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## 'Preferred Position?' The Reporter's Privilege in the 21st Century and Beyond

Is there any institution the American public loves to hate more than the news media? Depending on your point of view, the institutional press is either irredeemably liberal or cravenly conservative, a toothless watchdog or a godless traitor, willing to do anything to sell newspapers or raise viewership ratings. News consumers marvel at the media's fixation on the latest peccadilloes of a drunken starlet or a straying senator at the sacrifice of stories that "matter." Anyone who has been the object of media attention "knows" that reporters are sloppy, arrogant, imprecise, agenda-driven, fixated on the negative, and, of course, biased. How could they be anything else, when no minimum education requirements, no licensing system, no mandatory ethics code, no disciplinary body can be used to keep the incompetents and undesirables out? And that's just the mainstream media. What about those bloggers – the infamous geeks in pajamas, spreading rumors throughout the Internet and railing at anything and everything in cozy anonymity from their shadowy basement lairs, accountable to no one?

How in the world could anyone seriously argue that these people should be granted any kind of testimonial privilege? Does anyone agree with the late Justice William O. Douglas, who wrote that "the press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know"?

Despite growing hostility from the judiciary, and an ongoing controversy concerning adoption of a federal reporter's privilege statute – still being debated in Congress as this issue of the *Bulletin* goes to press – the idea is neither new, nor novel. Journalists have claimed the right to protect confidential sources since the colonial era. Currently, 34 states, plus the District of Columbia, have enacted some form of statutory protection for the press, and courts in all the states, with the exception of Wyoming, have recognized at least a qualified privilege, as have the majority of federal circuits.

The absence of a federal reporter's privilege is the anomaly, rather than the rule. But some say 49 states (and the District of Columbia) are misguided or mistaken. The Supreme Court of the United States must be counted among the skeptics. Given an opportunity to recognize a constitutionally-based privilege in 1972, the high court declined to do so, at least on the facts presented in four consolidated cases, all involving situations where reporters had witnessed criminal activity and were ordered to testify about it before a grand jury.

Readers of the *Bulletin* know that reporters named Jim Taricani, Judith Miller, Matt Cooper, Josh Wolf, James Risen, and Toni Locy, among many others, have faced the prospect of jail, fines, or both, for refusing to cooperate with authorities. Most of the news media have concluded that the time has come to turn to Congress for a remedy. Despite bi-partisan support, their efforts have been vigorously opposed by the Justice Department, the Bush Administration and its legislative supporters. They all claim that a statutory shield law would open the floodgates to a torrent of unauthorized leaks of classified information and undermine the War on Terror.

Proponents of the legislation have made concessions and agreed to carve-outs and exceptions to try to assuage these concerns. But even assuming that a federal shield law could be drafted that Justice could live with, would it be good public policy to recognize a privilege for journalists? Do journalists "deserve" to have a privilege?

In this issue of the *Bulletin*, Silha Fellow Patrick File, together with Silha Research Assistants Amba Datta and Michael Schoepf, have compiled the "Silha Bulletin Guide to Journalist's Privilege" to help our readers make up their own minds about what may be the most important issue in media law and ethics of the 21st century. We hope you will find it useful, and we welcome your comments.

(This introduction is adapted from Professor Kirtley's article, "Reporter's Privilege in the 21st Century," which was published in the Winter 2007/2008 issue of *Delaware Lawyer* magazine.)

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# Silha Bulletin Guide to Journalist’s Privilege

## *Federal Privilege Question is Facing a Crossroads*

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## I. INTRODUCTION

In mid-April 2008, as the U.S. Congress was poised to consider passing the “Free Flow of Information Act of 2007,”<sup>1</sup> a federal law that would, in a limited fashion, protect journalists from compelled disclosure of confidential sources or information by courts, prosecutors, or parties in lawsuits, the frontrunner candidates in the 2008 presidential race announced their support for the legislation. At annual meetings hosted April 14 and 15 by the American Society of Newspaper Editors (ASNE) and Associated Press (AP), Sens. Barack Obama (D-Ill.), Hillary Clinton (D-N.Y.), and John McCain (R-Ariz.) each gave speeches in which they publicly announced their backing for the bill.

In his April 14 speech at the AP annual meeting, McCain said that he had “narrowly” decided to support the bill. “It is, frankly, a license to do harm, perhaps serious harm. But it also is a license to do good; to disclose injustice and unlawfulness and inequities; and to encourage their swift correction,” McCain told the roomful of journalists, continuing, “There will be times, I suspect, when I will wonder again if I should have supported this measure. But I trust in your integrity and patriotism that those occasions won’t be so numerous that I will, in fact, deeply regret my decision.”

McCain’s measured remarks frame the complexities and high stakes on both sides of an issue in media law that may be arriving at a pivotal historical moment: the journalist’s privilege. The journalist’s privilege is the claim that journalists have a right to refuse to disclose confidential sources or information when they have been compelled to do so in a judicial process such as a grand jury investigation, or a criminal or civil trial. McCain’s comments reflect the tenuous balance upon which the journalist’s privilege rests: that under some circumstances, it better serves the public interest and preserves the free flow of information to allow a journalist to keep secrets from the government, an investigator, a court, or a party in a lawsuit. The remarks also highlight particularly salient concerns in contemporary American society and politics: the public’s right to know, openness in government and big business, and a heightened concern for national security.

High-profile cases of reporters, broadcasters, and even bloggers served with subpoenas and held in contempt of court have drawn attention to the journalist’s privilege issue from the news media and the academic community in recent years, but the question of whether and when an individual should be able to claim the privilege has a rich and complex background in American law and society. Moreover, regardless of the fate of the “Free Flow of Information Act of 2007,” American society and its courts will continue to engage in the process of defining and balancing concepts like “journalism,” “news,” “public interest,” and even “national security” and “terrorism.”

This article is meant to help its reader gain a broad understanding of the journalist’s privilege and its sources in the law, as well as consider the complexities of defining who is a journalist, and whether and how those individuals should be protected by the law. It will identify and explain the ideological and legal sources, justifications, and criticisms associated with recognizing a journalist’s privilege, and it will analyze the proposed federal shield law currently before

the U.S. Congress and examine some of the practical obstacles to its passage.

## II. SOURCES OF THE JOURNALIST’S PRIVILEGE

### A. Ideological and historical sources

There are three potential sources in the law for a journalist’s privilege: the First Amendment, judicially created common law, and statutes or court rules. For most of America’s history, including its colonial days, courts have not recognized a journalist’s privilege from any source, although publishers in England did have a limited privilege to refuse to reveal some confidential information in libel cases.<sup>2</sup>

Nevertheless, the absence of a privilege has not stopped American journalists from promising confidentiality to their sources – or serving jail time to keep their promises. The journalists’ argument is that anonymous sources are sometimes essential to independent reporting on public affairs. Without the ability to protect anonymous sources who may otherwise fear retribution for disclosing sensitive or secret information, they say, journalism will become an “investigative arm of government.”<sup>3</sup>

In one early example in 1722, James Franklin – a printer and newspaper publisher whose younger brother and apprentice Benjamin would eventually become known as one of the “founding fathers” – was called before the Colonial Assembly and asked to divulge the source behind an allegedly seditious libel he had published. When Franklin refused, he was jailed for one month.<sup>4</sup> In 1848, John Nugent, a reporter for the *New York Herald*, became the first journalist to claim a privilege, but without success. He was jailed for contempt of Congress when he refused to divulge the identity of a source who had given him a copy of a secret draft of a U.S. treaty with Mexico.<sup>5</sup> Nearly 50 years later, Maryland enacted the first state shield law in 1896 after a *Baltimore Sun* reporter was jailed for refusing to reveal the identity of a confidential source to a grand jury.<sup>6</sup> Over the next 76 years, other states slowly followed Maryland’s lead. By the time the U.S. Supreme Court decided *Branzburg v. Hayes* in 1972, its first and thus far only case addressing the journalist’s privilege question, 17 states had created a journalist’s privilege via statute.<sup>7</sup>

### B. Sources in the law

#### 1. The constitutional privilege

In *Branzburg*, the Supreme Court held that reporters who have witnessed criminal activity do not have a constitutional right to refuse to identify confidential sources when subpoenaed to testify before a grand jury. But the 5 to 4 decision did not settle the matter in other contexts. Justice Powell, part of the five-justice majority, added a separate concurring opinion to “emphasize” what he believed to be the “limited nature” of the Court’s decision.<sup>8</sup> Powell wrote that journalists enjoy some constitutional protection when summoned to testify before a grand jury, and that they cannot be called “other than in good faith,” nor if the information sought has only a “tenuous” relationship to the underlying investigation.<sup>9</sup> Powell’s “enigmatic”<sup>10</sup> opinion left lower federal courts to struggle with whether, why, and in what contexts a constitutional privilege is appropriate.

<sup>1</sup> H.R. 2102, 110th Cong. (2008) (enacted); S. 2035, 110th Cong. (2008).

<sup>2</sup> CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §5426 716 (1980).

<sup>3</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

<sup>4</sup> Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 233 (1974).

<sup>5</sup> Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 533 (2007).

<sup>6</sup> Act of Apr. 2, 1896, ch. 249, 1896 Md. Laws 437 (codified at MD. CODE ANN., CTS. & JUD. PROC. §9-112 (LexisNexis 2002)); see Papandrea, *supra* note 5, at 534.

<sup>7</sup> *Branzburg v. Hayes*, 408 U.S. 665, 690 n.27 (1972) (citing then-existing state shield laws).

<sup>8</sup> *Id.* at 709 (Powell, J., concurring).

<sup>9</sup> *Id.* at 710 (Powell, J., concurring).

<sup>10</sup> *Id.* at 725 (Stewart, J., dissenting).

Most circuit courts of appeal to consider the issue of constitutional privilege have reached the conclusion that the First Amendment offers some protection for reporters seeking to guard information related to news gathering.<sup>11</sup> After all, even Justice Byron White admitted in his opinion for the *Branzburg* majority that “news gathering is not without its First Amendment protections.”<sup>12</sup> The journalists who asserted the privilege in *Branzburg* argued that if journalists cannot guarantee confidentiality, some sources will no longer come forward. This “chilling” effect will remove from the public sphere information that otherwise would have – and should have – reached it.

The precise contours of the First Amendment privilege vary. Some federal appeals courts limit *Branzburg* to its specific facts, finding that even though there is no privilege for a grand jury subpoena, there is at least a qualified privilege to protect confidential information in most other circumstances. Other courts recognize a privilege only in civil cases.

For example, less than six months after the Supreme Court issued its *Branzburg* opinion, a three-judge panel of the 2nd Circuit U.S. Court of Appeals unanimously upheld a pre-*Branzburg* trial court order finding constitutional protection for subpoenaed journalists.<sup>13</sup> In *Baker v. F & F Investments*, the 2nd Circuit held that in a civil case, a journalist could not be compelled to name a confidential source “absent a concern so compelling as to override the precious rights of freedom of speech and the press.”<sup>14</sup> In *United States v. Burke*, the 2nd Circuit extended *Baker*’s holding to criminal cases.<sup>15</sup>

The qualified constitutional privilege in the 2nd Circuit extends to confidential sources and news gathering materials. A party seeking to overcome the privilege must show that the information sought is “highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.”<sup>16</sup> Justice Potter Stewart proposed a similar test in his *Branzburg* dissent that has gained acceptance in several circuits.<sup>17</sup> Stewart’s test also required the party seeking to overcome the privilege to present evidence that the subpoenaed journalist actually has the information sought.

In contrast to the 2nd Circuit, the D.C. Circuit has recognized a much more limited constitutional privilege. In *Zerilli v. Smith*, the court held that a reporter has a qualified constitutional privilege to

refuse to name a confidential source in a civil case.<sup>18</sup> But the federal courts in the D.C. Circuit have declined to extend the privilege to criminal cases, and have held non-party journalists in contempt, even in civil cases, for refusing to reveal their sources.<sup>19</sup>

The 7th Circuit Court of Appeals has declined to recognize a journalist’s privilege, holding that the only inquiry is whether the subpoena is “reasonable in the circumstances.”<sup>20</sup> In the 2003 case *McKevitt v. Pallasch*, Judge Richard Posner called the prevailing view in other circuits – that a qualified privilege exists outside the context of a criminal grand jury – “rather surprising[] in light of *Branzburg*.”<sup>21</sup> The 7th Circuit panel held that courts should enforce subpoenas issued to journalists so long as they are issued in “good faith.”<sup>22</sup>

As Posner noted, the subpoena at issue in *McKevitt* sought recordings of three journalists’ conversations with a witness whose identity was known and who planned to testify at the trial.<sup>23</sup> The situation was factually different from most privilege cases where reporters seek to protect the identity of a confidential source or shield confidential information that has not been published.

Posner’s view – that the Constitution provides no more protection for reporters facing subpoenas than it does for any other subpoena recipient – remains the minority view among federal appellate courts. There is some evidence, however, that his influential position has persuaded other federal judges to retreat from privilege findings in post-*Branzburg* jurisprudence.<sup>24</sup> Some commentators argue that the *McKevitt* decision has contributed to a diminished regard for constitutional privilege among all federal judges.<sup>25</sup>

## 2. The common law privilege

In January 1975 Congress adopted the Federal Rules of Evidence following 10 years of debate and several drafts prepared by a committee of lawyers, judges, and academics.<sup>26</sup> The rules established a uniform procedure for the admission of evidence, including the testimony of witnesses, in federal courts. In Article V, the portion of the rules governing testimonial privileges, Congress rejected the specific suggestions of the committee which drafted the rules. Instead, legislators created an open-ended rule that calls for judges to “interpret” testimonial privileges according to the “reason and experience” of the “common law.”<sup>27</sup>

<sup>11</sup> See *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705, 711–15 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596–97 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 714–15 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 467–68 (9th Cir. 1975); *Baker v. F. & F Investments*, 470 F.2d 778, 785 (2d Cir. 1972); see also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997) (noting that the existence of a reporter’s privilege is an open question in the 8th Circuit). *But see McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (rejecting a reporter’s privilege); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (rejecting a reporter’s privilege in a case involving a subpoena to testify before a criminal grand jury).

<sup>12</sup> *Branzburg*, 408 U.S. at 707.

<sup>13</sup> *Baker*, 470 F.2d at 785 (2d Cir. 1972).

<sup>14</sup> *Baker*, 470 F.2d at 785.

<sup>15</sup> *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983).

<sup>16</sup> *Burke*, 700 F.2d at 77.

<sup>17</sup> *Branzburg v. Hayes*, 408 U.S. 665, 740 (1972) (Stewart, J., dissenting).

<sup>18</sup> *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

<sup>19</sup> See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *Lee v. Dept. of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

<sup>20</sup> *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

<sup>21</sup> *Id.* at 532.

<sup>22</sup> *Id.* at 533.

<sup>23</sup> *Id.* at 533.

<sup>24</sup> See Jane E. Kirtley, *Will the Demise of the Reporter’s Privilege Mean the End of Investigative Reporting and Should Judges Care if it Does?*, 32 OHIO N.U.L. REV. 519 (2006) (citing examples of judges who have dismissed the constitutional privilege); Ronnell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. (forthcoming 2008) available at <http://ssrn.com/abstract=1125500>; see also Kevin Rector, *A Flurry of Subpoenas*, AMER. JOURNALISM REV. (Apr./May 2008) available at <http://www.ajr.org/Article.asp?id=4511> (discussing the Jones study).

<sup>25</sup> See Kirtley, *supra* note 24, at 520–21; Lucy A. Dalglish & Casey Murray, “*Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter’s Privilege Law Is Being Reversed*,” 29 U. ARK. LITTLE ROCK L. REV. 13, 36 (2006).

<sup>26</sup> Pub L. No. 93-595, 88 Stat. 1926 (1975); FED. R. EVID. 501.

<sup>27</sup> Compare FED. R. EVID. 501 (2006) with Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230–61 (1972). The committee recommended that nine specific privileges be adopted. A journalist/source privilege was not among them.

The U.S. Supreme Court has not ruled on whether the rules of evidence provide for a common law journalist's privilege, but the Court's adoption of a therapist/patient privilege in *Jaffee v. Redmond*<sup>28</sup> provides a two-part test that balances the benefit of the privilege against the evidentiary harm it causes and then looks to the experience of other states with a similar privilege. Although *Jaffee* deals with the therapist/patient privilege, not the journalist's privilege, the test applies to the adoption of any new privilege under the Federal Rules of Evidence and the common law.

