SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

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An Exclusive Report from the Silha Center:
Cameras Monitor Minnesota Recount Trial

As Minnesota's experiment with cameras in the courtroom during the Coleman-Franken recount trial drew to a close on March 12, 2009 after 34 days of testimony, news outlets across the country had produced thousands of stories about the fight between Norm Coleman and Al Franken over Minnesota's empty Senate seat. Many of the stories included pictures of the three judges conferring or the lawyers hunched over stacks of documents. Some included footage of the wood-paneled chamber, packed full of lawyers, judges, and reporters. But only a handful mentioned the cameras or discussed the wisdom of allowing them in trial courts.

In published reports on the trial, no one complained about grandstanding lawyers or nervous witnesses. No one suggested that the cameras had compromised the fairness of the proceedings. In fact, no one talked about the cameras at all.

That is good news for camera proponents as Minnesota courts prepare for a pilot program designed to put more cameras and other electronic media coverage in trial courtrooms and study how those cameras affect trial participants. In January, the Minnesota Supreme Court ordered the Advisory Committee on General Rules of Practice to set up the pilot program by early 2010. The pilot is a response to a petition from the Society of Professional Journalists and other media groups asking for new rules that would make it easier to get cameras into trial courtrooms. (See "Minnesota High Court Approves Cameras-in-Court Pilot Program" in the Winter 2009 Silha *Bulletin*.)

Current Minnesota rules prohibit cameras from trial courts unless all parties and the judge agree to allow them. According to media groups pushing for changes, the party consent requirement has functioned as a near ban on news media cameras in trial courts. The election contest was one of the first trials with electronic coverage since the rule went into effect in 1982.

In interviews with the Silha Center, observers expressed some concerns with the coverage and the conduct of the journalists in the courtroom, but they all agreed that the camera experiment went smoothly. Although the clerk had to remind assembled observers the first day that "note passing" and "gum chewing" were prohibited, the disruptions were not caused by the cameras.

The clerk never admonished the photographer in the corner snapping pictures, sometimes with a foam cover insulating the camera to muffle the shutter noise, sometimes without.

Jason Barnett, executive director of TheUptake.org, an independent news Web site that carried a live streaming video of the entire trial, said he thought it went well. More importantly, so did the court's communications staff.

"I had a meeting with the courts [in early April], and they were really happy," he said. "Looking at the recount trial as a pre-pilot project, it went really well. I think that the way the courts handled the situation was great, and I think the way the journalists handled the situation was great."

Judge Elizabeth Hayden, one of the three judges who presided over the trial, declined an interview request, saying she and her colleagues had agreed not to talk about the trial "for a while."

Lawyers for Franken also said they would not talk about the trial until the appeals process wraps up. The Minnesota Supreme Court will hear the case in June, and from there an appeal to the U.S. Supreme Court is possible. But Ben Ginsberg, one of Coleman's lawyers, and members of the media agreed to share their impressions of the experiment with the Silha Center.

As the attorney for both of George W. Bush's presidential campaigns, Ginsberg has worked with prominent clients on high profile matters before. According to his law firm's Web site, he played a "central role" in the controversial Florida recount in 2000 that required an appearance in the U.S. Supreme Court before his client was finally inaugurated as the 43rd U.S. President. Ginsberg said he has tried cases in front of courtroom cameras before.

He said that cameras had virtually no impact on the way participants conducted themselves in the recount trial, and the problems for lawyers were only a matter of "logistics."

"I think [witnesses] sat up a little straighter and probably paid more attention to their appearance," Ginsberg said of the people who took the stand during the recount trial. "But I don't think it impacted their testimony at all."

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Ginsberg said that he only thinks about the cameras "for the first five seconds or so." His only complaint was with the journalists who did not understand what he called "ground rules" for cameras and microphones in the courtroom.

"There would be times during the trial, especially in the beginning days, when we would be having conversations during breaks in the trial. Somebody would send an e-mail that says 'there's an inquisitive mic and they can hear your conversations.' That got our attention," he said.

"But I think that was really sort of just the logistical issues at the start of the trial, and it wasn't a persistent problem," he continued. "I mean as long as the cameras are not prying and trying to read people's notes, which also happened on one or two occasions at the beginning, or as long as the microphones are not picking up conversations that are other than the official courtroom proceedings, I don't think there's any problem."

"I don't think the media perceive for a second that their job is to educate the public about the finer legal nuances of court proceedings ... ."

– Ben Ginsberg
Lawyer for Norm Coleman

Ginsberg said it is the role of the lawyers and the court personnel to explain to journalists before the trial begins where the cameras and microphones belong and what material can be recorded. The reporters were simply trying to gather news without thinking about the implications of the material they were intentionally recording, he said.

If cameras and audio recording devices capture an attorney's notes or pick up a conversation between an attorney and client, it could create concerns related to legal doctrines that provide for privileged communication between attorneys and their clients and protect attorney work product.

"I think it was something where the ground rules weren't set, and once it was explained to them, they complied. But I think they looked at it as reporting to be taking the cameras and sticking it on peoples' notes and microphones to pick up conversations," he said. "I don't think anybody told them that was … something they shouldn't be doing. And they were doing it."

"Probably if there were reporters writing stories on their laptops and the camera had been looking at the reporters writing their stories, the reporters would have objected too," he said.

Professor Stephen Simon of the University of Minnesota Law School, a veteran trial lawyer, said incidents where cameras zoom in on an attorney's notes or audio recorders pick up their private conversations are unacceptable. "I would be outraged," he said.

Simon represented clients in two jury trials during the 1990s that were part of a study of the effects of cameras on trials. Eugene Borgida, a University of Minnesota psychology professor, conducted the study, but video recorded during the study was never disseminated. Simon said that for cameras to work properly, strict ground rules have to be set up in advance, and agreed to by the judge, the parties, and the media.

During the Borgida study, those ground rules required that the camera remain in a fixed place with a fixed perspective; never capture images of jurors; be turned off if a witness objected; and have a piece of tape covering up the "red light" so jurors could not tell if it was on or off.

Simon said that if the media cannot agree to similar ground rules, then there should be no electronic media coverage in courtrooms.

Mark Anfinson, the Minneapolis attorney who presented the media groups' petition asking the court to relax the rules governing cameras in courtrooms, said that some of Simon's suggestions are "going to happen anyway," such as prohibitions on filming jurors. But he said he would oppose a rule that said journalists could not move the camera to focus on a particular person.

"I don't think that's feasible," Anfinson said. "Journalists have to be able to move the camera so they can capture the person who is speaking, particularly if there is only one camera allowed in the courtroom."

Anfinson also questioned the assumption that the camera itself would somehow affect a trial. "Where is the case that the camera and its function affect the process?" he asked. He said that many courts have voluntarily brought cameras and other recording devices into courtrooms for other purposes, such as recording preliminary proceedings to cut down on the need for court reporters.

Ginsberg said that despite his initial concerns, journalists did a good job covering what was going on inside the courtroom, but not necessarily explaining the legal process and rules. However, Ginsberg said that is not their job.

"I don't think the media perceive for a second that their job is to educate the public about the finer legal nuances of court proceedings, I think they perceive it on a much more political, almost legally superficial level, and that was their goal. They met their goal," he said.

According to TheUptake's Barnett, the content of the coverage is one of the concerns expressed by judges and lawyers who want to maintain the status quo.

"I think what they're worried about is how the video is going to be used. They're worried … [People] are only going to see the most crazy moment inside the trial and then the brand of the Minnesota Court system will be damaged because of that. I think that's their biggest concern. I think that's a legitimate concern."

But Barnett said the Web can change that by providing a medium to stream entire trials live, as TheUptake and some other news organizations did with the recount trial.

"With the Web, and especially the way we go about doing stuff and the partners we've made with different technological developers, we have the ability to live stream as many events as possible at once. And so we can have a page per trial, we can have a page per system, we can have a page per court," he said.

There is also an audience for such coverage, Barnett said. TheUptake received between 60,000 and 100,000 unique visitors per month during its coverage of the election contest, about the same

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amount of traffic that its coverage of the Republican National Convention generated in September 2008.

"And that's 'uniques'. There are a lot of repeats," he said. "Our [audience] was from all over the country. People were coming from everywhere, especially from law firms and law schools."

Those people were also participating in TheUptake's live blog, which provided a running commentary of the trial that was moderated by TheUptake's staff. That commentary included some political jabs, but also efforts to explain the esoteric legal concepts and evidentiary rulings that came up in the trial. Barnett said that active moderation is the key to intelligent and interesting blog commenters.

Barnett said TheUptake allowed a certain number of colorful comments that may have been off topic, "but we never allowed any of the crazy comments. A few might have slipped through here and there, but we kept the conversation really civil. We didn't screen for political opinion, but we did screen for … 'the judge looks like an idiot' or whatever," he said. "And what that did, [is] early on people realized that they were being moderated and they stepped up to the plate. More people participated on the live blog because they knew that they could actually state an opinion and it would matter."

Barnett said that TheUptake even contacted some of the commenters and later used them as sources for its own stories.

"Some of them were practicing lawyers, some of them were former judges, and so their opinion actually was pretty right on and really interesting," he said. "We used that live blog tool as a reporting tool. Not only did it drive a lot of traffic because people became very addicted to it … we developed a community basically around this trial and a lot of them were very very valuable sources and interesting commenters. I thought it was a very good educational tool."

Barnett said the only problems were technical glitches, especially early on.

"The equipment they have at the state capital or the courthouse is not great. And they know that. They are looking to try to improve a lot of this. The audio system inside of the courtroom is ancient, and it actually failed one of the first few days. They had to pull stuff in from all over the building to try to get something to work inside the courtroom. But I look at all technical problems … as something that can be fixed. Everything can be fixed," Barnett said.

As for the judges and lawyers involved, he said cameras might raise their profiles and lead strangers to recognize them on the street, but they will not increase the administrative burden on the courts. Logistical duties like coordinating pool coverage and setting up cameras and microphones in the courtroom will be handled by media representatives.

"If the courts open this up, we want to work with them." He said TheUptake would stream more live, unedited content from court proceedings if they had access.

Assistant News Director Michael Caputa at WCCO television said that WCCO was glad to have the opportunity to use footage from inside the courtroom, and would provide more coverage of the courts if given the opportunity.

"We were excited when we heard about the opportunity," he said. "We weren't sure what kind of interest we'd have, but we went in with a plan." The plan was to pool footage with other stations in the Twin Cities, and broadcast the footage both on the WCCO Web site and on nightly newscasts.

Like TheUptake, WCCO started the trial streaming gavel-to-gavel coverage on its Web site. However, Caputa said the station quit streaming when it became apparent that its audience was not interested. Caputa said that some days the live coverage would only draw 100 people per day. But WCCO continued to offer taped coverage of the trial on its Web site and use taped segments from the court room in its nightly newscasts.

Caputa said the footage helped WCCO reporters explain the complex issues involved in the trial by showing footage of the actual ballots in dispute, and also provide context for what was actually happening in the courtroom.

"To me, what that trial really showed to our viewers was, just how – I don't want to use the word tedious – but how it got down to the actual nitty-gritty and how big every little thing becomes [in a trial]," Caputa said. "I don't think that most people, especially here … have a good idea of what's going on inside a courtroom."

Even journalists who have covered a trial or two do not always understand how courts operate, he said. "There are a lot of these things that we don't see when you're only in court for the day or you're only in court for the afternoon."

"I think that [cameras in courts] would help everyone understand those kinds of things more. But I also think it would bring more attention to several kinds of stories," Caputa continued. "Television stations often make decisions on what they're going to cover based upon what they can get for video and sound; by that I mean hearing from individuals on tape. Sometimes trials that perhaps deserve more attention don't [get covered] simply because we don't have elements that typically make up good television news stories."

Deb Pastner, senior photo editor at the Minneapolis *Star Tribune*, said that the political and legal questions raised in the trial drove the newspaper's coverage, while the photos provided context for the issues discussed in print.

Simon, of the University of Minnesota Law School, said that is the way courtroom photos and video should be used. "Visuals give the observers the perspective of who's speaking; it is the content of the speech that's important."

Pastner said images of the judges at work and Coleman watching from his seat at the plaintiff's table are all the photographers were able to capture.

"To be quite frank, basically every day that we'd go it was essentially the same picture over, and over, and over again," Pastner said. "Because it sort of

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"Not only did [the live stream] drive a lot of traffic because people became very addicted to it … we developed a community basically around this trial and a lot of them were very very valuable sources and interesting commenters. I thought it was a very good educational tool."

– Jason Barnett
Executive Director,
TheUptake.org

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went through the same process each time, it was really duplicative photography."

But just because the photos were duplicative, that does not mean access to the courtroom to shoot photographs is not important, Pastner said. It still provides a visual record to the public of how the judicial process functions.

"I am very happy that we had access to capture it, and it's an absolute visual record of what happened. That being said, it wasn't surprising photography each time," she said.

Not every trial, however, will be the same. Some trials may be more emotional and generate more interesting, albeit controversial, pictures, Pastner said.

Pastner acknowledged many critics argue that O.J. Simpson's 1995 murder trial in California state court is a perfect example of why courts should ban cameras. It turned into a "circus," she said. But she also said that there is an argument the public should see how attorneys, witnesses, and parties act in the courtroom.

"This wasn't that kind of a thing because I think from a visual standpoint it was a very boring process. It was essentially people talking with a pile of papers. Now if Al Franken and Norm Coleman had been in the courtroom everyday and they were making faces at each other … that would have been a situation where we photograph that," she said. Those photographs would have been more controversial.

"Obviously anything that involves politics, people are going to have reactions to it," she said. "Political photography can very much strike a chord with people."

Whether the resulting photos generate public interest or not, Pastner said the public should be able to see what is going on in courtrooms. "If this is a discussion around, you know, should we allow photography in courtrooms? Then absolutely, I'm glad we were there," she said.

Simon said that if done right, cameras and audio recorders can provide better coverage of trials than a reporter with a pen and paper ever could. "My argument is the camera is more neutral," Simon said. "The reporter is a filter."

Simon said that the presence of the camera in the courtroom will have some effect on the trial. The key is to develop a set of rules to minimize that effect, he added.

The Advisory Committee charged with creating those rules and the pilot project to study the impact of cameras on trial participants will meet next on June 4. Several members said at the last meeting that they hoped to recruit academics to study the impact of the cameras involved in the pilot program, without any cost to the courts. The committee will send its recommendations back to the state's high court by January 2010 and the pilot program will probably start sometime next year.

"The reality is that the court has made a pivot on the issue," Justice Lorie Gildea said at the Advisory Committee's April 23 meeting about cameras in Minnesota courtrooms. "It just can't cost the court any money."

Until the pilot program begins, however, people interested in watching video from Minnesota's trial courtrooms have only one option, but plenty of content. TheUptake's video archive, including every minute of the 34-day trial, is available at http://tinyurl.com/trialvideo.

– Michael Schoepf
Silha Fellow

Look for an expanded report analyzing the scholarship and legal issues surrounding cameras in Minnesota courtrooms from the Silha Center this summer. The report will be available at the Silha Center's Web site:
www.silha.umn.edu

Supreme Court News

U.S. Supreme Court Ruling Leaves FCC's Ban on Fleeting Expletives in Place

Court Vacates 'Wardrobe Malfunction' Fine, Remands Case to 3rd Circuit

In a 5 to 4 ruling handed down April 28, 2009, the U.S. Supreme Court overturned a lower court's decision that found that the Federal Communications Commission's (FCC) rule change on "fleeting expletives," was "arbitrary and capricious."

Instead, Justice Antonin Scalia's opinion for the majority called the rule change at issue in *Federal Communications Commission v. Fox Television Stations, Inc.*, 07-582, 2009 WL 1118715 (Apr. 28, 2009), "entirely rational." However, the Court decided not to address underlying First Amendment concerns, saying to do so would be "a rush to judgment without a lower court opinion."

