranian. "Under which conditions would you accept the election of Ahmadinejad, and if you do accept it without any significant changes in the conditions there, isn't that a betrayal of the – of what the demonstrators there are working towards?" This exchange was problematic, Calderone wrote,

Background Briefings, *continued on page 39*

Background Briefings, *continued from page 38*

because "reporters typically don't coordinate their questions for the president before press conferences."

Kurtz reported in February that journalists were bothered by Obama's practice of deciding the day before his news conferences which reporters to call on and notifying them in advance. Salon.com columnist Glenn Greenwald observed in a February 12 post that former President Bush was also known to use a pre-arranged list of reporters to call on for questions.

In a June 24 column for *The Washington Post*, Dana Milbank compared the exchange between Pitney and Obama to one of the scripted soap operas that typically appear during the afternoon when Obama held his June 23 press conference. Milbank wrote that Obama knew Pitney would be present because White House aides had called him the day before to invite him, and even escorted him into the press conference. "They told him the president was likely to call on him, with the understanding that he would ask a question about Iran," Milbank wrote.

The White House responded by acknowledging that it did reach out to Pitney before the press conference, telling him that it was possible he would be called upon. "In the absence of an Iranian press corps in Washington, it was an innovative way to get a question directly from an Iranian," said Deputy Press Secretary Bill Burton.

– Ruth DeFoster
Silha Research Assistant

Rohde Kidnapping, *continued from page 33*

Wasserman said "journalists believe that on balance the world is better off when realities are exposed instead of concealed." However, there are always exceptions, Wasserman wrote. "Media show restraint with suicides, bomb threats, rape victims, juvenile crime – and it may be time to revisit the whole matter of kidnap coverage. But that's a very different matter from covering up news as a special favor to a powerful friend."

According to *The New York Observer*'s Web site, Keller told *Times* Assistant Managing Editor Rick Berke June 22 that Rohde thanked him for not reporting on the kidnapping. Berke interviewed Keller and Managing Editor Jill Abramson about their roles at the newspaper at a public forum put on by *The Times* to allow readers to hear its editors talk candidly.

Keller said, "I talked to David and he said, 'By the way, thank you for not making a public event out of this. We heard the people who kidnapped me were obsessed with my value in the marketplace. If there were a lot of news stories, they would have held me much tighter.'"

– Jacob Parsley
Silha Research Assistant

Salons, *continued from page 34*

In a letter to readers published July 5 in *The Post,* Weymouth defended the idea of holding such events, but wrote that the flier promoting the events went too far, and stressed that the off-the-record dinners, in their proposed form, were inappropriate and irresponsible.

"We have canceled the planned dinner," Weymouth wrote. "While I do believe there is a legitimate way to hold such events, to the extent that we hold events in the future, large or small, we will review the guidelines for them with The Post's top editors and make sure those guidelines are strictly followed. Further, any conferences or similar events The Post sponsors will be on the record."

– Ruth DeFoster
Silha Research Assistant

Twitter Hacked, *continued from page 37*

website and its editor … acted in good faith and were far from the soulless accomplices that some argued." Rainey said TechCrunch did "what journalists are supposed to do. It tried to bring more information to its audience, while holding back other documents that could cause needless harm."

The July 15 *New York Times* Bits post also reported that Arrington said TechCrunch felt an "ethical obligation to help Twitter" in this situation, and that he was working "to help them mitigate the damages" that could come as a result of the leaked documents. Arrington said he sent Twitter all the documents he received and is trying to put Twitter in direct contact with the hacker, although he said he would not reveal the hacker's identity to Twitter.

Arrington also said that despite his efforts to keep personal documents private, they might turn up elsewhere on the Web. "We're not the only people who have them," he said. "There's presumably a young hacker out there who wants to make a name for himself. I wouldn't be surprised to see them wrapped up and thrown on BitTorrent at some point."