In *Jaffee*, the Supreme Court found that the public and private interests supported by the therapist/patient privilege were "significant," in contrast to the "modest" evidentiary benefit that would result from denying the privilege.<sup>29</sup> The court then looked to the "experience" of the states and noted that all 50 had adopted some form of therapist/patient privilege.<sup>30</sup>

No federal appellate court has explicitly endorsed a common law journalist's privilege since *Jaffee* was decided in 1996. Many judges have simply avoided the issue by holding that any journalist's privilege is not absolute, and can be overridden by compelling government interests in disclosure.<sup>31</sup>

For example, in *In re Grand Jury Subpoena, Judith Miller*, each judge on a three-judge D.C. Circuit panel reached a different conclusion on whether a common law privilege exists – one judge argued it does, one argued it does not, and one declined to reach the issue. Nevertheless, all three judges agreed that the government's interest in determining who leaked the identity of a covert CIA agent to the press outweighed the reporter's interest in protecting her source and the public's interest in newsgathering.<sup>32</sup>

Prior to *Jaffee*, at least one federal Court of Appeals endorsed a common law journalist's privilege, but the 3rd Circuit's opinion in *Riley v. City of Chester* relied heavily on the "constitutional dimension" of the issues involved.<sup>33</sup> Perhaps for that reason, the *Riley* common law privilege has taken on a "constitutional dimension" of its own, even in subsequent 3rd Circuit cases.<sup>34</sup> This means that analysis under the *Riley* standard resembles First Amendment privilege cases more closely than post-*Jaffee* common law privilege cases. The most recent courts to consider a common law journalist's privilege cite *Riley* in passing, but apply the *Jaffee* test.<sup>35</sup>

### 3. *The statutory privilege*

Reporter's privilege statutes, or "shield laws," are in place in 34 states and the District of Columbia.<sup>36</sup> The scope of protections provided by the statutory privileges varies from state to state. For example, Alaska's statute<sup>37</sup> employs broad language in granting journalists a privilege to refuse to testify unless the court finds that exercise of the privilege would "result in a miscarriage of justice" or "be contrary to the public interest."

Maine's statute,<sup>38</sup> on the other hand, specifically identifies when a court may override the privilege. In Maine, the information sought must be material and relevant to the case, necessary to settle the issue, and unobtainable from other sources, and disclosure must be shown to be in the public interest before a court can compel the reporter to reveal it. Maine's shield law, signed into law on April 18, 2008, follows a familiar pattern employed by several other states in that it sets out a broad prohibition that can be overcome if the party seeking disclosure can prove the elements of a four-part test similar to that proposed by Justice Stewart in his *Branzburg* dissent.

The U.S. Congress has also considered numerous proposals for a federal shield law – 99 were proposed between 1972 and 1978 alone.<sup>39</sup> The most recent proposal, H.R. 2102, passed in the House in October 2007, and its companion, S. 2035, is pending in the Senate. The bills, both titled "The Free Flow of Information Act of 2007" use a specific approach similar to the Maine law to qualify the privilege. Though their language is not identical, both bills provide a privilege for journalists to refuse to disclose information related to news gathering unless certain specific requirements are met. For example, under both versions of the bill, a journalist could be forced to disclose the identity of a confidential source if it is necessary to prevent a specific act of terrorism, it is unobtainable from other sources, and the public interest in disclosure outweighs the public interest in gathering news.

### 4. *U.S. Attorney General guidelines*

Although no federal shield law has been enacted to date, regulations governing when U.S. Department of Justice officials may issue subpoenas to reporters have been in place since the early 1970s.<sup>40</sup>

<sup>28</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> *See, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *vacated by* 459 F.3d 160 (2d Cir. 2006).

<sup>32</sup> *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

<sup>33</sup> *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979).

<sup>34</sup> *See, e.g.*, *United States v. Criden*, 633 F.2d 346 (1980).

<sup>35</sup> *See, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *vacated by* 459 F.3d 160 (2d Cir. 2006).

<sup>36</sup> As of May 2008 they include Alabama (ALA. CODE § 12-21-142 (2004)); Alaska (ALASKA STAT. §§ 09.25.300 to .390 (2004)); Arizona (ARIZ. REV. STAT. ANN. § 12-2237 (2004)); Arkansas (ARK. CODE ANN. § 16-85-510 (West 2003 & Supp. 2004)); California (CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070 (West 2005)); Colorado (COLO. REV. STAT. ANN. §§ 13-90-119, 24-72.5-101 to -106 (West 2004)); Connecticut (CONN. GEN. STAT. ANN. 52-146t (West 2006)), Delaware (DEL. CODE ANN. tit. 10, §§ 4320 to 4326 (2004)); the District of Columbia (D.C. CODE §§ 16-4701 to 4704 (2004)); Florida (FLA. STAT. ANN. § 90.5015 (West 2004)); Georgia (GA. CODE ANN. § 24-9-30 (2004)); Illinois (735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (LexisNexis 2004)); Indiana (IND. CODE ANN. §§ 34-46-4-1 to -2 (West 2004)); Kentucky (KY. REV. STAT. ANN. § 421.100 (West 2004)); Louisiana (LA. REV. STAT. ANN. §§ 45:1451 to 1459 (2004)); Maine (MAINE REV. STAT. ANN. tit. 16, § 61 (2008)); Maryland (MD. CODE ANN., CTS & JUD. PROC. § 9-112 (2004)); Michigan (MICH. COMP. LAWS ANN. § 767.5a (West 2004)); Minnesota (MINN. STAT. §§ 595.021 to .025 (2005)); Montana (MONT. CODE ANN. §§ 26-1-901 to -903 (2003)); Nebraska (NEB. REV. STAT. §§ 20-144 to -147 (2004)); Nevada (NEV. REV. STAT. 49.275, 49.385 (2005)); New Jersey (N.J. STAT. ANN. §§ 2A:84A-21 to 21.13 (West 2004)); New Mexico (N.M. STAT. ANN. § 38-6-7 (West 2004)); New York (N.Y. CIV. RIGHTS LAW § 79-h (Consol. 2004)); North Carolina (N.C. GEN. STAT. § 8-53.11 (2000)); North Dakota (N.D. CENT. CODE § 31-01-06.2 (2003)); Ohio (OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2004)); Oklahoma (OKLA. STAT. tit. 12, § 2506 (2004)); Oregon (OR. REV. STAT. §§ 44.510 to .540 (2001)); Pennsylvania (42 PA. CONS. STAT. ANN. § 5942 (West 2000)); Rhode Island (R.I. GEN. LAWS §§ 9-19.1-1 to -1-3 (2004)); South Carolina (S.C. CODE ANN. § 19-11-100 (Law. Co-op. 2004)); Tennessee (TENN. CODE ANN. § 24-1-208 (West's 2004)) and Washington (WASH. REV. CODE ANN. § 5.68.010 (West 2008)). Hawaii's state legislature passed a shield law on April 29, 2008. The bill, HB 2557, had yet to be signed by the Governor at press time.

<sup>37</sup> ALASKA STAT. §§ 09.25.300 to .390 (2004).

<sup>38</sup> MAINE STAT. ANN. tit. 16, § 61 (2008).

<sup>39</sup> *See* Monica Dias, *Leggett's Case Revives Talk about Shield Law*, NEWS MEDIA & L., Winter 2002.

<sup>40</sup> 28 C.F.R. § 50.10.

The guidelines are structured like the proposed federal shield law with a general prohibition and specific exceptions. They call for federal officials to exhaust other sources of information before seeking to subpoena a reporter. They also require negotiations with the reporter before issuing a subpoena in most circumstances, and explicit permission from the U.S. Attorney General. To obtain that permission, the Justice Department official must state “reasonable grounds” to believe that the information is necessary to resolve a disputed issue or solve a crime.

It is important to note, however, that the Attorney General guidelines are only that, and courts will not enforce them.<sup>41</sup> Some commentators have argued that because they are not binding as a matter of law, the Attorney General has too much authority to simply ignore them when they become inconvenient.<sup>42</sup>

### III. RATIONALE FOR FASHIONING A FEDERAL SHIELD LAW

High profile cases involving subpoenaed journalists have galvanized advocates on both sides of the journalist’s privilege debate.<sup>43</sup> In addition to policy arguments based on the importance of a journalist’s privilege to the news gathering process and the free flow of information, proponents often contend that a strong privilege is necessary to bring uniformity to the fractured web of regulations that has developed over the last 200 years and to stop what they say is a trend toward more subpoenas of journalists.

#### A. Creating uniformity in the law

Proponents contend that the lack of uniformity between different jurisdictions can chill sources even in states with strong shield laws.<sup>44</sup> For example, a reporter who is not a party to a state court employment discrimination action in Minnesota may be protected by the state’s shield law from forced disclosure of confidential source information. But if the same case is brought under federal anti-discrimination laws in the federal courthouse across the street, the reporter will have to convince a federal trial judge to be one of the first in the Eighth Circuit to adopt a constitutional or common law privilege. Meanwhile, if the reporter had the good fortune of being subpoenaed in the 2nd Circuit, he or she would have a better chance to convince the federal judge there to apply a constitutional privilege, as courts in that circuit have already recognized one. Without a uniform federal standard, the argument goes, there is no way for journalists or sources to know whether confidentiality can truly be guaranteed.

Professor Geoffrey Stone contended in a 2005 law review article that uncertainty chills sources and creates confusion among journalists, sources, and lower federal courts.<sup>45</sup> Only an absolute privilege, Stone argues, with perhaps a narrow exception for imminent threats to national security, will properly protect sources

and give journalists confidence in the scope of their confidentiality guarantees.<sup>46</sup>

Stone argues that the cost of the privilege, in terms of lost evidence, will be small.<sup>47</sup> Sources will come forward anonymously to speak to journalists, or they will not come forward at all. Law enforcement is thus better off with a privilege than without it, because the existence of the privilege will lead sources to disclose information they might otherwise withhold, which would leave the government, and the public, in the dark.<sup>48</sup>

#### B. Curtailing rising subpoenas and harassment of journalists

Supporters also contend that the number of subpoenas issued to journalists has increased precipitously in recent years. According to data obtained by the Reporters Committee for Freedom of the Press (RCFP) through a Freedom of Information Act (FOIA) request, the Justice Department issued three subpoenas to reporters in 2006. But a new study by law professor RonNell Andersen Jones suggests that number could be inaccurate. The April/May 2008 issue of *American Journalism Review* reported that Jones’ study found more than 3,000 news organizations had received subpoenas from federal and state authorities in 2006 alone,<sup>49</sup> and that more than 300 of those were federal subpoenas. That is 100 times the number reported by the Justice Department in response to the RCFP’s FOIA request.<sup>50</sup> “If 2006 is a representative year, it certainly would appear that reporters and their organizations are spending time, resources and money in a pretty wide variety of cases,” Jones told *American Journalism Review*.

In addition to the increase in subpoenas, some commentators contend that courts are growing less receptive to arguments for a First Amendment privilege, harming journalists’ ability to contest subpoenas. Lucy Dalglish and Casey Murray of the RCFP called Judge Posner’s opinion in *McKevitt v. Pallasch*, coupled with post-Sept. 11, 2001 national security concerns, “the perfect storm that devastated the federal reporter’s privilege.”<sup>51</sup> The authors note a “dramatic spike” in federal subpoenas and they praise journalists for completing investigative reports despite the threat, but argue that some stories will be lost to cautious sources without a strong journalist’s privilege.<sup>52</sup>

### IV. CONCEPTUAL CHALLENGES TO THE JOURNALIST’S PRIVILEGE

The apparent support for passage of a federal shield law from scholars and politicians does not do away with some legitimate criticism of the journalist’s privilege. Even with a federal law protecting confidential sources and information from compelled disclosure, some fundamental conceptual challenges to the privilege will remain.

<sup>41</sup> See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1152 (D.C. Cir. 2006).

<sup>42</sup> See Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U.J. LEGIS. & PUB. POL’Y 115, 154–159 (2004).

<sup>43</sup> See, e.g., John D. Castiglione, *A Structuralist Critique of the Journalist’s Privilege*, 23 J.L. & POL. 115 (2007); Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection after Branzburg*, 57 DUKE L.J. 199 (2007); Noah Goldstein, Current Developments, *An International Assessment of Journalist Privileges and Source Confidentiality*, 14 NEW ENG. J. INT’L & COMP. L. ANN. 103 (2007); Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 40–41, 48–50 (2005).

<sup>44</sup> See, e.g., Goldstein, *supra* note 43, at 129; Jaime M. Porter, Note, *Not Just “Every Man”*: Revisiting the Journalist’s Privilege Against Compelled Disclosure of Confidential Sources, 82 IND. L.J. 549, 560 (2007); see also Castiglione, *supra* note 43, at 128–29 (noting the “compelling” argument that the “circuit split is untenable” despite taking a critical stance toward shield laws generally).

<sup>45</sup> Stone, *supra* note 43, at 45.

<sup>46</sup> Stone, *supra* note 43, at 51–55.

<sup>47</sup> See Stone, *supra* note 43, at 40–41.

<sup>48</sup> Stone also discussed the journalist’s privilege in the 2006 Silha Lecture. See “Geoffrey Stone Predicts First Amendment will Protect Journalists from Prosecution at 21st Annual Silha Lecture” in the Fall 2006 issue of the *Silha Bulletin*.

<sup>49</sup> Jones, *supra* note 24.

<sup>50</sup> See Reporters Committee for Freedom of the Press, Special Report: Shields and Subpoenas, available at [http://www.rcfp.org/shields\\_and\\_subpoenas.html](http://www.rcfp.org/shields_and_subpoenas.html).

<sup>51</sup> Dalglish & Murray, *supra* note 25, at 36.

<sup>52</sup> Dalglish & Murray, *supra* note 25, at 42.

#### A. *Why treat journalists differently from other citizens?*

Other privileges that are recognized in American jurisprudence, such as the attorney-client privilege or the doctor-patient privilege, subordinate the truth-seeking function of courts to the preservation of a confidential relationship. But critics of the journalist's privilege point to key differences between journalists as a group and doctors, lawyers, and psychotherapists who enjoy a recognized testimonial privilege regarding confidential communications with their clients or patients. Doctors and lawyers are licensed, accredited professionals, but journalism has no membership requirements. Critics argue that because journalists are not licensed or accredited, making defining who is a journalist problematic, journalists should be subject to subpoenas just as all other citizens are. *Washington Post* reporter Walter Pincus has criticized recent efforts to pass a federal shield law, writing that supporting the legislation amounts to journalists asking Congress to regulate them.<sup>53</sup>

Another distinction that sets journalists apart from other groups that enjoy testimonial privileges is that the journalist-source privilege "belongs" to the journalist and not to the source. Although journalists are frequently mindful of the wishes of their sources when they are subpoenaed to reveal source identities,<sup>54</sup> the journalist ultimately asserts the privilege, not the source.<sup>55</sup> In the context of the attorney-client privilege, the privilege belongs to the client, not the attorney. Furthermore, unlike lawyers and doctors, whose relationship with their clients is contractual because a client typically pays for the services rendered, a reporter's relationship to his sources lacks the same kind of formality.<sup>56</sup>

Even if journalists are granted a testimonial privilege similar to the one enjoyed by some professionals, the question of whether a privilege should be applicable to criminal proceedings is controversial.

#### B. *Tension with the Sixth Amendment*

Granting a privilege to protect the relationship between a journalist and source potentially creates a tension with the Sixth Amendment's safeguard of a criminal defendant's right to compel witnesses to provide testimony supporting his or her case. According to the Sixth Amendment, a criminal defendant "shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." If a journalist called as a witness invoked a right to refuse to answer questions about sources or information, the defendant might be denied access to critical information in the trial. Therefore, a journalist's privilege must be balanced with the Sixth Amendment's guarantee of a fair trial for criminal defendants.<sup>57</sup>

In theory, the Sixth Amendment should trump a journalist's privilege rooted in either common law or in a statute because the guarantee of a fair trial is a constitutional guarantee that takes precedence over judge-made law and statutory protections. As a practical matter, however, courts often engage in a balancing analysis based on the facts and circumstances of a case to determine whether to compel a journalist's testimony in a criminal case. In *In re Farber*, for instance, the New Jersey Supreme Court held that a provision of the state constitution affording a criminal defendant the right to compel witnesses – similar to the protections granted by the Sixth Amendment – prevailed over the state's shield law. However, the court stated that it would hold a preliminary hearing to determine whether issues of relevance, materiality, and the availability of alternative sources for the information sought favored compelling a journalist's testimony.<sup>58</sup> While acknowledging that the state constitution's protections for compelling witness testimony trumped statutory recognition of a journalist's privilege, the New Jersey Supreme Court nevertheless required the criminal defendant to make a showing that the evidentiary value of compelling the reporter's testimony outweighed the public interest in the free flow of information.