The ruling overturned a June 2007 U.S. Court of Appeals decision from the 2nd Circuit that remanded an FCC indecency ruling against Fox Television. The 2nd Circuit found that the commission's new policy against one-time, unscripted uses of expletives was "arbitrary and capricious" under the Administrative Procedure Act, (APA), 5 U.S.C. § 706, because it failed to give a reasoned basis for a significant change in policy. Federal administrative agencies like the FCC are governed by the act, which allows them to revise rules and policies at their discretion, as long as the changes are not "arbitrary and capricious." In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the U.S. Supreme Court defined that term to mean that "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Specifically at issue in this case were one-time, fleeting uses of what the Supreme Court called "the F- and S-words" broadcast live by Fox during the 2002 and 2003 Billboard Music Awards. In 2002, upon receiving an award, actress and singer Cher said, "People have been telling me I'm on the way out every year, right? So fuck 'em." In 2003 presenter Nicole Richie made reference to her popular television show, saying, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The FCC received complaints after both broadcasts, and issued notices to Fox that it was in violation of the commission's new policy prohibiting the broadcast of fleeting expletives. Fox challenged the notices, and CBS Broadcasting, Inc., ABC, Inc., NBC Universal, Inc., NBC Telemundo, and the Center for Creative Voices in Media, Inc., a nonprofit organization of professional writers, directors, producers, performers, and musicians, joined in the court challenge.

The Supreme Court said the lower court misinterpreted the APA as requiring an agency to demonstrate that its new policy has good reason and that the reasons for the new policy are better than the reasons for the old one. "The Act mentions no such heightened standard," Scalia wrote. "It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." Moreover, Scalia wrote, technological advances that have reduced the costs of "bleeping" offending words make the FCC's choice to move away from its older rules rational.

According to the Supreme Court opinion, the 2nd Circuit criticized the FCC for failing to give sufficient evidence in support of the contention that children will be harmed by fleeting expletives. The Supreme Court disagreed, saying, "Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate."

The Supreme Court also disagreed with the 2nd Circuit's opinion which faulted the FCC for not providing evidence for its contention that allowing the continued use of fleeting expletives would lead to an overall increase in their use, "one at a time." Scalia wrote, "Even in the absence of evidence, the agency's predictive judgment … makes entire sense. To predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance."

The broadcasters also argued that the FCC went beyond its scope of authority approved in the landmark broadcast indecency case, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), which held that the First Amendment does not prohibit the FCC from levying limited civil sanctions for the public broadcast of indecent language when contextual factors, such as audience and time of day, are taken into account. That case arose out of a daytime radio broadcast of comedian George Carlin's "Seven Dirty Words" routine. To the contrary, Scalia wrote that the Court "has never held that Pacifica represented the outer limits of permissible regulation."

"The broadcasters attempt to turn the sword of Pacifica, which allowed some regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what Pacifica sanctioned. Nothing prohibits federal agencies from moving in an incremental manner," Scalia wrote.

Justice Kennedy concurred in part and concurred in the result, as did Justice Thomas. Justices Souter, Ginsburg, and Stevens joined in a dissent by Justice Breyer, and Justices Stevens and Ginsburg also wrote their own dissents.

Justice Breyer wrote that the FCC's explanation for the rule change failed to satisfactorily explain its change in policy, which he distinguished from the creation of a policy in the first instance. Breyer drew a comparison to "an (imaginary) administrator who, explaining why he chose a policy that requires driving on the right-side, rather than the left-side,

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> "It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."
>
> – Justice Antonin Scalia
> U.S. Supreme Court

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of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an initial choice, that explanation is not at all rational if offered to explain why the administrator changed driving practice, from right-side to left-side, 25 years later." Breyer said the majority's holding "could … significantly change judicial review in practice, and not in a healthy direction."

"Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?" Breyer wrote.

Breyer said the FCC failed to consider two important issues in justifying its rule change: First Amendment problems and the rule's impact on smaller broadcasters, which might not be able to afford "bleeping" technology.

"The FCC said next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,'" Breyer wrote. "The FCC had explicitly rested its prior policy in large part upon the need to avoid treading too close to the constitutional line."

Breyer said that small radio and television stations, fearing fines of up to $325,000 for airing fleeting expletives, might respond by cutting back local coverage of live events. The FCC said "nothing at all" about the concerns of small broadcasters in its consideration of the rule change, Breyer wrote.

The majority dismissed Breyer's concerns about small stations self-censoring, expressing doubts that small-town broadcasters have a heightened risk of liability under the fleeting expletive rule. "In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood," Scalia wrote. The majority also observed that the FCC "went out of its way" to note that there would be good reason to make exceptions to the rule in the case of "breaking news coverage."

Justice Stevens, who wrote the majority opinion in the 1978 *Pacifica* case, said in his dissent that the FCC policy change "bears no resemblance to what Pacifica contemplated" because it "improperly equated" words that "may not be polite, but that are not necessarily 'indecent.'"

"As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent," Stevens wrote.

In addition to joining Breyer's dissent, Justice Ginsburg wrote to highlight the underlying First Amendment issues. "There is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow," Ginsburg wrote.

Justice Thomas' concurrence also addressed underlying First Amendment issues, as he wrote separately to "note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case": *Pacifica* and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which upheld the doctrine that the FCC could require broadcasters to give multiple sides of public issues "equal time" based on the fact that licensees are granted access to a scarce public resource, the broadcast spectrum.

Thomas wrote that the *Pacifica* and *Red Lion* decisions constitute a "deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium." Thomas observed that the language of the First Amendment does not suggest that there should be exceptions allowing the FCC, or any government body, to regulate speech differently depending on medium or circumstances. Moreover, Thomas wrote, "even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of Red Lion and Pacifica, dramatic technological advances have eviscerated the factual assumptions underlying those decisions."

Thomas wrote that he is "open to reconsideration of Red Lion and Pacifica in the proper case."

The opportunity to reconsider the FCC's power to regulate speech under the First Amendment may reach the Court relatively soon. On remand, the 2nd Circuit is likely to take up consideration of those issues.

On May 4, the Supreme Court also vacated the 3rd Circuit's ruling in *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008), the infamous 2004 Super Bowl "wardrobe malfunction" case, remanding it for further consideration in light of its decision in the fleeting expletives case.

The "wardrobe malfunction" case involved halftime performers Janet Jackson and Justin Timberlake. The FCC fined 20 CBS broadcast stations the maximum $27,000 each for airing the brief exposure of Jackson's breast during the live broadcast of the Super Bowl halftime show, for a total fine of $550,000. In July 2008 the 3rd Circuit overturned the FCC fine, calling it "arbitrary and capricious," but it will now consider reinstating it. (See "3rd Circuit Strikes Down FCC's Super Bowl Fine As 'Arbitrary and Capricious'" in the Summer 2008 issue of the Silha *Bulletin*.)

According to The Associated Press on April 28, acting FCC Chairman Michael Copps said the decision in *Federal Communications Commission v. Fox Television Stations, Inc.* was "a big win for America's families," saying it "should reassure parents that their children can still be protected from indecent material on the nation's airwaves."

Fox Television said it was "optimistic that we will ultimately prevail when the First Amendment issues are fully aired before the courts."

For more Silha *Bulletin* coverage of the fleeting expletives rule change, see "Second Circuit Strikes Down FCC's 'Fleeting Expletives' Rule as 'Arbitrary and Capricious'" in the Summer 2007 issue, "Broadcasters Challenge Indecency Standards" in the Winter 2007 issue, and "FCC Backtracks on Some Indecency Rulings, Continues to Pursue Others in Court" in the Fall 2006 issue.

– Patrick File
Silha Fellow and *Bulletin* Editor

Supreme Court News

U.S. Supreme Court Will Hear Animal Cruelty Video Case

Government Asks Court to Create A New Exception to the First Amendment

The U.S. Supreme Court has agreed to hear a case that will ask whether depictions of animal cruelty should join the few categories of speech not protected by the First Amendment, like obscenity, "fighting words," and child pornography.

United States v. Stevens, No. 08-769, challenges the constitutionality of a 1999 federal law, 18 U.S.C. § 48, which prohibits the creation, sale, or possession of a depiction of an act of animal cruelty for commercial gain, "where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value."

The case comes on appeal by the federal government following a July 2008 10 to 3 *en banc* ruling by the 3rd Circuit U.S. Court of Appeals in *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008), which vacated the conviction of Robert Stevens under 18 U.S.C. § 48 and found the law unconstitutional on its face.

In 2005, a Virginia jury found Stevens guilty on three counts of violating the statute after he sold three dog fight videos to law enforcement investigators. The investigators had found advertisements for Stevens' videos in the publication *Sporting Dog Journal*. Two of Stevens' videos depicted dog fights in the U.S. and Japan, and a third showed footage of hunting excursions in which pit bulls were used to catch wild boar, as well as footage of the dogs being trained by attacking a farm pig.

In a majority opinion by Judge D. Brooks Smith, the 3rd Circuit declined the government's request that it recognize speech depicting animal cruelty as categorically unprotected by the First Amendment. "It has been two and a half decades since the Supreme Court last declared an entire category of speech unprotected" Smith wrote, referencing *New York v. Ferber*, 458 U.S. 747 (1982), which held that child pornography depicting actual children is not protected speech. Later, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court refused to recognize virtual child pornography as a category of unprotected speech. (See "Supreme Court Strikes Down Virtual Child Pornography Law" in the Spring 2002 Silha *Bulletin*.)

Four other categories of speech that the U.S. Supreme Court has ruled are not protected by the First Amendment are "fighting words," under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), "threats," under *Watts v. United States*, 394 U.S. 705 (1969), "speech that imminently incites illegal activity," under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and "obscenity," under *Miller v. California*, 413 U.S. 15 (1973). "The common theme among these cases," Smith wrote, "is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest."

According to the opinion, the government attempted to argue that the depictions of animal cruelty proscribed by 18 U.S.C. § 48 are analogous to depictions of child pornography. "That attempt simply cannot carry the day," Smith wrote.

The government argued that the court should apply a test outlined in *Chaplinsky* that balances the government interest in banning the speech against the speech's value. But in light of the analogy to child pornography, the court instead discussed the constitutionality of 18 U.S.C. § 48 using four factors of an analysis set out by the Supreme Court in *Ferber* for the creation of a new category of unprotected speech.

First, the court asked whether the government has a "compelling" interest in banning depictions of animal cruelty. The court found that it does not. "Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm," Smith wrote. Moreover, the court disagreed with the government's argument that the law serves to prevent future animal cruelty and other anti-social behavior because viewing videos depicting animal cruelty can serve to "desensitize" the viewer to those acts, leading him or her to lose the ability to empathize with the suffering of animals or humans. "This reasoning is insufficient to override First Amendment protections for content-based speech restrictions," because "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," Smith wrote, quoting *Ashcroft v. Free Speech Coalition*.

Turning to the second factor in the *Ferber* rationale, that child pornography is "intrinsically related to the sexual abuse of children," Smith wrote that this was a "similarly weak position for the Government to rely upon in this case." The intrinsic link argument was based on the notion that the distribution of child pornography continues to harm the children involved even after the abuse has taken place, the court observed. "While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace," Smith wrote.

The third *Ferber* factor states that "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. Smith wrote that although "this drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context … there is no empirical evidence in the record to confirm that the theory is valid in this circumstance." Moreover, Smith wrote, the fact that most dog fights are conducted at live venues and produce significant gambling revenue suggests that the video market does not serve as a primary economic driver of the animal cruelty the law is meant to target.

The fourth *Ferber* factor is that the value of the prohibited speech is "exceedingly modest, if not *de*

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> "Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm."
>
> – D. Brooks Smith
> 3rd Circuit U.S. Court of Appeals

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minimis." Although a section of 18 U.S.C. § 48 states that the law "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," the court ruled that this section alone cannot "constitutionalize § 48." Smith wrote that the court saw two problems with using an exception clause to make the statute constitutional: "First … this view overlooks … the great spectrum between speech utterly without social value and high value speech. Second, if the mere appendage of an exceptions clause serves to constitutionalize § 48, it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering."

Finding that the speech restricted by 18 U.S.C. § 48 was constitutionally protected, the 3rd Circuit applied a "strict scrutiny" analysis to the law, asking whether the law serves a compelling government interest, is narrowly tailored to achieve that interest, and provides the least restrictive means to achieve the interest. The court ruled that it failed to meet all three prongs of that test.

The majority opinion also discussed the breadth of the statute in light of what its legislative history indicates was its intended purpose. According to the opinion, 18 U.S.C. § 48 was initially aimed at curbing the production of a very particular type of depiction of animal cruelty called "crush videos." The videos, according to a 1999 House committee report cited in the majority opinion, are depictions of "women inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." Smith wrote that "Testimony presented at a hearing on the Bill, and referenced in the House Committee Report, indicates that 'these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.'"

The majority opinion observed that the purported government interest in 18 U.S.C. § 48 in regulating the treatment of animals and preventing animal cruelty because it can lead to other antisocial behavior does not necessarily follow from the bill's narrow initial intent of halting the creation and dissemination of "crush videos." The court observed that the videos Stevens was convicted for selling were not "crush videos." Moreover, "if a person hunts or fishes out of season, films the activity, and sells it to an out-of-state party, it appears that [18 U.S.C. § 48] has been violated. Similarly, the same person could be prosecuted for selling a film which contains a depiction of a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film."

Judge Robert E. Cowen wrote a dissent, joined by Judges Julio M. Fuentes and D. Michael Fisher. Cowen wrote that the government interest in preventing animal cruelty is, in fact, compelling. "[T]his interest is readily apparent from the expansive regulatory framework that has been developed by state and federal legislatures to address the problem," Cowen wrote, observing that "[l]aws prohibiting cruelty to animals have existed in this country since 1641." The dissent also disagreed with the majority on the question of the value of speech and whether the law's exceptions serve to "constitutionalize" it. "The speech outlawed by the statute at issue shares the salient characteristics of the other recognized categories of unprotected speech, and thus falls within the heartland of speech that may be proscribed based on its content," Cowen wrote.

In the government's petition for writ of *certiorari*, filed with the Supreme Court in December 2008, then-U.S. Solicitor General Gregory Garre argued that, contrary to the 3rd Circuit's interpretation of 18 U.S.C. § 48, the law is "carefully crafted … to reach only a narrow category of depictions that have no redeeming social value." The petition further argued that even if the statute reaches protected speech, the 3rd Circuit erred in striking it down on its face. This point was taken up in a reply brief filed in April 2009 by President Obama appointee Solicitor General Elena Kagan, who argued that the 3rd Circuit "took the extraordinary step of invalidating 18 U.S.C. 48 [sic] on its face without finding that the statute was substantially overbroad—and indeed, without even considering this question. Moreover, the court of appeals decided the facial challenge without attempting to determine whether the statute is constitutional as applied to respondent's own conduct." The government argued that "at a minimum, a significant class of depictions prohibited by Section 48 can be constitutionally proscribed."

An *amicus curiae* brief filed by the Humane Society of the United States in support of the government's petition outlined in specific detail some of the gruesome types of videos 18 U.S.C. § 48 was meant to target. It called the Court of Appeals' finding that preventing acts of animal cruelty is not a compelling government interest "a tragic error that, if left undisturbed, will distort consideration of animal welfare issues in the lower courts, Congress, and state and local legislatures for years to come." The brief also sought to remind Justices of "the extensive body of research" suggesting that people who abuse or kill others often do so "as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals," and the fact that breeding and training dogs to fight and kill poses "an acute public safety risk [and] is part of an underground criminal subculture that includes gang activity, drug-dealing, and illegal gambling."

"This case … presents an excellent opportunity for this Court to clarify that the gruesome depictions of animal mutilation targeted by §48 simply do not merit the dignity of First Amendment protection at all," the Humane Society brief said.

A brief filed by Stevens in opposition to the government's petition for writ of *certiorari* pointed out that at trial, expert testimony supported the educational value of the videos Stevens produced, and that Stevens was not present at the fights or hunting excursions shown on the videos. The Supreme Court is expected to hear oral arguments on the case in the fall of 2009 or winter of 2010.

– Patrick File
Silha Fellow and *Bulletin* Editor

FOIA and Access

Obama's Policies Promote Openness; Some Secrecy Persists

Barely three months into its first term, the Obama administration continued its trend toward an increasingly open federal government by announcing new Freedom of Information Act (FOIA) policies and the release of previously unavailable photos and memoranda from the Justice Department regarding treatment of terrorism suspects. However, the President also showed signs that his promise "to usher in a new era of open Government" had its limitations, as he later announced plans to block the release of the detainee photos.

Meanwhile, criticism from both sides of the debate continued to mount, as some commentators suggested the release of too much information would compromise national security and others complained that the new disclosure policies still come up short.

Holder releases FOIA Memo; Results Mixed

Attorney General Eric Holder issued a memo on March 19 during national Sunshine Week, addressed to the heads of all executive departments and agencies and emphasizing the importance of compliance with the FOIA. The memo followed a January 21 letter from President Barack Obama stressing the presumption of government openness. (See "Obama Promises More Government Openness; Skeptics Demand Immediate Results" in the Winter 2009 Silha *Bulletin*.)