Twitter has not said whether it will file a lawsuit over the hacking. In a 2006 case, *O'Grady v. Superior Court*, Cal. App. 4th 1423 (Cal App. 2006), a California appeals court rejected an attempt by Apple Computer Inc. to discover several bloggers' confidential sources for a blog post that revealed confidential aspects of Apple's development plans. The court ruled the bloggers could claim a journalist's privilege under Cal. Const. art. I, § 2(b) and Cal. Evid. Code § 1070. The ruling effectively ended Apple's attempt to sue the bloggers for revealing its trade secrets. For more on the case, see "Appeals Court Finds That Bloggers Have Same Protection As Journalists, Newsgatherers in the Summer 2006 Silha *Bulletin* and "Apple Suit Tackles Legal Protections for Bloggers" in the Winter 2005 issue.

– Jacob Parsley
Silha Research Assistant

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

Non-profit Org.
U.S. Postage
PAID
Minneapolis, MN
Permit No. 155

SILHA CENTER
FOR THE STUDY
OF MEDIA ETHICS
AND LAW

Silha Events

2009 Silha Lecture: Award-winning Investigative Reporter Charles Lewis

With its First Amendment protections, relative transparency, and physical security afforded to all citizens, the United States should be the world's most hospitable place for investigative reporting. However, 2009 Silha Lecturer Charles "Chuck" Lewis asserts that this is no longer the case. He will examine reasons why in his lecture, "Unspoken Realities about Investigative Journalism and the Law" at 7:00 p.m. on Oct. 21, 2009, at Cowles Auditorium on the West Bank of the University of Minnesota in Minneapolis.

In the cover story of the May/June 2009 *Columbia Journalism Review*, Dean Starkman reported that very few "investigative stories … confront directly powerful institutions about basic business practices while those institutions were still powerful." According to Lewis, major news media have been reluctant to conduct such investigations for years. He will assert in his lecture that they have also failed to report on the oversight and accountability functions of government, and investigative reporters who have tried are thwarted by their own timid or cash-strapped employers. As a result, Lewis will argue, the public is not as well informed as it should be.

What, Lewis asks, has discouraged the traditional watchdog's inclination to bark – let alone bite?

A national investigative journalist for the past 30 years, Lewis worked at ABC News, CBS News' "60 Minutes," and as the founder and former executive director of the Center for Public Integrity. The co-author of five books, including the national bestseller *The Buying of the President 2004*, he is preparing a new book about truth, power, the news media and the public's right to know. In 1998, Lewis received a prestigious MacArthur Fellowship, nicknamed the "Genius Award," which is awarded annually to 20 to 40 Americans "who have shown extraordinary originality and dedication in their creative pursuits and a marked capacity for self-direction."

Lewis faced legal threats from many quarters while leading the Center for Public Integrity and its International Consortium of Investigative Journalists, the first working network of 100 premier reporters in 50 countries. Despite warnings from the Justice Department under then-Attorney General John Ashcroft, the Center published the secret draft "Patriot II" legislation. In October 2003, the Center posted online the U.S. war contracts in Iraq and Afghanistan, first revealing Halliburton as the top war contractor. That report, *Windfalls of War*, won the prestigious George Polk Award. The Center also filed 73 Freedom of Information Act requests and successfully sued the Army and the State Department in federal court to obtain and publish the Halliburton and other lucrative contracts.

Lewis received the PEN USA First Amendment Award in 2004 "for expanding the reach of investigative journalism, for his courage in going after a story regardless of whose toes he steps on, and for boldly exercising his freedom of speech and freedom of the press."

The Silha Lecture will include an opportunity for audience Q&A. The event is free and open to the public. No reservations or tickets are required. Light refreshments will be served.

The Silha Center is based at the School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities, including the 24th annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

For further information, please contact the Silha Center at 612-625-3421 or silha@umn.edu, or visit www.silha.umn.edu.

– Sara Cannon
Silha Center Staff