Critics of a journalist's privilege say placing a legal burden on a criminal defendant to show the value of compelling a journalist's testimony also raises constitutional concerns because such a requirement is inconsistent with the words of the Sixth Amendment, which do not require it. At a Senate Judiciary Committee hearing in 2006, Deputy Attorney General Paul J. McNulty said, "[The proposed federal shield law] requires a court to balance criminal defendant's 'constitutional rights' against the public interest in newsgathering and in maintaining the free flow of information. Such a balancing requirement is indefensible; individuals facing grave criminal penalties, say, for example, a life sentence, should not have their 'constitutional rights' – indeed, their liberty – thwarted by the interest of 'newsgathering.'"<sup>59</sup>

Concerns about recognizing the privilege under the Sixth Amendment in criminal proceedings notwithstanding, critics contend that the privilege may create an impediment to the truth-finding function of all trials and proceedings in general. To the extent that the function of the civil and criminal proceedings is predicated on the principle of seeking the truth through witness testimony, the journalist's privilege, like all other testimonial privileges, could frustrate that goal by allowing a journalist to refuse to share information about sources and material.

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<sup>53</sup> See Walter Pincus, Commentary, *Walter Pincus Sees Shield Law As "a Bad Misstep,"* NIEMAN WATCHDOG, Dec. 3, 2007, available at <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=218>.

<sup>54</sup> Judith Miller agreed to testify about her conversations with I. Lewis "Scooter" Libby after spending 85 days in jail only because Libby personally released her from her promise of confidentiality. "I am leaving jail today because my source has now voluntarily and personally released me from my promise of confidentiality regarding our conversations relating to the Wilson-Plame matter," Miller said. See Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released From Jail*, WASH. POST, Sept. 30, 2005, at A1.

<sup>55</sup> See e.g., *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984); *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 (S.D.N.Y. 1989); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 F.R.D. 489 (C.D. Cal. 1981); *New Jersey v. Boiardo*, 416 A.2d 793 (N.J. 1980); *Sands v. News America Publishers*, 560 N.Y.S.2d 416 (N.Y. App. Div. 1990); *State v. Ventura*, 101 Ohio Misc. 2d 15, 720 N.E.2d 1024 (Ct. Common Pleas 1999).

<sup>56</sup> See Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979 (2006). But see *Cohen v. Cowles Media*, 501 U.S. 663 (1991).

<sup>57</sup> See *In re Farber*, 394 A.2d 330, 337–38 (N.J. 1978).

<sup>58</sup> *Id.*

<sup>59</sup> *Hearing Before S. Comm. on the Judiciary*, 109th Cong. 8 (2006)(statement of Paul J. McNulty, Deputy Attorney General, Department of Justice).

## V. PRACTICAL OBSTACLES TO FASHIONING A FEDERAL SHIELD LAW

In addition to the conceptual and constitutional concerns surrounding a journalist's privilege, practical obstacles stand in the way of fashioning a federal shield law. Some of these obstacles, such as reaching a satisfactory definition of who the law is meant to cover, create challenges for the adoption of any shield law; others, such as dealing with threats to national security, are particularly problematic on the federal level.

### A. Difficulty in defining who is a journalist

Justice Byron White, in writing for the plurality opinion in *Branzburg*, outlined concerns about creating a privilege under the First Amendment for journalists, which he said "would present practical and conceptual difficulties of a high order." White continued, "Sooner or later it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."<sup>60</sup> Nevertheless, courts and state legislatures have continued to create their own definitions, addressing the complex question of "who is a journalist" in different ways, state by state, and jurisdiction by jurisdiction. Meanwhile, modern technology and the Internet's potential to "make every person ... his or her own journalist,"<sup>61</sup> have added salience and urgency to the question.

#### 1. Statutory definitions

With a majority of states having established a statutory journalist's privilege,<sup>62</sup> lawmakers have not shied away from engaging in the process of determining who qualifies as a journalist. Statutory definitions vary widely, however.

Some of the state statutory definitions are quite broad. Tennessee, for example, extends a qualified privilege to "a person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast."<sup>63</sup> Minnesota's open-ended "Free Flow of Information Act" protects any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public."<sup>64</sup> In Alabama, by contrast, the privilege is limited to only a "person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station;"<sup>65</sup> and in Ohio, the privilege

covers only "person[s] engaged in the work of, or connected with, or employed by ... any noncommercial educational or commercial radio broadcasting station, ... any noncommercial educational or commercial television broadcasting station, or any newspaper or ... press association."<sup>66</sup>

#### 2. Federal court definitions

Federal courts sometimes have focused on an analysis of the information-gathering activities of the person claiming the journalist's privilege rather than his or her institutional affiliations. One of the most widely recognized tests came from a 1987 2nd Circuit U.S. Court of Appeals decision in *von Bulow v. von Bulow*.<sup>67</sup> Here a witness was held in civil contempt after she invoked a journalist's privilege in refusing to hand over written material that had been subpoenaed. The witness claimed that she was preparing a book on the subject of the lawsuit in which she was called to testify, but the court ruled that an "individual claiming the privilege must demonstrate, through competent evidence, the intent to use [the] material – sought, gathered, or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process." The court relied in part on a 1977 decision from the 10th Circuit that had extended a journalist's privilege to a documentary filmmaker on similar reasoning – the fact that he had gathered investigatory information with the intention of disseminating the information to the public through a documentary film.<sup>68</sup>

The 9th Circuit employed the test developed in the *von Bulow* case in the 1993 case *Shoen v. Shoen* to extend the privilege to a professional investigative book author.<sup>69</sup> The court called the 2nd Circuit's reasoning "persuasive," adding "The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. ... What makes journalism journalism is not its format but its content."<sup>70</sup>

#### 3. The federal Free Flow of Information Act

Legal scholars and commentators have recognized the inevitable question of whether bloggers or other online news reporters should be covered by a federal journalist's privilege statute.<sup>71</sup> In crafting definitional schemes for their proposed federal journalist's privilege statutes, many scholars have favored a functional, format-free approach of legal analysis, similar to what was set out in the *von Bulow* test.

Representative of the functional analyses is Professor Linda Berger's proposal in a 2003 law review article that "any individual engaged in journalism should be protected by journalists' shield laws."<sup>72</sup> Berger identified three essential elements that a court could consider to determine whether an individual was "engaged

<sup>60</sup> *Branzburg*, 408 U.S. at 703.

<sup>61</sup> Blumenthal v. Drudge, 992 F.Supp. 44, 48 n.7 (D.D.C. 1998), quoting Bruce W. Sanford and Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 CONN. L. REV. 1137, 1139–43 (1996).

<sup>62</sup> See *supra* note 36.

<sup>63</sup> TENN. CODE ANN. § 24-1-208(a) (West 2004).

<sup>64</sup> MINN. STAT. §§ 595.021 to .025 (2005).

<sup>65</sup> ALA. CODE § 12-21-142 (LexisNexis 2004).

<sup>66</sup> See OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2004).

<sup>67</sup> *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

<sup>68</sup> *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10 Cir.1977). More recently, in Wisconsin in 2007, a state circuit court recognized a limited common law journalists' privilege for a documentary filmmaker. The Silha Center submitted a friend of the court brief in that case. See "Wisconsin Circuit Court Rules Journalist's Privilege Protects Documentary Filmmaker's Nonconfidential Sources" in the Winter 2007 issue of the *Silha Bulletin*. The Silha Center's brief can be found online at <http://www.silha.umn.edu/Resource%20Documents/STATE%20OF%20WISCONSIN.pdf>.

<sup>69</sup> *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

<sup>70</sup> *Id.* at 1293.

<sup>71</sup> See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of 'Journalist' in the Law*, 103 DICK. L. REV. 411 (1999) for an early example.

<sup>72</sup> Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003) at 1411. See also, e.g., Laura Durity, *Shielding Journalist-Bloggers: The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11 (2006). But see Mary-Rose Papandrea, *supra* note 5; Papandrea proposes a "comprehensive approach" which offers a presumptive qualified privilege to "everyone who disseminates information to the public."



in journalism:” regular and public dissemination of information, the presence of internal verification measures (such as editors), and transparency regarding the owner or sponsor of the publication and the editorial standards that are followed.

It is unclear whether either version of the “Free Flow of Information Act of 2007” currently before Congress will provide criteria which satisfy scholars, commentators, lawmakers and the executive branch, let alone create satisfactory protection to journalists, no matter how they may be defined.

H.R. 2102, which passed the House Oct. 16, 2007, defines “covered person” as “a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.”<sup>73</sup>

The version of the bill before the U.S. Senate, S. 2035, has yet to come to a vote. The version reported out of the Senate Judiciary Committee on Oct. 22, 2007 defines “covered person” as “a person who is engaged in journalism” and includes the covered person’s supervisors, employers, parent company, subsidiary or affiliate.

According to an Oct. 16, 2007 article on the Web site c|net, H.R. 2102’s sponsors tailored their “covered person” definition to exclude “casual” bloggers by including the requirement that the person receive “a substantial portion of the person’s livelihood or ... substantial financial gain” for their efforts. For some commentators, however, a “means tested” privilege is too restrictive. According to Tim Rutten, a columnist for the *Los Angeles Times*, “it’s hard to imagine any American court accepting the notion that our Constitution protects only the speech of those who make money from it.”<sup>74</sup>

#### B. *An absolute privilege or a qualified one?*

Another obstacle to creating a federal journalist’s shield law may be, in part, the demands of journalists themselves. Attempts to pass a federal shield law in the years since the *Branzburg* decision were complicated by journalists who refused to support a qualified privilege. A qualified privilege enables a court to compel testimony when it determines that the need for procuring the information through compelled disclosure outweighs the public’s interest in the reporter’s ability to keep it confidential. An absolute privilege, on the other hand, enables journalists to refuse to provide testimony in all circumstances. Within 24 hours of the Supreme Court’s ruling in *Branzburg*, Sen. Alan Cranston (D-Cal.) introduced a bill providing an absolute privilege for reporters in federal and state proceedings.<sup>75</sup> In 1973, 65 bills were introduced to provide some form of testimonial privilege for journalists. Ultimately, Sen. Sam Ervin (D-N.C.), who introduced one of the shield bills in Congress in 1973 and who chaired the Senate Watergate Committee, stated that efforts to pass a federal shield law consistently failed in part because the press wanted an absolute privilege.<sup>76</sup>

Critics of a qualified privilege claim that it is difficult to accommodate the competing interests that might qualify a privilege without unduly limiting the reporter’s protection. Cranston quoted Professor Paul

Freund of Harvard Law School as saying, “It is impossible to write a qualified newsman’s privilege. Any qualification creates loopholes which destroy the privilege.”<sup>77</sup> Nevertheless, the qualified privilege is the norm in the vast majority of state shield laws<sup>78</sup> and appears in the current versions of the federal shield bills.

Most proponents of a shield law codifying an absolute privilege, however, have conceded an exception to a shield law for circumstances in which compelled testimony will assist in identifying a breach to national security.<sup>79</sup>

#### C. *National security concerns*

National security concerns pose a significant obstacle to passage of a federal shield law today. Critics claim that shielding journalists from a compelled disclosure of information which could avert a threat to national security will hamper law enforcement efforts to combat such threats effectively. Meanwhile, shield law supporters claim that protecting the confidentiality of sources and information is integral to reporting on sensitive issues, including national security, and serves the public’s right to know about the government’s actions and matters of public interest. As Judge J. Harvie Wilkinson wrote in his concurrence in *United States v. Morison*, “The First Amendment interest in informed public debate does not simply vanish at the invocation of the words ‘national security.’”<sup>80</sup>

Concerns about threats to national security fall into three distinct categories. Critics claim that a federal shield law might: permit withholding of information received through confidential sources that would aid a criminal investigation or reveal a threat of impending attack; encourage leaks of national security secrets to the media which allow terrorists and others to learn about American anti-terrorism strategies; and protect terrorists themselves who pose as journalists to gather information and plan attacks.

#### 1. *Impeding government investigations*

Federal shield law critics contend that journalists should not be accorded a privilege to withhold information with potentially dangerous implications for national security. Many journalists, meanwhile, recognize that ethical principles might prompt them to voluntarily assist law enforcement in situations of imminent danger to national security, but reject the notion that they should be compelled to serve as an investigative arm of government. At a July 2005 congressional hearing, *New York Times* columnist William Safire stated, “If a national security crisis is about to occur, as citizens, reporters have to help. But journalists and reporters are not the fingers at the end of the long arm of the law.”<sup>81</sup>

The Department of Justice has also expressed concerns that a federal shield law would transfer to the judicial branch of government authority over law enforcement and national security determinations that is constitutionally reserved to the executive branch. Assistant Attorney General Rachel Brand testified before the House Committee on the Judiciary on June 14, 2007 that because the executive branch is responsible for international relations and national security, it includes officials with “access to the broad array of information necessary to protect our national security” as well as the responsibility

<sup>73</sup> H.R. 2102 § 4(2), 110th Cong. (2008) (enacted).

<sup>74</sup> See Tim Rutten, *Regarding Media: Don't just shield 'pro' journalists*, LA TIMES, Oct. 20, 2007.

<sup>75</sup> See Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 498 (2006).

<sup>76</sup> See Monica Dias, *supra* note 39.

<sup>77</sup> 119 CONG. REC. 6 (1973)(statement of Sen. Cranston).

<sup>78</sup> See Siegel, *supra* note 75, at 498.

<sup>79</sup> See Stone, *supra* note 43.

<sup>80</sup> See 844 F.2d 1057, 1082 (4th Cir. 1988).

<sup>81</sup> See John Eggerton, *Administration Opposes Shield Law for Journalists*, BROADCASTING & CABLE, Sept. 21, 2006, available at <http://www.broadcastingcable.com/article/CA6374011.html>.

to oversee confidential investigations and to promulgate regulations which protect that confidentiality. Therefore “the executive is better situated and better equipped than the judiciary to make determinations regarding the national security interest,” Brand testified.<sup>82</sup>

## 2. Encouraging harmful leaks

Critics also say a federal shield would encourage harmful leaks of national security secrets to the media. The Valerie Plame leak investigation that eventually sent *New York Times* reporter Judith Miller to jail arose from a government leak of classified information, and some have said the February 2008 federal subpoena of *New York Times* reporter James Risen came in response to his exposure of botched secret CIA activities in Iran in his book, “State of War.”<sup>83</sup> Government sources who leaked classified information were also instrumental in the exposés of the Bush Administration’s domestic wiretapping program and a program that secretly tracked the finances of suspected terrorists.<sup>84</sup> Although the President has called such leaks and the subsequent news coverage “disgraceful,” proponents of the shield law claim that similar stories, such as the revelations of abuse at the Abu Ghraib prison in Iraq, are integral to fulfillment of journalism’s watchdog function.<sup>85</sup>

In a Feb. 10, 2006 *New York Times* op-ed column, Former Central Intelligence Agency Director Porter Goss wrote that a federal shield law would empower more unauthorized sources to speak to journalists, and would allow publication of stories with sensitive intelligence information, thus impeding terrorism investigations. According to Goss and others, the American media are sources of information that aid terrorists in eluding capture because they can discern the course of an investigation through news reports.<sup>86</sup> In 2002, the CIA stated in a report that al-Qaida relies on the American media to help it evade U.S. intelligence operatives, according to the Reporters Committee for Freedom of the Press.<sup>87</sup> Through facilitating the publication of sensitive information by shielding sources who divulge that information to journalists, the law would indirectly jeopardize government investigations, critics say.