"The Freedom of Information Act … reflects our nation's fundamental commitment to open government," Holder wrote. "This memorandum is meant to underscore that commitment and to ensure that it is realized in practice."

The FOIA, 5 U.S.C. § 552, specifies how government agencies are required to make records available to the public and the media upon request, unless the requested information falls under a specific list of exemptions. Despite the exemptions, the U.S. Supreme Court has held in *U.S. Department of State v. Ray*, 502 U.S. 164 (1991), that the FOIA creates "a strong presumption in favor of government disclosure."

"I strongly encourage agencies to make discretionary disclosures of information," Holder said in the memo. "An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."

Holder also said that even where an agency determines that it should not make full disclosure of a record, it must consider partial disclosure. "Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information," the memo said. "Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure."

The memo noted that exempt data would still be withheld, citing national security, personal privacy, privileged records, and law enforcement interests as examples. But, reiterating Obama's January FOIA memo, Holder emphasized that "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Later in the memo, Holder formally rescinded the previous FOIA memorandum issued by then-Attorney General John Ashcroft on Oct. 12, 2001, which stated that the Department of Justice would defend decisions of government agencies to withhold records "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." (See "Surveys on Access to Information Released" in the Summer 2003 Silha *Bulletin* for more on the Ashcroft memo and its effect on government access.)

In contrast to the Ashcroft memo, Holder stated that the Department of Justice will defend a denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." The memo also stated that the new openness principles would be applied to pending FOIA litigation, if "in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information."

Holder stated that every federal government employee should be aware of FOIA policy and assist in carrying it out. "I would like to emphasize that responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency's FOIA staff," the memo said. "We all must do our part to ensure open government … . Unnecessary bureaucratic hurdles have no place in the 'new era of open Government' that the President has proclaimed."

The memo also encouraged government agencies to go beyond the specific requirements of the FOIA and work proactively to release information before FOIA requests need to be made. "[A]gencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs," the memo said.

Before concluding the memo, Holder reiterated new requirements that went into effect on Dec. 31, 2008, under § 552(a)(7) of the FOIA. Government agencies must assign tracking numbers to FOIA requests that will take longer than ten days to process, and provide that tracking number to the requester. Agencies also must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number.

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Holder stated that the Department of Justice will defend a denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

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In an April 8 interview on The CBS Evening News with Katie Couric, Holder said that national security would remain one of the areas in which the government would, at times, need to maintain secrecy. "This is a very transparent administration. This is going to be a very transparent Justice Department. But I'm not going to sacrifice the safety of the American people or our ability to protect the American homeland. And that is, as I said, first and foremost."

On April 17, in response to the Holder Memo, the Justice Department's Office of Information Policy (OIP) issued new department guidance stating that "The combined impact of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines is a sea change in the way transparency is viewed across the government."

The OIP guidance listed a series of steps to implement the new policies. "Agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption," the guidance stated. "Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking 'Can this be released?' rather than asking 'How can this be withheld?'"

"The new attorney general guidelines read as if there is a new show in town and for the first time in eight years everyone is welcome to come see it," said Meredith Fuchs, counsel for the National Security Archive, a private group that publishes declassified government documents and files many FOIA requests, in a March 20 Associated Press (AP) story.

Fuchs said the Holder memo ought to help the archive's lawsuit to obtain legal memos it has sought, but that it would probably take some time to implement the changes. "It's not like the flood gates open up and every document comes out, but I do think there will be sort of incremental change and it will happen over time," she said in an April 17 *Federal Computer Week* story.

David Sobel, an attorney with the Electronic Frontier Foundation (EFF), a digital rights advocacy organization, said in the March 20 AP story that Holder's decision to review some existing cases should open more records to public view.

"Both the president and the attorney general have now articulated an extremely pro-disclosure policy for the federal government, and that is a very positive development," Sobel said. "If there is really a new presumption in favor of disclosure, one would expect to see the outright reversal of many Bush-era decisions to withhold information."

However, in a March 19 posting on the EFF's Deeplinks blog, Sobel expressed reservations about the actual effects of the directive, which he compared to the policies instituted by former Attorney General Janet Reno. "The fact that these pronouncements come so early in the life of the new administration is a particularly promising development. But, as they say, the proof is in the pudding and it remains to be seen if these proclamations from on high produce real results down in the bureaucratic trenches," Sobel wrote. "We will soon learn in our pending lawsuits whether the new administration is truly prepared to reverse the pro-secrecy practices of the Bush administration."

"Both the president and the attorney general have now articulated an extremely pro-disclosure policy for the federal government, and that is a very positive development."

– David Sobel
Attorney, Electronic Frontier Foundation

A March 6 letter to Obama from the Public Interest Declassification Board, a body established by Congress in 2000 to advise the president on declassification policy, gave several suggestions for speeding along the declassification of many government documents, and suggested there was much more room for improvement. "Our Board was heartened by your early statements and actions on openness in Government. Still, we have to sound a note of alarm about how well the Government is doing in this area," the letter said. "Serious attention to the classification process itself is needed to ensure that it supports declassification and to address the particularly challenging and long-standing issue of over-classification."

There have already been early tests of the Obama administration's promise of increased openness. For example, the Federation of American Scientists has asked the Office of the Director of National Intelligence (ODNI) to reconsider its refusal to disclose the budget total for the National Intelligence Program for fiscal year 2006.

Steven Garfinkel, former director of the Information Security Oversight Office, called the ODNI practice of classifying obsolete budget information while releasing current budget information "stupid," according to a March 24 post on the Secrecy News blog.

In a victory for open-government advocates, on April 22 Transportation Secretary Ray LaHood rejected a proposal by the Federal Aviation Administration to keep reports about bird strikes on airplanes secret. LaHood said that FAA efforts to keep the information secret "doesn't really comport with the president's idea of transparency" in an April 23 story in *The Washington Post*.

"I mean, here they just released all of these CIA files regarding interrogation, and … the optic of us trying to tell people they can't have information about birds flying around airports, I don't think that really quite comports with the policies of the administration," LaHood said.

A March 26 post on the Secrecy News blog also suggested that Obama's new transparency policy was seeing immediate results in federal courts. The story cited a March 23 opinion, *Electronic Frontier Foundation v. Office of Director of National Intelligence*, No. C 08-01023 JSW, 2009 WL 773340 (N. D. Cal. March 23, 2009), in which Judge Jeffrey S. White ordered the ODNI and the Department of Justice to reconsider a denial of requested records by employing the new Holder guidelines.

In another FOIA lawsuit, *Electronic Frontier Foundation v. Department of Justice*, No. 07-0656 (D.D.C. 2009), Judge John D. Bates ordered the Justice Department "to evaluate whether the new FOIA guidelines affect the scope of its disclosures and claimed withholdings in this case."

EFF attorney Sobel said in the Secrecy News

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Obama Openness, *continued from page 10*

post that there have been at least four cases in which court orders have considered the Holder memo in their decisions. "I think it shows that a bit of aggressiveness on the part of FOIA litigants will likely force the government to reconsider prior withholding decisions," Sobel said.

In another FOIA development, Congress's approval of the omnibus spending bill included $1 million in start-up funds for the Office of Government Services, which will house the new ombudsman for the FOIA.

Rick Blum, coordinator of the Sunshine in Government Initiative, a coalition of media groups that promotes government accessibility, praised the funding measure. "This is an important step towards having a fully functioning FOIA ombudsman," said Blum. "For too many years, government transparency has been in crisis …. OGIS should help end stalemates and lengthy delays when faced with controversies over disclosure decisions. This investment will help agencies strengthen their responses to FOIA requests."

Justice Department Releases 'Torture Memos'

On April 16, at the behest of the President, the Department of Justice released four previously secret legal memos regarding detainee treatment during the Bush administration. The memos were the subject of an American Civil Liberties Union (ACLU) lawsuit.

"While I believe strongly in transparency and accountability, I also believe that in a dangerous world, the United States must sometimes carry out intelligence operations and protect information that is classified for purposes of national security," Obama said in a statement that came out the same day as the memos. "I have already fought for that principle in court and will do so again in the future. However, after consulting with the Attorney General, the Director of National Intelligence, and others, I believe that exceptional circumstances surround these memos and require their release."

The President cited several reasons for releasing the memos, including that the interrogation techniques described had already been widely reported and that the Bush administration publicly acknowledged some of the practices described. Obama also said he had ended the techniques described in the memos and that "therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time. This could contribute to an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States," the statement said.

The released legal memos described various interrogation techniques available to be used in the interrogation of al Qaida detainees and discussed whether the tactics were in violation of federal law. The four memos, originally circulated in 2002 and 2005, were added to a list of eight other memos from the Office of Legal Counsel that were written in the wake of the Sept. 11, 2001 terrorist attacks and were released under orders from the Obama administration on March 2, 2009.

An April 17 op-ed in *The Wall Street Journal* by former Attorney General Michael Mukasey and former CIA Director Michael Hayden criticized the decision to release the memos. "The release of these opinions was unnecessary as a legal matter, and is unsound as a matter of policy," the op-ed said. "Its effect will be to invite the kind of institutional timidity and fear of recrimination that weakened intelligence gathering in the past, and that we came sorely to regret on Sept. 11, 2001."

Plan to Release Detainee Photos Hits Roadblock

The Department of Defense announced on April 23 that it was planning to make public hundreds of photos depicting potentially abusive treatment of detainees in Iraq and Afghanistan, but the White House announced on May 13 that the administration would attempt to block the release of the photos, citing potential backlash against United States troops.

The Defense Department had said it would produce the images by May 28 in compliance with a September 2008 court order, *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.)

An April 23 story on the Fox News Web site said that the Bush administration had refused to disclose the images, claiming that public disclosure would generate outrage and violate U.S. privacy obligations towards detainees under the Geneva Conventions.

Pentagon spokesman Bryan Whitman said that adverse court decisions had influenced the Pentagon's decision to release the pictures. "We felt this case had pretty much run its course," he said in the April 23 Reuters story. "Legal options at this point had become pretty limited."

But Obama disagreed, and according to a May 13 AP story, instructed administration lawyers to challenge the release in court. "The president does not believe that the strongest case regarding the release of these photos was presented to the court and that was a case based on his concern about what the release would do to our national security," White House Press Secretary Robert Gibbs said.

ACLU attorney Amrit Singh, who argued the case before Court of Appeals criticized Obama's decision. "The decision to not release the photographs makes a mockery of President Obama's promise of transparency and accountability," Singh said in the May 13 AP story. "It is essential that these photographs be released so that the public can examine for itself the full scale and scope of prisoner abuse that was conducted in its name."

– Jacob Parsley
Silha Research Assistant

> "[A]fter consulting with the Attorney General, the Director of National Intelligence, and others, I believe that exceptional circumstances surround [the torture] memos and require their release."
>
> – Barack Obama
> President of the United States

FOIA and Access

1st Circuit Blocks Live Webcast of File-Sharing Trial

The 1st Circuit U.S. Court of Appeals overruled a Massachusetts federal district judge April 16, 2009 and barred live webcasting of a prominent file-sharing lawsuit brought by several record companies against a Boston University graduate student.

The court's ruling, *In re Sony BMG Music Entertainment*, No. 09-1090, 2009 WL 1017505 (1st Cir. April 16, 2009), came in response to a motion filed by the plaintiff record companies seeking to block District Court Judge Nancy Gertner's January 14 order permitting the webcast of a non-evidentiary motions hearing at the request of plaintiff Joel Tenenbaum's legal team. (See "Judge Allows Live Webcast of Copyright Trial; RIAA Appeals" in the Winter 2009 Silha *Bulletin*.)

"While the new technology characteristic of the Information Age may call for the replotting of some boundaries, the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen."

– Bruce M. Selya
1st Circuit U.S. Court of Appeals

The record companies argued that a local rule in the District of Massachusetts, D. Mass. R. 83.3, prohibits the webcast of any civil proceedings. The rule states that "Except as specifically provided in these rules or by order of the court, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court."

Circuit Judge Bruce M. Selya, writing for the court, said that Gertner's interpretation of the rule was "palpably incorrect," and that Rule 83.3 was to be construed as a "broad prohibition" against the use of any cameras in a federal district courtroom in Massachusetts.

The court also said that barring cameras from courtroom proceedings was consistent with the recommendations of the Judicial Conference of the United States, the principal policy-making body for the federal courts. "[W]hen the Judicial Conference promulgates a policy, that policy, even if not binding in the strictest sense, is not lightly to be discounted, disregarded, or dismissed," Selya wrote.

Selya also dismissed Tenenbaum's argument that the denial of webcasting violated his right to a public trial in the federal courts, thus contravening the Sixth Amendment and Supreme Court cases such as *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which held that the public and the press had a First Amendment right to attend criminal trials. Selya wrote that *Richmond Newspapers* dealt solely with the public's right to attend trials, and that "While the new technology characteristic of the Information Age may call for the replotting of some boundaries, the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen."

The court also declined to differentiate between broadcast by radio or television and webcasting. "The difference between televising and webcasting is one of degree rather than kind. Both are broadcast mediums," Selya wrote. "The absence of a specific reference to webcasting [in Rule 83.3] is not telling; both at the time when the policy was promulgated and at the time when the resolution was adopted, Internet webcasting had not attained the ubiquity that currently prevails."

"We are also mindful that emerging technologies eventually may change the way in which information – including information about court cases – historically has been imparted," Selya wrote in his conclusion. "Yet, this is not a case about free speech writ large, nor about the guaranty of a fair trial, nor about any cognizable constitutional right of public access to the courts … if a controlling rule, properly interpreted, closes federal courtrooms in Massachusetts to webcasting and other forms of broadcasting (whether over the air or via the Internet), we are bound to enforce that rule."

Circuit Judge Kermit Lipez wrote a concurring opinion stating that, although the court rules were clear and the webcast was rightfully barred, "there are no sound policy reasons to prohibit the webcasting authorized by the district court," and that "this case calls into question the continued relevance and vitality of a rule that requires such a disagreeable outcome."

Lipez cited *In re Providence Journal Co.*, 293 F.3d 7 (1st Cir. 2002) for the principle that "public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system," and that "[i]nformation received by direct observation is often more useful than that strained through the media."

"As the outcome of this proceeding demonstrates, the Rule, the Policy, and the Resolution should all be reexamined promptly," Lipez concluded.

"We are disappointed by the First Circuit's decision and maintain that Joel is being denied a constitutional right to a public trial in the age of the internet. We believe that Judge Gertner was within her authority to make decisions regarding her own courtroom. We intend to explore every legal option available to Joel," a statement on Tenenbaum's Web site, Joelfightsback.com, said in response to the decision.

An April 25 news release on the Tenenbaum site said that Harvard Law School professor Charles R. Nesson, who is representing Tenenbaum in the case along with a team of Harvard Law School students, decided to file a petition for rehearing *en banc* and to request to stay the contested hearings. The team also requested that the Massachusetts district court judges expedite a consideration to amend Rule 83.3 to permit a district court judge the ability to exercise discretion over the allowance of cameras, but the request was denied.

In an April 20 story in *The Harvard Crimson*, Neeson said that the webcast would provide necessary public oversight, especially considering the subject matter of the case. "Joel is being dragged into court by arbitrary authorities ... . If the public was aware of what the recording industry is doing to Joel and others like him, they would be outraged," Nesson said. "I believe that this outrage would be expressed in the form of (seeking) change."

Trial Webcast Blocked, *continued on page 17*

FOIA and Access

Wisconsin Group Sues Newspaper, Alleges Exclusive Right to Coverage of High School Sports

The Wisconsin Interscholastic Athletic Association (WIAA) filed a declaratory judgment action in state court Dec. 5, 2008 asserting exclusive ownership of all pictures, video, and written accounts of the Wisconsin high school athletic events it organizes.

According to the complaint, that means any newspaper that streams live game video on its Web site or posts live play-by-play updates of the action without permission is violating the law. The WIAA complaint asks the Portage County (Wis.) District Court to issue "an order declaring the rights of the WIAA to control the transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any game … that it sponsors, and that it has the right to grant exclusive rights to others" to control depictions of the games.

According to its Web site, the WIAA organizes state championship tournaments for 14 different girls' and boys' sports for its member schools around the state. Regular season games are not subject to the WIAA policies. The WIAA includes both public and private schools.