In an April 2, 2008 “views letter” asserting their opposition to S. 2035, Attorney General Michael Mukasey and Director of National Intelligence John Michael McConnell echoed Goss’ concerns, saying added protections of a journalist shield would empower leakers to disclose highly sensitive information without fear of identification.<sup>88</sup>

On the other hand, journalists argue that valuable sources will not come forward to reveal information about government abuses unless a federal law establishes a uniform standard for a journalist’s privilege in federal courts. Although reporting on classified leaks may be controversial, newspaper publishers and editors have stated that they consult with the government regarding stories that might implicate significant security concerns. The *Times*’ domestic wiretapping story, for instance, was held for over a year in deference to government requests to withhold it from publication.<sup>89</sup>

Critics of a federal shield law say they believe newspaper policies are inadequate safeguards for national security. They point to existing protections in place for whistleblowers in the government and say that these individuals should not be guaranteed confidentiality by a shield law if they circumvent whistleblowing procedures and go instead to a member of the media. Goss wrote in his *New York Times* op-ed that “[T]hose who choose to bypass the [Intelligence Community Whistleblower Protection Act] and go straight to the press are not noble, honorable or patriotic. Nor are they whistleblowers. Instead they are committing a criminal act that potentially places American lives at risk.”<sup>90</sup>

## 3. Protecting terrorists or other criminals

Critics have also said that a federal shield law could protect terrorists who pose as journalists in order to plan attacks. Mukasey’s and McConnell’s April 2, 2008 letter asserted that the definition of “covered person” in S. 2035 is “astonishingly broad” and could include “those linked to terrorists.” Despite exceptions in the bill for foreign powers, agents of foreign powers, terrorists and terrorist organizations as they are defined by various executive agencies and other federal legislation, Mukasey and McConnell say the bill does not go far enough. “All individuals and entities who ‘gather’ or ‘publish’ information about ‘matters of public interest’ but who are not technically designated terrorist organizations, foreign powers, or agents of a foreign power, will be entitled to the bill’s protections,” the letter said, “no matter how closely linked they may be to terrorists or other criminals.”<sup>91</sup>

House Judiciary Committee Chairman John Conyers (D-Mich.) has challenged the assertion that terrorists would be protected by a federal shield law. According to a June 15, 2007 *San Francisco Chronicle* story, Conyers said, “Who would believe that Hamas would be allowed in federal court to claim that they had the use of the shield to protect them?” said Conyers. “It’s totally absurd and without any basis whatsoever.”<sup>92</sup>

## VI. CONCLUSION

The complicated debate over a journalist’s privilege will continue amid American policymakers’ concerns about leaks of confidential information, national security, and the “War on Terror.” And if the intertwined histories of American journalism and law can be taken as any indication, coming to a satisfactory legal definition of journalism will not get any easier. Even after the passage of a federal shield law, the profound challenge of defining and balancing key values of American democracy would fall to federal judges: who will have to determine how to maintain the free flow of information while ensuring a fair trial process. Meanwhile, assurances of confidentiality will remain a core component of newsgathering as well as statecraft, and the risks and rewards for those involved in either endeavor at the highest levels will be significant.

<sup>82</sup> *Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 7-8 (2007) (statement of Rachel L. Brand, Assistant Attorney General, Department of Justice).

<sup>83</sup> See “Reporters Fight Federal Subpoenas” in the Winter 2008 issue of the *Silva Bulletin*.

<sup>84</sup> James Risen & Eric Lichtblau, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1; James Risen & Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>85</sup> See Papandrea, *supra* note 5.

<sup>86</sup> See Porter Goss, Op-ed, *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006.

<sup>87</sup> See Homefront Confidential, *The Reporter’s Privilege*, Reporters Committee for Freedom of the Press, <http://www.rcfp.org/homefrontconfidential/privilege.html> (last visited May 1, 2008).

<sup>88</sup> See “Views Letter from Attorney General Mukasey and Director of National Intelligence McConnell on S. 2035 ‘Free Flow of Information Act,’” April 2, 2008. The letter, and others from various executive branch officials, is available online at <http://www.usdoj.gov/opa/media-shield.htm>.

<sup>89</sup> See Paul Farhi, *At the Times, a Scoop Deferred*, WASH. POST, Dec. 17, 2005, at A7. See also “*New York Times* Held Story About Domestic Spying Program Over a Year,” in the Winter 2006 issue of the *Silva Bulletin*.

<sup>90</sup> See *supra* note 86.

<sup>91</sup> See *supra* note 88.

<sup>92</sup> See Zachary Coile, *Journalist bill may benefit terrorists, House panel told; Committee chair says Justice officials’ remarks are ‘absurd’*, S. F. CHRON., June 15, 2007, at A6.

## Access

### Federal 'Sunshine' Laws Move Closer to Passage

Two "sunshine" bills designed to make federal courts more open to the public by providing for cameras in courtrooms and reducing the number of sealed cases and settlements continued their journey through Congress when the Senate Committee on the Judiciary approved both bills on March 6, 2008.

#### *The Sunshine in the Courtroom Act*

The Sunshine in the Courtroom Act, S. 352 and H.R. 2128, authorizes judges in U.S. district courts and appellate courts, including the Supreme Court, to allow still photography, video recording, and audio recording during court proceedings. Sen. Chuck Grassley (R-Iowa) introduced S. 352 in January 2008 and it passed the Judiciary Committee two months later. The House version of the bill passed through committee in October 2007. (See "Court Access: Federal Law would Allow Cameras in U.S. Courts" in the Fall 2007 issue of the *Silha Bulletin*.)

Both versions allow the senior appellate judge on a panel, or the chief judge for an appellate court sitting *en banc*, to permit cameras in appellate court proceedings. The proposed bills would authorize trial judges to allow cameras in proceedings over which they preside, but according to Sens. Grassley and Charles Schumer (D-N.Y.), the chief judge in each judicial district could ban cameras from any proceeding in that district.

The bills authorize witnesses to request that their identities be obscured and require that courts prohibit filming jurors.

The Senate version requires that the Judicial Conference of the United States promulgate guidelines governing procedures for allowing cameras in federal courts. The House version authorizes, but does not require, procedural rules.

Both bills await a vote before the full House and Senate.

#### *The Sunshine in Litigation Act*

The Sunshine in Litigation Act, S. 2449 and H.R. 5884, prohibits court orders sealing information discovered in preparation for litigation that relates to public health and discourages enforcement of settlement agreements that would have a similar effect. The bill, designed to make it more difficult for companies to conceal information concerning defective or dangerous products, was introduced in the House on April 23, 2008 after the Senate version passed through the Judiciary Committee on March 6.

Under the proposed bill, information "relevant to the protection of public safety" that is not "outweighed by a specific and substantial interest in maintaining" confidentially could not be sealed by a federal court. The Silha Center submitted comments supporting a stricter local rule adopted in the District of South Carolina in 2002. (See "U.S. Court Rulings Affecting Access to Information: South Carolina District Court Bans Secret Settlements" in the Fall 2002 *Silha Bulletin*.)

The bill would eliminate unnecessary secrecy concerning information relevant to public health or safety at three phases of litigation. It prohibits federal courts from issuing protective orders under Rule 26(c) of the Federal Rules of Civil Procedure covering such information discovered during the pre-trial phase of litigation; it would ban approval or enforcement of settlement agreements restricting disclosure of such information; and it would prevent courts from sealing civil court records containing such information.

Even if both parties to a settlement agreement stipulated that access to information related to public health or safety should be restricted, the court would be required to perform the balancing test. If the interest in confidentiality does not outweigh the interest in disclosure, the court must refrain from approving the settlement agreement, the bill says.

According to a press release issued April 23 by the sponsors of the bill in the House, Robert Wexler (D-Fla.) and Jerrold Nadler (D-N.Y.), the bill would prevent manufacturers of defective toys, automobile parts, pharmaceuticals, and other products from covering up litigation related to their products by agreeing to settle cases on the condition that the plaintiffs keep the defect and result of the litigation confidential.

As an example, the press release points to the now-widely publicized Firestone tire defects that led to a massive recall in 2001. The release said that between 1997 and 2001 Firestone settled disputes related to 271 fatalities "behind closed doors" before finally recalling 6.5 million defective tires. According to the release, the Sunshine in Litigation Act would prevent Firestone from hiding the defects in the tires from the public.

The House and Senate versions of the bill are nearly identical except for a "rebuttable presumption" of confidentiality related to "personally identifiable information" in the newer House version of the bill. The proposed bill makes personally identifiable information presumptively confidential unless the public interest in disclosure outweighs the personal interest in confidentiality.

In addition to public safety issues implicated by such secret settlements, they also pose ethical issues for attorneys. According to a November 2002 article in the *Media Law Letter* by Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, attorneys have a duty to zealously represent their clients. That means attorneys must sometimes settle cases even where the settlement may cause harm to the public.

That creates an ethical conflict for attorneys that bar organizations have been reluctant to remedy. The Sunshine in Litigation Act, if adopted, would help keep attorneys out of the ethical dilemma secret settlements create.

The House version of the bill has been referred to the Committee on the Judiciary. The Senate has not acted on the bill since it was passed by the Judiciary Committee on March 6.

— MICHAEL SCHOEPP

SILHA RESEARCH ASSISTANT

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The sponsors of "The Sunshine in Litigation Act" say the bill would prevent manufacturers of defective products from covering up litigation related to their products.

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## Access

### Revised MLB Press Credential Agreement ‘may be satisfactory’

The Associated Press Sports Editors (APSE) accepted Major League Baseball’s credential agreement April 8, 2008 after nearly six weeks of negotiations concerning game photos and video clips posted on the Internet.

The dispute arose over questions about who owns the “content” of baseball games. Photographers say the pictures they take belong to them and the news organizations they work for, but baseball executives maintain that they have a right to control use of the images because they own the “content” – the game itself.

The APSE, The Associated Press (AP), the Associated Press Managing Editors (APME), and the National Press Photographers Association (NPPA) objected to language in the proposed agreement that prohibited newspapers from posting more than seven game photos online and required that they remove all photos within 72 hours unless the photos were accompanied by an article about the game. When the Boston Red Sox and Oakland Athletics opened the season March 25 in Japan, the APSE cautioned its members to sign the agreement only “under protest.”

The original agreement also explicitly prohibited “photo galler[ies]” – Web-based collections of photographs depicting baseball games – and it called for the baseball commissioner’s office to retain the authority to define “photo gallery” at “its sole discretion.”

Baseball is not the first professional sports league to attempt to control news coverage of its events. Others – including football, golf, and rugby – have achieved varying degrees of success restricting coverage of sporting events in the past. (See “News Organizations Fight Limits on Access to Sports Events” in the Fall 2007 issue of the *Silha Bulletin*.)

In separate letters to baseball Commissioner Allan (Bud) Selig, the AP, APME, and NPPA rejected the original credential proposal in late February 2008.

“As society moves deeper into the digital age, newspaper coverage – including work done on our Web sites – must continue to chronicle America’s pastime with the same depth and heart that we’ve displayed since the game’s inception,” APME President David Ledford wrote in a letter to Selig. “Please don’t handcuff the institutions which for more than a century have drawn millions of fans to [baseball] by chronicling the great moments and the great players that have kept baseball vibrant through times good and bad.”

In addition to restrictions on photo galleries, the newspaper groups also objected to increased restrictions on “non-text accounts,” including video and audio recordings of baseball games and interviews with players. The agreement called for credentialed reporters to ask for “prior written consent” before transmitting video or audio. The agreement also limited the length of video and audio clips to two minutes and prohibited archiving the content on newspaper Web sites for more than 72 hours.

The original proposal, along with comments from AP Associate General Counsel Dave Tomlin, is available at <http://www.apme.com/news/2008/022808mlbcredentials.pdf>.

After the newspaper groups rejected the original proposal, representatives from the APSE, the AP, and other groups met with baseball officials to discuss the credential agreement. On March 21, four days before the season opened, Major League Baseball distributed an edited credential agreement to newspaper groups. But the sports editors and the NPPA again rejected the proposed agreement because of continued restrictions on online content.

According to a story on the NPPA’s Web site, the second proposal continued to restrict the number of photos a newspaper could post online and required that the newspaper remove the photos within a specified time. The second proposal also prohibited changing the captions on a photo and posting the content on any Web site other than the newspaper’s “flagship” news site.

“It appears that Major League Baseball is no longer satisfied to have a monopoly on the game itself but now wishes to maximize its profits by controlling the words, sounds and images that come from those games,” NPPA President Tony Overman wrote in the organization’s second letter to Selig. “The 2008 MLB Terms and Conditions of Credentials constitute a blatant act of overreaching into the operation and purpose of a free and unfettered press and interfere with the gathering and dissemination of news by individual photojournalists and the organizations they work for.”

Like the sports editor’s group, the NPPA urged its members to refuse to sign the agreement unless forced “under duress,” a March 27 story on the NPPA Web site said. A March 24 report on the APSE Web site recommended that newspapers agree to abide by the 2007 credential agreement for the 2008 season until an agreement could be reached with Major League Baseball.

The third proposal for a credential agreement appeared April 8. It eliminated the prohibition on photo galleries and the specific restrictions on the number of photos allowed on Web sites. Instead, it called for newspapers to post only a “reasonable” number of game photos on their Web sites, the same language employed by the National Football League’s credential agreement. This time, an article on the APSE Web site greeted the proposal with tepid approval, stating it “may be satisfactory to the majority of the APSE’s membership” and recommending members sign it “conditionally.”

The APSE recommended conditional approval pending additional negotiations predicted to take place in the middle of July, the article said. The ASPE will not support any restrictions on editorial content, the report said. According to an April 24 article from the First Amendment Center, other press groups have continued to oppose the most recent credential agreement.

“It appears that Major League Baseball is no longer satisfied to have a monopoly on the game itself but now wishes to maximize its profits by controlling the words, sounds and images that come from those games.”

– Tony Overman  
President, National  
Press Photographers  
Association

## Media Ethics

### *Times' Story about Military Analysts Makes Ripples, Not Waves*

#### *Media Critics Lambaste Networks for Lax Standards, Limited Response*

An April 20, 2008 *New York Times* story revealed that the Pentagon encouraged so-called military analysts to put a positive spin on news coverage of the Iraq war. The story said that the retired military officers trumpeted administration talking points in appearances on network and cable news broadcasts and op-ed pieces in major newspapers in exchange for access to high-level military officers and Bush administration officials.

In the story, "Behind TV Analysts, Pentagon's Hidden Hand" by David Barstow, several analysts expressed regret for their participation in the Pentagon's "snow job." But the Pentagon said the analysts were simply provided with factual information to keep the public informed.

The *Times* story quoted Bryan Whitman, a Pentagon spokesman who argued that it would be "a bit incredible" to believe the analysts would act as "puppets of the Defense Department." But one of the analysts, retired Green Beret Robert S. Bevelacqua, said that is exactly what the Pentagon asked the retired officers to do. "It was them saying, 'We need to stick our hands up your back and move your mouth for you.'"

Citing materials obtained through Freedom of Information Act requests and interviews with analysts and former government officials, the story documents extensive contact between the retired officers and Bush administration officials, including intimate meetings with then-Secretary of Defense Donald Rumsfeld and Pentagon-sponsored trips to Iraq and Guantanamo Bay, Cuba.

The story said that the analysts were reluctant to criticize the war policy because it would mean an end to administration access and the benefits associated with it. Several of the analysts also served as consultants or directors for defense department contractors. For them, Pentagon-sponsored trips to Iraq and meetings with top military officials meant inside information on the products and services the military needed.

For example, one CNN analyst, Gen. James Marks, also worked as a manager for defense department contractor McNeil Technologies. The *Times* reported that in 2006 Marks was "intensively" bidding on a \$4.6 billion military contract while at the same time appearing on CNN as a frequent military analyst on conditions in Iraq.

CNN admitted that the McNeil job should have disqualified Marks from working as an analyst, but maintained that it was unaware of the details of his role with the company, the story said. Marks said the McNeil job did not influence his CNN commentary. "I've got zero challenge separating myself from a business interest," he told the *Times*. Marks currently serves as president of the McNeil division that won the contract, the story said.

Following the story, media commentators commended the *Times* for its investigative journalism

and lambasted the broadcast news outlets for failing to vet their analysts for potential conflicts of interest. But several commentators noted the story's rapid disappearance from the public spotlight and wondered whether the analysts' connections to military officials are really news.

In an April 21 Huffington Post Web site article, Ari Melber called the *Times* reporting "meticulous and aggressive" and praised the news organization for filing suit to force the government to turn over the documents on which much of the article was based. Melber criticized the military's role in the campaign and noted that several organizations had called on Congress to investigate.

Howard Kurtz wrote that the "degree of behind-the-scenes manipulation ... is striking," in his April 21 *Washington Post* column. But Marty Ryan, a Fox News executive producer, defended the cable network's choice to employ the well-connected analysts. He told Kurtz that the inside knowledge and understanding of Pentagon strategy "makes them valuable to us."

"[I]t's a little unrealistic to think you're going to do a big background check on everybody," Ryan said. "Some of the business ties aren't necessarily relevant when you're asking them about a specific helicopter operation."

Executives at Fox News had "refused to participate" in the original *Times* story.

At Salon.com, Glenn Greenwald wrote that the refusal of the networks to respond to the *Times*' inquiry was "the most incredible aspect of the story." Greenwald continued: "Just ponder what that says about these organizations – there is a major exposé in the [*Times*] documenting that these news outlets misleadingly shoveled government propaganda down the throats of their viewers on matters of war and terrorism and they don't feel the least bit obliged to answer for what they did or knew about any of it."

In the *Times* story, CNN and ABC offered brief comments, but neither admitted fault or suggested they would look closer at military analysts in the future. "We make it clear to [the analysts] we expect them to keep us closely apprised" of ethical conflicts, an ABC executive said. CBS, Fox, and NBC refused to comment in the April 20 story.

In an April 22 *Los Angeles Times* story, Scott Collins argued the original article made "minimal ripples" with the public because the TV networks ignored it and it had to compete with a democratic presidential primary in Pennsylvania. Collins pointed out that none of the Sunday morning talk shows discussed the article.

Collins and others, including Greenwald on Salon.com and Greg Mitchell of *Editor & Publisher*, praised the *New York Times*' reporting, but noted that the media's acceptance of well-connected officials as independent analysts is no longer news. Mitchell

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"Just ponder what that says about these organizations – there is a major exposé in the [*Times*] documenting that these news outlets misleadingly shoveled government propaganda down the throats of their viewers on matters of war and terrorism and they don't feel the least bit obliged to answer for what they did or knew about any of it."

– Glenn Greenwald  
Salon.com

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**Military Analysts**, continued on page 14

**MLB Agreement**, *continued from page 12*

Journalists must apply for press credentials with individual teams in order to gain access to the clubhouse for interviews with players and coaches after the game. Credentialed journalists also have access to team news conferences. Before a team will issue credentials, the journalist must agree to rules created by Major League Baseball.

The agreement does not enumerate criteria for evaluating credential applicants, but does state that credentials may only be issued to journalists “acting on a specific assignment for a newspaper, or for a press, news or photographic service.”

Although the new agreement loosened restrictions on photo galleries compared to those originally proposed in February, the restrictions on audio and video content remain unchanged. The credential agreement allows newspapers to post audio and video clips recorded on team property that are two minutes long or less. The reporter must provide the team with written notice of intent to provide “non-text accounts” and the clips must be removed from newspaper Web sites within three days. A copy of the credential agreement can be downloaded at <http://pressbox.mlb.com/pressbox/credentialing/index.jsp>.

***Update: Illinois Newspapers Reach Agreement with High School Association***

An April 7, 2008 settlement between the Illinois High School Association (IHSA) and the Illinois Press Association provides for unrestricted press access to Illinois high school sporting events and complete editorial control for newspapers.

The press association filed suit in November 2007 after the IHSA attempted to limit access to the state football tournament and control the use of press images from the tournament. (See “Illinois Press Association Sues High School Sports Association Over Image Controls” in the Fall 2007 *Silha Bulletin*.)

“The IHSA will assert no authority to control or regulate the production, distribution or sale of any newspaper product. Nor will any newspaper access credentials to IHSA-sponsored events be conditioned by any limitation on the production, distribution, or sale of any newspaper product,” said the settlement agreement in *Illinois Press Association v. Illinois High School Association*, No. 07-CH 885 (April 7, 2008).

— MICHAEL SCHOEPF  
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**Military Analysts**, *continued from page 13*

and Greenwald pointed out two separate *New York Times* articles – one op-ed and one news story, both from 2003 – that reached similar conclusions.

“Many Americans confronted with stories of media manipulation by government officials aren’t, at this point, shocked and awed. Instead they’ve come to expect it. Increasingly, they consider the media simply a mouthpiece for whoever has the most power. You don’t have to tell John Q. Public that the fix is in; he takes it for granted,” Collins wrote.

Edward Wasserman, Knight Professor of Journalism Ethics at Washington and Lee University, challenged the use of so-called “analysts” and “consultants” on news coverage of all subjects because they blur the line between journalists and sources. “What they are is a new breed of newsroom mutt,” Wasserman wrote in an April 28, 2008 *Miami Herald* column.

Wasserman argued that the line between journalists and sources should be clear. If an independent outside expert is necessary to speak with authority on a complicated issue, journalists should make sure they find a truly independent expert.

“Institutionalizing the news consultant is no way to enrich the news; it’s just another way to corrupt it. Consultants must go,” Wasserman wrote.

Wasserman spoke at the Silha Center’s 2008 Spring Ethics Forum on April 24. The forum focused on strategies for remaining independent when covering politics and war. (See “Forum Explores Journalistic Independence, War and Politics” on page 27 of this issue of the *Silha Bulletin*.)

— MICHAEL SCHOEPF  
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# Media Ethics

## Los Angeles Times Retracts Story Based on Fake Documents

**A** *Los Angeles Times* story published in March 2008 that purported to have new information about a 1994 attack that helped launch a bloody bicoastal war among high-profile rappers was found to be based on faked FBI documents and questionable sources, embarrassing the newspaper as it retracted and apologized for the story.

The story, headlined “An Attack on Tupac Shakur Launched a Hip-Hop War,” appeared on the newspaper’s Web site on March 17, 2008 and in a shorter version in the print edition March 19. It revisited a Nov. 30, 1994, ambush at a recording studio in New York where Shakur was beaten and shot several times by three men. No one has ever been charged in the crime, but Shakur later said he suspected allies of rapper Sean “Diddy” Combs were responsible. According to the *Times*, the assault sparked a war between Shakur and fellow West Coast rappers and their East Coast rivals, ultimately resulting in the shooting deaths of Shakur in 1996 and East Coast rapper Christopher Wallace, better known as Notorious B.I.G., in 1997.

The March 17 *Times* story said the paper had obtained “FBI records,” summaries of interviews with a confidential informant who accused associates of Combs of helping to set up the attack on Shakur. The story cited several unnamed sources who corroborated the information in the documents.

On April 7, the *Times* reported that it had concluded that the FBI documents were fabricated and that other sources the story relied on did not support the assertions that three associates of Combs – James Rosemond, Jacques Agnant, and James Sabatino – had arranged the assault after Shakur had rejected an offer to sign with Combs’ record label, Bad Boy Records.

“The Times specifically retracts all statements in the article, and in its related publications, that state or suggest in any way that Rosemond, Agnant and Sabatino orchestrated or played any role in the assault on Shakur,” the *Times* said April 7, continuing, “To the extent these publications could be interpreted as creating the impression that Combs was involved in arranging the attack, The Times wishes to correct that misimpression, which was neither stated in the article nor intended. ... Any statements or implications suggesting that Combs was given advance knowledge of the assault on Shakur, or played any role in it, are specifically retracted.”

On March 27 the *Times* reported in a front-page apology that it had received “withering criticism” for the March 17 story, and Deputy Managing Editor Marc Duvoisin and reporter Chuck Philips, who won a 1999 Pulitzer Prize for his reporting on corruption in the entertainment industry, both issued statements of apology.

The *Times*’ April 7 and March 27 stories about the apology and retraction are available online at <http://www.latimes.com/entertainment/news/la-et-quadrereaction7apr07,0,3600312.story>. The original March 17 story was removed from the newspaper’s Web site on April 7.

The “withering criticism” came in the form of a 5,000-word story on the Web site The Smoking Gun questioning the documents the *Times* had used in reporting the story, which were posted on [latimes.com](http://latimes.com), as well as the veracity of the documents’ apparent source, Sabatino, a “con-man” currently serving a federal prison sentence for fraud.

The Smoking Gun described Sabatino, 31, as an “accomplished document forger, an audacious swindler who has created a fantasy world in which he managed hip-hop luminaries [and] conducted business” with famous rappers and industry insiders during the 1990s.

The Web site said Sabatino had filed the FBI documents, dubbed “302s” for the number on the top of the form on which they are prepared, with the U.S. District Court in Miami as part of an ongoing lawsuit against Combs for an alleged “soured business deal.”

However, The Smoking Gun reported that the forms do not appear anywhere on the FBI’s computerized Automated Case Support database. They were distributed by Sabatino himself, who claimed that they were provided to him during the discovery phase of a 2002 criminal case. According to The Smoking Gun, a federal law enforcement official who was involved in the 2002 case said that the Secret Service had headed the investigation and the FBI had no role in the case.

Moreover, The Smoking Gun reported that the documents appear to have been prepared on a typewriter, technology it said the agency has not used in 30 years. The Smoking Gun reported that Sabatino, like other inmates at all Bureau of Prisons facilities, has access to photocopying machines, office supplies, and typewriters, according to the bureau’s 2008 Legal Resource Guide, which says inmates must be permitted “a reasonable amount of time ... to conduct their own legal research and to prepare legal documents.”

The Web site pointed out spelling and grammatical errors as well as the use of unusual acronyms that appeared on Sabatino’s “302s” which were inconsistent with standard FBI procedure. The Smoking Gun said “most telling” were “obvious similarities (type size, font, line spacing, individual character renderings)” between the “302s” from the *Times* story and other court filings created by Sabatino while he has been incarcerated.

The Smoking Gun said both the “302s” and Sabatino’s court filings show similar “spelling deficiencies.” The word “making” appears as “makeing” and the word “during” appears as “durring” in both the “302s” and Sabatino’s *pro se* court pleadings, The Smoking Gun reported. The Smoking Gun report is available at <http://www.thesmokinggun.com/archive/years/2008/0325081sabatino1.html>.

The *Times* reported April 7 that its investigation concluded that “Sabatino fabricated the FBI reports and concocted his role in the assault as well as his supposed relationships with Combs, Rosemond and Agnant.”

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“In relying on documents that I now believe were fake, I failed to do my job.”

– Chuck Philips  
Reporter, *Los Angeles Times*

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*LA Times Duped, continued on page 16*

On April 7 the *Times* also said it “was mistaken in reporting that Rosemond has served prison time for drug dealing and was convicted in 1996 of drug offenses,” specifically retracting the statements. The Smoking Gun had not challenged the reporting on Rosemond’s criminal history.

Philips’ statement of apology said “In relying on documents that I now believe were fake, I failed to do my job.” Duvoisin’s statement said, “I deeply regret that we let our readers down.”

According to *Editor & Publisher* on March 26, Combs’ lawyer Howard Weitzman said he had sent two letters to the *Times* demanding removal and retraction of the story, one on March 18 and one on March 26.

*Editor & Publisher* reported that Weitzman said, when he first learned of the story on March 17, that he believed its alleged link between Combs and the shooting was false. When the documents were called into question by a third party, he said it showed the paper was not careful enough in its research, *Editor & Publisher* reported.

*Editor & Publisher* reported on March 26 that Weitzman said he had taken no steps to begin a lawsuit against the paper, but that a simple retraction may not be enough to avert a legal response. “[A retraction] does not absolve them of their liability, [it] only lowers the level of liability,” Weitzman said.

According to California Civil Code § 48a (2007), if a person claiming libel demands a retraction of the allegedly defamatory material within 20 days of becoming aware of the publication or broadcast, and the publisher or broadcaster satisfactorily retracts the material in question within three weeks of receiving the plaintiff’s notice, the plaintiff is limited to collecting “special damages,” such as lost wages or trade, and may not collect “general damages” which the state law defines as for “loss of reputation, shame, mortification and hurt feelings.”

The *Times* reported March 27 that in a letter to *Times* Publisher David Hiller, Weitzman said he believed that the *Times*’ conduct met the legal standard for proving “actual malice,” which would allow a public figure such as Combs to obtain damages in a libel suit. “Actual malice” is defined as publishing defamatory material with knowledge of its falsity or reckless disregard for whether it was true or false.

Media critics spoke out about the incident, criticizing the *Times*’ editorial procedure before the story was published.

Bob Steele, an ethics scholar at journalism think tank the Poynter Institute and member of the Silha Center’s advisory board, said in a March 27 column on the Poynter Web site that “... the quality control process at the LA Times apparently fell far short.” Steele’s column is available online at <http://www.poynter.org/column.asp?id=67&aid=140402>.

Steele’s questions, as well as those of other critics, focused on the provenance of Philips’ sources for the documents and corroboration.

Bill Wyman, former arts editor for National Public Radio and Salon.com, said in a March 28 post on his blog Hitsville that the *Times*’ report and the rebuttal from The Smoking Gun raise questions

over whether Sabatino was Philips’ main source for the story and the documents, and whether the other unnamed sources’ reported corroboration of the forged documents would stand on their own.

Wyman also pointed to the contrast between *Times*’ characterization of Sabatino as a close and trusted associate of Combs who was present at the New York studio the night of the attack, and The Smoking Gun’s report which Wyman said characterized Sabatino as a “buffoon.” According to The Smoking Gun report, “[I]n the reams of copy about the 1994 attack, Sabatino’s name has never appeared anywhere. The first time a publication linked him to the Shakur ambush came last week in the *Times*.”

According to Wyman, a 1999 Miami *New Times* profile of Sabatino and his “buffoonish career” more closely resembled The Smoking Gun characterization. Wyman’s blog post is available at <http://www.hitsville.org/2008/03/28/at-the-la-times-the-pain-may-be-just-beginning/>.

The *Times* reported March 27 that in an interview, Philips said he had believed the FBI documents were legitimate because he had heard many of the same details about the attack in his reporting, and that three prison inmates who had purportedly carried out the attack and two other witnesses of the attack corroborated portions of the scenario described in the article.

According to the *Times*, Philips said he sought to check the authenticity of the documents with the U.S. attorney’s office in New York, which declined to comment, and with a retired FBI agent, who said the documents appeared legitimate. Philips did not directly ask the FBI about the documents, the *Times* reported.

Slate Editor at Large Jack Shafer speculated that Philips’ comments may demonstrate “confirmation bias,” or “a universal human trait to seek evidence that confirms what you already believe, to interpret the evidence you’ve collected to bolster your existing view, and to avoid the evidence that would undermine your notions.” Shafer’s March 27 “Press Box” media criticism column is available online at <http://www.slate.com/id/2187574/>.

*Washington Post* columnist Howard Kurtz wrote March 28 that “the story represents the biggest debacle at the *Times* since 1999, when the paper damaged its credibility by sharing profits with the Staples Center from a special magazine issue on the sports arena.”

Kurtz also said it was “the most prominent blunder involving unverified documents” since a 2004 incident involving CBS News’ “60 Minutes” and questions raised by bloggers and Web sites over documents the program said showed President Bush had received preferential treatment as a member of the Texas Air National Guard. Bloggers challenged the documents via online forums and using graphic illustrations and expert typographers, leading CBS News to eventually retract the story. CBS News’ Dan Rather stepped down in the wake of the controversy. (See “Dan Rather, Other Staff Members Depart ‘60 Minutes’ in Wake of Ethics Controversy in the Winter 2005 issue of the *Silha Bulletin*.) — PATRICK FILE



## New Media

### Federal Court Decisions Add Uncertainty to Internet Law

#### *Communications Decency Act and Fair Housing Rules Clash in 7th, 9th Circuits*

Two spring 2008 cases asked federal courts to interpret a law designed to limit the liability for Internet service providers when their users engage in prohibited speech online in the context of federal fair housing standards. The key difference in the contrasting decisions appears to be the degree to which the different Web sites actively seek particular information from users.

On March 14, 2008, the 7th Circuit U.S. Court of Appeals ruled that the Web site Craigslist is not liable for free classified housing advertisements posted by its users that discriminate on the basis of race, religion, sex, and national origin.

In *Chicago Lawyers' Committee v. Craigslist*, 519 F.3d 666 (7th Cir. 2008), the 7th Circuit held that Craigslist, an online network of classified advertisements featuring more than 30 million notices posted per month, neither created nor induced the posting of discriminatory ads by users on its Web site. Therefore, Judge Frank Easterbrook wrote for a three-judge panel, the "[plaintiffs] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."

The ruling was a victory for Web sites that display user-generated content, said Craigslist Chief Executive Jim Buckmaster in a statement, according to a March 17 Associated Press story.