Several media companies licensed by the WIAA to broadcast the events joined the association in the lawsuit against Gannett Co. and the Wisconsin Newspaper Association (WNA). Gannett owns *The Post-Crescent* (Appleton, Wis.), which streamed live video on the Internet of a Nov. 8, 2008 football game between Appleton North and Stevens Point public high schools in violation of the WIAA media rules, the complaint said. The WNA also sent a letter to the WIAA in October questioning the legality of its media rules.

Those rules, published in the WIAA's 2008-09 Media Policy Guide, purport to prohibit newspapers, or any other enterprise, from providing live coverage of athletic events sponsored by the WIAA without a license.

"Newspapers transmitting 'real-time' or 'live' text, audio, image or video depicting action of [WIAA] events is considered similar to that of a play-by-play radio or television broadcast and are subject to rights fees," the media guide states. It also informs the newspapers that permission to stream video over the Internet is only available from When We Were Young Productions, a private company with exclusive rights to cover WIAA events.

In addition to license fees ranging from $250 to $1,500 and permission from the private production company, newspapers that want to stream video of WIAA events are also required to turn over a copy of the video to When We Were Young to be repackaged and sold at a profit, a letter from the WNA attorney to the WIAA said.

That letter, dated Oct. 31, 2008, argued that the WIAA policies prohibiting live coverage of games and matches involving public high schools are unconstitutional. Because the WIAA is a "state actor," the First Amendment forbids rules that bar reporters from using all available technology to report on the athletic events, the letter said.

"The WNA does not object to reasonable fees paid to host schools to cover their costs of producing the events, including any costs specifically incurred to facilitate internet streaming coverage. To require [newspapers] to pay fees to a competing news organization and relinquish ownership of their work product, however, is plainly unconstitutional," the letter said.

The letter cited several cases to support its argument, including *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). In *Brentwood Academy*, the U.S. Supreme Court held that a Tennessee athletic association similar to the WIAA was a state actor and therefore must comply with the requirements of the First and Fourteenth Amendments.

A federal district court in Wisconsin reached a similar conclusion in a 1975 case, holding the WIAA could be sued under 42 U.S.C. § 1983 for violating a student's constitutional rights "under the color of state law." The case, *Leffel v. Wisconsin Interscholastic Athletic Association*, 398 F. Supp. 749 (E.D. Wis. 1975), was brought under federal statutes and constitutional provisions requiring equal treatment for student athletes regardless of gender. The WNA letter did not cite *Leffel*.

In contrast to the WNA's letter, the WIAA's December 5 lawsuit cited no legal authority for its assertion of ownership in public high school athletic events. Although the complaint cited the WNA letter, it failed to address whether the athletic association is a private actor. Rather, it argued that a game or match is an "entertainment event and not a governmental function" and therefore outside the scope of First Amendment news gathering protections.

After the WNA learned of the legal complaint in late February, more than 20 Wisconsin newspapers responded with a barrage of criticism in editorials, opinion columns, and even a cartoon in the *Green Bay Press-Gazette* lampooning the legal complaint's requested prohibition on "drawing" high school sporting events. Those columns and editorials, along with other documents related to the case, are available from the WNA at www.wnanews.com/index.asp?menuid=526.

An editorial in the March 12, 2009 *Wisconsin State Journal* (Madison) argued state high school sports tournaments "belong" to the public, not the WIAA. "High school sporting events and the cherished memories they create belong to the athletes, their families, friends and fans. They don't belong – every word, image and sound from the biggest games – to the Wisconsin Interscholastic Athletic Association."

"The WIAA needs to lighten up and realize that newspapers across Wisconsin are the biggest force publicizing their events with the most in depth and

Newspaper Sued, *continued on page 14*

"To require [newspapers] to pay fees to a competing news organization and relinquish ownership of their work product … is plainly unconstitutional."

– Letter from Wisconsin Newspaper Association to Wisconsin Interscholastic Athletic Association

FOIA and Access

Coach Apologizes after Threat to Ban Student Reporters

The head football coach at the University of Wisconsin - Whitewater apologized to the student newspaper April 23, 2009, one day after threatening to ban student reporters from covering the football team in an angry outburst motivated by a critical editorial.

An editorial published April 22 in the *Royal Purple* criticized three football players for an incident at a campus gym where police were called after the players attempted to work out without showing their student IDs. That evening, coach Lance Leipold called sports editor Chris Kuhagen and unleashed an angry tirade that included several expletives, an April 22 story on the *Royal Purple*'s Web site said. Leipold told Kuhagen that student reporters would be denied access to the football team for the 2009 season.

But the next day, April 23, Leipold and Athletic Director Paul Plinske met with the staff of the newspaper to apologize and assure editors they would have continuing access to the team. "Leipold promises to cooperate with the Royal Purple in the future," a statement released by the university on April 23 said.

"I am disappointed that Coach Leipold responded in this manner," Plinske said in the statement. "This is by no means a reflection on Warhawk Athletics. Instead, it is an instance where an excellent coach allowed his passion for the program and his team to get the best of him. Coach Leipold knows his behavior was unacceptable."

– Michael Schoepf
Silha Fellow

Newspaper Sued, *continued from page 13*

continuing coverage. And with new technology, newspapers are now posting video clips and blogging about games as they occur to keep fans better informed," the editorial continued.

The WIAA responded to critics in a March 6, 2009 press release that said the lawsuit was filed in response to the WNA's October letter in an effort to protect resources that pay for high school tournaments. The letter said WIAA is not seeking any damages or other remedies for past violations of the policies.

The press release argued that the WIAA is a private actor and its licensing revenue, which could be jeopardized by live streaming on newspaper Web sites, is necessary to support the state tournaments it sponsors.

"The WIAA is a private, not-for-profit association comprised of more than 500 volunteer member high schools in the state. The Association receives no direct revenues from the State through taxes, and approximately 90 percent of its operational budget is generated though gate receipts of Tournament Series events and its business agreements. It is these revenues that the WIAA uses to secure the use of tournament venues and reimburse its member schools for tournament expenses," the press release said.

The release also argued that its policies do not interfere with traditional newspaper reporting, but only with attempts at live transmission of the play-by-play information. "The WIAA is not denying any newspapers from their traditional method of reporting on events, instead, making a clear distinction between reporting and live transmission of an event. In addition, any media may use up to two minutes of actual game highlights for its video news stories on the Web site, the same guidelines television has practiced for years."

Later in March 2009, the WNA filed a motion to move the case from state court to federal district court in Madison, Wis. The WNA also filed a response and counterclaim asserting its constitutional arguments in federal court, The Associated Press reported March 25.

According to a March 24, 2009 story in *The Lakeland Times* (Minocqua, Wis.), an attorney for the WNA said the case should be moved to federal court because it deals with matters of federal copyright law, not state law.

The WIAA and Wisconsin's newspapers have quarreled about coverage of state high school athletic events before. In 2007 the athletics group announced it had granted exclusive photo rights to a private company and newspapers risked losing state tournament press credentials unless they stopped their long-time practice of selling photo reprints to the families and friends of student athletes, the AP reported March 7, 2009.

Most newspapers criticized the rule and continued to sell the reprints anyway. The WIAA never followed through on its threat to revoke credentials, the AP report said.

A similar dispute between press groups and a high school athletics association about photography rights in Illinois led the Illinois Senate to pass a law guaranteeing press access to high school athletic events, the National Press Photographers Association reported April 1, 2008. But a companion bill in the Illinois House, H.B. 4582, died because it was not voted on before the session ended Jan. 13, 2009. (See "Illinois Press Association Sues High School Sports Association over Image Controls" in the Fall 2007 Silha *Bulletin*.)

– Michael Schoepf
Silha Fellow

FOIA and Access

Veterans Affairs Seizes, Returns Radio Reporter's Equipment at D.C. Medical Center

On April 10, 2009, the Veterans Affairs Department (VA) returned a digital memory card to a radio reporter after confiscating it while the reporter interviewed a veteran at the VA Medical Center in Washington, D.C.

David Schultz, a reporter for local National Public Radio (NPR) affiliate WAMU 88.5 in Washington, D.C., attended a public meeting on April 7 hosted by the VA Medical Center at which veterans spoke about the quality of their health care, according to an April 10 Associated Press (AP) story.

After the meeting, Schultz spoke with veteran Tommie Canady, who commented publicly during the meeting about the quality of his treatment for terminal pancreatic disease. Schultz recorded the interview, in which Canady said he was unhappy with his VA treatment, on his digital recorder.

While they were speaking, Schultz and Canady were interrupted by VA public affairs officer Gloria Hairston, who said Schultz could not use the material on the recorder, according to an April 13 post on Federal Eye, a *Washington Post* blog. When Schultz objected, Hairston walked away and returned with security guards who told Schultz to hand over his equipment. Schultz did so after calling his editor, who advised him to hand over the card and leave, CNN reported April 11. Hairston said she would erase the audio from Schultz's memory card.

"This whole incident was completely out of nowhere," Schultz said, according to CNN. "I've been a professional journalist for three years. I've never seen anything like this."

Federal Eye reported, based on WAMU's broadcast of the recording's contents after it was returned, that Hairston first interrupted the interview as Canady told Schultz that he was forced out of the Army by a racist captain and was homeless for three years. On the audio recording, Hairston tells Schultz, "I can't allow you to use this. I can't." She then says to Canady "OK you can't talk anymore. … You can't do it." Schultz told Canady, "You have a right to talk if you want to talk."

When Hairston left to find security guards, Canady told Schultz that patients at the VA Medical Center did not receive proper care from staff. "I've spent months in here, some of these guys spend years in here. We know exactly what goes on in this hospital, and they hide it. It's time for it to come out to the public. This is sad." A transcript of the recorded conversation is available online at http://voices.washingtonpost.com/federal-eye/2009/04/post_6.html?hpid=news-col-blog.

Hairston told Schultz that he and Canady did not sign consent forms that are required by the VA before reporters can talk to hospital patients, according to an April 11 *Washington Post* story. VA spokeswoman Katie Roberts said "We have procedures and policies in place, so that our patients can make informed decisions about what information they feel comfortable releasing or discussing with the public. That is why before we permit one-on-one interviews to be filmed or videotaped on our premises we request written consent," the Federal Eye blog reported April 10.

WAMU stated that Schultz's First Amendment rights were violated by the seizure of the memory card from the digital recorder. In a letter sent April 10 to the VA, WAMU General Manager Caryn G. Mathes wrote, "Mr. Schultz's newsgathering activities and the product of his work not only are protected by the First Amendment, but he was attending a public meeting at which the VA had encouraged public discussion on the treatment it gives to minority veterans." The letter demanded the return of the "unlawfully seized" memory card.

In a letter to the VA, Barbara Cochran, president of the Radio-Television News Directors Association, said "For a government official to take a reporter's equipment away while he is conducting an interview amounts to the kind of prior restraint that has been repeatedly found unconstitutional by the U.S. Supreme Court."

Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press (RCFP), also sent a letter to the VA, stating that confiscation of Schultz's memory card was a violation of the Privacy Protection Act of 1980. The Privacy Protection Act, 42 U.S.C. § 2000aa *et seq.*, protects a journalist's work product and documentary materials from seizure by federal law enforcement officials or employees in connection with criminal investigations. If the government seeks access to such information, it must file a subpoena to obtain the material.

The RCFP letter said the events were reminiscent of a 2004 incident in which two reporters' tape recorders were seized by U.S. marshals during a speech delivered by U.S. Supreme Court Justice Antonin Scalia in Hattiesburg, Miss. Although Scalia has a strict no-recording policy for public appearances, according to a June/July 2004 *American Journalism Review* story, no announcement was made regarding the policy preceding his address at the Presbyterian Christian High School. Near the conclusion of the speech, U.S. marshals confiscated tape recorders belonging to an AP reporter and a local journalist. The audio tapes were later returned, but Scalia's remarks were taped over. After the AP filed a lawsuit in federal district court in Jackson, Miss., alleging violations of the First, Fourth, and Fifth Amendments and the Privacy Protection Act, the Marshal Service acknowledged that it violated federal law. (See "US Marshal Orders Reporters to Erase Scalia Speech Tapes" in the Spring 2004 Silha *Bulletin*.)

The AP reported April 10 that the VA returned the sound card to Schultz and issued a statement stating it "regrets this incident occurred as we appreciate the interest of the press in covering veterans' issues."

An April 16 RCFP story said that WAMU was

Equipment Seized, *continued on page 17*

> "This whole incident was completely out of nowhere. I've been a professional journalist for three years. I've never seen anything like this."
>
> – David Schultz
> Reporter, National Public Radio

FOIA and Access

Minnesota Legislature Toys with Secrecy Measures

The Minnesota House of Representatives recognized Sunshine Week 2009 with a unanimous resolution affirming constitutional rights to "freedom of the press and freedom of expression," but media law commentators questioned the depth of that conviction, pointing to actions designed to increase secrecy earlier in the session.

Minnesota House Reluctant to Increase Media Access

The Minnesota House of Representatives initially rejected credentialing online-only journalists over concerns about an influx of requests for credentials. The House also considered placing restrictions on where journalists could shoot photos and videotape, but abandoned the proposal following scrutiny from media commentators.

In a March 15 opinion column in the St. Paul *Pioneer Press* Jane Kirtley, director of the Silha Center and professor of media ethics and the University of Minnesota, argued that the press's job is to "inform the public," regardless of the medium.

"This is a classic ploy by those in government who think that information is just too important to entrust to the public. It doesn't take a law degree to figure out that this is unconstitutional. So it wasn't surprising that both the House majority and minority leaders decided it would be prudent to reaffirm their commitment to the public's right to know by supporting the resolution," Kirtley wrote.

Jason Barnett, executive director of online-only TheUptake.org said that it got credentials to the Senate with "no problem." But the House was concerned that additional cameras and reporters could catch legislators in politically embarrassing circumstances. Barnett agreed that might happen, but said it is TheUptake's job to hold them accountable for their actions.

"So we fought them and we made a public stink," Barnett said. Eventually House leaders relented and issued credentials to TheUptake, giving its journalists access to the house floor. Local Web site The Minnesota Independent reported March 18 that Internet and radio reporter Marty Owings also received credentials after initially being denied them.

"We cannot allow this bill to become law if it comes at the cost of any perception that our residents have nothing less than the transparent, honest government they deserve."

– Chris Coleman
Mayor, St. Paul, Minn.

Senate Bill Would Hide Preliminary City Budget Data

Meanwhile, a bill introduced by Sen. Mee Moua (DFL-St. Paul) Feb. 27, 2009 and backed by the League of Minnesota Cities would conceal every Minnesota mayor's budget proposals from the public and the press until after the final proposal had been presented to the city council. The bill appeared likely to die in committee as the *Bulletin* went to press.

St. Paul Mayor Chris Coleman, an early supporter of the bill, publicly changed course following criticism from the local media. The St. Paul *Pioneer Press* reported March 13, 2009 that Coleman sent a letter to the league calling the policy "misguided."

Moua's bill, S.F. 1121, would make "[b]udget proposals, preliminary drafts, and other preliminary documents … protected nonpublic data." Minnesota's Data Practices Act, Minn. Stat. Ann. § 13.02, defines "protected nonpublic data" as any data "not on individuals" that is "(a) not public and (b) not accessible to the subject of the data."

If enacted, city budget information would become public only after a final budget is presented to the city council by the mayor. Even then, only the final budget and "supporting data" would become public. Preliminary drafts and proposals not included in the final budget could remain secret.

According to the League of Minnesota Cities' 2009 City Policies guide, the bill would encourage innovation in city budgeting. "In these challenging budget times, cities are encouraged to engage in creative problem solving and propose innovative solutions to address budget problems. Currently, preliminary budgetary documents produced by cities are public information. This results is [sic] a chilling effect on innovation and creativity," the Nov. 20, 2008 policy guide said.

The March 13 *Pioneer Press* story reported that reviews of the preliminary budget data the bill would hide had led to several recent stories in the local media. Those stories included reports on St. Paul budget proposals that would close a library and several recreation centers, as well as reduce the size of the city's fire department. If the bill were enacted, those preliminary suggestions could remain hidden from the public unless they are part of the final proposal that is presented to the city council.

Coleman's letter to the League of Minnesota Cities said "our approach was misguided," the *Pioneer Press* reported March 13. "We cannot allow this bill to become law if it comes at the cost of any perception that our residents have nothing less than the transparent, honest government they deserve," Coleman wrote in the letter. He is Second Vice President of the league.

An exception to the Data Practices Act, Minn. Stat. Ann. § 13.605, hides preliminary state budget data from the public until a final proposal has been presented to the legislature. Like Moua's bill, the state-level exception makes the final proposal and supporting data public and allows the governor to make preliminary proposals public if it would help the process. The statute states explicitly that "preliminary drafts" are not part of the "supporting data" made public when the final proposal is presented to the legislature.

– Michael Schoepf
Silha Fellow

Trial Webcast Blocked, *continued from page 12*

According to an April 16 story in *The Boston Globe*, Nesson said he was willing to appeal the First Circuit's ruling to the Supreme Court because the issues implicated go beyond Tenenbaum's suit.

"The idea that a United States federal district court judge doesn't have the discretion to open her courtroom to the public is a tribute to the fear that the O.J. Simpson case set loose amongst the federal judiciary," Nesson said. "It seems very short-sighted."

Attorney and technology writer Richard Koman also criticized the decision in an April 16 story on the technology Web site ZDNet.com. "The First Circuit's oral arguments on this question were available immediately following the hearing. That's OK, but a live webcast would be a violation of policy," Koman wrote. "That clearly makes no logical sense. Yet this is how the law works."

Cara Duckworth, a spokeswoman for the RIAA, said in the April 16 *Globe* story that the association was "pleased with the First Circuit's decision in his matter" and could "now look forward to focusing on the underlying copyright infringement claims in this case."

– Jacob Parsley
Silha Research Assistant

Equipment Seized, *continued from page 15*

still "very concerned" that the VA had made suggestions that Schultz did not identify himself as a reporter at the VA public meeting.

CNN reported April 11 that VA spokeswoman Roberts said that Canady was "confused and didn't know he (Schultz) was a reporter." Schultz, according to Roberts, refused to sign in when he arrived at the VA meeting even though other members of the media did so. Roberts also said Schultz became "hostile" when asked to sign a form in order to interview Canady.

In the letter to the VA, WAMU General Manager Mathes said Schultz contacted the VA before the meeting to say that he would attend and identified himself to a public affairs official at the meeting. Schultz's reporting equipment also displays WAMU's logo.

"We reiterate our request for a prompt apology to WAMU and Mr. Schultz," Mathes said, according to the April 16 RCFP story. "And we ask that the VA stop suggesting that Mr. Schultz in any way concealed his identity as a journalist, which is simply untrue."

The VA announced that it would begin an investigation of the incident on April 13. "We want to do a top to bottom review in order to learn what happened, why it happened, and what lessons can be learned from the experience," said Roberts in an April 12 statement. "We need to grow from this incident in order to determine how we can better provide media access while supporting the privacy of our Veterans."

ABC News reported April 10 that Schultz told WTOP-AM radio that "the story is not about me versus the hospital. It's about why is the hospital taking these measures to prevent Mr. Canady from speaking. What are they trying to hide?"

– Amba Datta
Silha Research Assistant

Endangered Journalists

Two American Journalists Arrested, to Face Trial in North Korea

Two American journalists arrested by North Korean border guards on March 17, 2009 will be put on trial June 4 for entering the country illegally and committing "hostile acts." Limited news and information about the journalists' situation and the lack of direct diplomatic relations between the United States and North Korea have exacerbated the situation.

Much remains unclear about the circumstances surrounding the arrest of Laura Ling, a Chinese-American, and Euna Lee, a Korean-American, both of whom work for the San Francisco-based television station Current TV.

South Korean legal expert Moon Dae-hong told the AP that under North Korea's criminal code, conviction for illegal entry could mean up to three years in a labor camp, while charges of espionage or "hostility toward North Koreans" could mean five to 10 years in prison.

Whether Ling, Lee, cameraman Mitch Koss, or their unidentified Chinese guide crossed the border into North Korea, and if so, whether they did so intentionally, is unclear. *The New York Times* reported March 21 that the crew had traveled to the border area between China and North Korea along the Tumen River to report on North Korean refugees crossing into China. *The Times* reported that the Tumen is narrow, partially frozen, and dry in the area where Ling and Lee were working, and they could have been confused about exactly where the border lay. According to *The Times*, South Korean newspaper *The Chosun Ilbo* reported that the journalists crossed the Tumen River and were arrested just before sunrise on March 17.

According to Reuters on March 19, however, some South Korean media had reported that South Korean government officials said the North Korean guards crossed the border into Chinese territory to arrest the two women after they ignored warnings to stop filming.

According to *The Times*, *The Chosun Ilbo* reported that Koss and the group's guide "freed themselves from the armed North Korean soldiers and ran back to China, while the two women were overpowered." Reuters reported March 24 that media reports said Koss and the guide were detained by Chinese border police and later released. Reuters quoted Chinese Foreign Ministry spokesman Qin Gang on March 24 saying, "The male American citizen involved in the case has left China." *The Times* of London reported April 25 that Koss was back in the United States.

According to Reuters on March 24, South Korean newspaper the *JoongAng Ilbo* reported that Ling and Lee were driven in separate cars to a suburb of Pyongyang, the North Korean capitol, on March 18, where they were held in a guesthouse by intelligence officers and interrogated, according to unnamed intelligence sources.

The Associated Press (AP) reported on March 30 that the state-run (North) Korean Central News Agency (KCNA), said "The illegal entry of U.S. reporters into the DPRK [Democratic People's Republic of Korea] and their suspected hostile acts have been confirmed by evidence and their statements," and that preparations to indict the Americans were underway as the investigation continued.

The New York Times reported May 14 that KCNA announced the June 4 trial date and said North Korea's highest court, the Central Court, will hear the case, indicating that the journalists will have no opportunity to appeal. The court usually hands down its verdict at the end of a one-day hearing, *The New York Times* reported.

According to *The New York Times* on March 31, South Korean officials said Ling and Lee would be the first U.S. citizens to ever be indicted and tried in North Korea. The AP reported April 25 that they are the first Americans to be arrested there since 1996.

South Korean legal expert Moon Dae-hong told the AP that under North Korea's criminal code, conviction for illegal entry could mean up to three years in a labor camp, while charges of espionage or "hostility toward North Koreans"—which could be considered "hostile acts"—could mean five to 10 years in prison. *The New York Times* said on April 1 that the Korean criminal code calls for "education through labor" for people convicted of "hostile acts."

Agence France-Presse (AFP) reported May 1 that President Barack Obama, in a statement marking May 3 as "World Press Freedom Day," said his administration was "especially concerned about the citizens from our own country currently under detention abroad: individuals such as Roxana Saberi in Iran, and Euna Lee and Laura Ling in North Korea." (For more on Saberi's case, see "Saberi Released from Prison in Iran, Sentence Suspended" on page 19 of this issue of the Silha *Bulletin*.)

The AP reported April 25 that because the U.S. does not have diplomatic relations with North Korea, officials have relied on the Swedish Embassy in Pyongyang to negotiate on its behalf over the detention of the American journalists. U.S. officials told the AP a Swedish envoy has met with both journalists. State Department spokesman Robert Wood said April 24 "We continue to call on the North Koreans to release the two Americans so they can be returned to their families. We'll continue to work this issue through diplomatic channels."

Current TV is a San Francisco-based media company launched in 2005 by former Vice President Al Gore. Its programming is created by both professionals and members of the public, and is offered via cable television and online. According to *The Wall Street Journal* on April 4, about one-third of Current TV's television programming is user-generated video. Neither Gore nor Current TV appear to have made any public statements about the arrest of Ling and Lee.

The arrest of the American journalists came at a precarious diplomatic moment. The April 25 AP story said North Korea tested a rocket on April 5, defying international calls to cancel the launch because it was seen by some as a test of technology for deploying a long-range missile. North Korea said the launch was a successful attempt to send a satellite into orbit.

– Sara Cannon
Silha Center Staff

Endangered Journalists

Saberi Released from Prison in Iran, Sentence Suspended

Freelance Journalist Initially Given Eight Years for Espionage

Iranian-American freelance journalist Roxana Saberi was released from prison on May 11, 2009 after an Iranian appeallate court issued a two-year suspended sentence in her espionage trial. Saberi was originally sentenced by the Revolutionary Court of Iran on April 15 to an eight-year prison term for spying, but Iranian officials had intimated her sentence might be commuted in light of the possibility of renewed diplomatic relations between the United States and Iran.

The Associated Press (AP) reported May 12 that Saberi told reporters outside her home in Tehran "I'm of course very happy to be free and to be with my parents again, and I want to thank all the people all over the world – which I'm just finding out about really – who whether they knew me or not helped me and my family during this period."

The AP reported that the family was making plans to return to the United States. *The Washington Post* reported May 11 that one of Saberi's lawyers, Abdolsamad Khorramshai, said that under the terms of her sentence, Saberi is free to leave the country, but she is banned from working as a journalist in Iran for five years.

Saberi grew up in Fargo, N.D., where her parents Reza and Akiko still reside. She attended Concordia College in nearby Moorhead, Minn., the AP reported May 11. She was named Miss North Dakota in 1997. She moved to Iran six years ago, the AP reported.

Saberi was arrested and detained Jan. 31, 2009 in Iran. The AP reported March 1 that she told her father in a phone call from prison on February 10 that she had been arrested for purchasing a bottle of wine, an offense under Islamic law. However, Iran Foreign Ministry spokesman Hasan Qashqavi later said Saberi was arrested for illegally working after her press card had expired, according to an April 14 *New York Times* story. Saberi was detained in northern Tehran's Evin prison, which is used for prisoners arrested on national security charges.

Saberi has reported for NPR, the BBC, and Fox News. A March 2 press release from the nonprofit advocacy organization Committee to Protect Journalists (CPJ) said Saberi's press credentials were revoked in 2006 by Iran's Ministry of Culture and Islamic Guidance, which handles accreditation for reporters employed by foreign news organizations.

Saberi was still filing short news stories from Iran after her press credentials were revoked, NPR.org reported. According to a March 13 press release from Human Rights Watch, Saberi was the Tehran bureau chief for Feature Story News, an independent broadcast news agency supplying ready-to-air news content to networks and Web sites, when she was detained. Reza Saberi told the AP April 15 that his daughter was also conducting research for a book on Iranian society and pursuing a master's degree.

The AP reported May 12 that one of Saberi's lawyers, Saleh Nikbakht, said her initial conviction for espionage stemmed from her copying and keeping a "confidential document" about the U.S. war in Iraq that she obtained while working as a freelance translator for the Expediency Council, an Iranian governmental body that mediates between the legislature, president, and ruling clerics over constitutional disputes. Nikbakht said Saberi occasionally worked as a translator for the council's Web site in 2006.

Nikbakht said Saberi admitted in her May 10 court appearance that she possessed the document, said she did not share it with American officials, and apologized. The court reduced the charge against her from espionage to possessing confidential documents, the AP reported.

Reuters reported March 6 that an official from Tehran's public prosecutor's office said that Saberi would be released "in a few days." But then on April 5, a revolutionary tribunal in Iran indicted Saberi on charges of espionage, *The Times* reported April 14. Iran's revolutionary courts hear cases involving terrorism or national security issues.

On April 13, the Revolutionary Court held a brief, closed-door trial for Saberi. Saberi said she herself did not know the trial was occurring until 15 minutes after it had begun, *The Times* reported April 19. In an April 18 story on NPR's "Weekend Edition," Reza Saberi said that Roxana had been coerced and "deceived" into confessing to the charges before her trial.

Saberi was sentenced to eight years imprisonment on April 15. Espionage charges typically carry a sentence of up to ten years in prison, according to the April 15 AP report, however, the death penalty has also been used against individuals convicted of espionage in Iran.

In protest of the conviction, Saberi began a hunger strike on April 23, ABC News reported, and continued her fast, consuming only liquids, until May 6, when she concluded it for "health reasons," the AP reported. Upon her release, Reza Saberi said "She has lost a lot of weight," adding that now "she is eating well [and] recovering," the AP reported.

Following the initial sentencing, Iranian President Mahmoud Ahmadinejad asked officials to examine the case, perhaps in an attempt to facilitate a renewal of diplomatic relations with the U.S., *The New York Times* reported April 19, 2009.

The Times reported that in an unusual move, Ahmadinejad wrote a letter to Tehran's prosecutor general, Saaed Mortazavi on April 19, stating "At the president's insistence, you must do what is needed to secure justice and fairness in examining these charges. Take care that the defendants have all the legal freedoms and rights to defend themselves against the charges and none of their rights are violated."

Ahmadinejad's letter had no binding legal force because Chapter XI of Iran's Constitution states the judiciary is independent from the other branches of government, including the executive.

Roxana Saberi, *continued on page 22*

"We continue to take issue with the charges against her and the verdicts rendered, but we are very heartened that she has been released."

– Hillary Rodham Clinton
U.S. Secretary of State

Endangered Journalists

RNC Update: Report Faults Police on Media Planning; Legal Fallout Continues

St. Paul officials continue to face fallout from the September 2008 Republican National Convention (RNC).

On Jan. 14, 2009, former U.S. Attorneys Tom Heffelfinger and Andy Luger released the conclusions of a commission appointed to review the planning and execution of RNC policing and public safety measures. The report called city and police planning for the event "successful … in many respects," but it also said that officials failed to adequately prepare residents and visitors for the possibility of violence and disruption in the streets of downtown St. Paul, struggled with communication and collaboration plans for the various law enforcement agencies involved, and called "treatment of the media during the RNC … uneven and uncoordinated."

The RNC Commission report said although city and law enforcement officials met with members of the media numerous times prior to the convention, "the expectations of journalists and [police] were not always the same."

Heffelfinger and Luger were appointed to head the seven-member commission, formally known as the Republican National Convention Public Safety and Implementation Review Commission, by St. Paul Mayor Chris Coleman. The St. Paul *Pioneer Press* and Minneapolis *Star Tribune* reported January 15 that the report cost $130,000. The commission included former St. Paul Mayor George Latimer, former Golden Valley Police Chief Robert Hernz, University of Minnesota law professor and juvenile justice expert Barry Feld, private investigator and former police officer Mary Ann Vukelich, and St. Paul business leader Linda White, who formerly worked for the Minnesota Department of Human Rights. Commission members unanimously endorsed the report's findings. The report said that members "conducted dozens of interviews, reviewed thousands of pages of documents and scores of photographs and watched hundreds of hours of video coverage of the convention," including "coverage from bloggers, independent media sources, the police, network news outlets and amateur videographers." The full report, an executive summary, and numerous supporting documents, photographs, and videos are available on the St. Paul city Web site at http://www.stpaul.gov/index.asp?nid=2901.

Overall, the commission praised law enforcement for its conduct throughout the four days of the convention. The report called police conduct "restrained and professional," and described the decisions to use heavy riot police presence and crowd control measures such as smoke grenades, tear gas, and pepper spray as "justified" in response to violence and property damage that occurred on the first day of the convention, and in light of intelligence that suggested that more violence was likely during subsequent days of the convention. However, the report also said "several specific incidents or situations of potential inappropriate conduct, including the improper uses of pepper spray and potential mass arrests … warrant further review."

The commission also said that the city's pre-convention message that the St. Paul RNC would be a "different convention" with a "softer police presence" raised citizens' expectations that police would be "a supportive rather than a threatening force," and were "unrealistic … given the real prospect of violent activities."

"Because of the high expectations created for this convention, the public was unprepared to witness riot gear outfitted officers and to see the use of pepper spray, smoke and other chemical devices to clear crowds of anarchists from the streets of Saint Paul, [and] unprepared for the amount and appearance of the security fencing surrounding the Xcel Energy Center. … [T]he city and [St. Paul Police Department] should have communicated a more balanced message regarding the prospects for the RNC," the report said.

The commission was also critical of planning for media coverage of convention events outside of the Xcel Energy Center, which it said "created mixed expectations and misunderstandings that could have been avoided."

The report said that problems with media planning began in the months before the convention. Although city and law enforcement officials met with members of the media numerous times prior to the convention, "the expectations of journalists and [police] were not always the same," the report said.

For example, representatives of the media told the commission that, based on their prior experiences with St. Paul police, they expected police would afford journalists "some grace to cover news events and believed that journalists caught up during demonstrations would be protected and not treated as part of the problem." Members of the media also complained that during RNC events and media arrests they received conflicting messages from within law enforcement about how police would handle journalists. Meanwhile, police officials told the commission that they went into the RNC with the belief that journalists did not enjoy any special rights of access or immunity from arrest by virtue of their role as members of the media.