"We're pleased the Court agreed that online service providers like Craigslist should not be held liable as 'publishers' of content submitted by their users, and view this outcome as a win for the general public's ability to self-publish content (such as free classified ads) on the Internet," Buckmaster's statement said.

Craigslist is a network of sites that allows users to self-publish classified advertisements for things like tenants, pets, services, and jobs. There are currently 450 Craigslist sites in 50 countries. In the U.S., there are sites for cities in all 50 states, Washington D.C., and a few U.S. territories. According to a Craigslist fact sheet posted on its Web site, Craigslist receives nine billion page views per month.

In February 2006, the Chicago Lawyers' Committee, a consortium of Chicago attorneys, alleged that Craigslist was violating federal housing laws with discriminatory housing ads posted on its Web site. In its brief filed Oct. 9, 2007, the committee cited examples of the advertisements posted on Craigslist by users, including "African Americans and Arabians tend to clash with me so that won't work out" or "No children." The federal Fair Housing Act (FHA), 42 U.S.C. § 3604, prohibits advertisements for the sale or rental of housing that state a preference or discriminate on the basis of "race, color, religion, sex, handicap, familial status, or national origin."

Lawyers for Craigslist argued that the Communications Decency Act (CDA) of 1996, 47 U.S.C. § 230(c)(1), provides broad immunity for Internet service providers from liability for content posted on their sites by users. The relevant provision

of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Judge Easterbrook wrote that § 230(c)(1) of the CDA stands for the proposition that an online information system cannot be "treated as the publisher or speaker of any information provided by" another speaker. Since Craigslist did not create the content of the housing advertisements, it was not the speaker or publisher of the words and therefore cannot be liable under the FHA.

In contrast to the 7th Circuit's decision, on April 3, 2008, the 9th Circuit U.S. Court of Appeals denied immunity under the CDA to Roommates.com, a Web site that allows users to indicate preferences for roommates based on gender, sexual orientation, and familial status.

Roommates.com offers an online service to help people find roommates and requires subscribers to create profiles featuring the answers to a series of questions. The questions require subscribers to state their preferences in roommates with respect to sex, sexual orientation, and familial status. Roommates.com offers profiles for individuals in 50 states in the United States and organizes its profiles by city.

The plaintiffs, local fair housing councils in California, sued the Web site's operators for violating the FHA. Like Craigslist, Roommates.com argued that it was entitled to broad immunity under the CDA.

Chief Judge Alex Kozinski's majority opinion in *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), stated that by soliciting information containing discriminatory preferences as a condition for using its services, Roommates.com had become an information content provider and thus responsible in part for creating the discriminatory information.

Unlike Craigslist, which offers a forum for others to post advertisements that might state discriminatory preferences, Roommates.com actively solicited the discriminatory information through its questionnaire, the court noted. Therefore, Roommates.com removed itself from the protection of the CDA.

The 9th Circuit remanded the case to the district court to determine whether Roommates.com is liable under the FHA for its actions.

Eugene Volokh, the Gary T. Schwartz Professor of Law at the University of California-Los Angeles School of Law, wrote April 3, 2008 on his popular legal blog, The Volokh Conspiracy, that the difference between the 7th and 9th Circuit decisions stems from the degree of solicitation of discriminatory information the Web site is involved in. "[I]t does suggest that when the outlets try to channel the speech in likely illegal directions, they may be liable for the result of that channeling," Volokh wrote.

"[I]t does suggest that when the outlets try to channel the speech in likely illegal directions, they may be liable for the result of that channeling."

– Eugene Volokh  
Professor, University  
of California-Los  
Angeles School of Law

– AMBA DATTA

SILHA RESEARCH ASSISTANT

## New Media

### Federal Court Upholds Rejection of Minnesota Video Game Law

On March 17, 2008, a three-judge panel of the 8th Circuit U.S. Court of Appeals upheld a Minnesota federal district judge's ruling that a Minnesota law banning minors from renting or purchasing violent video games is unconstitutional.

The Minnesota Restricted Video Games Act, Minn. Stat. § 325I.06 (2006), would prohibit anyone under the age of 17 from purchasing or renting video games rated "M" (Mature) or "AO" (Adults Only), punishable by a \$25 fine for the buyer. Additionally, the law would require video game retailers to post a sign to notify customers about the law and fine.

The law was challenged by the Entertainment Software Association and the Entertainment Merchants Association, groups representing the video game industry, immediately after it was signed into law on May 31, 2006. On July 31, 2006, Judge James Rosenbaum of the U.S. District Court for the District of Minnesota granted the plaintiffs' motion for permanent injunction in *Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065 (Dist. Minn. 2006), ruling that the law violates the First Amendment.

Rosenbaum wrote that since video games enjoy First Amendment protection, the Minnesota Restricted Video Games Act, which regulates games based on their content, is "presumptively invalid and subject to strict scrutiny." Under strict scrutiny, the State must demonstrate that the law is narrowly tailored to achieve a compelling state interest.

Rosenbaum ruled that the state failed to prove the existence of a causal relationship between video games rated "M" or "AO" and any harm to Minnesota's children. "The State's professed concerns, in the absence of evidence showing them to be well-founded, do not outweigh the chilling effect on free speech that would result from the Act's becoming effective," Rosenbaum wrote.

Rosenbaum also held that the act was unconstitutional because it depends on the rating system of the Entertainment Software Rating Board (ESRB), a private ratings group to which game makers voluntarily submit. According to Rosenbaum, since the ESRB privately makes ratings determinations with no public input or opportunity to challenge a rating, and since the ratings would result, under the Minnesota law, in prohibiting speech and levying civil penalties, the act was an unconstitutional violation of the First Amendment as well as the due process clause of the Fourteenth Amendment because it is an "improper delegation of authority."

"This delegation of power [to the ESRB] affords no basis upon which a court could constitutionally impose a fine on the children of the state of Minnesota for violating the Act," Rosenbaum wrote.

The 8th Circuit upheld Rosenbaum's ruling on March 17, 2008 in *Entertainment Software Association v. Swanson*, 519 F.3d 768 (8th Cir. 2008). The court held that it was bound by *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), in which the 8th Circuit ruled that any restriction on the purchase or rental by minors of violent video

games is subject to strict scrutiny analysis because violent video games are free speech protected under the First Amendment.

The court repeated its reasoning from the *Interactive Digital* decision, saying that "while we have concluded that an interest in safeguarding the psychological well-being of minors is 'compelling in the abstract,' the alleged harms must be shown to be 'real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"

The court said that it accepted that the state of Minnesota has a compelling interest in safeguarding the "psychological well-being of its minor citizens," and that the state's evidence provided substantial support for the contention that violent video games have a "deleterious effect upon the psychological well-being of minors," but because the precedent of *Interactive Digital* demands a showing of "statistical certainty of causation," the Minnesota Restricted Video Games Act must be found unconstitutional under strict scrutiny.

On March 28, 2008, Minnesota Attorney General Lori Swanson filed a petition for rehearing by an *en banc* panel of the 8th Circuit U.S. Court of Appeals.

According to GamePolitics.com, a blog operated by a group called the Entertainment Consumers Association, the language of the three-judge panel's opinion suggests that it might be sympathetic to the Minnesota Attorney General's position in an *en banc* rehearing.

In particular, the blog referred to the following passage in the opinion: "We are not as dismissive of ... evidence [of a link between violent games and violent behavior] as have been some of the courts that have found similar evidence to be inadequate to establish the causal link." The blog post on the decision is available online at <http://gamepolitics.com/2008/04/11/minnesota-appealing-video-game-law-ruling/>.

Attorney Robert Corn-Revere discussed the drive to regulate violence in the media at the 2007 Silha Lecture, presented Oct. 1, 2007. (See "2007 Silha Lecture Focuses on Media Violence Regulation" in the Fall 2007 issue of the *Silha Bulletin*.)

Corn-Revere said that laws similar to the Minnesota Restricted Video Games Act have been struck down in recent years on a constitutional basis by courts in Indiana, Missouri, Washington, California, Illinois, Michigan, Louisiana, and Oklahoma.

According to Corn-Revere, courts have resisted attempts by lobbying groups and legislators to mandate regulatory regimes for violent content in video games, movies, and music, resisting strategies that would extend narrow traditionally accepted categories of unprotected speech, such as obscenity, to encompass violent content. State and federal courts have said instead that violent media deserve as much First Amendment protection as other forms of literature or entertainment, while also citing the practical problem of creating a satisfactory legal definition of excessive violence.

— PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

"While we have concluded that an interest in safeguarding the psychological well-being of minors is 'compelling in the abstract,' the alleged harms must be shown to be 'real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'"

— 8th Circuit U.S. Court of Appeals, *Entertainment Software Association v. Swanson*

# International Media/Endangered Journalists

## China: Prelude to Olympics and Crisis in Tibet Elicit Criticism and Nationalism

Controversy has flared during the prelude to the 2008 Beijing Olympic games as free press advocacy groups have criticized China's human rights record on media and free speech restrictions. Meanwhile many Chinese have spoken out against international media coverage they have called biased and unfair.

Much of the focus has been on the situation following violence in Tibet and resulting restrictions on access for foreign journalists there and in neighboring provinces.

The Associated Press (AP) reported on March 15, 2008 that protests initiated by Buddhist monks in Tibet's capitol, Lhasa, grew violent the week of March 10 – 14. According to the AP, a March 10 protest on the anniversary of the 1959 exile of the Dalai Lama, Tibet's spiritual leader, led to arrests after protesters unfurled a Tibetan national flag, which is banned, and demanded independence.

The AP reported that on March 14, police had moved in to stop another group of protesting monks when larger crowds gathered. Protesters and police clashed, and cars and shops were attacked and burned. Much of the violence targeted migrant Han Chinese who have populated the Tibet region as the Chinese government has subsidized development there. The AP said the Chinese government has reported that 22 deaths resulted from the March 14 rioting, but Tibetan exiles have reported the death toll as closer to 140. The AP reported on March 17 that sympathy demonstrations sprang up in Tibetan communities in the neighboring provinces of Sichuan, Qinghai, and Gansu, drawing a mobilization of security forces across a broad expanse of western China.

Reports also vary on how many have been imprisoned and await trial following the riots. According to *The New York Times*, the Chinese government has said fewer than 100 are imprisoned, while a Tibetan human rights group has put the number of detained Tibetans at more than 5,000. Chinese state news agency Xinhua reported April 29 that a court in Lhasa sentenced 30 people to prison in connection with the riots. The sentences ranged from three years to life.

The AP said March 17 that because of restrictions on access for foreign media, it has been difficult to independently verify casualties, the scale of protests, and the government response. The AP also reported March 17 that Hong Kong broadcaster TVB said public security officers kicked out reporters from three Hong Kong television stations in Lhasa: Cable TV, TVB, and ATV. TVB said it was forced to delete its footage of the March 14 violence.

According to the AP's March 17 report, government officials expelled foreign reporters from Tibetan areas in Qinghai and Gansu provinces, and foreign journalists were turned away from of a candlelight vigil for Tibet held at an outdoor plaza in Beijing by students from Central Nationalities University, an elite school for ethnic minorities.

The New York-based nonprofit Committee to Protect Journalists (CPJ) said March 17 that the expulsions and restrictions contravene media regulations enacted in January 2007 to allow greater freedom for foreign journalists in the run-up to the 2008 Olympic Games. The temporary regulations, in effect Jan. 1, 2007 through Oct. 17, 2008, promise foreign reporters unrestricted travel in China and uncensored Internet access, and say that accredited foreign journalists may interview any consenting Chinese organization or citizen. Human rights groups like CPJ, Amnesty International, Human Rights Watch, and Reporters sans Frontières (Reporters Without Borders or RSF) have criticized the Chinese Government for not upholding the new regulations. (See "China Failing to Deliver on Pre-Olympics Press Freedom Promises According to NGOs' Reports" in the Fall 2007 issue of the *Silha Bulletin*.)

On March 27, *USA Today* reported that one of its reporters was among a group of about 20 international journalists allowed on a two-day government-led tour of Lhasa intended to show that the area had calmed. The report said that officials from China's Foreign Ministry discouraged the group of journalists from deviating from the itinerary set by the government, saying that to do so would be dangerous.

*USA Today* and the AP reported that during a visit to Jokhang Temple on the second day of the visit, at least 30 monks interrupted an official briefing, shouting, "do not believe them" and "Tibet is not free." Government handlers shouted for the journalists to leave and tried to pull them away during the outburst, according to the AP and *USA Today*.

The AP reported April 10 that a statement from six United Nations (U.N.)-appointed investigators called on the Chinese government to lift restrictions it had imposed on domestic media that limited people's access to information about the violence in Tibet. The U.N. experts said they received anecdotal reports that Internet controls in China have increased recently, with blocking of Tibet reports on foreign news sites and censoring of Tibet-related discussions on domestic chat sites.

Agence France-Presse (AFP) reported March 16 that access to the video-sharing Web site YouTube was denied in China after footage of the Tibetan protests appeared there. According to AFP, footage of the riots on broadcast television was also limited in China, with state-run media showing a short clip of Tibetan rioters destroying Chinese shops in Lhasa, but no footage of the police or military response. The AFP reported that the domestic broadcast of CNN was regularly blacked out whenever a story about the Tibet unrest ran.

*The New York Times* reported April 18 that Chinese authorities detained Jamyang Kyi, a prominent Tibetan television broadcaster who is also a popular singer. According to the report, Kyi, an announcer at the state-run television station in Xining, Qinghai,

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The Associated Press said that because of restrictions on access for foreign media in Tibet, it has been difficult to independently verify casualties, the scale of protests, and the government response.

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a western province bordering Tibet, was escorted from her office by plainclothes police officers on April 1, colleagues and friends told the *Times*. The *Times* said there has been no official confirmation of the detention.

According to the *Times*, along with being a broadcaster and singer, Kyi is a respected intellectual and blogger who has written about women's rights and the trafficking of girls.

### ***Torch Relay Sparks Protests, Nationalism***

Meanwhile, the around-the-world relay of the Olympic torch has proven to be another flashpoint for controversy, as protestors at many of the torch's stops have sought to use the relay to draw attention to human rights issues.

In one incident, three protesters from RSF found their way around heavy security at the Athens, Greece lighting ceremony on March 24, with one person managing to briefly unfurl a banner behind Beijing Olympic Organizing Committee head Liu Qi as he made a speech. According to the AP, RSF identified the three protesters as Robert Menard, the group's general secretary, Jean-Francois Juliard and Vincent Brossel. CNN reported that Juliard said the men used their press cards to get access to the ceremony.

A single protester and the banner were briefly seen on the television coverage of the event. The banner depicted the Olympic rings made with handcuffs. A story and video of the incident is available via the BBC Web site at <http://news.bbc.co.uk/2/hi/europe/7310654.stm>.

According to Toronto's *Globe and Mail*, coverage of the chaotic torch relay protests in Paris on April 7 was absent from Chinese state television, which instead showed images of Paris tourist sites. According to *The Globe and Mail*, state broadcasters made only brief mentions of the protests and did not show any pictures of them.

*The Globe and Mail* reported that foreign broadcasters like CNN and the BBC were sporadically blacked out in Beijing when the broadcasters showed scenes of the Paris protests.

The torch relay has sparked feelings of nationalism among large expatriate Chinese communities, particularly in France, Australia and San Francisco, according to the *Los Angeles Times*, which reported April 26 that the wave of Olympic pride has led many Chinese to speak out against Western media which they have said has been biased against China in its coverage of the Tibet protests.

According to *The New York Times* on April 16, specific criticisms have mostly focused on mislabeled photo captions that have inaccurately identified a police crackdown against Tibetan protesters in Nepal as having instead occurred in China. Another photo which drew criticism was posted on the CNN Web site and purported to show demonstrators running from military vehicles in Lhasa. An uncropped version of the photo shows other demonstrators hurling objects at the vehicles. Many of the photos, videos and commentary (some in English) are available at the Web site <http://www.anti-cnn.com/>.

The Foreign Correspondents Club of China said

in an April 30 statement that at least 10 foreign correspondents in China "have received anonymous death threats during a campaign, on the Web and in state-run media, against alleged bias in Western media coverage of the Tibetan unrest and its aftermath." The club's Web site is at <http://www.fccchina.org/>.