The report also said that representatives of the St. Paul police, Mayor Coleman's office, and the Ramsey County and City Attorney's Offices met with attorneys representing the Reporters Committee for Freedom of the Press (RCFP) on several occasions before the convention to discuss concerns about prompt processing if police detained or arrested journalists during demonstrations, and how to expedite the return of their equipment if it was seized. The commission reported that RCFP attorneys said they expressed concerns about police improperly arresting journalists covering a disturbance because police misunderstood their presence at the scene, requested that identifiable and verifiable journalists be cited rather than arrested and subjected to lengthy booking processes, and were told that mass arrests were not expected and that police would only arrest journalists if they engaged in illegal activity. Meanwhile, government officials interviewed by the commission expressed frustration that the media lawyers did not appear to have a clear

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RNC Update, *continued from page 20*

understanding of what they wanted, and said that the RCFP lawyers never provided a draft protocol or plan for implementing their requests.

The commission cited the lack of a protocol as a key failing that led to the "uneven and uncoordinated" treatment of media during the RNC.

The report specifically cited a discrepancy between how members of the media were treated during the arrests of large groups of people in a park on Shepard Road on September 1 and on the Marion Street Bridge on September 4. In the September 1 incident, more than a hundred protesters, members of the media, and bystanders who gathered in a small park near the Mississippi River were encircled by riot police and told they were under arrest. Self-identified journalists and some bystanders were allowed to leave without being cited or arrested, the report said.

In contrast, on the evening of September 4, a group of protesters and media were directed onto the Marion Street Bridge, where they were surrounded and told they would be arrested. In that case, the journalists were not permitted to leave and many were arrested. The report said that some journalists acknowledged to the commission that they should have been arrested for staying within an unlawful assembly, but others believed that they were essentially forced to join the crowd on the bridge by law enforcement and then were improperly detained and charged.

One Twin Cities reporter later told local ABC affiliate KSTP that he was mistreated by police on the night of September 4. Seth Rowe, a reporter for Sun Newspapers, which publishes 42 weekly newspapers in the suburbs of Minneapolis and St. Paul, told KSTP in a March 8, 2008 interview that he was arrested on the Marion Street Bridge, booked, and released at 3 a.m. with a small group of arrestees that were driven by police to an unfamiliar part of town and dropped off.

Rowe told KSTP he asked, "'How do I get back to my car?' and they didn't answer. They just got back into the paddy wagon, slammed the door and took off." KSTP reported that Rowe filed a complaint, and said he would consider joining a class action suit if one is filed.

The commission report did not discuss in detail every complaint that it received from journalists who said they were arrested or detained, explaining that its "scope of review [did] not include our rendering findings or conclusions relating to specific incidents." However, it said the commission "heard testimony, reviewed videos, and received documents describing the arrests of professional journalists with RNC credentials covering the violence in downtown Saint Paul."

The report specifically cited the September 1 arrest of Matt Rourke, an Associated Press (AP) photographer with RNC press credentials, at the intersection of Ninth and Jackson Streets in downtown St. Paul, calling it "troubling." The AP told the commission Rourke was arrested and held for about 10 hours before being released. Meanwhile, Evan Vucci, another RNC-credentialed AP journalist present at the same location and time as Rourke, was tackled and his camera destroyed before being promptly released. In a footnote, the report said the Rourke arrest "may warrant further review or investigation."

The commission also said it heard complaints that police confiscated journalists' notebooks and equipment and that there were administrative delays in returning them. "Some media representatives characterized the arrests of journalists and temporary loss of their equipment as a form of prior restraint that prevented on-going coverage of events," the report said.

The report said more than 40 journalists were arrested and detained. For more on those arrested, which included reporters, photographers, and videographers from Twin Cities television stations WCCO and KARE-11, the national MyFox television chain, the *Pioneer Press*, The Associated Press (AP), several local and national news Web sites and blogs, and student newspapers from around the country, see "Dozens of Journalists Arrested at Republican National Convention in St. Paul" in the Fall 2008 Silha *Bulletin*.

On Sept. 19, 2008, Coleman announced that St. Paul would not prosecute journalists who were arrested and charged with misdemeanors for being present at an unlawful assembly during the RNC, saying "the city attorney's office will use a broad definition and verification to identify journalists." St. Paul City Attorney John Choi told the *Bulletin* that as of November 12, his office had reviewed citations against 42 journalists and had declined to prosecute 34 who were charged only with misdemeanor presence at an unlawful assembly and whose status as journalists was confirmed. According to an "RNC Update" posted on the City Attorney's office Web site at http://www.ci.stpaul.mn.us/index.asp?nid=2757 and dated February 20, the City Attorney dismissed 39 cases against individuals because they were identified as journalists.

The January 14 commission report concluded that the "St. Paul Police Department's decision not to draft a protocol for the arrest or detention of journalists led to the uneven treatment of journalists and the unnecessary arrest and detention of members of the media. While the Commission recognizes that the drafting of such a protocol is complicated and requires law enforcement to make difficult choices regarding who constitutes a journalist, SPPD should have had a protocol in place. As part of the protocol, the SPPD should have placed trained officers at the scene of large arrests to identify journalists and to assist them to locate and protect their equipment and maintain contact with their news organizations. This should not have been the responsibility of one Public Information Officer."

"As a result," the report said, "the message of peaceful protesters was substantially drowned out by the extensive media coverage of anarchist violence and the attention paid to arrested journalists."

Erin Dady, director of marketing and convention planning at the St. Paul Mayor's office told the *Bulletin* April 13 that the city is reviewing police policy for dealing with the media.

The *Star Tribune* reported February 26 that seven

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RNC Update, *continued from page 21*

lawsuits alleging police misconduct during the RNC were filed February 26 in U.S. District Court in St. Paul. The Web site Minnesota Independent reported February 27 that the civil suits accuse officers of physical and sexual abuse, illegal searches and seizure of property, and wrongful detainment.

Minnesota Independent reported that three of the lawsuits came from journalists who claim the actions of police officers prevented them from doing their work. Wendy Binion, an Oregon resident who works with the Web site Portland IndyMedia, was arrested on the second day of the convention near Mears Park. Her lawsuit claims that she was "battered, assaulted, subjected to excessive, unreasonable force, unreasonably seized, falsely arrested and falsely imprisoned" by St. Paul police officers. She also alleges that officers confiscated her video camera, ATM card, and other personal property and did not return it for two months.

New York residents Vladimir Teichberg and Olivia Katz of the group the Glass Bead Collective claim they were stopped by police officers while walking in northeast Minneapolis five days before the convention began. They claim the officers detained them for at least 30 minutes and held their possessions — including a laptop computer, cell phones and cameras — for 14 hours. The Minnesota Independent reported that the lawsuit claims Teichberg and Katz were not charged with a crime, and most of their property was returned except for a $100 bill and Katz's driver's license.

The *Star Tribune* reported February 26 that more suits were likely as the American Civil Liberties Union of Minnesota prepares suits for 21 clients and conducts internal discussions about broader litigation, and attorneys for the Minnesota chapter of the National Lawyers Guild anticipate at least 100 more people will sue the city and its police department.

– Patrick File
Silha Fellow and *Bulletin* Editor

Roxana Saberi, *continued from page 19*

In an April 22 interview with ABC News Chief Washington Correspondent and anchor George Stephanopoulos, Ahmadinejad said he would not intervene in the case. "I am not a judge, and I do not pass judgment over judicial cases," he said. "In Iran, the judiciary is independent."

According to *The New York Times* and the AP, officials from the Iranian judiciary also made statements in mid-April encouraging fairness in the appeals process and hoping that the sentence would be "reconsidered." The rare comments were interpreted as an indicator that Saberi's sentence might be commuted, the AP reported.

According to Nikbakht, Saberi was originally convicted for violating Article 508 of the Iranian criminal code, which prohibits "collaborating with a state at war with the Islamic Republic of Iran," according to a May 11 press release issued by Paris-based free press advocacy organization Reporters sans Frontieres (RSF or Reporters without Borders). The appeals court modified the charges against Saberi because the U.S. and Iran are not at war, RSF reported May 10. Instead, the appeals court convicted Saberi of collecting and transmitting classified information under Article 505 of Iran's criminal code.

The United States asserted that Saberi was innocent of spying charges and tried to advocate on Saberi's behalf indirectly with Iran through the Swiss government. *The Times*' April 14 story said U.S. State Department spokesman Robert Wood called the espionage charge "baseless." In March, the United States also gave a letter to an Iranian delegation attending a conference at The Hague, asking that Saberi and two other Americans detained or missing in Iran be freed. According to *The New York Times* on May 12, a senior State Department official said the United States views the release of Saberi as a "partial response" to that letter, but it should not be viewed as a "grand gesture of détente," he said.

Before Saberi's release, U.S. officials hinted that her detention had strained the Obama administration's efforts to initiate a dialogue with Iran. "[W]e think responding in a positive way to the Saberi case would be helpful, in terms of winning goodwill on the part of the United States and the American people," Wood said, according to an April 16 *Washington Post* story.

However, a media adviser to Ahmadinejad said in an interview that "The U.S. says it's extending a hand of friendship while at the same time it sends spies such as Ms. Saberi to Iran. The U.S. government must change its contradictory behavior and take a truthful and clear and defined position," according to an April 19 *Washington Post* story.

News organizations and press advocacy groups lent Saberi their support during her imprisonment and after her release. In an April 16 editorial, *The New York Times* said Saberi had become a "political pawn" in international relations between the United States and Iran, which were broken off after the 1979 hostage crisis. "Iran's government needs to release Ms. Saberi and end this dangerous farce," the editorial asserted. "Iran is ensuring that its shockingly poor human rights record will remain a contentious issue between the two countries and make finding rapprochement even harder."

An RSF statement issued May 11 following Saberi's release stated, "The appeal court's decision to free her can be used as a legal precedent for other journalists currently detained in Iran. The fact nonetheless remains that, despite her innocence, she is still regarded as guilty by the Iranian authorities."

According to *The Times* on May 12, Secretary of State Hillary Rodham Clinton told reporters in Washington D.C. "We continue to take issue with the charges against her and the verdicts rendered, but we are very heartened that she has been released."

– Amba Datta
Silha Research Assistant

Supoenas and Shield Laws

Judge Rules in Ashenfelter's Favor on Fifth Amendment; Reporter Protects Sources and Avoids Contempt Order

A U.S. District Court Judge in Michigan ruled April 21, 2009 that *Detroit Free Press* reporter David Ashenfelter could refuse to answer questions about confidential sources based on the Fifth Amendment right against compelled self incrimination.

The ruling came at a closed-door deposition at the Theodore Levin Federal Courthouse in Detroit. It was related to former Assistant U.S. Attorney Richard Convertino's ongoing lawsuit against the Department of Justice.

Convertino's lawsuit claims that the Justice Department violated the Privacy Act, 5 U.S.C. § 552a, when it leaked information to reporters about his alleged misconduct during a 2003 terrorism trial. Ashenfelter, who first wrote about Convertino's handling of the trial on Jan. 17, 2004, is not a party to the lawsuit. (See "Gannett Co. Subpoenaed to Disclose DOJ Source" in the Fall 2006 issue of the Silha *Bulletin*.)

At the April 21 deposition, Convertino's lawyer, Stephen Kohn, objected when Ashenfelter cited the Fifth Amendment in refusing to name his sources. But Judge Robert Cleland, who was present at the deposition, upheld the refusal without further explanation, Ashenfelter's lawyer Richard Zuckerman said in an April 22 Associated Press (AP) story.

Ashenfelter first asserted a Fifth Amendment privilege at a Dec. 31, 2008 deposition after Cleland ruled in August 2008 that Ashenfelter could not rely on a First Amendment privilege to protect his confidential sources. (See "Judge Orders Michigan Reporter to Give Up Sources in Privacy Act Case" in the Fall 2008 Silha *Bulletin* and "Ashenfelter Pleads the Fifth in Ongoing Effort to Protect Confidential Sources" in the Winter 2009 Silha *Bulletin*.)

The Fifth Amendment provides that "No person … shall be compelled in any criminal case to be a witness against himself … ." Ashenfelter argued that because he could foreseeably be charged as a co-conspirator with his sources under the Privacy Act, he could not constitutionally be forced to name the alleged co-conspirators in a deposition.

The Privacy Act creates criminal sanctions as well as civil penalties for government officials who disclose recorded information about an individual without the consent of that individual. Convertino is suing the Justice Department under the statute for illegally disclosing to Ashenfelter information about his alleged mishandling of a 2003 terrorism trial. In order to succeed, Convertino has to prove the identity of the official who made the disclosure.

Convertino objected to Ashenfelter's Fifth Amendment claim, and in February 2009 Cleland agreed, ruling that Ashenfelter could not assert a blanket Fifth Amendment privilege and refuse to answer all of Convertino's questions. Instead, Cleland suggested Ashenfelter submit a detailed affidavit laying out his specific objections to each question and scheduled the April deposition when he would be present to rule individually on Ashenfelter's privilege claims.

Ashenfelter submitted a sealed affidavit in late March and a motion asking Cleland to rule immediately on his Fifth Amendment claim or certify the question for an interlocutory appeal to the 6th Circuit U.S. Court of Appeals. Appeals are typically barred unless the trial court has reached a final decision in a case, but in certain circumstances an appellate court will consider a preliminary issue – like Ashenfelter's Fifth Amendment claim – if asked to do so by the trial court. The procedure is called an interlocutory appeal.

Cleland, however, refused both requests in a March 31, 2009 ruling, *Convertino v. U.S. Department of Justice*, No. 07-CV-13842, 2009 WL 891701 (E.D. Mich. March 31, 2009), setting the stage for the April 21 deposition.

The March ruling made clear that Ashenfelter's sealed affidavit might play a part in Cleland's ultimate rulings on Ashenfelter's Fifth Amendment claims, but only on a question-by-question basis at the April deposition. Cleland also denied the interlocutory appeal, holding it was premature since he had yet to uphold or deny the privilege claims.

"Ashenfelter is simply expected to appear for his deposition as ordered. Should he choose to then refuse to answer questions based on a particular objection, the court will consider the asserted basis at that time, assisted perhaps by his affidavit submission," Cleland wrote.

Free Press Publisher David Hunke and Editor Paul Anger joined Ashenfelter, Cleland, Zuckerman, and Kohn at the April 21 deposition, which was closed to the public. But only the two lawyers would comment on the proceedings, the April 22 AP story said.

"We stand by our position that the *Detroit Free Press* is not a criminal enterprise. [The Fifth Amendment claim] is a red herring," Kohn said, according to the AP.

But Zuckerman said that the Fifth Amendment claim was not about whether Ashenfelter broke the law, but about the risk of criminal prosecution, the AP story said. "The Fifth Amendment is asserted because prosecutors may act irrationally," Zuckerman said.

According to an April 22, 2009 story in the *Free Press*, advocates for reporters praised the ruling, but also argued it pointed to the need for further safeguards for reporters seeking to protect confidential sources.

"It's a victory for freedom of the press today," said Lucie Morillon, Washington, D.C. director for Reporters sans Frontieres (RSF or Reporters Without Borders). "Sources who want to come forward with important information need to know that journalists are able to keep their words and not give their names away."

– Michael Schoepf
Silha Fellow

"Sources who want to come forward with important information need to know that journalists are able to keep their words and not give their names away."

– Lucie Morillon
Washington, D.C.
director, Reporters sans Frontieres

Supoenas and Shield Laws

Texas Enacts Shield Law

Texas Gov. Rick Perry signed a journalist's shield bill into law on May 13, 2009, making Texas the 36th state, as well as the District of Columbia, to adopt a statutory testimonial privilege for reporters.

"The Free Flow of Information Act," HB 670, passed on unanimous votes in both the Texas House of Representatives and Senate. It extends a qualified privilege to journalists under the state's civil and criminal codes, allowing them to refuse to disclose information or sources in some circumstances. The law went into effect immediately upon its signing.

The bill covers a broad cross-section of people professionally engaged in news gathering and reporting in a wide variety of media platforms.

The bill covers a broad cross-section of people professionally engaged in news gathering and reporting in a wide variety of media platforms. It defines a "journalist" as a person who, "for a substantial portion of the person's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider." The law includes "parent[s], subsidiar[ies], division[s], or affiliate[s]" of covered journalists, as well as anyone who "supervises or assists" with the above newsgathering activities.

Additionally, the privilege extends to "a journalist, scholar, or researcher employed by an institution of higher education" as well as to people who, at the time they "obtained or prepared the requested information … [were] earning a significant portion of [their] livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or [were] serving as an agent, assistant, employee, or supervisor of a news medium or communication service provider."