The *Los Angeles Times*, AP, and *Atlanta Journal-Constitution* reported that protestors demonstrated outside CNN offices in Hollywood, Calif. on April 19 and at the network's world headquarters in Atlanta on April 19 and 26, calling for the firing of commentator Jack Cafferty, a regular commentator on CNN's "The Situation Room," for comments he made on April 9 during an exchange with the host, Wolf Blitzer.

In comparing America's relationship with China today versus several decades ago, Cafferty said, "We are ... running hundreds of billions of dollars' worth of trade deficits with [the Chinese], as we continue to import their junk with the lead paint on them and the poisoned pet food and export, you know, jobs to places where you can pay workers a dollar a month to turn out the stuff that we're buying from Wal-Mart. So I think our relationship with China has certainly changed," he continued. "I think they're basically the same bunch of goons and thugs they've been for the last 50 years."

An April 19 AP story said police estimated the peaceful Hollywood protest included 2,000 to 5,000 people. *The Atlanta Journal-Constitution* said the April 26 Atlanta protest included "hundreds of people" and an airplane circling overhead with a banner that said "Go Olympics! CNN Stop Bashing Chinese!!!"

The Chinese Foreign Ministry blasted CNN for the comments, and rejected the network's initial response to the remarks, according to *The Washington Post* on April 18.

CNN released a statement April 15 that said "Jack [Cafferty] was offering his strongly held opinion of the Chinese government, not the Chinese people. CNN would like to clarify that it was not Mr. Cafferty's, nor CNN's, intent to cause offense to the Chinese people, and would apologize to anyone who has interpreted the comments in this way." Cafferty himself also clarified that the comments were directed at China's government and not its people, *The Washington Post* reported.

Foreign Ministry spokeswoman Jiang Yu said CNN and Cafferty's statements did not go far enough. "Their statement not only did not make a sincere apology, but also took aim at the Chinese government, attempting to sow dissension between the Chinese government and the people," Jiang said on April 17, the *Post* reported. "We cannot accept it."

*The Washington Post* reported that Chinese Foreign Ministry spokesperson Liu Jianchao met with CNN Beijing Bureau Chief Jaime FlorCruz on April 16 in Beijing, but both CNN and the Foreign Ministry declined to comment on the meeting.

According to an April 23 report from Xinhua, the Journalism and Communications Committee of the Chinese Association of Higher Education suggested that CNN and other Western news media should

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# International Media/Endangered Journalists

## Jailed Journalists Freed in Iraq and Zimbabwe; *Reuters*

### Cameraman Killed by Israeli Missile in Gaza

#### *AP Photographer Freed in Iraq after Two Years*

Iraqi Associated Press (AP) photographer Bilal Hussein was released by American military officials on April 14, 2008 after two years of imprisonment for allegedly working with insurgents in Iraq.

An Iraqi judicial committee dismissed Hussein's terrorism-related charges on April 7 and ordered him released, but the U.S. military continued to hold him until its own review determined he was not a threat to coalition or Iraqi forces.

According to the AP on April 9, the four-judge panel of the Iraqi Federal Appeals Court stated that a new amnesty law put into effect in February 2008 by the Iraqi parliament provides amnesty to detainees held for insurgency-related offenses. The court ruled that the allegations against Hussein fall under the anti-terrorist law and are therefore subject to amnesty.

Lt. Cmdr. Kenneth Marshall, spokesman for U.S. military detention facilities in Iraq, said that the 2-month-old amnesty law did not apply to individuals held in U.S. custody, according to an April 10 Reuters story.

U.S. military authorities also asserted that a U.N. Security Council mandate permits them to detain anyone in Iraq deemed a security risk to coalition or Iraqi forces, even if an Iraqi judicial body rules that the individual should be released, according to an April 14 AP story. The U.N. mandate expires at the end of 2008.

The U.S. military conducted its own review of Hussein's detention after the Iraqi judicial panel ruled that Hussein should be released immediately.

On April 14, Maj. Gen. Douglas M. Stone signed Hussein's release order, stating that the military review concluded that Hussein "no longer presents an imperative threat to security," according to an April 15 *New York Times* story.

Hussein, a Pulitzer prize-winning photographer, was captured by U.S. military forces on April 12, 2006. American military investigators alleged that Hussein was a terrorist media operative and stated that Hussein's connections with insurgents were demonstrated by his access to insurgent attacks on U.S. and Iraqi forces depicted in his photography and by Hussein's willingness to forge an identification card for a terrorist, according to the April 14 AP story. Hussein maintained his innocence throughout his imprisonment.

In December 2007, the U.S. Army stated that Hussein's fate would be determined by the Iraqi judicial system, according to an April 16 *News Photographer Magazine* story. (See "U.S. Brings Terrorism Case Against AP Photographer in Iraq" in the Winter 2008 issue of the *Silha Bulletin*.)

The Iraqi judicial committee may still be considering a separate allegation made by the U.S. military that Hussein had contacts with the kidnapers of an Italian citizen, Salvatore Santoro,

who was killed by his captors in 2004. Hussein was one of three journalists taken by insurgents at gunpoint to see the body, according to an April 9 AP story.

Joe Stork, Middle East director for Human Rights Watch, told the AP for an April 14 story, "We welcome the release of Bilal Hussein, which is long overdue. ... If the U.S. and Iraqi authorities have evidence against detainees they should charge them and give them a fair trial, rather than holding them indefinitely."

#### *CBS Reporter Freed in Basra Raid*

Kidnapped British photojournalist Richard Butler was freed on April 14, 2008 when Iraqi soldiers broke into a house in Basra and rescued him after two months of captivity.

Butler was working for CBS News in Iraq when he was abducted from the Sultan Palace Hotel in Basra on Feb. 10, 2008. (See "War Zone Remains Dangerous for Western, Iraqi Journalists" in the Winter 2008 issue of the *Silha Bulletin*.)

Iraqi soldiers conducting a military sweep in the Jibiliya area of Basra, a Shiite militia stronghold, found Butler in good condition, according to an April 14 CBS News story. Gunmen within the house where Butler was held opened fire on the army patrol, leading to an exchange of gunfire and the photojournalist's ultimate rescue. The Iraqi army patrol captured one gunman, but three men escaped.

Maj. Gen. Jalil Khalaf, chief of the Basra police, gave an alternate account of the events leading to Butler's rescue, according to an April 15 *New York Times* story. Khalaf told the *Times* that the police had received a tip that a journalist was being held in a house in the area. The police subsequently conducted the raid that led to Butler's release.

Describing his release, Butler said on Iraqi state television, "The Iraqi army stormed the house and overcame my guards and they burst through the door. I had my hood on, which I had to have on all the time and they shouted something at me, and I pulled my hood off. And then they ran me down the road."

The specific motivation for Butler's kidnapping remains unknown. Some suspicions have focused on forces associated with Shiite cleric and militia leader Moqtada al-Sadr, according to the April 15 *New York Times* story.

Sadr's group negotiated the release of the Iraqi interpreter who was abducted with Butler from their hotel in Basra on February 13. Negotiations with the kidnapers were also underway for Butler's release but stalled over the question of how to release the British journalist without leading to identification of his captors, according to a February 17 Reuters story.

Harith al-Ethari, head of Sadr's political office in Basra, denied any involvement by Sadr in Butler's kidnapping. Ethari told *The New York Times* for

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"We welcome the release of Bilal Hussein, which is long overdue. ... If the U.S. and Iraqi authorities have evidence against detainees they should charge them and give them a fair trial, rather than holding them indefinitely."

– Joe Stork  
Middle East director,  
Human Rights Watch

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an April 15 story that a few days after Butler was kidnapped, Sadr's forces received a message that Butler would be released. Later, Ethari said he received a message on his cell phone, saying "Remove your hands from the matter of the journalist or we will kill you."

U.K. Foreign Secretary David Miliband told the AP for an April 14 story that he was "very grateful to (Iraqi) security forces for the professionalism of the task they have undertaken."

**Zimbabwe Government Imprisons Foreign Journalists**

Zimbabwe deported a British reporter to South Africa after subjecting him to eight days of harsh interrogation, and imprisoned two foreign journalists accused of violating a restriction on practicing journalism without government permission. According to an April 8 *Washington Post* story, Zimbabwe has banned most foreign journalists from covering its recent elections.

The *Times of London's* Africa correspondent, Jonathan Clayton, was arrested and accused of falsifying immigration papers on April 9, 2008 as he was trying to enter Zimbabwe through the southern city of Bulawayo, according to an April 17 Agence France-Presse (AFP) story.

The *Guardian* of London reported on April 17 that Clayton was found guilty by a court in Zimbabwe of making a false declaration based on the answers he gave to security officials while being questioned. Clayton was fined 20 billion Zimbabwe dollars, or about 125 British pounds.

Clayton, who traveled to Zimbabwe after the disputed elections held on March 29, was imprisoned for eight days. After being arrested, Clayton was blindfolded and taken in handcuffs and without shoes to the headquarters of the local intelligence services, where he was interrogated all night, according to an April 17 AFP story. Clayton told the AFP that during the interrogation one of his interrogators began to kick the soles of his feet and then told him to kneel down before he punched him. Clayton said, "Then they tried to make me jog, stand on my head and stand on one foot which I did very badly."

Richard Beeston, the *Times's* foreign editor, told Reuters for an April 17 story, "We're extremely relieved to have him out. It was ridiculous of the authorities to hold him in extremely unpleasant conditions and hold this farcical trial."

A Zimbabwe court also dropped charges against Pulitzer prize-winning *New York Times* reporter Barry Bearak and freelance British reporter Stephen Bevan on April 16, 2008. Both reporters were alleged to have been covering the elections in Zimbabwe without government permission, according to an April 17 *New York Times* story.

Magistrate Gloria Takwunda said that the state "failed dismally to prove that there was reasonable suspicion of them practicing as journalists," according to an April 16 AP story.

According to *The New York Times* on April 17, the reporters were arrested on April 3 at a hotel near Harare, Zimbabwe when they were swept up in a raid that was part of a crackdown following the March

29 national elections.

Bearak and Bevan were released on bail on April 7. However, they were not allowed to leave the country until the court issued its ruling.

According to an April 17 *New York Times* story, *Times* Executive Editor Bill Keller said of Bearak, "His only offense was honest journalism, telling Zimbabwe's story at a time of tormented transition. He had no intention of becoming part of that story."

In an April 27 *New York Times* story, Bearak described the circumstances surrounding his arrest and detention. Because most Western reporters are denied entry to Zimbabwe, Bearak said he posed as a tourist when he entered the country. Usually, he left his laptop in Johannesburg, South Africa, threw away his notes each night after e-mailing their contents to himself at an Internet café, and wrote stories only in Johannesburg, Bearak said. But during the elections, when he was required to file daily stories, he needed to work on his laptop from his hotel room. When the police raided his hotel in Harare, Bearak said they found his notes on his desk and stories on his laptop.

Ultimately, Bearak was released on bail after a hearing in which the police were unable to provide sufficient evidence that he was working as a journalist. Bearak wrote in the April 27 story that the police presented as evidence against him a story found on his desk that was written by another *New York Times* reporter and published in 1989. After being released, Bearak and Bevan crossed the border into Zambia to avoid being rearrested by the government. Bearak's lengthy account of his arrest and imprisonment is available on the *New York Times* Web site at <http://www.nytimes.com/2008/04/27/world/africa/27bearak.html?page-wanted=1&ei=5070&en=4e12de95e582e3c5&ex=1209960000&emc=eta1>.

**Reuters Cameraman Killed in Gaza**

Reuters cameraman Fadel Shana was killed by metal darts from an exploding missile on April 16, 2008 in the Gaza Strip after stepping out of his car to film an Israeli tank approximately 1,000 yards away.

The three inch-long metal spikes, or "flechettes," found in Shana's body are consistent with darts that are sprayed from the flechette missile used by Israel in the Gaza Strip. The Israeli army has denied responsibility for firing the shot that killed Shana, a Palestinian journalist, who was wearing body armor labeled "PRESS" when he was killed, according to an April 17 Reuters story.

Footage recovered from Shana's video camera shows the tank he was filming opening fire. Two seconds later, with dust rising up from the tank's gun, the tape goes blank, presumably at the moment Shana was shot, according to an April 16 Reuters story.

Shana's soundman, Wafa Abu Mizyed, was wounded, and two teenage bystanders were killed in the incident.

On April 16, fighting in the Gaza strip left 17 Palestinians and three Israeli soldiers dead, according

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to Reuters. Shana's crew had been sent to cover the violence and was riding in an unarmored sport utility vehicle labeled "TV" and "Press." It stopped on a back road in sight of the Israeli tank in order to film.

An Israeli military official told Reuters that it could not confirm that a tank had fired at Shana, and it could not comment on the type of weaponry used.

"It should be emphasized that the area in which the cameraman was hurt is an area in which ongoing fighting against armed, extreme and dangerous terrorist organizations occurs on a daily basis," said the military official. "The presence of media, photographers and other uninvolved individuals in areas of warfare is extremely dangerous and poses a threat to their lives."

Reuters, the Committee to Protect Journalists, and the Paris-based free press advocacy group Reporters sans Frontiers (Reporters Without Borders, or RSF) called for an investigation by the Israeli army, which has defended the use of flechette missiles in Gaza in response to complaints by human rights activists, including groups like Human Rights Watch. In 2003, the Israeli Supreme Court ruled that it would not ban the use of flechette missiles by the Israeli army because they are not illegal under international law.

"We and the military must work together urgently to understand why this tragedy took place and how similar incidents can be avoided in the future," said David Schlesinger, editor-in-chief of Reuters, according to an April 17 Reuters story.

— AMBA DATTA

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**China**, *continued from page 20*

review the canons of professional journalism taught to Chinese journalism students, such as the "Journalist's Creed," written by Missouri School of Journalism founder Walter Williams.

According to Xinhua, the committee said in a statement, "As teachers engaged in journalistic education in China, we have been striving to call for our students to abide by professional ethics of journalism and respect for civilization of all human beings. ... But we have noticed distorted reports and vicious offence [sic] on China delivered by some mainstream Western media at a time when China is going to hold the Beijing Olympic Games."

Reuters reported April 23 that, according to Hong Kong newspaper *Wen Wei Po*, a group of Chinese lawyers had filed a lawsuit against CNN in a Beijing court for violating "the dignity and reputation of the Chinese people." Reuters said the court had yet to accept the case.

— PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

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## Student Media

### *Daily Nebraskan* Story Draws Governor's Office Ire; Federal Judge Finds Virginia Alcohol Ad Restrictions Unconstitutional

#### **Daily Nebraskan Clashes with Governor's Office**

Nebraska Governor Dave Heineman's office considered banning *Daily Nebraskan* reporters from his press conferences and excluding the student newspaper from a media e-mail list after it revealed in an April 3, 2008 story that a convicted murderer participating in a work-release program is a tour guide at the governor's mansion.

Officials from the governor's office arranged for a student reporter from the *Daily Nebraskan*, the student newspaper at the University of Nebraska-Lincoln, to take a private tour of the governor's mansion after the newspaper expressed interest in writing a story about the 50-year-old mansion's March 12, 2008 addition to the National Register of Historic Places.

The *Daily Nebraskan* instead published a story about Timothy Haverkamp, a tour guide at the mansion, who was convicted of second-degree murder and sentenced to 10 years to life in prison for two cult-related killings in 1985. According to the April 3 front-page story, Haverkamp's good behavior made him eligible to participate in work-release programs through Nebraska's Department of Corrections, and he leads tours at the governor's mansion five days a week, giving detailed explanations of the mansion's paintings and architectural details to tourists.

According to an April 7 column by *Daily Nebraskan* Editor Josh Swartzlander, student reporter Rachel Albin initially filed a story about the mansion and the National Register after she and a photographer took the tour. Prior to the tour, Albin's mother had mentioned to her that several prison inmates worked at the governor's mansion through a work-release program. Albin later passed the tip on to her editor when they were discussing the story she had written, Swartzlander wrote.

Upon entering the name of the tour guide into the Nebraska Department of Corrections' online inmates locator, Albin and her editor determined that Haverkamp was a violent offender. After that discovery, Swartzlander wrote, Albin tabled her original story and wrote a new one about the work-release program and Haverkamp's criminal history.

The governor's office claimed it had been deceived by the student newspaper, according to an April 7 *Omaha World-Herald* story. The *Daily Nebraskan* reported April 4 that a spokeswoman for Gov. Heineman, Ashley Craddock, informed the student newspaper that it would no longer be allowed to cover the governor's press conferences at the capitol. She added that security would be called to remove student reporters if they attempted to attend the press conferences.

"We are kind of at a point where we feel we need to cut ties," Craddock said, adding, "I wouldn't say that the story was inaccurate, but I would say some things were taken out of context. It's not entirely inaccurate, but it's not the full picture, either."

The governor's office reversed its decision to ban *Daily Nebraskan* reporters from press conferences later in the day on April 4, but the office maintained that it would drop the newspaper from an e-mail list used to send press releases and information to the media. On April 7, according to the *Omaha World-Herald*, Gov. Heineman told his staff to restore the *Daily Nebraskan* to the e-mail distribution list as well.

The *Daily Nebraskan* asserts that the tour was not set up "under false pretences."

"No one tricked their way into the mansion to try to get a juicy story, and no ethical barriers were breached," Swartzlander asserted in the April 7 column. "No one at the *Daily Nebraskan* violated any principles of journalism ethics in reporting the Haverkamp story."

"[W]hen a convicted murderer who was involved in one of the most heinously brutal crimes in modern Nebraska history is leading tours of the governor's mansion, that's news," Swartzlander wrote. "At the very least, if violent offenders on work-release are allowed to work directly with the public, the public deserves to know."

#### **Federal Court Strikes Down Virginia Alcohol Advertising Regulations**

A federal judge ruled on March 31, 2008 that two Virginia regulations that seek to limit alcohol advertisements, one of which is specifically aimed at college student publications, violate the First Amendment.

In *Educational Media Company at Virginia Tech v. Swecker*, No. 3:06CV396 (E.D. Va. Mar. 31, 2008), U.S. Magistrate Judge M. Hannah Lauck held that the two state regulations violated the First Amendment because they did not effectively advance the state's asserted interests of encouraging temperance and fighting underage alcohol consumption. The regulation aimed at college publications was also not narrowly tailored, Lauck ruled, meaning that it infringed on the First Amendment rights of college publications more than necessary to advance the asserted interest.

The American Civil Liberties Union filed a complaint on behalf of the *Collegiate Times*, Virginia Tech's student newspaper, and the *Cavalier Daily*, the University of Virginia's student newspaper, in May 2006 in the U.S. District Court for the Eastern District of Virginia. Both student newspapers estimated that they had lost approximately \$30,000 dollars in advertising revenue in 2006 as a result of the regulations, according to Lauck's opinion.

"We're obviously pleased with the outcome because we saw that this severely threatened our advertising revenues," said Amie Steele, *Collegiate Times* editor-in-chief, according to an April 2, 2008 *Cavalier Daily* story. "And on an editorial side we ... felt like this hindered our freedom of speech and freedom of the press."

"[W]hen a convicted murderer who was involved in one of the most heinously brutal crimes in modern Nebraska history is leading tours of the governor's mansion, that's news."

– Josh Swartzlander  
Editor, *Daily Nebraskan*



**Student Journalists**, *continued from page 24*

The plaintiffs challenged two state regulations. The first was 3 Va. Admin. Code 5-20-40(A), which limits alcohol advertising published in print and electronic media to the use of specific enumerated phrases such as “Mixed Drinks,” “Cocktail Lounges,” and “Polynesian Drinks.” The regulation bans use of the phrase “Happy Hour” in advertisements. It also prohibits use of the words “Speakeasy” or “Bar” in an advertisement unless the words are used in combination with other words that “connote a restaurant” or are part of a liquor licensee’s trade name.

The second regulation challenged by the plaintiffs, 3 Va. Admin. Code 5-20-40(B)(3), prohibits advertisements of beer, wine, and mixed beverages in college student publications, defined as publications prepared by college students distributed primarily to individuals under 21 years of age. The regulation permits alcohol advertisements by dining establishments in college publications, but the advertisements must use only words designated in the statute, including the words “beer” and “mixed beverages.” The ads cannot specify prices or brands.

Defendants, the Alcoholic Beverage Control Board of Virginia (ABC), asserted that the reduction of underage drinking and over-consumption of alcohol on college campuses was a substantial interest justifying the infringement on the First Amendment rights of the student newspapers posed by 3 Va. Admin. Code 5-20-40(B)(3).

Lauck analyzed the regulations using the framework established by the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) for commercial speech, which is defined as speech that does no more than propose a commercial transaction. Under the *Central Hudson* analysis, a court must first determine whether the expression is lawful and not misleading and therefore is protected by the First Amendment. The court must then determine whether the regulation at issue directly advances a substantial government interest, and then finally determine whether the regulation is narrowly tailored to advance the asserted government interest.

With respect to the first challenged regulation, 3 Va. Admin. Code 5-20-40(A), Lauck determined that the state presented no evidence that permitting the use of only generic phrases like “Mixed Drinks” directly advanced the state’s asserted goal of “encourag[ing] temperance.” In addition, the court stated that happy hours and similar events could be advertised on the radio or television, thus counteracting the potential impact of a ban that only extended to print and electronic media.

With respect to the second challenged regulation, 3 Va. Admin. Code 5-20-40(B)(3), the court acknowledged that underage drinking is a significant problem on college campuses, and applauded the state’s efforts to address it. However, the state presented no evidence that the regulation directly contributed to temperance among students, the court said.

“[N]ot a single witness testifies as to how this regulation, which has been in effect for decades, has directly advanced the admittedly substantial governmental interest of preventing underage consumption of alcohol or abusive drinking,” Lauck wrote.

The regulation also is not narrowly tailored, Lauck wrote. It is overinclusive because it prohibits adult readers who also read the *Collegiate Times* and *Cavalier Daily* from receiving alcohol advertising. Both student newspapers had demonstrated that at least 50 percent of their audience was of legal age to purchase and consume alcohol. Neither the rationale for permitting some words in advertisements and excluding others, nor the rationale for allowing advertisements associated with dining establishments was fully explained, Lauck wrote.

Although this case raised an issue of first impression in the 4th Circuit, Lauck cited an opinion authored by then-Circuit Judge Samuel Alito for the 3rd Circuit U.S. Court of Appeals on a similar issue. In *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), the 3rd Circuit struck down a Pennsylvania statute banning alcohol advertising in educational institution publications. Judge Alito wrote in his opinion, “[T]he law applies to ads that concern lawful activity (the lawful sale of alcoholic beverages) and that are not misleading, and we see no other ground on which it could be argued that the covered ads are outside the protection of the First Amendment.” (For more on the case see “Pitt News Can Run Alcohol Ads” in the Summer 2004 *Silha Bulletin*. For more on Justice Alito’s views on the First Amendment, see “New Justice Alito Addresses the Importance of the First Amendment at Confirmation Hearings” in the Winter 2006 issue.)

Lauck granted summary judgment for the plaintiffs and granted an injunction against the regulations.

– AMBA DATTA

SILHA RESEARCH ASSISTANT

# Libel

## U.K. Appeals Court Overturns Restaurant Review Libel Ruling

The Court of Appeal for Northern Ireland overturned a £25,000 jury award March 10, 2008 for a Belfast restaurant owner who claimed he had been defamed by an unflattering restaurant review in the *Irish News*. The three-justice panel held that the trial court failed to properly instruct the jury on the defense of “fair comment” and ordered a new trial.

The case arose out of an Aug. 26, 2000 *Irish News* review of Goodfellas restaurant in Belfast. In the review, critic Caroline Workman called the dining experience “joyless,” the squid “reconstituted fish meat,” and the chicken marsala “inedible.” She recommended readers “stay at home.”

According to the Court of Appeal’s decision, restaurant owner Ciaran Convery filed suit in November 2000 alleging that the article was defamatory.

The *Irish News* and Workman argued that most of the article consisted of “fair comment” and portions of the article that could be considered facts were true. “Fair comment” is a defense to libel in the United Kingdom that allows defendants to avoid a verdict for the plaintiff by showing that the statements in question are fair opinions on matters of public importance, the court’s ruling said.

In addition to the requirement that the statements in question refer to a matter of public interest, the defendant must also show that the statements in question “involve authentic comment as opposed to assertions of fact,” are “based on facts which are true” and readily identifiable, and that the comment is “one which an honest person might make,” Lord Chief Justice Sir Brian Kerr wrote in his opinion.

According to the court, the comment does not have to be “fair” as the term is generally understood; the comment can be “exaggerated” and even “prejudiced.” But the comment must be one which, based on readily identifiable and true facts, a person could genuinely hold.

The plaintiff can defeat the defense of fair comment by showing that the defendant acted with “malice.” “Malice” means that the defendant made the allegedly defamatory statement without an “honest belief” in the opinion expressed.

The three justices agreed that the trial court erred by allowing the jury to consider statements as facts that should have been considered as comments. For example, the court presented the statements “[t]he cola was flat, warm and watery” and “[t]he starters were of poor quality” to the jury as statements of fact when they should have been presented as statements of comment. “None of these qualities can be measured as an objective fact,” Kerr said.

The justices held that the misdirection by the trial judge may have confused the jury and muddled the newspaper’s separate defenses – fair comment and justification or truth – in a prejudicial manner. Although the justices indicated that it seemed unlikely a jury would not find the statements to be fair comments if properly instructed, the outcome was not “inevitable,” so a new trial was required.

The appellate court’s decision was greeted with relief by British press. *The Times* of London ran a March 15, 2008 story by Giles Coren that both summarized the ruling and reviewed Goodfellas, the restaurant at the center of the dispute.

“Can there be anything more counter-intuitive than choosing to pay a visit to a restaurant the day after it has lost a court case?” Coren asked in the article.

After summarizing the court’s ruling and offering a disclaimer he wrote: “In short, loyal readers, as long as I ate the meal I tell you I ate, and as long as I truly believe what I write, I can say anything. If you thought the critics were scary before, you wait ‘till [sic] you get a load of us now.”

Coren continued, clearly confident in his interpretation of the court’s ruling, with a review of the chicken marsala, the same dish Workman called “inedible” in her *Irish News* review. “Without the court papers to confirm what I had ordered, I’d have guessed I was eating thin strips of mole poached in Ovaltine,” Coren wrote of the chicken dish.

“It is revolting. It is ill-conceived, incompetent, indescribably awful. A dish so cruel I weep not only for the animal that died to make it, but also for the mushrooms. Ms Workman [sic] said it was inedible but, to be honest, as it sits before me, congealing quietly, I cannot leave it alone but return to it every few minutes with the grim fascination of a toddler mesmerised by a pile of its own faeces, nibbling at it, gurning with revulsion, then nibbling some more.”

Convery, the restaurant owner, could appeal the ruling to the House of Lords, the United Kingdom’s highest court, or return to the trial court for a new trial. “In my eyes it makes a farce of the judicial system when a jury is overturned,” he told Agence France-Presse on March 11.

– MICHAEL SCHOEPF  
SILHA RESEARCH ASSISTANT

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*Irish News* food critic Caroline Workman called the dining experience at Goodfellas restaurant “joyless,” the squid “reconstituted fish meat,” and the chicken marsala “inedible.” She recommended readers “stay at home.”

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# Silha News

## Forum Explores Journalistic Independence, War and Politics

According to Edward Wasserman, rather than strive to act independently, journalists should find the “ethically permissible” conflicts of interest among contemporary journalism’s necessary dependencies and obligations.

Wasserman’s remarks led a panel discussion about the challenges of remaining independent when covering war and politics at the Silha Center’s Spring Ethics Forum.

The forum, held April 24, 2008 at the University of Minnesota’s Nolte Center, featured a panel of veteran Twin Cities-area journalists with experience covering combat, natural disasters, and national and international politics.

Wasserman, the Knight Professor of Journalism Ethics at Washington and Lee University, was the evening’s featured speaker. Wasserman has written and edited for *The Miami Herald* and held leadership positions at Media Central LLC, the (Miami) *Daily Business Review*, and Primedia Inc., among others. He has extensive writing and editorial experience in covering economics, politics, and media organizations.

In his opening remarks, Wasserman discussed conflicts of interest he considers “endemic” to the field of journalism, including pressure to favor advertisers, “sucking up to sources,” and pandering to the public. “Acting independently is impossible, because journalism is practiced within a nexus of dependencies and obligations,” Wasserman said. Instead, conflicts of interest should be “managed carefully and zealously and candidly” by journalists and media organizations through “in-house discussion,” altering assignments or rotating beats, and recognizing and acknowledging the conflicts for what they are, he said.

The panelists shared their own experiences covering war and politics and their perceptions of contemporary ethical dilemmas for journalists.

Sharon Schmickle, a reporter for MinnPost.com, said the pressures on independence for reporters in war zones can be similar to those reporting on Washington politics. She related the story of a colleague from *The (Baltimore) Sun* who said that when he is embedded with troops in Afghanistan, he writes “I am not one of them” on his notebook every day. “I have to tell you,” Schmickle said, “the same thing is true on Capitol Hill.” She told the story of how she insisted on calling the late Sen. Paul Wellstone “Senator Wellstone,” instead of his preferred “Paul,” as a way of preserving her independence as a journalist.

Eric Black of MinnPost.com contended that a journalist’s quest for a “defensible appearance of objectivity” interferes with seeking truth and reporting it. Although balance can be a journalistic virtue in covering politics, Black said, “when it becomes microscopically measuring the inches of copy given to the two parties in a campaign, it’s going to invariably create a weaker piece of journalism.”

Gary Hill, communications director for the office of the Majority Leader at the Minnesota Senate, said the

problem of journalistic “groupthink” can be as much a threat to independence as other outside forces, citing the “boys and girls on the bus” mentality of political correspondents following campaigns.

Richard Sennott, a photographer for the Minneapolis *Star Tribune*, recalled being smuggled into Iraq before the 2003 invasion in the bottom of a potato truck. Sennott acknowledged the problems associated with trying to act as an independent “participant observer” while developing close relationships with subjects.

Questions and comments from the audience of 95 were wide-ranging, including the challenges of remaining independent when the human impulse would be to help those in need, as well as the April 2008 revelation by *The New York Times* that “military analysts” for the major media corporations were little more than Pentagon mouthpieces.

Members of the panel said that they were not immune to emotion when working in combat or disaster situations, but had to see it as part of their work and embrace the idea that their work could and would do something positive for victims of disasters or war. Wasserman said that journalists should not distort the professional obligations of objectivity or independence to allow them to act independently of their “obligations as a moral person.”

Panelists agreed that the scandal surrounding the use of Pentagon-groomed analysts was troubling. Schmickle said that she always assumed that information provided to her by the military when she was embedded would serve the military, but that the media’s use of experts was ultimately more deceptive. The use of such experts by news organizations was a “cheap way” to cover the war, Schmickle said. Hill derided the practice as “horrific, cheap, and tawdry,” saying, “The networks let their guard down and allowed themselves to be used in a horrible fashion.”

According to Wasserman, the news organizations who used the military experts “didn’t have any illusions about getting objective commentary from [the experts], ... they wanted more praise and upbeat stuff to keep the administration at bay.” Wasserman continued, “they slipped this new category in on us, called the ‘news consultant’ or ‘news analyst,’” which is “dangerous” because it carries more authority than a reporter or source, but is not as scrutinized.

For more on *The New York Times* story on military analysts and its fallout, see “*Times’ Story about Military Analysts Makes Ripples, Not Waves*” on page 13 of this issue of the *Silha Bulletin*.

The forum was presented by the Silha Center for the Study of Media Ethics and Law and the Minnesota Pro Chapter of the Society of Professional Journalists (SPJ), and co-sponsored by the National SPJ in honor of its annual Ethics Week observance. The Silha Center is supported by a generous endowment from the late Otto Silha and his wife, Helen.

— SARA CANNON

SILHA CENTER STAFF

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Journalism ethics professor Edward Wasserman said that acting independently is impossible. Thus, it is important to decide which conflicts of interest are “ethically permissible.”

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# Raise Your Hand If You're a Journalist: Does Responsible Reporting Need a Legal Defense?

*Featuring: Siobhain Butterworth, Readers' Editor, The Guardian*

**October 6, 2008**

7:00 p.m. - 9:00 p.m.

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Siobhain Butterworth is the readers' editor for *The Guardian* newspaper in London. She investigates complaints – about matters such as accuracy, privacy, injury to reputation and journalistic ethics – from a position of independence within the paper. She writes a weekly column about these and other issues. She qualified as a solicitor in 1991 and was Legal Director for Guardian News & Media for more than a decade.

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