The bill says the term "communications service provider" applies to telecommunications carriers, information service providers, interactive computer service providers, and information content providers as they are defined by the Communications Act of 1934, 47 U.S.C. § 153 and 47 U.S.C. § 230.

The bill says "news medium" applies to a lengthy list of about 30 individual media formats, from "newspaper, magazine or periodical" to "Internet company or provider" and including "other means, known or unknown, that are accessible to the public."

In the context of civil proceedings, the bill says those who can claim the privilege may not be compelled by a state government body to disclose "any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist," or its source. In order to overcome the privilege, the party seeking disclosure must make "a clear and specific showing that (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the subpoena is not overbroad, unreasonable, or oppressive … (3) reasonable and timely notice was given to the target of the requested disclosure; (4) the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and (6) the information … is relevant and material to the proper administration of the official proceeding … and is essential to the maintenance of a claim or defense."

The bill says that publication of privileged information does not constitute a waiver of the journalists' privilege in civil proceedings.

In the context of criminal proceedings, however, the privilege is limited to unpublished information or sources. In the case of confidential sources, it can be overcome if the party seeking disclosure makes "a clear and specific showing that" other reasonable efforts to identify the source have been exhausted, and the source "was observed by the journalist committing a felony, … is a person who confessed or admitted to the journalist the commission of a felony," or "is a person for whom probable cause exists that the person participated in a felony."

There are also exceptions where "disclosure of the confidential source is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm," and where the person seeking disclosure can make "a clear and specific showing that" other reasonable efforts to identify the source have been exhausted and "the information, document, or item was disclosed or received in violation of a grand jury oath."

In circumstances of criminal proceedings where the above exceptions do not apply, the privilege can still be overcome when "all reasonable efforts have been exhausted to obtain the information from alternative sources; and the unpublished information, document, or item: (A) is relevant and material to the proper administration of the official proceeding … and is essential to the maintenance of a claim or defense … or (B) is central to the investigation or prosecution of a criminal case and[,] based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred."

The bill instructs courts to consider whether "the subpoena is overbroad, unreasonable, or oppressive; reasonable and timely notice was given of the demand for the information, … whether the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; [and whether] the subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information." The bill says that no one factor above should be "outcome-determinative" by itself.

The Associated Press reported on May 1 that similar proposals for a shield law were unsuccessful in 2005 and 2007.

– Patrick File
Silha Fellow and *Bulletin* Editor

Ethics

Did Financial Journalists Misjudge the Economic Downturn?

As commentators continue to explore the sources of the economic downturn in the United States, critics of financial news reporters as well as business journalists themselves are saying little was done to predict the current problem.

As early as late 2006, economists predicted that the housing bubble in the United States would burst, creating a sharp economic downturn, according to an April 5, 2009 *Las Vegas Sun* story. By 2007, the housing bubble had ruptured, producing the largest drop in home prices in the United States since the Great Depression.

Many critics have said that although journalists like *Washington Post* columnist Steve Pearlstein and *New York Times* columnist Paul Krugman warned about the larger repercussions of collapse in the subprime market over the last several years, most journalists did not fulfill their watchdog role effectively. The criticism of business news reporters has triggered a wave of self-evaluation among journalists and editors, some of whom believe that the industry fell prey to the same mistakes financial regulators did.

"We all failed," CNBC on-air editor Charlie Gasparino said, according to an Oct. 6, 2008 *Washington Post* column by Howard Kurtz. "What we didn't understand was that this was building up. We all bear responsibility to a certain extent."

Stephen Engelberg, managing editor of investigative news organization ProPublica, said in a March 9, 2009 National Public Radio "Morning Edition" story, "I think in retrospect we in the journalism world had a very imperfect understanding of how the financial system fit together. When people said, 'we can have a subprime crisis, and subprime loans are a relatively small part of the economy and don't really connect to each other,' we did not understand how the credit markets worked."

Comments by former Federal Reserve Board Chairman Alan Greenspan suggest that he and other government officials did not see the financial crisis coming. In a CNBC documentary, "House of Cards," which aired in February 2009, Greenspan said that he did not fully understand the details of complex securities on the market.

Greenspan also said last year that predicting the recession was impossible. Speaking before the House Committee on Oversight and Government Reform on Oct. 23, 2008, Greenspan said, "If all those extraordinarily capable people [working for the Federal Reserve] were unable to foresee the development of this critical problem … I think we have to ask ourselves, 'why is that'? And the answer is that we're not smart enough as people. We just cannot see events that far in advance. And unless we can, it's very difficult to look back and say 'why didn't we catch something?'"

Some critics have said that the business media did nothing to publicize Wall Street financial woes because of a wrongheaded focus on publishing CEO profiles and touting lucrative investments.

In a Sept. 17, 2008 column on business news Web site MarketWatch.com, senior columnist Jon Friedman said he "cringed" at his fellow reporters while attending a press conference on Bank of America's proposed acquisition of Merrill Lynch, an event he said should have been "another glaring sign of greed, stupidity and mismanagement on Wall Street." Friedman wrote, "[T]he media were so polite and deferential to the two CEOs, they behaved as if the press conference were a victory lap for the financial services industry."

A January/February 2009 *Mother Jones* story observed a shift in perspective by the business media to viewing its audience "as investors rather than citizens." An investor-oriented perspective has resulted in an increase in specific categories of coverage, like mergers and acquisitions stories, which require financial journalists to cultivate Wall Street sources, the story said. Profiles of flashier CEOs, like former Citigroup chairman Sandy Weill, have also become typical for the business media, *Mother Jones* reported.

Wall Street Journal reporter Michael Hudson told *Mother Jones*, "The press were kind of prisoners of respectability. With exceptions, they really want official sources; they want official approval; they don't want to be too out front. They do a good job after the fact, but not beforehand, when it counts."

In a December/January 2009 *American Journalism Review* (*AJR*) story, *Wall Street Journal* Deputy Managing Editor Nikhil Deogun said "There is a tendency sometimes to get really caught up, particularly in personal finance journalism, to write about the latest product that a bank is selling."

A group of journalists, economists, and scholars have challenged this approach, calling on CNBC to devote more resources to "watchdog journalism" and investigative financial reporting.

The group, called Fix CNBC, posted an open letter on its Web site, http://fixcnbc.com, on March 16, 2009, stating "Americans need CNBC to do strong, watchdog journalism — asking tough questions to Wall Street, debunking lies, and reporting the truth. Instead, CNBC has done PR for Wall Street. You've been so obsessed with getting 'access' to failed CEOs that you willfully passed on misinformation to the public for years, helping to get us into the economic crisis we face today. You screwed up badly. Don't apologize — fix it!" As of mid-May, 22,333 people had signified their support for the online letter.

The letter was inspired, according to the group's Web site, by "Daily Show" host Jon Stewart's roast of CNBC show "Mad Money" host Jim Cramer on the March 13, 2009 episode. In his interview with Cramer, Stewart called for more accountability for average investors, saying that CNBC, while broadcasting the slogan "In Cramer We Trust," failed to more aggressively investigate Wall Street and advised investors to keep their money in the market while it was crashing.

Financial Journalists, *continued on page 27*

> "We all failed. What we didn't understand was that this was building up. We all bear responsibility to a certain extent."
>
> – Charlie Gasparino
> On-air editor, CNBC

Ethics

Los Angeles Times Criticized over Ads that Look Like Newspaper Stories

"Because of the times that we're in, we have to look at all sorts of different—and some would say innovative—new solutions for our advertising clients."

Eddy Hartenstein
Publisher, *Los Angeles Times*

Two prominent April 2009 *Los Angeles Times* advertisements which were designed to look like news stories raised questions about whether the newspaper was blurring the lines between advertising and news content in response to declining revenue.

On April 9, the *Los Angeles Times* ran a front-page ad in the left hand column for a new NBC show, "Southland," about a rookie Los Angeles Police Department police officer. The ad was labeled as an advertisement and featured the NBC logo. It contained content resembling a news story describing a fictitious reporter's ride-along with new police officer Ben Sherman, a character on the new show.

The advertisement raised the ire of media commentators and readers because of its resemblance to a news story.

In response, the *Los Angeles Times* said in a statement, "Today's NBC 'Southland' ad was designed to stretch traditional boundaries," according to an April 10 *Wall Street Journal* story. *Los Angeles Times* Publisher Eddy Hartenstein said that he ran the ad over objections from the newsroom because the newspaper needed the advertising revenue.

"Because of the times that we're in, we have to look at all sorts of different—and some would say innovative—new solutions for our advertising clients," Hartenstein said, according to an April 10 *Los Angeles Times* story. The Tribune Company, which owns the *Los Angeles Times*, filed for Chapter 11 bankruptcy protection in December 2008. The April 10 *Los Angeles Times* story reported that, according to the Newspaper Association of America, industry wide advertising revenues declined 17 percent in 2008.

The *Los Angeles Times* approached NBC with the idea for the advertisement, *The New York Times* reported April 9. Hartenstein said the *Los Angeles Times* received a "significant premium" over its traditional advertisement rate for the "Southland" ad.

NBC Entertainment Marketing President Adam Stotsky told *Variety* magazine for an April 9 story, "We thought it was an interesting, provocative, breakthrough idea. … The L.A. Times has to strike a balance between creating innovative solutions for marketers and the editorial integrity of the product."

LA Observed, a Los Angeles news Web site, reported April 9 that Hartenstein had originally reserved the entire right-hand column of the front page, which generally features the main story in a print newspaper, for the NBC advertisement. After objections from the newsroom and advertising department, the ad was moved to the left column. According to LA Observed, the ad was wider than the *Los Angeles Times* column width. Consequently, it was not delineated as the newspaper's advertisements usually are by "the usual thin lines separating ads from news."

Los Angeles Times Executive Editor John Arthur, who was on vacation when the ad was printed, called it "horrible" and said "I never dreamed it would be filled with news-looking content like it was," according to an April 12 interview with The Wrap, a Web site covering entertainment and media. Arthur said he would not comment on whether the paper would run similar advertisements in the future, but said he looked forward to creating an agreement with Hartenstein regarding advertisements "because we need advertising revenue in a big way."

MediaFile, a Reuters blog, reported April 9 that 100 *Los Angeles Times* staff members had signed a petition sent to Hartenstein objecting to the ad. "The NBC ad may have provided some quick cash, but it has caused incalculable damage to this institution," the petition read. "This action violates a 128-year pact with our readers that the front page is reserved for the most meaningful stories of the day. Place [sic] a fake news article on A-1 makes a mockery of our integrity and journalistic standards."

Many major newspapers, including the *Los Angeles Times*, *The New York Times*, and the *Chicago Tribune*, run ads on their front pages, although they are rarely designed to look like news content. *The New York Times* reported April 9 that the *Los Angeles Times* has been running front-page ads since 2007.

A *Los Angeles Times* blog called Readers' Representative Journal reported April 10 that the newspaper had received more than 80 e-mails from readers regarding the advertisement, many of whom stated they were cancelling their subscription to the newspaper. Reader Michael Bruce Abelson wrote, in an e-mail reprinted on the blog, "While I understand you guys are under tremendous financial pressure to stay afloat, today's front-page faux news story (really an advertisement for NBC's new show 'Southland') goes too far. … By squandering this valuable journalistic real estate, you've now lost all (remaining) credibility as [a] serious newspaper."

Other readers objected to the ad's deceptive nature. But NBC marketing president Stotsky said, "I think most consumers will recognize that this is an ad," *The New York Times* reported in its April 9 story.

Geneva Overholser, director of the school of journalism at the University of Southern California's Annenberg School for Communication, said "Some people say readers are smart and they can tell the difference, but the fundamental concept here is deeply offensive. Readers don't want to be fooled, they don't like the notion that someone is attempting to deceive them," according to the April 9 *New York Times* story.

Bob Steele, a DePauw University professor, Poynter Institute ethics scholar, and Silha Center National Advisory Board member, wrote in an April 10 post on PoynterOnline that while many readers may be able to distinguish between a news story and the "Southland" advertisement, the idea of selling

***LA Times* Criticized**, *continued on page 27*

Financial Journalists, *continued from page 25*

Fix CNBC's members include Dean Baker, co-director of the Center for Economic and Policy Research, Lawrence Mishel, president of the Economic Policy Institute, Todd Gitlin, professor at Columbia University's School of Journalism, and Christopher Hayes, Washington D.C. editor at *The Nation* magazine.

The Associated Press (AP) reported March 13, 2009 that CNBC had no comment on the petition drive. The network has defended its coverage, however, saying its programming reflects multiple perspectives, the AP reported.

AJR concluded that top business news outlets, including *The Wall Street Journal*, *Fortune*, and the business sections of *The Washington Post* and *The New York Times*, provided adequate warning of financial risks. Financial reporters, the *AJR* reported, have been writing about the housing bubble and unchecked growth in Fannie Mae and Freddie Mac for years. "The business media have done yeoman's work during the past decade-plus to expose wrongdoing in corporate America," the story said.

Other members of the business media blame the audience, saying that readers would not have welcomed more investigative reporting. *Fortune* magazine Managing Editor Andy Serwer said, according to Kurtz's Oct. 6, 2008 *Washington Post* column, "if we had written stories in late 2000 saying this whole thing's going to collapse, people would have said, 'Ha ha, maybe,' and gone about their business."

Marcus Brauchli, executive editor of *The Washington Post*, told *AJR* "The notion that the business press wasn't paying attention is wrong, and the assertion that we were asleep at the switch is wrong. … . But it is very hard to get the public's attention for stories warning of complex financial risks in the middle of a roaring, populist bull market."

The caliber of business reporting might also have fallen victim to layoffs at mainstream news outlets. The number of business journalists at print newspapers has fallen 25 percent since 2000, according to Chris Roush, director of the Carolina Business News Initiative at University of North Carolina-Chapel Hill, *Mother Jones* reported.

Dean Starkman, former reporter for *The Wall Street Journal* and author of the January/February 2009 *Mother Jones* story, said significant declines in advertising revenues and the shakier financial situation of the mainstream media has resulted in pressure to forgo investigative reporting, which uses valuable resources. "Time-consuming investigations were undertaken at the reporter's own risk: If a lead didn't pan out—no matter why—it hit your productivity numbers, putting your career in peril," Starkman wrote. Starkman is currently managing editor of *The Audit*, an online critique of the financial journalism industry and part of the *Columbia Journalism Review*. He left *The Wall Street Journal* in 2004.

The Huffington Post announced March 29, 2009 that it is creating the Huffington Post Investigative Fund to support and facilitate investigative journalism, including stories about the economic crisis. "As the newspaper industry continues to contract, one of the most commonly voiced fears is that serious investigative journalism will be among the victims of the scaleback," co-founder and *Huffington Post* Editor-in-Chief Arianna Huffington said in a March 29 story on the *Huffington Post* Web site. "Yet, given the multiple crises we are living through, investigative journalism is all the more important."

– Amba Datta
Silha Research Assistant

***LA Times* Criticized**, *continued from page 26*

ads that look like fake news stories has ethical implications. "Making the ad look like news in story style and writing trades on the credibility of news content, with the hope that readers will be more inclined to read the ad and give it greater credence," he wrote. Steele acknowledged the *Los Angeles Times*' financial struggles, but, he said, "The Times' execs are chopping away at the journalistic foundation. They are selling pieces of the paper's journalistic soul."

But Dan Kennedy, media critic for *The Guardian* of London, said that "Given that we're in pretty desperate times, far better that The L.A. Times do this than say no to the revenue and end up having to cut back on their actual news coverage," according to the April 9 *New York Times* story.

The *Los Angeles Times* raised some controversy again with an advertisement on Sunday, April 12. The ad, promoting the movie "The Soloist," was laid out like a four-page section in the newspaper's Calendar entertainment section. "The Soloist" is based on the experiences of *Los Angeles Times* columnist Steven Lopez, who chronicled his friendship with homeless and mentally ill musician Nathaniel Ayers – formerly a student at the Juilliard School in New York – in his columns and a book. The advertisement included an interview with Lopez.

The New York Times reported April 10 that a spokeswoman for the film's distributor, Paramount Pictures, said that the *Los Angeles Times* initiated the advertising deal with Paramount that featured Lopez. The deal included promotional ads for the movie on Los Angeles' KTLA Channel 5 Morning News and a contest on the *Los Angeles Times* Web site.

The "Soloist" advertisements were labeled as an advertising supplement and the text of the advertisement was in a different font from news stories in the newspaper.

In an April 19 *Washington Post* profile, Lopez said that "The Soloist" advertisement may have been "inappropriate." But he said, "It's a story that came from the newspaper and touched all these people. Why not play up some of our work that has captured the imagination?"

– Amba Datta
Silha Research Assistant

Libel

1st Circuit Denies Rehearing in Libel Case Disallowing Truth as An Absolute Defense

"This second decision reads like a list of excuses on the court's part – construing narrowly the arguments that Staples had previously raised, and construing strictly the rules of waiver."

– Julie Hilden
Attorney & Legal Commentator

The 1st Circuit U.S. Court of Appeals denied a petition for rehearing *en banc* brought by the office supply company Staples March 18, leaving in place a panel decision that permitted the plaintiff to continue a defamation lawsuit even though the allegedly defamatory statements are true.

The five-judge panel determined in *Noonan v. Staples, Inc.*, 561 F.3d 4 (1st Cir. 2009), that Staples "did not timely argue that the present matter was a matter of public concern or that the statute was unconstitutional as applied to a matter of private concern." The court ruled that since the First Amendment issue had not been raised by Staples earlier in the case, the issue had been waived. Therefore, the company could not challenge the constitutionality of the state statute at issue in a petition for rehearing.

The panel also held that the company had failed to demonstrate that the constitutional problem was clear enough to justify the panel acting *sua sponte* and striking down Massachusetts' libel statute anyway.

In its denial, the court cited cases such as *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), holding that the First Amendment does not necessarily apply in all matters of private concern. The panel also refused to certify the issue to the Massachusetts Supreme Judicial Court, holding that the state law issue was not properly raised on appeal.

The 1st Circuit originally held in a Feb. 13, 2009 opinion, *Noonan v. Staples*, 556 F.3d 20, (1st Cir. 2009), that Alan Noonan, the plaintiff in the case, could maintain an action for libel in Massachusetts against Staples after the company sent an e-mail to more than 1,500 employees stating truthfully that Noonan was fired for violating the company's travel and expenses policy. In overturning the federal district court, the 1st Circuit opinion interpreted Mass. Gen. Laws ch. 231 § 92 as recognizing an exception to truth as a defense against libel if the defendant acted with ill will in publishing the libelous statement. (See "1st Circuit Rules Truth Not Always a Defense to Libel" in the Winter 2009 issue of the Silha *Bulletin*.)

"Staples still does not cite a case for the proposition that the First Amendment does not permit liability for true statements concerning matters of private concern," the court wrote in the March 18 order rejecting the petition for rehearing. "The Massachusetts Supreme Judicial Court case relied upon by Staples [*Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975)] did not hold that truth is an absolute defense in private concern cases, but rather that a private figure may recover for a negligently made defamatory falsehood in a case of public concern."

Legal commentator Julie Hilden criticized the court's reasoning. "Interested readers may want to peruse this second, brief order as a not-so-shining example of how a court can wriggle out of deciding a difficult and important constitutional question," Hilden wrote in a March 30 story on the Web site FindLaw.com. "This second decision reads like a list of excuses on the court's part – construing narrowly the arguments that Staples had previously raised, and construing strictly the rules of waiver."

Several media organizations, including The Associated Press, ABC, NBC, CBS, National Public Radio, *The New York Times*, the Newspaper Association of America, and the Society of Professional Journalists, among others, attempted to file an *amicus* brief in support of the petition for rehearing. But the motion by the media organizations to file the brief was denied because "acceptance of the brief might create a need that would not otherwise exist for judicial recusal," the court said in a separate March 18 order.

"The decision, if it stands, will create a precedent that hinders the media's ability to rely on truthful publication to avoid defamation liability," the rejected brief said. "It will make even indisputably accurate reporting subject to potential defamation liability if a judge or jury – second-guessing the media's contrary judgment – were to conclude that the subject matter did not implicate the public interest … . Most fundamentally, the court's decision is of concern to *amici* because it violates hard-won protections for freedom of speech and the press."

"[This] could … make its way to the Supreme Court," wrote Massachusetts attorney and journalists Robert Ambrogi on his Media Law blog on March 13. "For the time being, however, be afraid – be very, very afraid – of this precedent. If ill will is all that is needed to turn a truthful statement into libel, then everyone is a potential defendant."

In a March 13 story in *The Boston Globe*, Noonan's attorney Wendy Sibbison said that she thought that the media organizations were overreacting, and that the court's holding applied only to lawsuits by private figures against private defendants. "No one is a bigger believer in the First Amendment than I am, and I genuinely cannot understand this outpouring of anxiety and catastrophizing," said Sibbison. "There isn't a First Amendment right for a private company to broadcast the news of a private person's firing to its employees."

Alex Jones, director of the Shorenstein Center on the Press, Politics, and Public Policy at Harvard University, said in the March 13 *Globe* story that the 1902 Massachusetts law was "an anachronism from a more censorious age" when some states passed laws that sought to trump the First Amendment. "There is every reason to be fearful that this kind of ruling could very well be damaging, because it puts a higher value on other things than it does on the truth," he said.

– Jacob Parsley
Silha Research Assistant

Silha Events

Silha Spring Ethics Forum and SPJ Town Hall Meeting Address Health Journalism's 'Fever Pitch'

As media coverage of an imminent swine flu pandemic raised concerns around the world, about 80 community members, journalists, journalism students, and professors gathered to discuss health news reporting at a spring ethics forum and town hall meeting titled "Fever Pitch: Does Health News Reporting Leave Consumers Out in the Cold?"

The event, co-sponsored by the Silha Center, Society of Professional Journalists (SPJ), and Minnesota News Council, featured a presentation by Gary Schwitzer, associate professor of journalism and mass communication at the University of Minnesota and publisher of HealthNewsReview.org, as well as a panel of five Minnesota journalists who cover the health beat. The event was held April 30, 2009 at the University of Minnesota's School of Journalism and Mass Communication.

After a welcome from National SPJ President and *St. Cloud Times* reporter Dave Aeikens and introductory remarks from Jane Kirtley, director of the Silha Center and professor of media ethics and law, Schwitzer began his talk by calling health news "the most vital beat in all of journalism" and said the media needs to "chill the fever pitch."

Schwitzer praised several of the journalists sitting on the panel for their work, including *St. Paul Pioneer Press* reporter Jeremy Olson and *Rochester Post-Bulletin* reporter Jeff Hansel, both of whom won Frank Premack Public Affairs Journalism Awards from the Minnesota Journalism Center for stories on health issues, as well as KMSP Fox-9 News reporter Jeff Baillon, a 2008 regional Emmy award-winner.

But Schwitzer was critical of local and national media for "cheerleading" coverage that can overemphasize the importance of medical research and so-called "breakthroughs," particularly when the research is conducted in news organizations' local area. As an example, Schwitzer cited coverage in March 2009 by the Minneapolis *Star Tribune* and KMSP of a University of Minnesota study that found a way to block the transmission of SIV—the monkey version of AIDS virus HIV—among five monkeys. Schwitzer said that although the study was important, the difference between HIV and SIV is significant, and the study was not the front page, banner headline "breakthrough" that the news organizations made it out to be.

Schwitzer said there exists an "imbalance" in health news reporting because of a focus on "too much stuff:" new drugs, new tests, and new machines. Media fail to focus on substantive healthcare problems Americans face or raise questions about the huge amount of public money spent on an insufficient American healthcare system. Schwitzer said one local story that should be examined is the growing "medical arms race" as Twin Cities-area hospitals grow and compete while marketing themselves to potential customers. Schwitzer said audiences are thirsty for a "sip" of quality health news, but said the huge amount of reporting that lacks substance was like "drinking from a fire hose."

Following Schwitzer's presentation, Kirtley posed a series of questions to the panel of journalists. When asked about the economics of health news reporting, *Star Tribune* health editor Dave Hage cited the difficult times all news organizations are facing. Hage said health reporters are "not being wined and dined."

Kirtley asked Olson what kinds of obstacles he faced in covering the sensitive story of Dan Markingson, also known as "Subject 13," a psychiatric patient who committed suicide while enrolled in a drug trial at the University of Minnesota. Olson said "the university wasn't grateful" that he and reporter Paul Tosto were covering the story, but court documents and cooperative Markingson family members were helpful in providing information.

Olson, Hansel, and Hage said the federal Health Insurance Portability and Accountability Act (HIPAA) can sometimes make reporting more difficult as it pertains to patient privacy, depending on how it is applied, in what jurisdiction, and by what health institution. Olson said working with, and sometimes around, the law made it seem "like an interpretive dance—it's whatever you want it to be." Hage said that journalists should be careful when dealing with the personal privacy of their sources and sensitive health care issues. However, he said when the law "is used to protect an institution, it's a bad idea."

As the lone television news reporter on the panel, Baillon was asked to discuss the propriety of "Video News Releases" (VNRs): controversial video press releases that are produced by prescription drug companies and sometimes aired on television news broadcasts without disclosure of attribution or source information. Baillon said his station does not use VNRs, although he said he understands the rationale of the smaller stations that do because they face budgetary constraints and are unable to employ experienced health reporters. But Baillon said he "doesn't condone" the use of VNRs by any news organization. (For more on VNRs, see "FCC Fines 'Fake News' Produced by Undisclosed Sponsors" in the Summer 2007 issue and "FCC Investigates Video News Releases" in the Fall 2006 issue of the Silha *Bulletin*.)

Susan Albright, co-managing editor of MinnPost.com and former editor of the *Star Tribune* editorial pages, said health care issues can pose a problem for editorial boards across the country because they are often very complex and the newspapers might not have personnel with enough expertise to cover them sufficiently. Nevertheless, she said, editorial boards must be thought and opinion leaders for their communities, so they might feel compelled to tackle

***Spring Ethics Forum**, continued on page 30*

University of Minnesota journalism professor and HealthNewsReview.org publisher Gary Schwitzer was critical of local and national media for "cheerleading" coverage that can overemphasize the importance of medical research and so-called "breakthroughs."

***Spring Ethics Forum**, continued from page 29*

complex issues even though they lack that expertise.

The panelists were also asked to give their thoughts on media coverage of the swine flu, or H1N1, virus outbreak. Was the possible pandemic "overhyped," and if so, were the media to blame? Schwitzer said that he had followed print media coverage closely and none that he had seen had crossed "what he called "the finest of fine lines between overreaction and under reaction." Hage agreed, saying that the *Star Tribune* had "killed" many more potential swine flu stories than it actually wrote about. Baillon said local news coverage had been good and "warranted."

Olson said he did not think local news coverage had been sensational, but also said the story was a very big one, comparing international efforts to stop a pandemic to "stopping mother nature in her tracks."

Hage also said he saw an opportunity to teach the public about health issues in which it might not otherwise be interested. "It's hard to get the public's attention about science," Hage said. Similarly, Albright said she appreciated the ability of an Internet-based news organization to not only provide information to its readers, but also to provide links to other sources to help them get more information.

Hansel said he saw his role as getting as much information to the public as possible, so the public could then decide how to react. He also said the historical fact of the 1918 flu pandemic meant media "don't have to guess whether [a pandemic] is possible."

In the public question and answer segment of the program, the panel addressed issues of how journalists should interact with editors who might be less knowledgeable than themselves on health issues, as well as how and when to counter drug-maker or government claims when they doubt their veracity.

Panelists also discussed the prevalence of direct-to-consumer prescription drug advertising, particularly during television news broadcasts. Schwitzer said he conducted one study that found as many as 14 different drug advertisements broadcast during a single 30-minute national news broadcast, which he said contributes to a "huge imbalance" in how consumers get their news about those drugs. Baillon was unsurprised by that figure, pointing out that the upper-middle aged people most likely to be watching evening news broadcasts are a key demographic for those drug companies.

The final segment of the forum was open to general questions about journalism and ethics from the audience, conducted by Aeikens and Duchesne Drew, *Star Tribune* managing editor for operations. The panelists and journalists fielded questions about online polling and reader comments, as well as how newsrooms are covering the news in difficult financial times. As the event concluded, Aeikens presented Schwitzer with a plaque bearing the SPJ's code of ethics, and attendees were invited to a reception in the School of Journalism's Heggen Room.

Silha Center sponsorship of the event was made possible by a generous endowment from the late Otto Silha and his wife, Helen.

– Patrick File
Silha Fellow and *Bulletin* Editor

Silha Events

Speakers Meet at the Intersection of Law Enforcement and Digital Privacy at Silha Spring Forum

At a March 25 Silha Spring Forum, Stephen Cribari, a criminal and constitutional law professor at the University of Minnesota Law School, said an ever-changing digital landscape has raised questions about constitutional interpretation. "Do we have to adjust the way we live to the Constitution, or do we need to adjust the Constitution to the way that we live our lives in an increasingly technological time?" Cribari asked.

Cribari was joined by Dick Reeve, General Counsel/Chief Deputy District Attorney for computer crimes in Denver, Colo; and Mary Horvath, an FBI Senior Computer Forensic Examiner. The three addressed a capacity crowd at the Murphy Hall Conference Center at the University of Minnesota School of Journalism and Mass Communication at the event, titled "Surveillance, Anonymity, and Privacy: Law Enforcement and your Computer."

Reeve discussed the constantly evolving role of computer technology in the prosecution of criminal cases. As technology evolves, Reeve explained, police understanding and use of technology evolves as well, and this has forced privacy law to address many problems involved with gathering digital evidence. "You can't talk about any kind of forensics without talking about law," Reeve said.

Reeve used several illustrations to demonstrate how technology plays an increasingly critical role in law enforcement investigations. He questioned the consequential effects on personal privacy. "The equipment is getting smaller, and the technology is getting greater," Reeve said, asking, "Is there such a thing as privacy anymore?"

Reeve summarized some ways that law enforcement officials are learning to use digital surveillance, and how these trends can be difficult to fit within the traditional framework of the Fourth Amendment of the U.S. Constitution. The Fourth Amendment, included in the Federal Bill of Rights in 1791, protects citizens from "unreasonable searches and seizures" by law enforcement. Reeve explained that it can be difficult to apply the 18th-century concept of "reasonable" to the digital context.

Reeve said federal statutes, such as the Electronic Communications Privacy Act, 18 U.S.C. § 2510, have attempted to define some boundaries, but he also mentioned recent court cases, such as *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), that illustrate the difficulty courts face in delineating the limits of digital privacy in the law enforcement context. *Forrester* compared e-mail to traditional "snail mail" and held that some parts of messages, such as the content, might be protected by the Fourth Amendment, but other parts, such as the address of the recipient, are definitely not.

"Technology is forcing us to give up a lot of privacy, and I don't know what to do about it. It's being driven by the information age," Reeve said. "The job for our present and future legislators and judges is to craft a balance between security and personal privacy."

In contrast, Horvath described the increasing use of technology as a tradeoff. "Nobody forced you to use technology," Horvath said. "With those comforts, you have to understand what you choose to give up in exchange."

Horvath, who regularly works on digital forensic investigations involving child pornography, retrieves evidence from computers, phones, automobile diagnostic systems, and other sources of digital information while conducting federal investigations.

Horvath explained that although a computer may not be directly involved in the commission of a crime, digital information can be used to find extensive information on criminal suspects, including phone contacts, bank and credit card records, and social contacts. Horvath said by gaining access to a suspect's computer, authorities can begin to sketch a profile about an individual's entire life.

"When I get your computer, I don't just get your computer, I get your whole world," Horvath said. "Your life is so available and so prevalent, you have no idea … I [can gain access to] every Web site you've been to, I know what time you went there, everything."

Horvath also explained how investigators can track e-mail, which, after being sent, routes through various network nodes and servers en route to its destination, and every point saves information on what is being sent. "It's all retrievable by subpoena and search warrant," Horvath said.

"You are not private. If you are using technology, there is no privacy," Horvath concluded. "And by using technology you agree to that; you just don't realize it."

The speakers took questions from the audience at the end of the presentation. Some members of the crowd asked Horvath specifically about permanently deleting computer data using specialized software or services.

"Tools are available, but nothing is foolproof," Horvath said in response to one audience member's question about encryption software. "Basically, if you're not a criminal, then you've got nothing to worry about from me."

Silha Center activities are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

– Jacob Parsley
Silha Research Assistant

"You are not private. If you are using technology, there is no privacy. And by using technology you agree to that; you just don't realize it."

– Mary Horvath
Senior Computer Forensic Examiner, Federal Bureau of Investigation

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